MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

NOVEMBER 11 1880 TO APRIL 13 1881

HENRY A. CHANEY

STATE REPORTER

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SUPREME COURT RULE 60.

At a session of the Supreme Court, held January 26, 1882, the following rule was adopted to stand as Supreme Court Rule 60:

RULE 60. Hereafter in all cases brought to this Court for the purpose of reviewing or revising the judgment, order, decree, or action of any other court, tribunal, or officer, the relative position of the parties and their designation as plaintiffs, petitioners, defendants, or respondents shall be the same in this Court as in the court, or before the tribunal, or officer whose action is in question; but they may further be designated as appellants or appellees.

The head-notes to the opinions in *Hansen v. Prince* (p. 519), *Humphrey v. Bayn* (p. 565), and *Gavigan v. Evans* (p. 597), are by Mr. Justice CAMPBELL, who wrote the opinions.

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

Rec. June 7, 1882.

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SUPREME COURT OF MICHIGAN.

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[Until January 1, 1881.

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[From December 31, 1880.

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

MUNICIPAL JUDGES.

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

[1] Resigned January 4, 1881.

[2] Appointed January 5, 1881.

TABLE OF CASES REPORTED.

	PAGE
Ackerman v. Ackerman,	135
Alpena School District, Turnbull v.,	496
American Express Co. v. Conant,	642
American National Bank v. Bushey,	135
Anderson, Beecher v.,	543
Aspinall, Detroit Fire & Marine Ins. Co. v.,	330
Atwood v. Bearss,	469
Auditor General v. State Treasurer,	161
Babillion, Peltier v.,	384
Backus v. Coyne,	584
Barnheisel, Moore v.,	500
Bartholomew, Wilson v.,	41
Bates v. Phinney,	388
Baughman v. Gould,	481
Bay Circuit Judge, Le Roux v.,	416
Bayn, Humphrey v.,	565
Bearss, Atwood v.,	469
Beecher v. Anderson,	543
Beecher v. Bush,	188
Beecher, Collins v.,	436
Beecher v. Dacey,	92
Beecher v. Marq. & Pacific Rolling Mill Co.,	103
Bengley v. Wheeler,	493
Berrien County Treasurer v. Bunbury,	79
Bigley v. Souvey,	370
Billings v. Breinig,	65
Blake v. Hubbard,	1
Board of Health v. East Saginaw,	257
Bonker, Spicer v.,	630
Bradford, Fletcher v.,	349
Breinig, Billings v.,	65
Brigham, Gott v.,	424
Brown, Estate of,	326
Bulte, Connecticut Mutual L. Ins. Co. v.,	113
Bunbury, Berrien County Treasurer v.,	79
Bunt v. Jones,	392
Burns v. Martin,	22
Burton v. Schildbach,	504
Bush, Beecher v.,	188
Bushey, American National Bank v.,	135
Bushey v. Raths,	181
Butler v. Hogadone,	390
Cameron, Grand Rapids & Ind. R. R. Co. v.,	451
Campau v. Campau,	367
Campbell v. Kuhn,	513
Campbell, Reynolds v.,	529
Casper v. Circuit Judge,	251

	Page
Chase v. Welsh, . . .	345
Cheever v. Washtenaw Circuit Judge, . .	6
Chic. & Canada Southern Ry. v. Peters, .	636
Chisholm, Fournier v.,	417
Church v. Holcomb, .	29
Cleveland v. Newsom,	62
Cobb v. Slimmer, . .	176
Coddington, Richardson v., ...	338
Collins v. Beecher, .	436
Comins v. Harrisville,	442
Comstock v. Toohey, .	603
Conant, American Express Co. v., . . .	642
Connecticut Mutual L. Ins. Co. v. Bulte, . .	113
Cook v. Detroit & Milwaukee R. R. Co., .	453
Cowie v. Fisher, . .	629
Coyne, Backus v., . .	584
Cranage, Johnson v., .	14
Culp, Gott v., . . .	265
Curtis, Sayles v., . .	279
Dacey, Beecher v., . .	92
Darmstaetter v. Moloney,	621
Day, McCullough v., .	554
Dayton v. Fargo, . .	153
Dayton, Vandoozer v.,	247
Demill v. Moffat, . .	410
Demill v. Thompson, .	412
Detroit & Milwaukee R. R. Co., Cook v., .	453
Detroit F. & M. Ins. Co. v. Aspinall, . .	330
Detroit v. Putnam, .	263
Detroit, Schehr v., . .	626
Detroit, Sheley v. . .	431
Dodge, Winfield v. . .	355
Drain Com'r, Lampson v.	150
Drain Com'r, Mabee v.,	568
Dubois, Hutchinson v.,	143
Dyer, Nicholson v., .	610
Dyer v. Rosenthal, . .	588
E. Sag., B'd of Health v.,	257
Eder, Toledo, Canada S. & Detroit Ry. Co. v.	329
Elliott v. Hart, . . .	234
Ellison v. Kittridge, .	475
Engle v. Hall, . . .	57
Estey v. Smith, . . .	402
Evans, Gavigan v., . .	597
Eveland v. Stephenson,	394
Fargo, Dayton v., . .	153
Farmer v. Hunter, . .	337
Feldman, Mette v., .	25
Fenn v. Kinsey, . . .	446
Ferris, Hecht v., . .	376
Fife Lake, Putman v.,	125
Fink, Scott v., . . .	241
First Nat. Bank of Port Huron v. Mellen, .	413
Fisher, Cowie v., . .	629
Fisk, Gates v., . . .	522
Fletcher v. Bradford, .	349
Foster v. Malone, . .	255
Fournier v. Chisholm, .	417
Franks v. Smith, . .	326
Freeman v. Weeks, .	335
Gale v. Hammond, . .	147
Gates v. Fisk, . . .	522
Gavigan v. Evans, . .	597
Gies, Harrington v., .	374
Goodale v. Marquette Supervisors, . . .	47

	PAGE
Goodspeed v. S. Bend Chilled Plow Co.,	237
Goodspeed v. Wiard Plow Co.,	322
Gott v. Brigham,	424
Gott v. Culp,	265
Gould, Baughman v.,	481
Gram v. Wasey,	223
Grand Rapids & Ind. R. R. Co. v. Cameron,	451
Hackley v. Headley,	569
Hall, Engle v.,	57
Hammond, Gale v.,	147
Hammond v. Wells,	11
Hansen v. Prince,	519
Harrington v. Gies,	374
Harrisville, Comins v.,	442
Hart, Elliott v.,	234
Havens v. Jones,	253
Hawkins v. Sanders,	491
Headley, Hackley v.,	569
Hecht v. Ferris,	376
Higgins Township Board, Hosier v.,	340
Hinckley v. Probate Judge,	343
Hogadone, Butler v.,	390
Holcomb, Church v.,	29
Holden v. Ranney,	399
Holmes v. Rice,	142
Horn, Sherburne v.	160
Horton, Pool v.,	404
Hosford v. Kanouse,	620
Hosier v. Higgins Township Board,	340
Hough, Soule v.,	418
Houghtaling, Pratt v.,	457
Howell v. Kittridge,	476
Hubbard, Blake v.,	1
Humphrey v. Bayn,	565
Hunter, Farmer v.,	337
Hursh, Jeffery v.,	59
Hutchinson v. Dubois,	143
Hyler v. Nolan,	357
In re Estate of Brown,	326
Jackson Circuit Judge, Van Norman v.,	204
Jeffery v. Hursh,	59
Johnson v. Cranage,	14
Jones, Bunt v.,	392
Jones, Havens v.,	253
Jones v. Schall,	379
Kanouse, Hosford v.,	620
Kent Circuit Judge, Casper v.,	251
Kinsey, Fenn v.,	446
Kirkwood, Marquette, H. & O. R. R. Co. v.,	51
Kittridge, Ellison v.,	475
Kittridge, Howell v.,	476
Kittridge v. Miller,	478
Kraft v. Raths,	20
Kuhn, Campbell v.,	513
Lake Shore & Mich. S. R. R. Co., Taylor v.,	74
Lamb v. Story,	488
Lampson v. Drain Com'r,	150
Lay, Vosburgh v.,	455
LeRoux v. Bay Circuit Judge,	416
Letson v. Reed,	27
Lewis v. Pond,	46
Mabee v. Drain Com'r,	568
Mabee, Wieman v.,	484
McCullough v. Day,	554
McDonald v. McDonald,	44

	Page
McLaughlin v. Smith,	277
Maclem, Pettibone v.,	381
McNaughton, Michigan Cent. R. R. Co. v., .	87
Malone, Foster v., . .	255
Marq. & Pacific Rolling Mill Co., Beecher v., .	103
Marq. Houghton & Ont. R. R. v. Kirkwood, .	51
Marquette Supervisors, Goodale v., . . .	47
Martin, Burns v., . .	22
Mattison, Olmstead v.,	617
Mellen, First Nat. Bank of Port Huron v., .	413
Mette v. Feldman, . .	25
Michigan Central R. R. Co. v. McNaughton,	87
Michigan Central R. R. Co. v. Smithson, . .	212
Miller, Kittridge v., .	478
Moffat, Demill v., . .	410
Moloney, Darmstaetter v.,	621
Moore v. Barnheisel, .	500
Muskegon Booming Co., Underhill v., . . .	496
Nathan, Rodman v., .	607
Nelson, White River Log & B. Co. v., .	578
Newsom, Cleveland v.,	62
Nicholson v. Dyer, . .	610
Nickodemus v. Nickodemus, ...	385
Nolan, Hyler v., . .	357
Nugent, Perkins v., .	156
Olmstead v. Mattison,	617
Osborne v. Van Houten,	444
Palmer v. Palmer, . .	150
Patrick Ryan's Case, .	173
Patterson, Wright v., .	261
Pattison, Wetmore v.,	439
Peltier v. Babillion, .	384
People, Preston v., . .	486
Perkins v. Nugent, . .	156
Peters, Chicago & Canada Southern Ry v.,	636
Pettibone v. Maclem,	381
Pettiford v. Zoellner, .	358
Phinney, Bates v., . .	388
Pierson, Wood v., . .	313
Pond, Lewis v., . . .	46
Pool v. Horton, . . .	404
Port Huron & L. Mich. R. R. Co., Rogers v.,	460
Pratt v. Houghtaling, .	457
Preston v. People, . .	486
Preston v. Ryan, . .	174
Prince, Hansen v., . .	519
Probate Judge, Hinckley v., ...	343
Putman v. Fife Lake, .	125
Putnam, Detroit v., .	263
Ranney, Holden v., .	399
Raths, Bushey v., . .	181
Raths, Kraft v., . . .	20
Reed, Letson v., . . .	27
Reynolds v. Campbell,	529
Rice, Holmes v., . .	142
Richardson v. Coddington, ...	338
Richardson v. Rogers, .	591
Rodman v. Nathan, .	607
Rogers v. Port Huron & L. Mich. R. R. Co.,	460

	Page
Rogers, Richardson v.,	591
Rose, University of Michigan v.,	284
Rosenthal, Dyer v.,	588
Rossman, Wallen v.,	333
Ryan, Preston v.,	174
Ryan's (Patrick) Case,	173
St. Clair Supervisors, Thomas v.,	479
Sanders, Hawkins v.,	491
Sayles v. Curtis,	279
Schall, Jones v.,	379
Schehr v. Detroit,	626
Schildbach, Burton v.,	504
Scott v. Fink,	241
Shelden v. Warner,	638
Sheldon v. Sullivan,	324
Sheley v. Detroit,	431
Sherburne v. Horn,	160
Simpkins v. Ward,	559
Slimmer, Cobb v.,	176
Smith, Estey v.,	402
Smith, Franks v.,	326
Smith, McLaughlin v.,	277
Smith v. Van Blarcom,	371
Smithson, Michigan Central R. R. Co. v.,	212
Soule v. Hough,	418
South Bend Plow Co., Goodspeed v.,	237
Souvey, Bigley v.,	370
Spicer v. Bonker,	630
State Treasurer, Auditor General v.,	161
Stephenson, Eveland v.,	394
Story, Lamb v.,	488
Stowell v. Stowell,	364
Streeter, Tilden v.,	533
Sullivan, Sheldon v.,	324
Taylor v. Lake Shore & Mich. S. R. R. Co.,	74
Thomas v. St. Clair Supervisors,	479
Thompson, DeMill v.,	412
Tilden v. Streeter,	533
Toledo & Ann Arbor R. R. Co., Wilcox v.,	280
Toledo, Canada S. & Detroit Ry v. Eder,	329
Toohey v. Comstock,	603
Turnbull v. Alpena School District,	496
Underhill v. Muskegon Booming Co.,	496
University of Michigan v. Rose,	284
Van Blarcom, Smith v.,	371
Vandoozer v. Dayton,	247
Van Houten, Osborne v.,	444
Van Norman v. Jackson Circuit Judge,	204
Vosburgh v. Lay,	455
Waldron v. Waldron,	350
Wallen v. Rossman,	333
Ward, Simpkins v.,	559
Warner, Shelden v.,	638
Wasey, Gram v.,	223
Washtenaw Circ. Judge, Cheever v.,	6
Weeks, Freeman v.,	335
Wells, Hammond v.,	11
Welsh, Chase v.,	345
Wetmore v. Pattison,	439
Wheeler, Bengley v.,	493

	PAGE		PAGE
White River Log & B. Co. v. Nelson, . . .	578	Wilson v. Bartholomew,	41
Wiard Plow Co., Goodspeed v., ...	322	Winfield v. Dodge, . .	355
Wieman v. Mabee, . .	484	Wood v. Pierson, . .	313
Wilcox v. Toledo & Ann Arbor R. R. Co.,	280	Wright v. Patterson, .	261
		Zoellner, Pettiford v., .	358

156 CASES.

TABLE OF CASES CITED.

* Distinguished. † Disapproved.

	PAGE
Adams v. Reeves 68 N. C. 34	576
Agent v. Rikeman 1 Den. 279	83
Aldrich v. Howard 7 R. I. 214	76
Allen v. Kinyon 41 Mich. 285	619
Anson v. Anson 20 Iowa 55	121
Argent v. Durrant 8 Term 403	403
Arnold v. Bright 41 Mich. 210	381
Ashmore v. Wainwright 2 Q. B 837	575
Astley v. Reynolds 2 Strange 915	574
Atkins v. Saxton 77 N. Y. 195	147
Atkinson v. Water Works 6 Exch. 404	77
Atlee v. Backhouse 3 M. & W. 633	576
Attorney General v. Lake Superior Ship Canal Co. 32 Mich. 233	468
Averill v. Wilson 4 Barb. 180	236
Bacon v. Cropsey 3 Seld. 195	236
Bainbridge v. Baddeley 2 Ph. 705	397
Baker v. Whiting 3 Sumn. 476	121
Baldwin v. Chicago etc. R. R. 50 Ia. 680	222
Baltimore etc. R. R. v. Wheeling 13 Grat. 40	553
Bancroft v. Peters 4 Mich. 619	320
Barber v. Smith 41 Mich. 138	83
Bartholomew v. Ireland Andr. 108	403
Basten v. Carew 3 B. & C. 649	423
Bates v. Ins. Co. 3 Johns. Cas. 238	575
Beck v. Burdett 1 Paige 305	208
Beckwith v. Frisbie 32 Vt. 559	576
Bennett v. Robinson 27 Mich. 26	60
Benson v. Mayor 10 Barb. 223	70
Berry v. Anderson 22 Ind. 36, 39	516
Berry v. Riley 2 Barb. 307	236
Berry v. Whitney 40 Mich. 71	27
Biggs v. Ferrell 12 Iredell 1	70
Bingham v. Thompson 4 Nev. 224	540
Blackwood v. Brown 26 Mich. 483	124
Blackwood v. Van Vleit 30 Mich. 118 61,	121
Blaine v. Ship Charles Carter 4 Cr. 328	236
Blair v. Compton 33 Mich 414	209
Bloomer v. Henderson 8 Mich. 395	60
Booth v. McQueen 1 Doug. (Mich.) 41	457
Borland v. Stewart 4 Wend. 568	235
Boudinot v. Bradford, 2 Dall. 266	247
Bowes v. Haywood, 35 Mich. 241	448
Bowker v. Johnson 17 Mich. 42	357
Bowman v. Bailey, 10 Vt. 170	198
Bowman v. Wathen 2 McLean 376	70
Bradley v. White 10 Met. 303	199
Bradshaw v. McLoughlin 39 Mich. 480	283
Brady v. Whitney 24 Mich. 154	154
Brewer v. Palmer 13 Mich. 104	499
Brewster v. Hammet 4 Conn. 540	145
Bridges v. Directors of New London Ry L. R. 7 H. L. 213; 9 Eng. 165 72,	73
Bridgland v. Shapter 5 M. & W. 375	70
Brig "City of Erie" v. Canfield 27 Mich. 479	69
Briggs v Briggs 20 Mich. 34	152
Briggs v. Lewiston 29 Me. 472	576
Brinckerhoff v. Lawrence 2 Sandf. Ch. 400, 406	558
Brink v. Freoff, 40 Mich. 614	18
Brittain v. Kinnaird 1 B. & B. 432	423
Brown v. Brown 1 W. & M. 325	568
Brown v. Davidson 102 U. S. 119	69
Brown v. Gilmore Penn St.	69
Brumly v. Westchester etc. Co. 1 Johns. Ch. 366	553
Brush v. Sweet 38 Mich. 574	154
Buckley v. Lowry 2 Mich. 419	208
Buffum v. Green 5 N. H. 71	516
Buford v. Rucker 4 J. J. Marsh. 551	553
Bullen v. Sharp L. R. 1 C. B. 86	196
Burchfield v. Moore 3 El. & Bl. 683	241
Burden v. Halton 4 Bing. 454	241
Burhans v. Van Zandt 7 N. Y. 523	121
Burke v. Wilber 42 Mich. 327	281
Burtenshaw v. Gilbert Cowper 49	245
Burton v. Maloon, Barnardiston 401	421
Cahill v. Ins. Co. 2 Doug. (Mich.) 124	632
Camp v. Waring 25 Conn. 520	40
Campau v. Barnard 25 Mich. 381	471
Campau v. Button 33 Mich. 525	43
Campau v. Campau 44 Mich. 31	368
Campbell v. Dearborn 109 Mass 130	540
Carroll v. Potter Walk. Ch. 355	154
Case v. Peters 20 Mich. 298	552

	PAGE
Champion v. Bostwick 18 Wend. 175..	197
Chandler v. Sanger 114 Mass. 364.....	575
Chase v. Dwinal 7 Me. 134.....	575
Chicago & Northwestern Ry v. Bayfield 37 Mich. 205.	217
Chickering v. Faile 38 Ill. 342..... ..	121
Church v. Gilman 15 Wend. 656.....	516
Church v. Knox 2 Conn. 514.....	146
Cicotte v. Morse 8 Mich. 424.	637
Clark v. Fredenberg 43 Mich. 263.....	85
Clavering v. Clavering 2 Vern. 473...	558
Coddington v. Mott 1 McCart. 430....	40
Collins v. Westbury, 2 Bay 211.....	575
Colman v. Post 10 Mich. 422.....	357
*Columbia Bank v. Jacobs 10 Mich. 349.....	471-2
Com'rs of Highways of Cortlandville v. Peck 5 Hill 215.....	83
Comstock v. Wayne Circ. Judge 30 Mich. 98....	11
Concord Bank v. Bellis 10 Cush. 276,..516,517	
Condee v. Clark 2 Mich 255.....	527
Conner v. Paxson 1 Blackf. 168.....	70
Converse v. Blumrich 14 Mich. 108.....	483
Conway v. Taylor 1 Black 603.....	70
Cooper v. Bigly 13 Mich. 463.....	640
Cooper v. Brock 41 Mich. 488.....	334
Cordell v. N. Y. C. & H. R. R. R. Co. 75 N. Y. 330.....	72
Couch v. Steele 3 El. & Bl. 402.....	76
Cox v. Hickman 8 H. L. Cas. 268, 306	195-6
Coxe v. Gibson 28 Penn. St. 160	61
Crawford v. Cato 22 Ga. 594.....	575
Crawshay v. Thornton 2 Myl. & C. 1..	502
Cummings v. Fearey 44 Mich. 39.....	4
Cummings v. Gann 52 Penn. St. 484...	317
Curtis v. Goodenow 21 Mich 18.....	40
Dale v. Lavigne 31 Mich. 149.....	326
Danville v. Pace 25 Grat. 1..... ...	511
Darling v. Hurst 39 Mich. 765.....	557
Darlington's Appeal 86 Penn. St. 512..	40
D'Arusmont v. Jones (Tenn.) 11 Cent. L. Jour. 253....	424
Davis v. Detroit etc. R. R. 20 Mich. 105	217
Davis v. Emerson 17 Me. 64.....	586
Davis v. Zimmerman 40 Mich. 24	590
Deal v. Bogue 20 Penn. St. 228, 233....	147
Demill v. Moffat 45 Mich. 410....	413
Dempsey v. Tylee 3 Duer 73, 95, 96...	558
Denny v. Cabot 6 Met. 82	199
Denton v. Livingston 9 Johns. 96.....	209
Detroit Advertiser & Tribune v. City of Detroit 43 Mich. 116.....	300
Dewey v. Bordwell 9 W and. 65.....	250
Dickeson v. Hilliard L. R 9 Exch. 79..	486
Dickinson v. Seaver 44 Mich. 624.....	154
Diehl v. Zanger 39 Mich. 601.....	24

	PAGE
Dixon v. United States 1 Brock. 177..	84
Dodd v. Kyffin 7 Term. 350	403
Doe v. Brewer 2 Chitty 323	89
Doe v. Knight 5 B. & C. 671.....516,	558
Dominick v. Eacker 3 Barb. 17.....	236
Douglas v. McCoy 5 Ohio 523.....	236
Douvielle v. Manistee 40 Mich. 585, 480n,	481
Drew v. Beard 107 Mass. 64.....	40
Drew v. Chesapeake 2 Doug. (Mich.) 33	71
Dublin, W. & W. Ry v. Slattery 3 App. Cas. H. of L. 1155: 24 Eng. 713	73
Dummer v. Chippenham 14 Ves. 245..	553
Dumont v. Kellogg 29 Mich. 423..... .	382
Dunham v. Rogers 1 Penn. St. 255, 262	199
Dupont v. Starring 42 Mich. 492.....	24
Eager v. Crawford 76 N.Y. 97.....	195
Eastman v. Clark 53 N.H. 276 ...196,	197
Edwards v. Taliafero 34 Mich. 15.....	332
Ehle v. Quackenboss 6 Hill 537.....	250
Ellison v. Kittridge 45 Mich. 475.....	476
Evarts v. Becker 8 Paige 506.....	421
Everitt v. Chapman 6 Conn. 347.....	197
Ex parte Delhasse 7 Ch. Div. 511.....	196
Exton v. Scott 6 Sim. 31...	558
Facey v. Fuller 13 Mich. 527.....	423
Fairfield v. McArthur 15 Gray 526. ...	110
Farm Ins. Co. v. Ross 29 Ohio St. 429	197
Farr v. Ward 3 Mees. & Wels. 25.....	241
Farrar v. Bridges 5 Humph. 411..... .	516
Farrington v. Sexton 43 Mich. 454. ..	4
Faulkner v. Bailey 123 Mass. 588.....	528
Fearey v. Cummings 41 Mich. 376,...4,	334
Felton v. Deall 22 Vt. 170.....	70
Final v. Backus 18 Mich. 218.....	154
First Nat. Bk. v. Watkins 21 Mich. 483	576
Fitch v. Newberry 1 Doug. (Mich.) 1...	55
Fletcher v. Fletcher 4 Hare 67.....	558
Flinn v. McKinley 44 Iowa 68	121
Flint & Pere Marquette Railway v. Lull 28 Mich. 510..... ...	452
Flint & Pere Marquette Railway v. Gordon 41 Mich. 420.....	124
Florentine v. Barton 2 Wall 211.....	423
Forbes v. Judge 23 Mich. 429.....	568
Ford v. Joyce 78 N. Y. 618.....	532
Foster v. Scripps 39 Mich. 376.....	486
Fox v. Willis 1 Mich. 321.....	208
Frost v. Peacock 4 Edw. Ch. 678.....	516
Fry v. Hill 7 Taunton 397.....	240
Fry v. Soper 39 Mich. 727.....	278
Gale v. Gould 40 Mich. 515 110,	148
Gardner v. Collins 3 Mas. 398	516
Gibson v. Stevens 7 N. H. 352.....	145
Gilbart v. Dale 5 Ad. & El. 543.....	56
Gilchrist v. McGee 9 Yerg. 455	24
Gillett v. Needham 37 Mich. 143..... .	363
Godfroy v. Disbrow Walk. Ch. 260....	474

	PAGE
Goodright v. Glazier, Burrow 2512	246
Gould v. Day 94 U.S. 405	516
*Grant v. Merchants Bk 35 Mich. 515	311
Grant v. Smith 26 Mich. 201	154
Green v. Graves, 1 Doug. (Mich.) 351	510
Green v. Kemp 13 Mass 515	108
Greenvault v. Farmers, etc. Bank 2 Doug. (Mich.) 498	208
Grim v. School Dist. 57 Penn. St. 433	576
Grocers' Bank v. Kingman 16 Gray 473	84
Gwynne v. Burnell 7 Cl. & F. 572	85
Hagg v. Baltimore etc. Co. 35 Md. 414	587
Haight v. Proprietors etc. 4 Wash. 601,	553
Haines v. Thompson 70 Penn. St. 434	539
Hall v. Ionia 38 Mich. 493	382
Hall v. Schultz 4 Johns. 240	576
Hamblin v. Warner 30 Mich. 95	158
Hankey v. Garratt 1 Ves. Jr. 236	145
Harmony v. Bingham 12 N. Y. 99	575
Harrell v. Ellsworth 17 Ala. 576	70
Harrison v. Bush 5 El. & Bl. 344	486
Hartford Fire Ins. Co. v. Davenport 37 Mich. 609	521
Hartford Fire Ins. Co. v. Owen 30 Mich. 443	643
Harvey v. Childs 28 Ohio St. 319	200
*Harwood v. Goodright 3 Wils. 497: Cowper 87	244-5
Hastings v. Merriam 117 Mass. 245	516
Hawley v. Jelly 25 Mich. 94	229
Haynes v. Knowles 36 Mich. 407, 410	146
Haynes v. Swann 6 Heisk. 560	540
Hebel v. Amazon Ins. Co. 33 Mich. 400	643
Henderson v. Desborough 28 Mich. 170	567
Henry v. Goldney 15 M. & W. 494	586
Hewett v. Adams 50 Me. 271	40
Hewitt v. Dement 57 Ill. 500	40
Hewitt v. Ingham Circuit Judge 44 Mich. 153	383
Hickling v. Hardey 7 Taunton 312	241
Hinman v. Eakins 26 Mich. 80	283
Hinman v. Littell 23 Mich. 484	195
*Hoffman v. Beard 32 Mich. 218	37
Holme v. Hammond L. R. 7 Exch. 218.	196
Holmes v. Old Colony R. R. 5 Gray 58	199
Holmes v. Williams 3 Cai. 98	236
Hooper v. Bridgewater 102 Mass. 512	90
*Horton v. Ingersoll 13 Mich. 409	122
Hosley v. Holmes 27 Mich. 416	516
Howe v. Starkweather 17 Mass. 240	209
Howland v. Blake 97 U. S. 624, 626..539,	540
Hubbard v. Trustees 2 J. J. Marsh. 81.	90
Hulett v. St. Louis etc. R. R. 67 Mo. 240	219
Humphrey v. Hurd 29 Mich. 44	60
Hunter v. Hopkins 12 Mich. 229	532
Hurlbut v. Britain 2 Doug. (Mich.) 191	510
Hyatt v. Adams 16 Mich. 180	63
Indianapolis etc. R. R. Co. v. Flanigan 77 Ill. 365	222
Inman v. Griswold 1 Cow. 199	236
Isaack v. Clark 2 Bulstrode 306	319
Ivinson v. Hutton 98 U. S. 79, 82, 83	532
Jackson v. Bell 19 Johns. 169	90
Jackson v. Leggett 7 Wend. 377	90
Jackson v. Page 4 Wend. 585	235
James v. Brown 11 Mich. 25	640
James v. Marvin 3 Conn. 576	247
James v. Pontiac &c. P. R. Co. 8 Mich. 91	209
Jenne v. Marble 37 Mich. 319	393
Jermain v. Langdon 8 Paige 41	424
Job v. Langton 6 El. & Bl. 779	587
Jochumsen v. Savings Bank 3 Allen 87	424
Johnson v. Ballou 28 Mich 379	468
Johr v. Supervisors 38 Mich. 532	88
Jones v. Swayze 42 N. J. L. 279	516
Jones v. Tyler 6 Mich. 368	532
Jones v. Water Comm'rs 34 Mich. 273.	493
Joy v. Thompson 1 Doug. (Mich.) 373	564
Joyce v. Williams 26 Mich. 332	24
Kavanagh v. Gudge 7 Man. & Gr. 320	403
Kelly v. Hendrie 26 Mich. 255	633
Kemp v. Finden 12 M. & W. 421	586
Kerr v. Birnie 25 Ark. 225	516
Kilshaw v. Jukes 3 B. & S. 847	196
Kimball v. Myers 21 Mich. 276	357
King v. United States 99 U. S. 229	85
Kingsbury v. Burnside 58 Ill. 310	516
Knerr v. Hoffman 65 Penn. St. 126	146
Knight v. Hughes 3 C. & P. 467	586
Ladd v. Chotard 1 Minor (Ala.) 366	70
Lady Superior v. McNamara 3 Barb. Ch. 375	516
Lake Shore R. R. v. Hunt 39 Mich. 469	643
Lake Shore R. R. v. Miller 25 Mich. 274	71
Lake Superior Building Co. v. Thompson 32 Mich. 293	283
Lamb v. Jeffrey 41 Mich. 719	19
Lambert v. People 29 Mich. 71	63
Lambert v. Staten Is. R. R. 78 N. Y. 104	73
Larzelere v. Starkweather 38 Mich. 96	37
Latham v. Udell 38 Mich. 238	516
†Laughlin v. Railway 28 Wis. 204	55
Lee v. Salinas 15 Texas 495	90
Leon v. Galceran 11 Wall. 188	69
Lessee of Dawson v. Porter 2 Ohio (Ham.) 304	90
Lessee of Hall v. Ashby 9 Ohio (Ham.) 96	90
Lessee of Matthews v. Thompson 3 Ohio 272	236
Lewis v. Avery 8 Vt. 289	236

	PAGE
Lewis v. Darling 16 How. 1	39
Lewis v. Gainesville 7 Ala. 85	70
Lewis v. McElvain 16 Ohio 347	511
Lippencott v. Allander 27 Iowa 460	70
Lloyd v. Lynch 28 Penn. St. 419	121
Loomis v. Marshall 12 Conn. 69, 79	195, 197
Loomis v. Smith 37 Mich. 595	619
Lovejoy v. Boston etc. R. R. Co. 125 Mass. 79	219
Lyon v. Fish 20 Ohio 100	236
McChesney's Lessee v. Wainwright 5 Ohio (Ham.) 452	90
McDonald v. Bewick 43 Mich. 438	605
McDonald v. Mallory 77 N. Y. 546	69
McGuffie v. Carter 42 Mich. 497	521
M'Intyre v. Rowan 3 Johns. 144	236
McLean v. Button 19 Barb. 450	558
Mackall v. Chesapeake Canal Co. 94 U. S. 308	70
Maltz v. Board of Education of Wilson Township 41 Mich. 547	499
Marquette Houghton & Ontonagon R. R. Co. v. Langton 32 Mich. 251	54
Martin v. Hamlin 18 Mich. 354	532
Mason v. School District 34 Mich. 228	85
*Matter of Godfrey Estate 4 Mich. 308	37
Matter of Smith 16 Johns. 102	145
Maul v. Rider 51 Penn. St. 377	121
Mead v. Westchester F. Ins. Co. 64 N. Y. 453	532
Medill v. Collier 16 Ohio St. 599	511
*Melia v. Simmons 45 Wis. 334	424
Merchants and Manufacturers' Nat. Bank v. Circuit Judge 43 Mich 292.	380
Merrill v. Montgomery 25 Mich. 73	421
Merrills v. Swift 18 Conn. 257	516
Mich. Ins. Co. v. Brown 11 Mich. 265	640
Midland Ry v. Bromley 17 Q. B. 372	56
*Millar v. Babcock 25 Mich. 138....471,	472
Mitchell v. Ryan 3 Ohio St. 377	516
Mok v. Detroit Building and Savings Association 30 Mich. 511.....507, 509,	512
Moliter v. Robinson 40 Mich. 200	615
Moore v. Hazelton 9 Allen 102	558
Moore v. Smith 19 Ala. 774	198
Moore v. Smith 11 Rich. 569	424
Morgan v. Evans 72 Ill. 586	236
Morris v. Morris 5 Mich. 171	154
Morrison v. Blodgett 8 N. H. 238	145
Motz v. Detroit 18 Mich. 495	433
Muddle v. Stride 9 C. & P. 380	56
Munch v. Shabel 37 Mich. 166	40
Musier v. Trumpbour 5 Wend. 274	197
Muskegon Booming Co. v. Underhill 43 Mich. 629	496
Myer v. Hart 40 Mich. 517	456
Nall v. Grange 8 Mich. 450	335
Nat. Bank of New London v. L. S. & M. S. R. Co. 21 Ohio St. 221	211
Neale v. Neales 9 Wall. 1	40
Nelson v. Suddarth 1 H. & Munf. 350	575
New Albany, etc. R. R. Co. v. Huff 19 Ind. 315	70
Newberry v. Detroit & L. S. Iron Co. 17 Mich. 141	210, 211
Newman v. Bean 21 N. H. 93, 98...145,	147
Nichol v. Lytle 4 Yerg. 456	24
Nicolls v. Lawrence 30 Mich. 395	21
Oppenheim v. Wolf 3 Sandf. Ch. 571	504
Overseers v. Ely, Lalor's Supp. 379	83
Palmer v. Rich 12 Mich. 414	39
Park v. Church 5 How. Pr. 381	236
Parks v. Allen 42 Mich. 482	456
Parmelee v. Lawrence 48 Ill. 331	511
Parrill v. McKinley 9 Grat. 1	40
*Parsell v. Genesee Judge 39 Mich. 542	567
Pawling v. United States 4 Cranch 219	557
Peck v. Tiffany 2 Comst. 451	236
Peirce v. Tobey 5 Met. 168	528
Pennoyer v. Neff 95 U. S. 714	423
Pennsylvania (The) 19 Wall. 125	73
People v. Dunning 1 Wend. 16	236
People v. Fox 25 Mich. 492	552
People v. Gaige 26 Mich. 30	552, 553
People v. Pitcher 15 Mich. 397	63
People v. Tripp 15 Mich. 518	568
People v. Wayne Circ. Ct. 11 Mich. 393	39
Perkins v. Spaulding 2 Mich. 157	236
Perrien v. Fetters 35 Mich. 233	363
Perrin v. Lepper 34 Mich. 292	521
Perrine v. Hankinson 11 N. J. 181	199
Perry v. Phelips 17 Ves. 174	397
Peter v. Kendal 6 B. & C. 703	70
Pettibone v. Smith 37 Mich. 579	382
Pettiford v. Zoellner 45 Mich. 358	423
Phelan v. Boylan 25 Wis. 679	121
Phelps v. Ball 1 Johns. Cas. 31	236
Pierce v. Alsop 3 Barb. Ch. 184	236
Pim v. Currell 6 Mees. & Wels. 234	70
Plimley v. Westley 2 Bing. N. C. 249	240
Porter v. Goodman 1 Cowen 413	236
Porter v. Purdy 29 N. Y. 106	423
Post v. Kimberly 9 John. 470, 504	194
Potts v. Plaisted 30 Mich. 149	58
Powell v. Smith 30 Mich. 451.....635,	640
Preston v. Boston 12 Pick. 14	576
Preston v. Neale 12 Gray 222	317
Price v. Alexander 2 Greene (Ia.) 427	198
Quincy Mining Co. v. Kitts 42 Mich. 34	217
Regan v. Howe 121 Mass. 424	516
Reinheimer v. Hemingway 35 Penn. St. 432	146
Rex v. Hipswell 8. B. & C. 466, 470.	108
Rex v. Loxdale 1 Burrow 445	564

	PAGE
Rex v. St. Gregory 2 Ad. & El. 99	107, 108
Richmond v. Robinson 12 Mich. 193	229
Robinson v. Campbell 3 Wheat. 212	89
Robinson v. Gould 26 Iowa 89	516
Robson v. N. E. R'y Co. 2 Q. B. Div. 85: 19 Eng. 228	73
Roderigas v. Savings Institution 63 N. Y. 460	424
Roediger v. Dr. Com'rs. 40 Mich. 745	569
Roosevelt v. Carow 6 Barb. 190	558
Ross v. Luther 4 Cow. 158	236
Sage v. Ensign 2 Allen 245	528
St. Nicholas v. St. Peter, Strange 1066	108
Sanborn v. Sanborn 7 Gray 142	40
Sasportas v. Jennings 1 Bay 470	575
*Saunders v. People 38 Mich. 221	309
Savings Bank v. Allen 28 Conn. 97	511
Schade v. Bessinger 3 Neb. 140	540
Scholey v. Mumford 69 N. Y. 98	575
Schoonmaker v. Gilmore 102 U. S. 118	69
Scrugham v. Wood 15 Wend. 545	558
Seitz v. Miles 16 Mich. 456	419
Shaw v. Gault 16 Irish C. L. R. 357	196
Shaw v. Woodcock 7 B. & C. 73	575
Sheldon v. Wright 5 N. Y. 497	423
Sherman v. Partridge 4 Duer 646	502
Shotwell v. Harrison 22 Mich. 410	474
Silliman v. United States 101 U. S. 465	576
Sirrine v. Briggs 31 Mich. 443	145, 146
Sitzman v. Pacquette 13 Wis. 291	423
Skeate v. Beale 11 Ad. & El. 983	576
Skipp v. Harwood 2 Swanst. 586	145
Smith v. Bromley Doug. 696	575, 576
Smith v. Hamilton 20 Mich. 433	24
Smith v. Lawrence 15 Mich. 499	229
Smith v. Mitchell 12 Mich. 180	590
Smith v. Thompson Walk. Ch. 1	556
Spaids v. Barrett 57 Ill. 289	575
Sprague v. Soule 35 Mich. 35	502
Stackus v. N. Y. C. & H. R. R. R. Co. 79 N. Y. 464	73
Stall v. Cincinnati 16 Ohio St. 169	540
Starkweather v. Benjamin 32 Mich. 305	483
*State v. How 1 Mich. 512	511
State v. Richmond 26 N. H. 232	109
Steamboat Co. v. Chase 16 Wall. 522	69
Steinbach v. Hill 25 Mich. 78	483
Stewart v. Carleton 31 Mich. 270	24
Stewart v. Stocker 13 S. & R. 199	236
Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290	532
Stone v. Martin 2 Den. 185	236
Summers v. Bromley 28 Mich. 125	640
Supervisor v. Stimson 4 Hill 136	83, 84
Sutton v. Hanford 11 Mich. 513	596
Swartwout v. Mich. Air Line R. Co. 24 Mich. 389	366
Swoboda v. Ward 40 Mich 420	73, 217
Tabor v. Van Vranken 39 Mich. 793	4
Talbot v. Seeman 1 Cr. 1-25	210
Tappan v. Blaisdell 5 N. H. 193	146
Tappan v. Kimball 30 N. H. 136	528
Tarner v. Walker L. R. 2 Q. B. 301	73
Taylor v. Fields 4 Ves. 396	145
Terrill v. Auchauer 14 Ohio (N. S.) 80	109
Terry v. Chandler 16 N. Y. 354	24
*Thomas v. Gain 35 Mich. 155	433
Thompson v. Ellsworth 39 Mich. 719	283
Thompson v. Morgan 6 Minn. 292	511
Thompson v. R. R. Co. 3 Sandf. Ch. 625,	70
Thompson v. School District No. 6 of Crockery 25 Mich. 483	43
Tibbals v. Jacobs 31 Conn. 428	516
Toledo etc. R. R. v. Black 88 Ill. 112	222
Tompkins v. Wheeler 16 Pet. 106	516
Toms v. Williams 41 Mich. 552	355
Treadwell v. Brown 43 N. H. 290	145
Tremolo Patent 23 Wall. 518	40
Tripp v. Hasceig 20 Mich. 254	532
Truesdail v. Ward 24 Mich. 117	229
Tucker v. Alger 30 Mich. 67	254
Turnbull v. Payson 95 U. S. 418	211
Turner v. Baker 64 Mo. 218	24
Tyler v. Peatt 30 Mich. 63	556
Underhill v. Muskegon Booming Co. 40 Mich. 660	496
United States v. Freeman 3 How. 556	564
United States v. ——— 1 Brock. 195	84
Vanderkarr v. Thompson 19 Mich. 82	532
Van Deusen v. Frink 15 Pick. 449	110
Vandike v. Rosskam 67 Penn. St. 330	146
Vermilyea v. Bank etc. 1 Paige 37	553
Vosburgh v. Teator 32 N. Y. 568	24
*Vyne v. Glenn 41 Mich. 112	574, 577
Wall v. Trumbull 16 Mich. 228	423
Wanata (The) 95 U. S. 600	73
Watson v. Hinchman 41 Mich. 716	184
Watson v. Woodman L. R. 20 Eq. Cases 721: 15 Eng. 572	528
†Waugh v. Carver 2 H. Bl. 235	196
Webster v. Bailey 31 Mich. 36	483
Webster v. Farley 6 Blatch. 163	236
Wentworth v. Day 3 Metcalf 352	317
Wesson v. Stephens 2 Ired. Eq. 557	516
West v. Laraway 28 Mich. 464	13
Whelan v. Sullivan 102 Mass. 204	40
White v. Heylman 34 Penn. St. 142	575
Whittington v. Boxall 5 Ad. & El. (N. S.) 143	403
Wilcox v. Howland 23 Pick. 167	576
Wiles v. Maddox 26 Mo. 77	145
Williams v. Hubbard Wal. Ch. 28	208, 556
Williams v. Mayor 2 Mich. 560	433
Williamson v. Smoot 7 Mart. (La.) 31	209

	PAGE
Willoughby v. Horridge 12 C. B. 742..	70
Willy v. Mulledy 73 N. Y. 310..	71
Wilson v. Jones 46 Md. 349.....	13
Winfield v. Adams 34 Mich. 437.....	335
Withington v. Southworth 26 Mich. 381.....	21
*Wood v. Seely 32 N. Y. 105.....	635
Woodbridge v. Detroit 8 Mich. 274....	433
*Worthington v. Hanna 23 Mich. 530..	591
Wurchcrer v. Hewitt 10 Mich. 453.....	640
Wych v. Meal 3 P. Wms. 310	553
Yarborough v. Abernathy 1 Meigs 413,	24
Yelverton v. Steele 40 Mich. 538....158,	368
Zabriskie v. Smith 3 Kernan 322.....	155
Zimmer v. Davis 35 Mich. 39	283
Zuver v. Lyons 40 Iowa 510.....	540

OCTOBER TERM, 1880.*

45 1
67 333

45 1
78 248

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86 157

45 1
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114 121

WILLIAM A. BLAKE, GARNISHEE OF WILLIAM BLASS AND JOHN P. MCNAUGHTON v. ALBERT H. HUBBARD.

Garnishment—Continuance—Abandonment of proceedings by delay—Fraudulent assignments for benefit of creditors—Effect on legal proceedings of rulings in chancery.

Garnishment proceedings should be speedy; they are not in the ordinary course of law, as they involve consequences that could not otherwise arise at law or in equity.

Garnishment proceedings against an assignee for the benefit of creditors were allowed to rest for two years until plaintiffs had obtained a decree on a bill in aid of execution which they had filed after taking out garnishment process. Plaintiffs then attempted to bring the garnishment issue to a hearing. *Held* that the proceedings in garnishment could not have been kept open without either a formal continuance or some action equivalent to consent by the garnishee; and even consent might not be allowed to cut off intervening rights, as a garnishee cannot waive the rights of other persons.

A fraudulent assignment for the benefit of creditors is not so absolutely void that a creditor's right to complain of it may not be lost by waiver or acquiescence; he cannot attack it until he has in some way acquired a legal standing, and he may let it alone if he chooses to do so.

A judgment creditor took out a writ of garnishment and soon after levied on some lands. The garnishee then made an issue of fact to be tried at law whereby, so far as concerned personalty, the question whether the assignment was fraudulent could be determined. The creditor afterwards filed a bill in aid of his execution. *Held* that the chancery suit could not affect the validity of the proceeding in garnishment, and a final decree by the Supreme Court in favor of the creditor could not preclude farther investigation at law as to whether he had not waived his right to complain of the assignment.

The rulings of the Supreme Court in a dispute in equity are not binding in an action at law between the same parties in regard to the same subject matter, so long as the issues are distinct.

*Continued from Vol. 44.

Error to Kalamazoo. Submitted October 27. Decided November 10.

GARNISHMENT. The garnishee brings error. Reversed.

Edwin M. Irish and *Brown, Howard & Roos* for plaintiff in error.

Dallas Boudeman for defendant in error.

CAMPBELL, J. Hubbard brought an action in March, 1878, in the Kalamazoo circuit upon a promissory note against John P. McNaughton, Flora McNaughton, Moses A. McNaughton, William Blass and Moses J. Mallock, getting service on all but Mallock. The defendants who were served pleaded, and on May 14, 1878, a judgment was rendered, but from the contradictory statements in the record we are unable to say whether it was against them all, or only against Blass and John McNaughton. It does not appear that any of the defendants complained of this judgment on error or otherwise. On the fourteenth of May before mentioned an execution was issued and levied on certain lands which Blass and John McNaughton had assigned to Blake for creditors.

On the 6th of June, 1878, Hubbard filed a bill in chancery against Blake and his two assignors, in aid of this levy, which was ultimately disposed of in this court on appeal, in favor of Hubbard, in April, 1880.

The assignment was made February 12, 1878. On the 3d of May, 1878, an affidavit was sworn to and garnishee process issued against Blake as holding property belonging to Blass and John McNaughton. He denied having any property belonging to them, and on interrogatories disclosed the facts relating to the assignment. On the 3d of June, 1878, he demanded an issue.

After this nothing was done until May, 1880, when Hubbard brought the garnishee issue to hearing, against the exceptions of Blake taken on the trial, and recovered judgment against him. At the time of the trial it appeared that he had in his possession, in addition to cash to a larger amount

than this judgment, about $600 of personal property, and some securities. This disclosure is not printed with the record, and so far as we can determine was never filed. There is nothing to show what personal property the assignee held when garnished.

There was testimony on the trial concerning the estimated value of the land levied on. There was also evidence of two later individual levies, one on McNaughton's interest, and one on Blass' interest in the same lands, and evidence was excluded of another levy against Flora McNaughton, William Blass and John P. McNaughton on a judgment rendered in 1880 upon a note dated in 1879, and garnishee proceedings against Blake under that judgment.

Blake was also precluded from showing that Hubbard had sued out another garnishee process against him, in the same suit now in controversy, on the 9th of April, 1880, which was just after the decision of this court in the chancery case.

As a reason for delay in pursuing the garnishee proceedings earlier, Hubbard affirmed that he understood from his attorney that there was an agreement to keep them open until the chancery case should be decided. No such agreement was proved.

The garnishee statute contemplates speedy proceedings. Its necessary operation is to tie up the hands of the garnishee and subject him to expense and annoyance. It cannot be regarded as a proceeding in the ordinary course, for it involves many consequences which could not otherwise arise either in law or in equity. If such proceedings could be delayed indefinitely it might not only injure the garnishee, but it might also affect other persons who have claims on the property in his hands. It appeared in this case that defendant offered to show subsequent garnishee proceedings commenced before the final decision of the chancery suit, but was not allowed to do so.

The statute, § 6477 of the Compiled Laws, declares that if the plaintiff obtain judgment against the principal defendant and there is not within two days a notice of motion for new trial or that the case will be removed to the Supreme Court,

the statutory issue shall stand for trial at the term of the court, on the docket containing the suit in the order of the formation of such issue. If a jury is demanded the court is to appoint a day unless the jury has been dismissed, and then it is to stand on the jury docket of the next term. Continuances may be granted as in other cases, and the plaintiff is required to see that the case is docketed, and to notify the garnishee. By section 6481 provision is made that if the principal cause is appealed to the Supreme Court and affirmed, the issue in garnishment shall be tried at the end of the next court or term to which the case has been continued, or at the end of that which was in existence at the time of affirmance.

In 1873 a new section was added at the end of the chapter providing that if the principal defendant failed to appear, the plaintiff must perfect his proceedings against him as soon as he can lawfully do so, and in default of this the garnishee proceeding may be ordered discontinued with costs. Sess. Laws 1873, 80.

We think that the cause cannot be kept open without either a continuance in form or some action equivalent to a consent of the garnishee. As the statute of 1873 allows any interested person as well as the garnishee to move for a discontinuance, we are not prepared to say that even the garnishee's consent, after other rights intervene, would cut them off. The general doctrine is that a garnishee cannot waive the rights of other persons. *Tabor v. Van Vranken* 39 Mich. 793. As the bill of exceptions shows no attempt to prove consent by the garnishee, it is to be seen whether the circumstances shown authorized it without positive consent.

The property held by the garnishee did not belong to the principal debtors, and was not so claimed. As to them the assignment was binding. The liability of Blake as garnishee arose, if at all, under Comp. L. § 6498, which allows property conveyed in fraud of creditors to be reached. See *Fearey v. Cummings* 41 Mich. 376; *Farrington v. Sexton* 43 Mich. 454; *Cummings v. Fearey* 44 Mich. 39.

The decisions on the subject of frauds against creditors do not hold fraudulent assignments so absolutely void that the

parties may not lose their right of complaint by waiver or acquiescence. They cannot attack it until they have acquired a legal standing in some way, and they may let it stand if they please.

In the present case it appears that Hubbard sued out his writ of garnishment to reach such property and effects as could be garnished. This was May 3, 1878. On the 14th of May, 1878, he levied on lands. He did not file his bill in aid of the execution levy until after the garnishee defendant had made an issue of fact to be tried at law, under which so far as the personalty was concerned the whole question of fraud could be determined.

The suit in equity could in no way affect the validity of the garnishee proceedings. Whatever effect it had as determining the rules of law for construing the assignment, it could only operate to maintain the levy. The facts which seemed to the court in equity as not affecting Hubbard's right of complaint, might have been quite different as shown to the court or jury in the garnishment issue. The record before us in the chancery suit indicates very clearly that some creditors had accepted the assignment. It might have appeared in the trial at law that Hubbard had done so. Our decision could in no way operate to preclude a further legal investigation on that matter. Our rulings in fact are no further binding on other controversies than if we were jurors, so long as the issues are distinct.

There was no legal reason why the case at law, which was ready for trial before the bill was filed, should not have been tried first. It is not customary to deprive parties of common-law trials on questions which can be dealt with in common-law courts as well as in equity. If this issue had been tried when it was ready for trial, the judgment of this court could probably have been had upon it a year or more in advance of the hearing on the chancery appeal.

We think that unless Blake was a party to this delay, the proceedings must be regarded as abandoned.

For this error the judgment must be reversed with costs and a new trial granted. It does not seem to us that anything

was in the way of the execution sale, or that it interfered of itself with the garnishee proceedings if otherwise valid.

The other questions, except as before referred to, are not important.

The other Justices concurred.

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NOAH W. CHEEVER ET AL., RELATORS v. THE CIRCUIT JUDGE FOR WASHTENAW COUNTY.

Executors may appeal from refusal of probate.

Executors under a will which gives them exclusive powers and trusts, and provides for unborn heirs, may appeal from its disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the estate among themselves and oppose the appeal.

The reasons of a competent testator concern himself only.

A will which provides that "after the death of testator's daughter, he gives her children and grand-children," etc., contemplates descendants then unborn who shall be in being at the time of the daughter's death.

Mandamus lies to require a circuit judge to hear an appeal by executors from an order of the probate court disallowing a will.

MANDAMUS. Submitted Oct. 27. Granted Nov. 10.

Sawyer & Knowlton for relators. The validity of a will is the only question before the probate court, and it is not pertinent to the question that beneficiaries do not choose to take under it: *Pierce v. Pierce* 38 Mich. 412; *Stebbins v. Lathrop* 4 Pick. 42; *Lorieux v. Keller* 5 Iowa 196; *St. John's Lodge v. Callender* 4 Ired. (N. C. L.) 335; *Hayes v. Hayes* 48 N. H. 219; the executor appeals from the disallowance of probate: *Howe v. Pratt* 11 Vt. 255; *Scribner v. Williams*

1 Paige 550; *Foster v. Foster* 7 Paige 48; *Brooks v. Barrett* 7 Pick. 94; *Besancon v. Brownson* 39 Mich. 392.

E. D. Kinne and *B. F. Granger* for respondent. Executors have no such interest in a will as authorizes them to appeal from its disallowance (*Farrar v. Parker* 3 Allen 556; *Lewis v. Bolitho* 6 Gray 137; *Henry v. Estey* 13 Gray 336; *Wiggin v. Swett* 6 Met. 194; *Swan v. Picquet* 3 Pick. 443; *Boynton v. Dyer* 18 Pick. 4; *Smith v. Bradstreet* 16 Pick. 264; *Penniman v. French* 2 Mass. 140; *Downing v. Porter* 9 Mass. 386); unless he is a legatee: *Newhouse v. Gale* 1 Redf. 217; *Cunningham v. Souza* id. 462; *Dickinson's Appeal* 2 Mich. 337; *Taff v. Hosmer* 14 Mich. 249; *Labar v. Nichols* 23 Mich. 310. *Mandamus* does not lie to review judicial action: *People v. Wayne Circ. Judge* 1 Mich. 359; *Mabley v. Judge of Superior Court* 32 Mich. 190.

Cooley, J. The sole question in this case is, whether the persons named executors in an instrument purporting to be the last will and testament of Hiram Arnold, deceased, may appeal from the order of the probate court disallowing the same, notwithstanding all persons who would be interested as heirs or distributees in case the decedent had died intestate, and all living persons whom the instrument purports to make beneficiaries, unite in a settlement of the estate and oppose the appeal. The circuit court held that they could not, and dismissed the appeal which, in due form, they had attempted to take.

The circuit judge was quite right in saying that litigation over estates is a great and growing evil, and that parties should be encouraged to avoid it by voluntary arrangements, instead of being prevented. But it becomes important in any case to make sure that all persons who are or may be interested join in the settlement, and also, in the case of wills, that no declared policy of the testator in putting his property or any portion of it beyond the control of those concerned in the settlement, is defeated thereby.

A reference to the will, a copy of which is given in the

margin,* will make it clear that purposes are expressed therein which were to be accomplished irrespective of the desires of the heirs, distributees or beneficiaries. One of these was the erection of a monument to the decedent; and it is a noticeable fact which may assist in the explanation of some other provisions of the will, that the executors, and not the family, were to decide upon this, and to determine upon the inscriptions and the headstones. In respect to this monument the executors alone can represent the testator's will,

*THE LAST WILL AND TESTAMENT OF HIRAM ARNOLD, OF SCIO, IN WASHTENAW COUNTY, MICHIGAN.

I, Hiram Arnold, being of full age and sound mind, do hereby make and execute this my last will and testament, as follows:

First—I hereby appoint Edward Treadwell and Noah W. Cheever the executors of this will, with full power to sell and convey the real estate and personal property belonging to my estate, without asking or obtaining license from any court for that purpose.

Second—I hereby make the following devises and bequests to the devisees and legatees hereinafter named, in lieu of and in full payment and satisfaction of all the claims, right, title and interest of such devisees and legatees in and to my estate.

Third—I hereby direct my said executors to erect on my lot in the cemetery at Ann Arbor a family monument of Scotch granite, with suitable inscriptions thereon, and also such headstones as they may deem appropriate; such family monument not to cost less than one thousand dollars.

Fourth—I give and bequeath to my granddaughter, Luella Beaman, the sum of one thousand dollars.

Fifth—I give, devise and bequeath to my grandson, Clay Green, and his heirs and assigns forever, all of the northwest quarter of section twenty-seven in township two south, in range six east, in Washtenaw county, Michigan, that lies south of the Huron river, and belongs to me.

Sixth—I give and bequeath to Sarah Bagley the sum of two thousand dollars, and to Josephine Bagley the sum of one thousand dollars, and to Georgiana Bagley the sum of one thousand dollars.

Seventh—After the payment of my debts, the expenses of the settlement and administration of my estate, and the above legacies, I give, devise and bequeath to my daughter, Escalala N. Green, the use, interest and income of my entire estate, both real and personal, during her life, except as hereinafter provided. When my granddaughter, Luella Beaman, shall become of the age of thirty-five years, then I give, devise and bequeath to her, and her heirs and assigns forever, one-fourth of my estate, both real and personal. And when my grandson, Clay Green, shall become of the age of thirty years, then I give, devise and bequeath to him, and his heirs and assigns forever, one-fourth of my estate, both real and personal. And after the death of my said daughter, Escalala N. Green, I give, devise and bequeath to her children and grandchildren all my estate, both real and personal, the use of which is above bequeathed to her, the same to be divided equally among them, share and share alike.

And I hereby make the above devises and bequests to Escalala N. Green and Clay Green and Luella Beaman, and their heirs and assigns, expressly subject to the payment to my son, Eugene B. Arnold, of a sum not less

and no settlement can deprive them of their discretionary authority. The decedent trusted to them, and to no others.

But it is equally manifest that the decedent had beneficiaries in view who could not possibly be represented in any settlement. The gift to Escalala N. Green is of a life estate only, and on her decease her share is to pass to her children and grandchildren, share and share alike. We do not understand that she then had any grandchildren, and the will must have intended the children and grandchildren who should be in

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than four nor more than six hundred dollars per year during his life, as my executors shall deem best; and I hereby direct my said executors to pay to my son, Eugene B. Arnold, during his life, the said sum not exceeding six hundred dollars per year, out of the income of my estate.

Eighth—I hereby will and direct that my daughter, Escalala N. Green, shall have the use, possession and control of my homestead farm, situated in the township of Scio, in Washtenaw county, Michigan, consisting of about three hundred acres, during her life, subject to the above devises and bequests.

Ninth—I hereby will and direct that my said executors and their successors shall keep all my estate, except said homestead farm, invested in good real estate mortgages, or other safe and reliable interest-bearing securities, and pay the interest and income from the same to my legatees as above provided, at least once each year, if possible, after deducting their reasonable charges and expenses in managing said estate, until said estate shall become absolutely vested in said legatees by the terms of this will.

Tenth—I hereby revoke all former wills by me made.

In witness whereof, I have hereunto set my hand and seal this 19th day of August, A. D. 1879.

HIRAM ARNOLD. [SEAL.]

This instrument, which I hereby declare to be a codicil to my will, executed by me on the 19th day of August, A. D. 1879, in presence of John Henley and Norman Dwight, as witnesses.

I make the following changes and additions to said will, viz.: I give and devise the following described land, being a part of my homestead: commencing at the southwest corner of the northwest quarter of section fourteen, town two south, range five east; thence east one hundred and twenty-one rods, to the east stone wall or fence; thence north along said stone wall to the Arnold road, so called; thence east along said road to its intersection with Delhi road; thence north along Delhi road to the north line of said section fourteen; thence west on said north section line to the northwest corner of said section fourteen; thence south along the Wing road to the place of beginning, to my son Eugene B. Arnold, during his life, and after his death to his heirs.

I hereby revoke and declare null and void the bequest in said will to my son, Eugene B. Arnold, of a sum not less than four nor more than six hundred dollars per year, contained in section "seventh" of said will.

I hereby give and bequeath to my son, Eugene B. Arnold, five hundred dollars, to be invested in a team and farming implements.

In witness whereof, I have hereunto set my hand and seal this 24th day of September, A. D. 1880.

H. ARNOLD. [SEAL.]

being at the death of Mrs. Green. The gift to Eugene B. Arnold is also for life only, and after his death his heirs become the beneficiaries. We do not know why these gifts to the daughter and son were thus restricted, but it is plain that the decedent intended that the descendants of his children should succeed to the property beyond a peradventure, and that it should not be in the power of the children themselves to prevent it. We need not inquire into the reasons; being sufficient to the decedent they are for legal purposes sufficient to all others.

To guard against his purposes being defeated the persons named as executors were made trustees with very extensive powers. They were given full discretion to sell real and personal estate without taking the advice of the probate court, they were to keep all funds invested, and upon them he relied to save the contingent interests for those who were in mind as future beneficiaries. When the living children and grandchildren undertake by agreement between themselves to appropriate the whole property, they attempt to make a new will for the testator; to take to themselves the fee when he gave life estates only; to relieve themselves from trusts which he deemed essential; to cut off after-born children who were plainly the special objects of his bounty. But it is plain that this cannot be done without an equal disregard of the will of and the law. The trustees are the representatives of the dead donor in his wishes, and they represent also the future beneficiaries, who, being as yet unknown, can have no other representatives or protectors.

The will was assailed on the ground of mental incompetency. Had the issue been fully and fairly tried in the probate court and decided on the merits, and had the appeal been taken on technical grounds, we should agree that the relators ought not to press it. It would be inexcusable in them to make costs for the estate which they at the outset must know would be incurred in a vain attempt to support a nullity. But there is every reason to believe from this record that the case has not been fully heard, and that the decision went as it did because of the compromise. Under such cir-

cumstances the executors have an undoubted right to appeal, for they have substantial interests to protect. Whether they might appeal for the mere purpose of protecting the decedent's reputation, if they believed his competency unjustly assailed, we need not discuss, for in this case such a question does not and cannot arise.

It is urged that the *mandamus* which is applied for is not a proper remedy. But the purpose is merely to set the court in motion that the appeal may be heard (*Comstock v. Wayne Circuit Judge* 30 Mich. 98); and it must issue as prayed.

The other Justices concurred.

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ALBERT R. HAMMOND v. MARTHA E. WELLS.

Builder's lien—Homestead exemption.

A mechanic's lien cannot be enforced against lands of which there is no written identification in the agreement for the work.

A mortgage given by a married man will not bind the homestead unless it is in writing; nor will a mechanic's lien, if it does not identify the premises by written description.

Charges cannot be imposed on real estate by oral agreements unless there are distinct and positive provisions enabling it to be done.

Appeal from Washtenaw. Submitted October 27. Decided November 10

PROCEEDINGS to enforce mechanic's lien. The petitioner appeals. Affirmed.

Noah W. Cheever for petitioner.

Sawyer & Knowlton for respondent.

GRAVES, J. This proceeding was taken to enforce a mechanic's lien. The steps to institute the lien were pur-

sued under the law as it existed when the Act of May 31, 1879, was adopted; but the suit was brought under the latter statute. The circuit judge after hearing on pleadings and evidence dismissed the petition and the petitioner appealed.

Several questions possessing interest are presented. There is one, however, which is paramount and controlling. It relates to an objection which is insurmountable, and the other points therefore cease to be material.

The lien is asserted as one arising out of the execution of a contract by the petitioner for putting up a dwelling-house for respondent on her lot in the city of Ann Arbor, and he sets forth the contract and alleges performance and the failure of respondent to pay the consideration, and prays a sale of the property.

The point of defense to which attention has been suggested is that from a date long prior to the contract down to the present time the lot has been the respondent's homestead, and as such exempt, and she contends it is exempt from these proceedings. The petitioner admits the fact that for many years and up to this time the lot has been her homestead, but he insists that it is bound notwithstanding, by this proceeding. His exact position is that the transaction enures as a lawful mortgage on the premises and is hence within the exception contained in the constitutional provision for the exemption of a homestead. Article xvi., § 2.

The case is to be decided on the particular facts and the question is brought within very narrow bounds.

The petitioner set down in writing a list of the particulars of a dwelling-house with brief descriptions of materials and of the style and quality of the work, and added what the price would be. The parties appended and subscribed a brief statement of their agreement to such plan and specifications, and that the price should be paid in a given manner. Such was the written agreement. No other writing was made. There was no reference to any site for the building. The writing was silent on the subject. On its face it was as capable of application to the putting up of a building on one site as on another. Hence the identification of the intended

place, if indeed any was understood as fixed upon, was left entirely in parol. And there is no evidence that the respondent contemplated as matter of fact the creation of a charge on any real estate.

For the purpose of the case it may be granted that the effect of the mechanic's lien law, where it is applicable, is to create a species of statute mortgage, whether the contract is written or unwritten and even though the land-holder may not have intended in point of fact to charge his estate; and that in case the contract is written and duly signed and describes the premises to be affected, it will attach and bind even though the place is a homestead. But granting all this, it remains to inquire whether a contract wholly blank in regard to the premises to be built on or affected, is a valid basis on which to establish a lien or statute mortgage by adverse proceedings against what was a homestead at the time of the contract and has so continued. The court is clearly of opinion that it is not.

At common law a mortgage could not be partly in writing and partly in parol, and it has always been deemed necessary that some kind of description of the premises intended to be encumbered should be in writing, and unless there are provisions which are very distinct and very positive to the contrary, the courts will decline to recognize the power to impose charges on real estate by oral agreement. *West v. Laraway* 28 Mich. 464; *Wilson v. Jones* 46 Md. 349.

When the Constitution was formed, a mechanic's lien could not be created on real estate unless there was a complete contract in writing, signed, acknowledged and recorded (Rev. Stat. 1846, ch. 126), and the exception contained in the second section of the article on exemptions in favor of mortgages lawfully obtained, was framed in view of the established rule at law that a mortgage, including the description of the premises, must be in writing. The qualification of the exception is very decisive. The mortgage which the exception from the exemption permits must be one that is not only lawfully obtained, but one that is signed by the wife if the maker is a married man. The mortgage then which is referred to and

intended by the Constitution is a written mortgage—a mortgage which may be signed, and therefore one whose signing would be suitable and regular as an act to attest the assent of the parties to the imposition of the burden on designated premises.

By no ingenuity can the contract relied on be brought within this description. It cannot therefore be allowed to operate adversely to the homestead exemption. It is practicable to bring many reasons to the support of this view, but it is not supposed to be necessary to extend the opinion.

The decree must be affirmed with costs.

The other Justices concurred.

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FERDINAND JOHNSON, AU GRES BOOM COMPANY ET AL. v. THOMAS CRANAGE JR., THOMAS PITTS ET AL.

Boomage—Charges for log driving—Conditional tender.

One who contracts to drive logs to a certain point at a fixed rate is bound to discharge any lien for tolls imposed by river improvement companies.

A tender may be coupled with such conditions as the party making it has a right to impose, such as that he shall receive what a payment or tender legally made would entitle him to.

A tender need not be divided to meet separate claims where they are all held by one person. Where more is demanded than is due, the person making the tender cannot be put in the wrong by requiring him at his peril to separate just from unjust charges.

Whether a boom company must not tender delivery of logs before being entitled to demand boomage charges thereon—Q.

An unambiguous contract cannot be varied in its legal effect by the understanding of the parties at or before its execution; and where the only question is as to its legal meaning, its construction cannot be aided by oral evidence of conversations between the parties.

Error to Bay. Submitted October 28. Decided November 10.

REPLEVIN. Defendants bring error. Affirmed.

Holmes, Collins & Stoddard and *Scofield & Webster* for plaintiffs in error.

McDonell & Mann for defendants in error.

MARSTON, C. J. The defendants in error brought an action of replevin to recover possession of a quantity of pine saw logs, which the defendants below held and claimed a lien upon for charges for boomage, driving the logs, and tolls to an improvement company. There is no serious dispute concerning the facts, and no question of ownership arises.

August 23, 1878, John Jenkinson entered into a written agreement with Pitts & Cranage (plaintiffs below), whereby he agreed to sell them a large quantity of white pine saw logs "to be delivered to said Pitts & Cranage at the boom of the Au Gres Boom Company at the mouth of the Au Gres River," and three million were to be so delivered in the spring of 1879.

March 29, 1879, a written agreement was entered into between the Keystone Lumber & Salt Manufacturing Company and Mapes, Gates & Fay, as parties of the first part, and John Jenkinson of the second part, under which the parties of the first part agreed "to break in, put afloat, and drive down within the limits of the Au Gres Boom Company" the logs then on the banks and roll-ways so sold to Pitts & Cranage. "Said first parties to break in said roll-ways, put afloat and drive down said logs within the limits of the boom aforesaid, on the first stage of water," etc., and in consideration thereof the second party was to pay them fifty cents per thousand feet.

It is conceded that the first parties satisfactorily performed this contract on their part. The Au Gres Boom Company is a corporation organized under the laws of this State, and it is admitted that this company was entitled to receive, and had a lien therefor, seventy cents per thousand feet for its services about the boomage, rafting, etc., of these logs.

Commencing above the limits of the Boom Company, the

Au Gres River East Branch Improvement Company, a corporation organized under the laws of this State, had improved the river by dredging and otherwise, and was entitled to twenty cents per thousand feet as tolls upon all logs passing through that portion of the river by it improved. That this company was entitled to twenty cents per thousand for all the logs in dispute was not controverted upon the trial below or in this court. The statute gives the Improvement Company and the Boom Company each a lien upon logs for the amount of their respective charges.

Ferdinand Johnson was and is secretary and treasurer of the Improvement Company, and treasurer of the Boom Company, and he had "authority to receive pay for the running of the logs on the contract" of March 29, 1879, between the Keystone Company, Gates & Fay, and Jenkinson. Parties wishing to get their logs when rafted, from the Boom Company, had to procure from Mr. Johnson an order upon the superintendent of the Boom Company directing him to deliver the logs, and all legal charges against the logs were to be paid by Mr. Johnson.

About the 27th of May, 1879, Pitts & Cranage were notified that two rafts of these logs were ready for delivery by the Boom Company, and they then ascertained that Mr. Johnson acting for the companies and parties in interest, claimed to hold these logs, and have a lien thereon as follows: In favor of the Keystone Company and Gates & Fay for services under the contract of March 29th, fifty cents per thousand feet; twenty cents per thousand feet in favor of the Improvement Company, and seventy cents per thousand feet in favor of the Boom Company. Cranage, representing the plaintiffs below, the owners of the logs, conceded the correctness of the Boom Company's claim; he did not question the legality of the Improvement Company's claim, but insisted that the twenty cents per thousand, toll to the Improvement Company, Jenkinson in the first instance was to pay, and under his contract of March 29th with the Keystone Company and Gates & Fay, it was for them to pay the Improvement Company tolls. And acting upon this theory

Cranage tendered a sum in gross sufficient to pay the Keystone Company and Gates & Fay their fifty cents per thousand and the Boom Company's seventy cents per thousand, and demanded the logs, which being refused, this action was commenced.

A number of very interesting questions were raised and discussed, concerning the right of the respective parties to a lien for their charges and the necessity of each retaining actual possession in order to preserve the same, but under our view of this case these questions are immaterial and will not be considered.

Jenkinson under his contract with Pitts & Cranage agreed to deliver the logs at the boom at the mouth of the Au Gres river. As between these parties it is very clear that the cost and expense, including tolls, would be for Jenkinson to pay. Jenkinson let the contract to the Keystone Company and Gates & Fay to put afloat and drive down within the limits of the Boom Company these logs. In driving down these logs they had to pass over the amended highway of the Improvement Company, and thus become liable to a charge or toll for the use thereof.

If Jenkinson under his contract with Pitts & Cranage was bound to pay the tolls, of which there can be no question, why should not substantially the same language in the contract of March 29th cast this burden upon the parties who thereby agreed to deliver the logs in the Boom Company's limits? Had Jenkinson let to these parties the contract of cutting, banking and delivering the logs at the place he had agreed, there could be little doubt but that all would concede the correctness of their paying the tolls, and yet wherein would such a contract differ from this? In their undertaking to deliver at a certain point, had it become necessary to build a dam, or purchase from the owners of a dam a "flood of water" as is frequently done, or to employ the services of a tug, the expense thereof would necessarily fall upon them. Under such circumstances they could no more call upon the owner of the logs to pay such charges, than could a person who had undertaken to deliver a lot of cattle at a certain

point, or a wagon-load of wheat, call upon the owner thereof to pay the tolls of the turnpike companies over which the cattle had been driven or the grain drawn. Where parties unqualifiedly undertake for a sum certain to sell and deliver, or to deliver at a point specified certain things, they must do so, and if, in order to perform their agreement, they must use the improvements or facilities offered by third persons, the expense thereof they cannot charge to the owner of the property.

The contractors under their agreement of March 29th could not deliver these logs at the place agreed upon, without payment of this toll. It was a part of the necessary expense and must, if not paid by the contractors, become and remain a charge upon the logs, but this charge could with no more propriety be cast upon the owner than could the labor account of breaking the roll-ways and driving the logs. It is said the statute gave the Improvement Company a lien upon these logs for its tolls. Granted, and had it decided not to let the logs pass into the Boom Company's limits until payment thereof, how could these contractors have performed on their part, and yet refused to pay the tolls? That the parties running the logs under such a contract must pay the tolls we have no doubt. This being so the tender made to Mr. Johnson, who represented all the claimants, was sufficient to cover all legal charges against the logs, as the twenty cents per thousand for tolls was included in the fifty cents agreed to be paid for running and delivering the logs under the contract of March 29th.

But it is said the tender was made in gross, whereas the amount of the respective liens or claims should have been tendered separately, and that the tender made was coupled with certain conditions, whereas a tender to be good must be unconditional.

A tender may very properly be coupled with conditions such as the party has a right to make and is entitled to as resulting from a payment or tender legally made. This has been repeatedly recognized in this court, and we need but refer to one or two of the late cases. *Brink v. Freoff* 40

Mich. 614; *Lamb v. Jeffrey* 41 Mich. 719. The plaintiffs could not obtain possession of their logs from the Boom Company, even had they paid in full all that was demanded, without an order from Johnson, and they on making a tender to him had a right to couple it with a demand for their logs, or what would entitle them to a delivery of the logs.

And they were under no obligation to separate the sum offered and make a distinct tender to meet each separate claim. Johnson represented all the parties and companies having claims against the logs, and he alone could give the proper order entitling plaintiffs to the possession thereof. It was for him to separate and pay or credit to each what rightfully belonged to it. His knowledge enabled him better than the plaintiffs to do this. Besides he demanded more than he was legally entitled to, and he could not thus put plaintiffs in the wrong, or compel them at their peril to separate the legal from the illegal demands; and it may be questionable whether it was not the duty of the Boom Company, or of Johnson acting for it, to tender delivery of the logs, before having any right to demand the legal charges thereon.

It is also claimed that the court erred in excluding evidence of conversation between Jenkinson and Fay, before the making of the contract of March 29th, relative to the tolls and the amount he would be willing to pay. It is said that the contract must be interpreted in the light of the surrounding circumstances, and that the conversations referred to would be admissible for such purpose, citing several cases in this court in support thereof. In this contract there is nothing ambiguous; the language is plain, free from doubt and no technical terms are used, so that the only question is as to the legal meaning of the contract. In such a case oral evidence in aid of the construction is not admissible. A plain and unambiguous contract cannot be varied in its legal effect, by the understanding of the parties at or previous to its execution.

The judgment must be affirmed with costs.

The other Justices concurred.

JOHN KRAFT v. PETER RATHS.

Garnishment—Return of writ not served.

A writ of attachment and garnishment, returned on the day of issue not served upon the principal defendant, cannot bind him.

A garnishee cannot be held on a disclosure that he has nothing except a draft payable to the wife of the principal defendant.

Argument on the merits cannot be made on a motion for a re-hearing, but only on the re-hearing itself, if granted.

Re-taxation of costs cannot be urged on a motion for a modification of the judgment.

Error to Wayne. Submitted Oct. 28. Decided Nov. 10.

ATTACHMENT. Defendant brings error. Reversed.

Rienzi Loud, for plaintiff in error.

James H. Pound, for defendant in error.

CAMPBELL, J. Raths sued out an attachment and garnishee process against John Kraft as debtor and Frederick Kraft as garnishee, on June 27, 1879, returnable July 7, 1879. The officer having the writ served it on the garnishee and returned it not found as to the principal defendant on the day of its issue.

On the return day the garnishee appeared, but the principal defendant did not. Mr. Loud appeared as an attorney and moved to quash the proceedings for the illegality of the return. This was overruled. The garnishee's answer showed that he had nothing in his hands, except a draft payable to the order of defendant's wife, and which, therefore, belonged to her in law and could be collected only on her order.

After the motion to quash was decided and an adjournment had been made, the justice allowed the officer to change his return *ex parte* and without any showing, by dating it July 2d, and averring he had not been able to find defend-

ant, and had served a copy of the writ on the 27th of June on the garnishee.

Judgment was thereafter rendered on the adjourned day, plaintiff proving his account, and the justice as he returns basing his judgment on the garnishee's disclosure.

The return is somewhat ambiguous on several matters, but we have no doubt the justice treated it as a case of attachment not personally served. No plea was ever put in, and the motions made and denied would have been senseless if there had been any appearance by the principal defendant.

As the writ was actually returned into the hands of the justice on the day of the issue, and never left his custody, the amended return even if good on its face—which it was not—could not have been allowed to give jurisdiction. There is no pretense that a writ returned not served as soon as issued, can be of any validity to bind a party. *Withington v. Southworth* 26 Mich. 381; *Nicolls v. Lawrence* 30 Mich. 395. Neither was the garnishee's disclosure evidence that any liability existed in him on which a responsibility could attach. The circuit court so held.

The proceedings were void and should have been vacated. The judgment of the circuit court affirming the principal judgment must be reversed with costs of both courts.

The other Justices concurred.

Afterwards, at the January term, 1881, the defendant in error moved for a re-hearing and a modification of the judgment, and urged that costs should not have been awarded against him. Submitted and denied January 4, 1881.

James H. Pound, for the motion.

THE COURT said they could hear no argument on the merits, which could only come up on the re-hearing, if granted. They denied the motion, as, in deciding the case, they had considered the questions raised. They also held that a question of the re-taxation of costs could not be raised on a motion for a modification of judgment.

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139	169
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CATHERINE BURNS v. JOHN T. MARTIN AND JAMES MARTIN.

Boundaries—Correction by re-survey—Adverse possession.

A re-survey is inadmissible in evidence to show that a private boundary is incorrect, if its starting point is outside of and does not belong to the immediate plan or local system by which the original survey was controlled.

A division line established by mutual agreement and acquiescence and constant occupancy for more than twenty years, cannot be changed without writing.

Error to the Superior Court of Detroit. Submitted October 28. Decided November 10.

EJECTMENT. Plaintiff brings error. Reversed.

Stewart & Galloway, for plaintiff in error.

Griffin & Dickinson, for defendants in error.

GRAVES, J. This is an action of ejectment brought by Mrs. Burns for a strip of land a few inches wide in block three (3) on the Thompson farm in the city of Detroit. The dispute hinges on the right position of the boundary between lots thirty-eight and thirty-nine. The plaintiff owns lot thirty-eight and the defendants lot thirty-nine, and she claims that they have encroached upon her lot thirty-eight. The defendants deny this and contend that they have confined their occupancy to the bounds of lot thirty-nine and that the plaintiff is now in fact holding a fraction of that lot against their right.

Thompson, the original proprietor, platted the premises in January, 1852, the survey being made by Mullett. Immediately thereafter the plaintiff's husband Thomas Burns contracted with Thompson for the purchase of lot thirty-eight and in the spring of 1852 built a house on it which is still there. Thompson subsequently carried out the contract by conveying to Burns, and he deeded to Mr. Gowan who in

turn conveyed to the plaintiff. About the time of Burns' purchase, Mrs. Ockford bought of Thompson lot thirty-nine and in June, 1875, she conveyed to one of the defendants who is her son-in-law. It is therefore seen that the parties' predecessors in title of the two lots began their holding from the original proprietor immediately after the lots were platted and that their purchases dated very near together.

The evidence was undisputed that at that time the lots were unfenced and that Mullett's stakes to make the lines and corners were standing, and that Burns and Ockford co-operated in putting up a fence between the two lots on the very line indicated by such stakes. The evidence was also undisputed that during the entire period from the spring of 1852 to June, 1875, when the grant of lot thirty-nine to one of the defendants took place, this original fence, apart from some partial alterations for the purpose of repairs needed, was maintained substantially at the same place and as the line fence between the lots; and that the respective proprietors not only tacitly recognized the line so indicated as the true one, but actually partitioned it into two equal parts in order to apportion and fix the duty and expense requisite to preserve the fence as a boundary, and thenceforward for more than twenty years actually maintained the fence and adhered to the line in accordance with the arrangement. Again, the evidence was uncontradicted that defendants are in possession of some little part of the premises on Burns' side of that line and claiming title thereto. The quantity can only be determined by a construction of the evidence.

To these facts the defendants opposed evidence to establish two things: *First*, that the line occupied by the old fence was not the true one; *second*, that the plaintiff had estopped herself from contending against the line claimed by the defendants.

The evidence relied on to show that the line of the old fence is incorrect consisted of a survey by Mr. Robinson and his explanation. For the purpose for which it was offered and laid before the jury this survey was of no value, and was entitled to no weight whatever. Its introduction was mis-

leading. That it should possess any value on the question at issue even under the defendant's theory, it should have proceeded from some mark or monument identified as a correct one to run and measure from, in executing the search for the line sought. But the survey had no such badge of fitness and credit. It was in substance a float. The starting point, it is true, was at what was supposed to be a stake actually set by Mullett. But it was on the opposite side of the street and at a considerable distance away, and not shown to belong nor apparently belonging to the immediate plan or local system by which the survey of lots thirty-eight and thirty-nine was regulated and measured, and there is no ground for presuming that it has any such relation to the line in question as to control it or testify to its position.

In regard to the second point the position is, that when Robinson shifted the line in his survey for defendants in 1875, and they changed the fence accordingly and constructed a house with the eaves extending beyond the old line, the plaintiff virtually assented. It is needless to recapitulate the evidence relied on as showing this. It had no tendency to prove that the parties concurred in a removal of the line previously acted on. On the contrary, when fairly received, it indicates that the plaintiff and her husband were dissatisfied and that defendants knew it.

But apart from this consideration, if the facts are as they appear in the record, there was no uncertainty about the line to be cleared up and settled, and no room for any parol arrangements. The line was already defined and established by mutual agreement, and acquiescence and consistent occupancy for more than twenty years and no change was practicable without writing: *Smith v. Hamilton* 20 Mich. 433; *Joyce v. Williams* 26 Mich. 332; *Stewart v. Carleton* 31 Mich. 270; *Diehl v. Zanger* 39 Mich. 601; *Dupont v. Starring* 42 Mich. 492. See also *Turner v. Baker* 64 Mo. 218; *Terry v. Chandler* 16 N. Y. 354; *Vosburgh v. Teator* 32 N. Y. 568; *Nichol v. Lytle* 4 Yerg. 456; *Gilchrist v. McGee* 9 Yerg. 455; *Yarborough v. Abernathy* Meigs 413.

The learned judge below was led to take a different view and he submitted the case on the theory that the jury might be governed by Robinson's survey and might find that the plaintiff was estopped, and the result was a verdict for defendant. According to the case the plaintiff was entitled to recover whatever is held by defendants beyond the old ground line where the fence was originally set.

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

The other Justices concurred.

JOHN METTE v. THEODORE FELDMAN.

Destruction of deed—Suit on bond given for payment of partnership debts.

Destruction of an unrecorded deed does not revest title in the grantor, but only deprives the grantee of the means of proving his title.

Certain lands belonging to an individual partner were included as assets in the partnership articles, and the firm gave a mortgage on them. The owner drew up a deed conveying an undivided half of them to his partner, but it was not recorded and he afterwards destroyed it and took up the mortgage with partnership notes. When he went out of the firm he took a bond from his partner binding the latter to pay all partnership debts, and gave him clear title to the lands, which the partner bought with the other assets. *Held*, that by destroying the former deed he would have been estopped from enforcing payment of the notes but for the subsequent conveyance of clear title, after which the notes constituted a liability enforceable by suit on the bond.

ERROR to the Superior Court of Detroit. Submitted October 28. Decided November 10.

DEBT on bond. Defendant brings error. Affirmed.

Atkinson & Atkinson for plaintiff in error. Assenting to the destruction of a deed estops one from asserting it: *Gugins v. Van Gorder* 10 Mich. 523.

Otto Kirchner for defendant in error.

CAMPBELL, J. In this case Feldman sued Mette on a bond conditioned to pay the debts of a firm of which they had been partners, but whose assets were sold to Mette. The sale included the premises occupied by the firm, the title of which had been entire in Feldman, and he gave a deed on the sale conveying a clear title.

The articles of partnership set out the land as forming part of the assets. At that time there was a mortgage on the land, which, it was admitted by Mette on the trial, was a firm liability. After the firm was organized Feldman conveyed one undivided half of the land to Mette, but the deed remained in a desk unrecorded. Shortly before the dissolution the partners quarreled, and Feldman destroyed the unrecorded deed, and about that time gave two notes of the firm to take up the mortgage, and, as he admits, did so for the purpose of destroying the title.

The defense rests on the ground that this estopped Feldman from claiming these notes to be a partnership obligation.

The destruction of the deed did not revest the title in Feldman, but it deprived Mette of the means of proving his title. If things had remained in that shape, we think that Feldman would have been estopped from calling on Mette to pay the notes until he had made him good. But the subsequent conveyance of a clear title before the bond of indemnity was given removed this difficulty. Mette received the consideration, and the deed secured him in its enjoyment. The notes were given to cancel a lien which he had originally recognized, and which was a charge on the firm by mutual understanding. They were, therefore, very clearly partnership obligations for all purposes, and he was rightly held bound to pay them.

The judgment must be affirmed with costs.

The other Justices concurred.

Isaiah Letson v. Benjamin S. Reed and George W. Abell.

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45	27
101	150
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103	540

Bona fide purchaser—When good faith is not presumable.

Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed.

Appeal from Cass. Submitted Oct. 28. Decided Nov. 10.

Bill to set aside deed. Defendant Reed appeals. Affirmed.

Edward Bacon for complainant.

O. W. Coolidge and *J. A. Kellogg* for defendants.

Marston, C. J. That Letson was most grossly defrauded by Abell in their land trade has not been and could not be controverted. It but remains to ascertain whether Reed is a *bona fide* purchaser from Abell, and we are of opinion that he has not shown himself to be such. This court has distinctly held that where a fraud has been committed, third parties in order to build up a right thereunder must establish the fact that they are *bona fide* purchasers and that this cannot be inferred from showing a purchase alone. *Berry v. Whitney* 40 Mich. 71.

There is evidence tending to show that Reed was such a purchaser, but it would be far from satisfactory even if standing alone, and when considered in the light of the surrounding circumstances, its effect as such is entirely destroyed.

The exchange of conveyances between Letson and Abell was made December 24, 1877. On January 2, 1878, Letson, suspecting that he had been defrauded, went to Pokagon, saw Abell and requested him to trade back farms which Abell agreed to do, and the next day at Niles was agreed upon as the time and place for such exchange.

After this interview and on the same day, January 2d, Abell conveyed the Letson farm to defendant Reed subject to two mortgages thereon which Reed was to pay as part of the consideration. Abell was indebted to Reed in the sum of $374.84 and to Reed & Post $25—these sums were to be deducted and the balance was to be paid to Abell. One of the mortgages had been given by Letson and there was about $71 due thereon; The other had been given by Abell to one Newton, but not recorded, as his, Newton's, share for assisting Abell in making the trade with Letson.

Reed before making the purchase did not go to see the land, but claims he had some knowledge of its location and value; he examined an abstract of title furnished him which did not show the Newton mortgage, or the amount due on the mortgage given by Letson; he took Abell's statement as to the amount due or to become due upon these mortgages, and assumed payment thereof; and upon the same day gave to Abell $240 for him to apply and pay upon the Newton mortgage, and Abell was given the deed of conveyance to Reed, to take on the same day and have recorded, and at the same time $25 was paid by Reed to Abell on the purchase.

This is Reed's version of the transaction, and of what was done on January 2d, and it shows pretty clearly that Reed either had more confidence in the honesty and integrity of Abell than his previous acquaintance would have justified, or that he did not exercise that due care and prudence which men under ordinary circumstances would be expected to. While such a transaction is possible it is not according to the usual course of business and is highly improbable.

There is evidence tending to show that on January 3d Reed had notice of the fraudulent character of the transaction between Letson and Abell, but whether on that day or later, we are of opinion that he has not shown that he in good faith paid Abell, or discharged his claim against him, or that he legally assumed the payment of any valid subsisting encumbrance on the land over and above the amount of the Letson mortgage—$71—and that still remains a lien upon the land.

It follows that the decree of the court below must be affirmed with costs.

The other Justices concurred.

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88 154

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116 213

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119 673

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126 292

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137 [6]513

45 29
153 [2]138

45 29
155 [4]553

45 29
156 [4]399

FANNIE CHURCH v. ADELAIDE D. HOLCOMB, JOHN H. EARLE, LUCIUS RUSSELL, SHERMAN C. PRINDLE ET AL.

Settlement of estate — Probate license to mortgage — Amendment of bill in equity — Costs on remanding record for amendment of bill.

The assent of parties does not determine a question of law, nor does their omission to contest a point urged against them.

A probate license to sell or mortgage real estate is not necessarily void for being granted after the expiration of the statutory time allowed for closing up the estate, if it has not been closed up in fact, and if the will contemplates that it shall remain in the hands of the executors for a longer period.

Where a will provides that as the testator's children become of age the executors shall set off to them their shares of the estate, and it is obviously the intent that the executors shall receive and pay out moneys in managing the estate and supporting, maintaining and educating the children, any resulting indebtedness incurred by the estate to the executors in the strict discharge of what they believe to be their duty will not stand on the same footing with debts contracted by the deceased in his life time nor be subject to the statutory limitation requiring claims against the estate to be presented and allowed within four years and a half.

Probate courts have general jurisdiction in testamentary and other probate matters, and their action therein is not void where no fatal defect appears on the face of the proceedings; it may be reversible on appeal, but must stand if an appeal is not taken.

Where a presumptively legal claim, approved by the probate court, exists against an estate which still remains unsettled after the time limited for that purpose, and is still, for some purpose, in the hands of the probate court, it is within the jurisdiction of that court to license the giving of a mortgage on the estate to meet the expenses of administration; and if no appeal is taken and the probate order is confirmed the mortgage becomes a valid claim.

Amendments to a bill in equity are discretionary with the court so long as they are not allowed to prejudice the substantial rights of the defendant. They should not be allowed at the hearing, however, if after amendment the case will be defective on the proofs.

Where a bill in equity, filed by the holder of mortgages supposed to be void, claimed an equitable lien in the nature of a mortgage, and the record showed that the parties had gone fully into their equities; that the proofs were all in; that there was no conflict on the facts constituting the complainant's case, and that the case that would have been made on a foreclosure bill was fully before the court, the record was remanded by the appellate court with leave to so amend the bill as to pray a foreclosure of the mortgages in case they were adjudged valid.

Where a chancery record is remanded with leave to amend the bill without prejudice to any proceedings, the complainant can be placed in no better position as to costs than if the bill had been dismissed without prejudice, and must pay all costs to the time decree is entered on the amended bill.

Appeal from Barry. Submitted October 28. Decided November 10

BILL for accounting, and to enforce an equitable lien. Complainant appeals. Record remanded with leave to amend bill but without prejudice.

Geo. C. Worth and *G. Thompson Gridley* for complainant.

James A. Sweezey, L. E. & C. M. Knappen and *Charles H. Bauer* for defendants.

COOLEY, J. The bill in this case is filed against the widow and heirs at law of Horton D. Holcomb, late of the county of Barry, deceased, to establish a lien upon the lands of which the decedent died seized, for moneys loaned by complainant to his executors, and for which mortgages were given, and also to charge the widow, the judge of probate, the counsel for the widow and several other parties with conspiracy to defraud both the estate and complainant as mortgagee. The bill was dismissed in the court of chancery, on full hearing on pleadings and proofs, except as to the widow, and complainant appeals.

The bill alleges that Holcomb died February 20, 1866, seized of 320 acres of land, lying in separate parcels in Barry county, and that he left a last will whereby he devised his lands to his wife and children, but with certain powers to the executors, all of which will appear by the copy of the will which is given in the margin.*

That the will made the wife, Adelaide D. Holcomb, and the decedent's brothers, Horace G. and Hiram W. Holcomb, executors.

That the will was probated and allowed in the county of Barry aforesaid May 15, 1866, and letters testamentary issued to the persons made executors.

That no order was entered by the probate court fixing the

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* In the name of God, Amen:—

I, Horton L. Holcomb, of the township of Prairieville in the county of Barry, and state of Michigan, feeling the uncertainty of life, and being feeble in bodily health but sound in mind and memory, do hereby make, publish and declare this my last will and testament, as follows; that is to say:

First. After the payment of all my just debts, if any there should be at my decease, together with funeral charges, and the expense of providing suitable marble to be erected at my burial place, I give and bequeath unto my beloved wife, Adelaide D. Holcomb, all my household goods and wearing apparel of every kind and description, to her sole use forever.

Second. I give, devise and bequeath unto my said wife, also, for and during her natural life, that portion of my homestead farm known and described as the north half of the north-west quarter of section one in township one north, of range ten west, in the county of Barry and the state aforesaid, with all the appurtenances thereto belonging; and after her decease the said described premises I give and devise in equal proportions to all my children who may survive me, being then born or that may thereafter be born, to them and their heirs forever.

Third. I give and devise all my real estate, wheresoever the same may be, not hereinbefore devised, in equal proportions, share and share alike, to all my children, me surviving, to them and to their heirs forever.

Fourth. I give and bequeath unto my beloved wife, also, one span of horses, two cows, and all the farming tools, vehicles and implements of husbandry that to me may belong at my decease.

Fifth. As to all my personal estate not hereinbefore specifically bequeathed, and all the increase and profits therefrom, and all the income and proceeds arising from the real estate, I direct that the same shall be held and owned in common by my said wife and all my children, to be used for the support and maintenance of my said wife, and for the support and maintenance and education of all my children, under the direction and control of my said wife, if she should continue competent to manage and control the same, and in case she should become incompetent, then under direction of the other executors of my will, hereinafter mentioned; and the remainder of the annually-accruing increase, proceeds and profits of my estate over and above the necessary amount for

time within which the debts and legacies should be paid and the estate settled as the statute requires.

That an inventory was filed July 31, 1866, showing the property of the estate to be, real estate, $6360; personal estate, $1100.

That on November 26, 1867, the said executors filed their bond as testamentary guardians of the heirs at law, who were minors; they having been appointed to that office by the will.

That on the same day last aforesaid the executors prayed leave to sell one eighty-acre lot belonging to said estate and invest the proceeds in the purchase of another parcel immediately adjoining the homestead, and the probate court

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properly stocking and supplying the farm, and the support, education and maintenance aforesaid, I direct shall be converted into money, and from time to time be put out on interest for the use and benefit equally, share and share alike, of my said wife and children, until the oldest child living shall arrive at the age of 21 years, when the share of estate belonging to such child, both real and personal, shall be set off, partitioned and distributed to such child by commissioners to be appointed therefor by the probate court of the proper county; and when a second child shall become of the age of 21 years, a like distribution and partition shall be made to such child, and so on until the share of each and every child shall have been set off, partitioned and distributed in the manner aforesaid, and thereafter the premises above devised to my beloved wife shall be and remain with the use, rents, proceeds, profits and income thereof, the sole property of my said wife for and during her natural life, then the real estate [shall revert] to my children, as directed in the second provision aforesaid described, and I do declare that it is my intent that the whole real estate, including the land devised to my wife, shall be used in common for the purpose and to the uses aforesaid, until partition and distribution shall be made substantially in the manner and at the time aforesaid, so that the use of all the real estate, and the profits and income therefrom, as well as the personal estate, except the personal estate specifically bequeathed to my wife, shall be charged with the common support and maintenance of my wife and children, and the education of the children, until the several shares shall from time to time be set off and distributed as aforesaid.

Sixth. And I do hereby direct that my said wife and Horace G. Holcomb and Hiram W. Holcomb shall under this, my last will and testament, be the joint guardians of all my children and of their estate during the minority of said children severally.

Seventh. And lastly hereby revoking all former wills by me at any time before made, I do hereby appoint my wife, Adelaide D. Holcomb, and my brothers, Horace G. Holcomb and Hiram W. Holcomb, executors of this, my last will and testament.

In witness whereof I have hereunto set my hand and seal, at Prairieville aforesaid, this thirty-first day of January, in the year one thousand eight hundred and sixty-six.

HORTON L. HOLCOMB. [L. S.]

assumed to grant leave, the sale was made and an order entered to confirm the same. This action of the executors and the probate court is averred to be wholly unauthorized and void, and the purchasers are made defendants as assuming to hold and claim the property which belongs to the estate.

That afterwards in December, 1871, Hiram W. Holcomb assumed to resign his trust as executor and guardian, and the probate court assumed to accept the resignation, which action of the court is alleged to be unauthorized and void.

That on or about the first day of December, 1874, the widow entered into a conspiracy with one Holbrook, since deceased, with the judge of probate and with other persons who are named as defendants, to cheat and defraud the estate and all persons having claims upon or against it, or against the heirs thereof in the manner stated below.

That Horace G. Holcomb was then deceased, and said Adelaide had for a long time been acting as sole executor and sole testamentary guardian.

That in furtherance of said conspiracy said Adelaide, with the assistance of other defendants named, did on the day last aforesaid file in the probate court what purported to be an itemized statement of her account, showing a balance in her favor of about $3900, with petition for the hearing and allowance thereof, and the defendant Prindle as judge of probate made a pretended order of allowance thereof, though the estate, as the judge well knew, was not indebted to said Adelaide in any sense whatever, and the time allowed by the statute for settling the estate had then long passed.

That afterwards on or about the eighth day of April, 1875, the said Adelaide filed her petition for leave to sell or mortgage certain lands belonging to said estate, a copy of which is also herewith given.*

* State of Michigan, County of Barry—ss.

In the matter of the estate of Horton L. Holcomb, late of said county, deceased.

The petition of Adelaide D. Holcomb, widow and executrix of the last will and testament of said deceased, respectfully shows that the personal estate of said deceased, according to the inventory and appraisement, now on file in this court, and which is all thus far that has come into the hands of your petitioner, amounts to the sum of about $1138.25 less the sheep

That on May 27, 1875, the said judge of probate assumed to grant an order for the mortgaging of said lands, a copy

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and other articles of personal property sold, as shows in her statement of December 1, 1874, and that the disposition and condition thereof are as follows:

That the same consisted of stock, farming utensils and necessary things with which to run and carry on the farm, and nearly the same amount is now on the farm, used and being used for the purpose, which said farm and real estate of which the said Horton L. Holcomb died seized and possessed, has been carried on and run in a prudent manner in common for the use and benefit of the widow and children of said deceased, and for the support, education and maintenance of the said minor children, under and by virtue of the provisions of the last will and testament of the said deceased.

Your petitioner further shows that as far as can be ascertained by her and as she verily believes, the first debts which the said deceased at the time of his decease and now due and outstanding against his estate, together with the expenses of working the farm and real estate from the time of his death until the first day of last December, and the expense of supporting the family and educating the children, after deducting the entire income of the said estate, amount to the sum of $3930.20, and that the charges of administering said estate, including further probable charges, will amount to the sum of at least $300, as she is informed and verily believes to be true.

Your petitioner further shows that in view of the facts and statements aforesaid, and as she verily believes, the personal estate of said deceased is insufficient to pay the just debts due from said deceased, and the charges of administering his estate, and that it will be necessary for the purpose of paying said debts and charges, including losses and expenses in running said farm and real estate, to raise the sum of $4239.20, by selling the following described real estate or some part thereof, of which the said Horton L. Holcomb died seized and possessed, the description, condition and value of each parcel, and of the whole of his real estate, according to the information and belief of your petitioner, are as hereinafter stated, that is to say—all that certain piece or parcel of land situate in the county of Barry, and state of Michigan, and known and described as being the south half of north-west fractional quarter of section one north, range ten west, and being a portion of the homestead farm of which said Horton L. Holcomb died seized and possessed. That the said piece of land contains no buildings, but is well fenced and in good state of cultivation, strong soil, good wheat land and valuable for farming purposes, and worth about fifty dollars per acre. Also, that other certain piece or parcel of land of which the said testator died seized and possessed, situate in Barry county, Michigan, and known and described as being the west half of south-west quarter of section number thirty, town two north, range ten west, containing eighty acres of land, in a good state of cultivation, well fenced and improved, rich soil, good wheat land, fair and even surface and valuable for farming purposes, and worth about fifty-five dollars per acre.

Your petitioner further shows that the name and residence of the heirs at law of said deceased and other persons interested in said estate, as your petitioner is informed and believed, are as follows: All reside in the county of Barry and state of Michigan, including all the creditors and heirs at law, to wit: The minor children of said deceased who live with your petitioner in the town of Prairieville, Barry county, Michigan.

Wherefore, your petitioner prays that she as executrix of said estate, may be empowered and licensed to sell real estate, or mortgage the same

of which is also given,* and that defendant Adelaide gave bond in regard to said order with the defendants John H. Earle and Lucius Russell as her sureties.

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in whole or in part, hereinbefore described, with the hereditaments and appurtenances, or so much thereof as will be sufficient for the payment of the said debts due against said estate, and the charges of administering the same as aforesaid, according to the statute in such case made and provided.

Dated March 1st, 1875. ADELAIDE D. HOLCOMB.

* Present, S. C. Prindle, Judge of Probate.

In the matter of the estate of Horton L. Holcomb, deceased.

This day having been appointed by the court for hearing the petition of Adelaide D. Holcomb, executrix of the last will and testament, and administratrix of the estate of said Horton L. Holcomb, late of said county of Barry, deceased, praying, for reasons therein set forth, that she may be licensed to mortgage certain real estate of said deceased, in said petition described. Now comes into court the said petitioner, and no persons appearing to oppose. And it appearing to the satisfaction of this court, by due proof on file, that a copy of the order of this court, touching the hearing of said petition, made on the eighth day of April last, has been duly published as therein directed. And it further satisfactorily appearing to this court, after full hearing on said petition, and on examination of the proofs and allegations of the petitioner, that the debts and valid claims which the said Horton L. Holcomb justly owed at the time of his decease, so far as the same can be ascertained, and which are now due and outstanding against his estate, including expenses incurred in maintenance of family, and expense of working farm and educating the children of said deceased, after deducting the entire income of the estate, amount to the sum of $4239.20 exclusive of interest. And the personal estate of said deceased in the hands of said executrix is insufficient to pay all said debts and valid claims due from said deceased with the charges of administering his estate, and that therefore it is necessary to borrow said sum and secure the same by mortgaging the real estate described in said petition to pay said debts, claims, interest and charges, and no person interested in said estate having given a bond to pay the same, as authorized by law.

Therefore, in consideration of the premises, it is ordered, adjudged and decreed by this court that said Adelaide D. Holcomb, executrix and administratrix as aforesaid, be and hereby is empowered, authorized and licensed to mortgage pursuant to the statute in such case made and provided, that part of the real estate whereof the said deceased died seized and possessed, as hereafter designated and described, for the purpose of paying said debts, claims, interest and charges.

And it is further ordered that the said executrix and administratrix give a bond in the penal sum of $8000, with one or more sureties to be approved by said judge, for the faithful discharge of her duty in the premises, as required by law. Said sums so borrowed to be for a term of not exceeding five years, and at a rate of interest not exceeding ten per cent. per annum. And it is further ordered that said executrix and administratrix immediately after such mortgage made make due returns to this court of her proceedings in the premises, by virtue hereof. The real estate authorized to be mortgaged, under and by virtue of this decree, is specified, designated and described as follows, to wit: All that certain piece or parcel of land situate, lying and being in the county of Barry and state of Michigan, known and described as being the south half of the

That in reliance upon this order complainant was induced to loan to said Adelaide $3000, accepting two mortgages upon said lands, of $1500 each, given by said Adelaide as sole executrix and testamentary guardian.

That of the said sum of $3000, $150 was appropriated by said Russell and the remainder was delivered to said Earle with the avowed purpose of delivering the same to said Prindle to be paid out and distributed.

That said Adelaide made a report of her proceedings in giving said mortgage, and the said judge of probate entered an order pretending to confirm the same.

That all the proceedings of said Adelaide and said probate court in respect to mortgaging said lands were wholly void, and that said Adelaide under said will had no power either to sell or mortgage the lands of the estate, except under the authority of a court of equity, and that complainant's mortgages therefor create no lien and are void.

That said Adelaide is insolvent; that the money obtained from complainant has been used for the benefit of the family of said deceased and for said estate, in part, but she does not know to what extent, and she is entitled in equity to a lien on the lands therefor, and to an accounting with the defendants, and a personal decree against them.

And the bill prays for a decree according to the theory of complainant's case as above stated and for other and further relief.

Such is the case made by the bill. The defendants answered, admitting the will, the proceedings in the probate court, and the giving of the mortgages, but denying explicitly all collusion, conspiracy and fraud. Voluminous testimony was taken, and it is sufficient for our purposes to say of it that it fails to charge the defendants or any number of them with collusion to defraud the estate or to wrong complainant, or with any intentional wrong whatever. The court of chancery

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north-west fractional quarter of section one (1), town one north, range ten west; also the west half of the north-west quarter of section thirty-six in town two north, range ten west, in said county of Barry, containing eighty acres.

S. C. PRINDLE, Judge of Probate.

dismissed the bill except as against the defendant Adelaide, but assuming the mortgages to be void, made a personal decree against her that she pay to complainant the amount of her mortgages. Complainant appeals.

The first question that presents itself on the appeal is whether the complainant and the court were right in assuming that the mortgages were void. The defendants do not contest the invalidity, and have no interest in doing so, but their assent does not determine the question of law. That, however, is supposed to be settled by previous decisions of this court.

Of the previous decisions, that in *Matter of Godfrey Estate* 4 Mich. 308, merely holds that the court will not license the sale of lands to pay debts against an estate after the legal remedy for their recovery has been barred by lapse of time. *Hoffman v. Beard* 32 Mich. 218, holds that a license to sell issued to an administrator after the estate has been actually closed, is wholly void, and may be treated as void in collateral proceedings. It is said in that case that the time allowed to an administrator in which to close up the estate must be restricted to four years and a half; but this rule is subject to exceptions, as was explained by a later case. *Larzelere v. Starkweather* 38 Mich. 96.

Does this case come within the general rule laid down in *Hoffman v. Beard?* If it does, that is an end to all controversy so far as concerns the validity of the mortgages; if not, that question is not disposed of by any adjudication. In our opinion the two cases differ in most important particulars.

In the first place the estate in question in *Hoffman v. Beard* had been closed before license to sell was granted, and the record showed the fact. In this case there had been no settlement, and the estate, whether rightfully open or not, was in fact still open. In the second place that was a case where the administration was wholly under the statute; in this case there is a will. Moreover the will by its express terms contemplates that the estate shall remain in the hands of the executors for a period longer than that limited by law for closing estates generally, and that action for partitioning

the estate shall be had from time to time in the probate court. No want of competency in the testator to make such provision is suggested and probably none will be set up.

Notwithstanding these provisions it was probably still necessary that all claims against the estate should be presented and allowed within the time limited by the general law. But it was obviously the intent of the will that the widow or the executors should receive and pay out moneys in managing the estate, and supporting, maintaining and educating the children, and it was not at all improbable that the estate would be found indebted to one or more of them while in the strict discharge of what they might believe to be their duty under the will. Any such indebtedness would not stand on the same footing with debts contracted by the deceased in his lifetime, and would not be subject to the same limitation.

Referring now to the account allowed against the estate in favor of the widow, we find it made up of payments made by her for the estate; of expenses in carrying on the farm, and supporting and educating the children, from which are deducted the receipts of the farm. It was to pay the balance on this account that the mortgage was licensed. There cannot be the least doubt that some portion of this account, at least, was a just claim against the estate. It is said, however, that admitting this to be the case, there existed a trust in respect to the lands which only a court of equity could deal with, and that the probate court exceeded its jurisdiction in assuming to act at all.

Whether the court of chancery would not have been the more appropriate tribunal to which to appeal is a question we shall not consider now. It is enough for the purpose of this case that the estate still remained unsettled, and was still in the hands of the probate court for some purposes, and that a claim presumptively legal and which the probate court had approved, existed against it. The probate court decided that it had authority to license the giving of the mortgage, and no appeal was taken from its decision. The license was not void, for it appeared to be a step in the regular administration of the estate under the will, and nothing in its recitals

was calculated to notify any one that it was not warranted by law. It may be that this is one of those cases lying along the borders of probate authority of which the court of chancery might have assumed jurisdiction, but the fact is immaterial. The probate court is one of general jurisdiction in testamentary and other probate matters. *People v. Wayne Circuit Court* 11 Mich. 393; and where no fatal defect appears on the face of the proceedings, its action in such matters is not void. It may be reversible on appeal, but it must stand if not appealed from.

There was then a valid order licensing the giving of complainant's mortgages, and the giving of the mortgages was confirmed. Complainant was under no obligation to look further, but was entitled to hold her mortgages as valid claims against the lands described therein. It remains to be seen whether we can afford her any relief in this suit.

The complainant's case is based upon a charge of conspiracy which is wholly without support in the evidence, and upon a concession that her mortgages are void. Had she claimed a foreclosure of the mortgages, decree would have been made in her favor. She does claim, however, that she is entitled to an equitable lien in the nature of a mortgage, and as this relief is akin to that which she should have had, it may be that the proper relief can be given under the general prayer, by an amendment now made to the bill by special favor.

It is plain from this record that the parties have gone fully into their equities, and that the case that would have been made on a foreclosure bill is fully before us. If therefore an amendment can be allowed, it will be entirely proper, just and equitable to grant a decree of foreclosure.

The rules for amendment are exceedingly liberal when justice will thereby be done and wrong prevented. A necessary party is often permitted to be added at the hearing; and even on appeal the case may be remanded for the purpose. *Lewis v. Darling* 16 How. 1; *Palmer v. Rich* 12 Mich. 414. A bill for specific performance is sometimes permitted to be converted into a bill to rescind when it is manifest from the evidence that such should have been the

relief prayed for. *Parrill v. McKinley* 9 Grat. 1; *Hewett v. Adams* 50 Me. 271. See *Whelan v. Sullivan* 102 Mass. 204; *Neale v. Neales* 9 Wall. 1. In *Sanborn v. Sanborn* 7 Gray 142, leave to change a bill for specific performance into a bill for relief on the ground of fraud, seems to have been denied only because jurisdiction in cases of fraud had been conferred on the court since suit was brought. An amendment to bring new transactions into an accounting in a partnership case was allowed at the hearing in *Drew v. Beard* 107 Mass. 64; and one quite as radical was permitted in *Darlington's Appeal* 86 Penn. St. 512, in the appellate court. In *The Tremolo Patent* 23 Wall. 518, an amendment was allowed after decree, which changed the character of the bill from one relying on a patent to one based on a re-issue; it being manifest that the merits had been fully gone into. The limit to amendments is this: they must not be allowed to prejudice the substantial rights of the defendant; but observing due caution in that regard, the time and the extent of change are in the discretion of the court. *Hewitt v. Dement* 57 Ill. 500; *Munch v. Shabel* 37 Mich. 166; *Codington v. Mott* 1 McCarter (N. J.) 430; *Camp v. Waring* 25 Conn. 520. A plain case for refusing an amendment at the hearing is where the case, after amendment, would be defective on the proofs. *Curtis v. Goodenow* 24 Mich. 18.

An amendment in this case will be entirely just to all parties. The proofs are in, and on all the facts constituting complainant's case, there is no conflict. But it is not the case made by the bill, though it is of the same nature, and the relief to be given upon it is similar to that which the complainant has specifically prayed. No wrong will be done and no confusion created by making the bill at this time correspond to the case made.

The decree, so far as it dismissed the bill against all the defendants but the widow and heirs of Holcomb, will be affirmed with costs. The record will then be remanded with leave to complainant to so amend her bill as to pray a foreclosure of the mortgages in case they are adjudged valid. This amendment will be made without prejudice to any of

the proceedings, and the court of chancery will thereupon enter the usual decree of foreclosure and sale, upon computation of the amount due. But complainant must pay to the defendants all costs up to the time the decree is entered. In respect to costs she can be placed in no better position than she would have been had her bill been dismissed without prejudice.

The other Justices concurred.

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LYMAN S. WILSON v. ORANGE A. BARTHOLOMEW, GARNISHEE OF GEORGE R. LOOMIS.

Certiorari to review garnishment proceedings—Exemption from process in garnishment.

Garnishment proceedings may be brought up from before a justice on a writ of *certiorari* sued out by the defendant in the principal case, if the latter's rights are cut off without his having an opportunity for a hearing.

Property exempt from execution is also exempt, at the election of the debtor, from process in garnishment.

The constitutional policy of exemptions is liberally construed by the courts.

Error to Hillsdale. Submitted October 28. Decided November 10.

GARNISHMENT. Plaintiff brings error. Affirmed.

Shepard & Fowle for plaintiff in error.

S. D. McNeal for defendant in error. Property exempt from execution cannot be reached by garnishment process. Drake on Attachment (4th ed.) § 480; *Davenport v. Swan* 9 Humph. 186; *Staniels v. Raymond* 4 Cush. 314.

GRAVES, J. Wilson in 1869 recovered a judgment before a justice of the peace against George R. Loomis for $15.30 damages and $1.85 costs. On the 2d of December, 1879, and more than two and a half years later, Wilson proceeded on the basis of this judgment debt to garnish Bartholomew. The latter appeared and disclosed that he had in his barn a mare belonging to the principal defendant and worth not to exceed $40 in his opinion. Certain other proceedings occurred which do not seem important now. The usual summons to show cause was issued and Bartholomew regularly appeared pursuant to it, and issue was joined in accordance with the statute.

In the course of the hearing it appeared conclusively that the mare of Loomis in Bartholomew's possession was exempt property. But the justice, being of opinion that the right of exemption was repudiated by the law of garnishment, rendered judgment against Bartholomew for $22.46 damages and $5.58 costs. Thereupon Loomis, the principal debtor, proceeding in his own name and apparently in his own behalf, made affidavit to procure a *certiorari* from the circuit court, and the writ was issued and return made thereto. The plaintiff in error resisted the case in that court on the ground that it was not competent for Loomis to prosecute the statutory *certiorari* in his own name and on his own account to review the judgment given against Bartholomew, and that *certiorari* at common law was wholly inapplicable. The circuit court however continued to entertain the case and finally reversed the judgment of the justice and awarded costs in favor of Loomis against Wilson.

It may be that the proceeding could not be supported as a statutory *certiorari*. But we are not bound to consider that question. It cannot be maintained that the legal rights of Loomis were liable to be cut off by the decision of the justice in a case between others and without his having an opportunity to be heard. The circuit courts are empowered to issue the writ of *certiorari* for the purpose of controlling the proceedings of inferior courts (Const. art. vi, § 8) where that remedy is deemed appropriate, and in a case having a close

analogy and not fairly distinguishable in principle we sustained the writ as one at common law (*Thompson v. School District No. 6 of Crockery* 25 Mich. 483); and in the later case of *Campau v. Button* we considered that it was enough in respect to his interest to entitle one to prosecute the writ, that he had rights subject to be injuriously affected unless he was allowed to move on his own account. 33 Mich. 525.

We think the maintenance of the writ was warranted by principles well settled in this State. It appears from the return made by the justice, of the evidence and in answer to the fifth allegation of error,* that he recognized as proved that the mare was exempt property within the meaning of the statute prescribing what shall be exempt, and that in substance and effect he so found, and that he went on the assumption that there remained only the question of law whether the statutes giving this remedy did not exclude the right. He thought they did. The plaintiff in error declines to defend this view and we think wisely. We entertain no doubt that a debtor's property which is exempt from execution, is also exempt from garnishee process at the election of the debtor. The provisions of the law concerning garnishment contemplate such immunity (§§ 6455, 6458, 6459) and even go further and allow exemption of a money indebtedness of $25 in certain cases. § 6440.

The policy of exemption is marked down in the Constitution and so far from being blind to it the courts have felt it to be their duty to give it a liberal exposition. The ruling made by the justice raised a question of law capable of revision.

We think no error is shown and the judgment of the circuit court must be affirmed with costs.

The other Justices concurred.

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*The fifth allegation of error was:

"5th. The justice erred in rendering a judgment against said Orange A. Bartholomew, because the evidence in the case did not warrant it, as the undisputed testimony shows that the mare in question in the possession of said garnishee was the property of the defendant George R. Loomis, and was exempt from execution."

LEONARD G. MCDONALD v. ALEXANDER MCDONALD, WILLIAM A. BOOTH ET AL.

Foreclosure—Petition to be allowed to answer—Title—Costs.

Where a defendant brought in by publication, petitions to be heard, his right to be admitted to answer the complainant's bill on payment of costs (Comp. L., § 5127) is absolute; his equities cannot be decided on affidavits opposing his petition, or in any way except in a hearing on the merits.

A foreclosure bill necessarily puts the defendant's title into the controversy; he can only be impleaded on the ground that he has or claims title. And the foreclosure would fail if one who claims title should be omitted.

Where a complainant in foreclosure is confident that a defendant has no interest, there is nothing to prevent his discharging him from the suit, but so long as he is kept on the record, he has a right to be heard.

Charges for the traveling of a party and for sundry expenses cannot be included in the legitimate costs of a suit.

Appeal from Delta. Submitted October 28. Decided November 10.

FORECLOSURE. Defendant Booth appeals. Reversed.

Gibson & Parkinson and *Brennan & Donnelly* for complainant.

Ed. E. Kane, for defendant appellant. The rights of a non-resident defendant brought in by publication and appearing in the case by petition, cannot be tried upon affidavits, but he may answer. *Bailey v. Murphy* Walk. Ch. 308; *Evarts v. Becker* 8 Paige 508; *Hartwell v. White* 9 Paige 368; *Jermain v. Langdon* 8 Paige 41.

CAMPBELL, J. The bill in this cause was filed in the county of Delta, to foreclose certain mortgages. The bill was filed June 19, 1877, and the defendant Booth was advertised as a non-resident, and never served with process. His

default was entered and a final decree rendered. The bill contains distinct averments, showing the title of the lands to have become regularly vested in Booth by record conveyance.

In March, 1880, the decree not having been carried out by sale, Booth filed his petition and noticed a motion for leave to appear. The complainant was allowed to introduce his own affidavit, to the effect that Booth had told him that he had no personal interest in the premises, and had only held them for the benefit of another defendant, and setting up various dealings and statements which were intended to show the want of equity in Booth's claim to defend. Booth's petition was accompanied by some affidavits indicating his position, but the circuit court refused to allow him to come in. From that order he appeals.

By section 5127 of the Compiled Laws, it is provided that, except in divorce cases, any defendant brought in by publication may petition to be heard, and "the party so petitioning shall be admitted to answer the complainant's bill, upon paying or securing to be paid such costs as the court shall adjudge."

This provision is positive and unqualified, and the right is absolute. The court has no power to decide defendant's equities on affidavit, or in any way except in a hearing on the merits. The title of defendant is necessarily put into the controversy by the bill. In the present case, complainant has gone so far as to aver its precise character. It is only because of an averment that he had or claimed title, that complainant could be justified in impleading him. If having title he should be left out, the foreclosure would fail.

If complainant is confident that Booth has no interest, there is nothing to prevent his discharging him from the suit. But so long as he is kept on the record he has a right to be heard.

The complainant undertook by way of enhancing the conditions of appearance to swear to a series of outlays and expenses amounting to $1915. Of these only $15 was for expenses of witnesses, and $1700 for trips of himself and others to various places, which were apparently conducted on

a very liberal basis. A further item was $200 for sundry expenses not specified.

Such charges have nothing to do with the legitimate costs in a cause and cannot be considered. It is difficult to imagine how the costs in a foreclosure suit can involve any large additional expense on account of this defendant. We shall allow him to come in on condition of paying fifty dollars. But as he has prevailed on this appeal, we shall grant him the costs of this court to be set off, so that if less than fifty dollars, he may pay the balance in thirty days after notice of this order, and if more, he shall have execution therefor.

An order will be granted reversing that of the circuit court, and allowing him to come in and be heard in the foreclosure suit on these terms.

The other Justices concurred.

HEMAN C. LEWIS v. OTIS POND.

Evidence to support claim for additional payment.

Where a purchaser of land orally agreed that if the premises, when surveyed, should exceed a certain amount for which he paid, he would pay more, the vendor could not sue the purchaser's assignee for the additional sum if the deed was not put in evidence, and there was nothing to show what land or how much was conveyed by it.

Error to Livingston. Submitted October 28. Decided November 10.

ASSUMPSIT. Plaintiff brings error. Affirmed.

T. R. Shields for plaintiff in error.

Waddell & Montague for defendant in error.

MARSTON, C. J. The theory upon which the plaintiff claims to recover is, that his assignor, in October, 1864, con-

veyed by deed a tract of land to defendant; that defendant then paid for 60 $\frac{63}{100}$ acres, and agreed that when the land conveyed was surveyed, if more than 60$\frac{63}{100}$ acres, he would pay for the surplus. The plaintiff had a survey made in 1878 which showed 62$\frac{8}{100}$ acres in the piece.

The deed was not offered in evidence, and what land or how much was conveyed therein was not shown on the trial. If there were but 60$\frac{63}{100}$ acres described in and conveyed by the deed, then there could be no foundation for the claim of the plaintiff in the present case. Under the evidence, whether the oral agreement to take and pay for the surplus was valid under the statute of frauds, and if so, whether the statute of limitations did not bar the claim, although raised, we think are not material, as it does not appear whether anything more than the sixty acres were conveyed.

The judgment must be affirmed with costs.

The other Justices concurred.

SILAS W. GOODALE, RELATOR v. THE BOARD OF SUPERVISORS OF MARQUETTE COUNTY.

Stenographer's salary—Apportionment of liability.

The Stenographer's Act (Comp. L. p. 1528) contemplates that a person appointed stenographer shall hold his office indefinitely, and independently of the county and the electors; that the appointment may be made for an entire judicial circuit whatever the number of counties it contains; and that it may be made for a single county when the circuit contains no more. But the entire circuit cannot be compelled to pay the appointee more than the statutory salary of $2000, and this should be apportioned by the circuit judge among the counties composing it. § 5035.

The several counties composing a judicial circuit should act affirmatively, through their respective boards of supervisors, as a basis for the appointment of a stenographer for the circuit; otherwise the law authorizing such appointments is not operative in every part of it.

But, in the absence of evidence to the contrary, such action may be fairly presumed where a stenographer's commission has been issued.

A stenographer appointed for a judicial circuit cannot compel the individual counties composing it to pay him specific sums by way of compensation, without showing that their respective quotas toward his statutory salary amount to those sums.

MANDAMUS. Submitted Oct. 28. Denied Nov. 10.

W. P. Healy for relator. The salary of an official stenographer cannot be decreased by the board of supervisors during his incumbency: *People v. Auditors* 13 Mich. 233; he can compel payment of the full amount by *mandamus: People v. Supervisors of Macomb* 3 Mich. 475; *Kennedy v. Gies* 25 Mich. 83; *Douvielle v. Manistee Supervisors* 40 Mich. 585.

John Q. Adams for respondent.

GRAVES, J. The act for the appointment of stenographers for circuit courts is admitted to have been in operation in Marquette county since 1872. That county however is one of seven which compose the twelfth judicial circuit. The others are Baraga, Houghton, Isle Royale, Keweenaw, Schoolcraft and Ontonagon. On the 21st of November, 1876, the governor appointed the relator to be stenographer for the twelfth judicial circuit and to hold during the pleasure of the governor unless suspended for misconduct by the court. At the October session of the supervisors of Marquette for that year they resolved that the salary of stenographer for that county should be $1200 per annum from and after the 1st day of July, 1876, and this resolution was standing when the relator accepted the governor's appointment, and he received from that county a compensation at the rate of $1200 per year from his acceptance until January 1, 1879. At the session of the supervisors in October, 1878, they adopted the report of a committee reducing the salary from $1200 to $600 and on the 9th of January, 1879, they fixed it at $800 per annum from January 1, 1879, until otherwise ordered. Since that time respondents' county

has paid him at that rate; but it is admitted in the papers that he never assented to the change or accepted the amount paid as full payment.

It appears from the answer filed by respondents that relator is drawing compensation from two other counties in the twelfth judicial circuit, namely, Houghton and Keweenaw. They say that from October, 1872, to January, 1879, Houghton county paid him $800 per year, and that for one year or more preceding January, 1879, as they are informed and believe, the county of Keweenaw paid him $300 per annum. They further say that they are informed that Houghton county has resolved to reduce relator's compensation from that county to $600 from January 1, 1879, and that Keweenaw has similarly resolved on a reduction to $250. The record is silent in regard to the other counties in the judicial circuit.

The relator prays that a *mandamus* may be awarded commanding the board of supervisors of Marquette county to audit his claim and allow him at the rate of $1200 per annum, and also to rescind this proceeding taken to reduce his salary.

The present statute relating to stenographers being the act of April, 1869, as amended in 1871 (Sess. Laws 1869, p. 157; 1 Sess. Laws 1871, p. 109; 2 Comp. L., p. 1528), is very confused and it is extremely difficult to retain the terms and still translate the various provisions into something reasonable and coherent. It manifestly contemplates that an appointee may hold for an indefinite period, and that his tenure shall be independent of the county and of the electors. It also contemplates that an appointment may be made for a single county in case the judicial circuit contains no more, and it must be admitted, as it seems to me, that an appointment for a judicial circuit as an entirety was meant to be authorized whatever number of counties might be embraced. But it is not so clear that an appointment was intended to be allowed for one county alone out of several composing a judicial circuit. That question is not now important. The case we have to deal with is one where the appointment was

not made for a county, but for a judicial circuit containing seven counties, and where several are confessedly contributing quotas. After much consideration to draw from the ambiguous provisions a reasonable conclusion it seems most probable that it was intended that no judicial circuit whether composed of one or several counties should be compelled on any ground to pay more than $2000 per annum whatever it might choose to do voluntarily. The electors have repeatedly refused to increase the salary of circuit judge, and it is scarcely credible that those representing the electors should designedly provide for vesting in these merely clerical assistants of the courts an absolute right to have a yearly salary without limit as to time of not less than $500 in excess of the salary considered sufficient by the constituent body for the judge himself, and morover as much in addition thereto as any board of supervisors might see fit to make it.

If the inference made is correct, it would be for each county of the judicial circuit to pay its proper share of the sum fixed as salary for the circuit, not exceeding $2000; such share being ascertained and apportioned by the circuit judge in the manner mentioned in section 5035. This would be compulsory. The payment by any one of the several counties in the circuit of a larger sum, not being obligatory, would be voluntary.

As a basis for the appointment of a stenographer for an entire judicial circuit the several counties composing it must take the requisite action to cause the law to operate therein, and for this purpose each county must act affirmatively through its own board of supervisors. Unless this is done the law is not caused to be operative throughout the circuit and the portion in which there has been no action is not under or subject to the law at all. The judicial circuit is not then covered by the statute and cannot be rendered subject to it.

The commission to relator and on which he founds his right was, as already stated, for the 12th judicial circuit. The several counties in the circuit either had or had not taken the requisite steps to give the law operation. If they

had not, the validity of the commission, as a legal title on which to found this proceeding, is more than questionable. But it is fair to presume they had. The fact that the governor actually commissioned the relator as stenographer for the 12th circuit carries with it an intendment, in the absence of evidence to the contrary, that the law had been rendered operative for that circuit.

Taking this to be the case, it follows that the facts in the record do not show any right in relator to demand any further sum from Marquette county or to have any kind of relief.

We have no evidence of the quota chargeable to the respective counties nor any showing to enable us to say that respondents' county is in any respect legally in fault. Even as respects Houghton and Keweenaw we only know that they have paid respectively the sums mentioned and purpose to pay the smaller rates spoken of. So much is indicated by the answer. But there is no information of any legal apportionment fixing them with a strict legal liability.

The application must be denied with costs

The other Justices concurred.

MARQUETTE, HOUGHTON & ONTONAGON RAILROAD COMPANY v. PHILIP B. KIRKWOOD AND CHARLES H. KIRKWOOD.

Liability of carriers of goods for breakage.

A court has no right to instruct a jury, or suggest to them, that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony.

Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier, it is inferable, in the absence of evidence, that they continued so until received by the defendant.

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One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order.

A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them; he has ordinarily no means of opening packages and examining their contents and has nothing to do with previous dealings with the property by independent carriers.

A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent.

One who claims damages for negligence must prove the negligence; it cannot be presumed.

A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him, or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods come into his charge, and until that is proved, the contract is not.

Error to Marquette. Submitted October 28. Decided November 10.

CASE. Defendants bring error. Reversed.

W. P. Healy for plaintiffs in error. Carriers cannot inquire into the contents of packages: *Nitro-glycerine Case* 15 Wall. 524; and are not liable on a mere presumption that they have injured goods which have gone through the hands of successive carriers: *Darling v. Bost. & Wor. R. R.* 11 Allen 295; *Bowman v. Hilton* 11 Ohio 303.

E. J. Mapes for defendants in error. It is presumed that goods received in good order by one of several successive carriers remain so until they reach the last: Hutchinson on Carriers, § 761; *Dixon v. Railroad* 74 N. C. 538; *Smith v. Railroad* 43 Barb. 228; *Brintnall v. Railroad* 32 Vt. 665.

CAMPBELL, J. Defendants in error sued plaintiffs in error and recovered damages for breakage of two marble soda fountains, taken by the railroad agents at Marquette and carried, one to Negaunee, and one to Ishpeming. The fountains

were packed in New York and forwarded by the New York Central Railroad, and by that company, as is claimed, turned over at Buffalo to the Lake Superior Transit Company, which is a connecting line. The Transit Company delivered the property at Marquette to the plaintiff in error with which it had no business arrangements, but which was the proper carrier from Marquette to the destination of the articles. The boxes, which were marked to be handled with care, were then apparently sound except that a handle of one, consisting of a strip of board, was injured. Each box when opened at its destination was found to contain a fountain of which some of the marble was broken.

The testimony for plaintiffs as well as that for defendants indicates that there was no appearance in either package which would indicate damages at any time, except the broken handle. There was no evidence of neglect on the part of the railroad company, and there was affirmative evidence to the contrary. It was conceded that the railroad company had no means of inspecting the property. Under these circumstances the circuit court told the jury that if the goods were delivered in New York in good order to the first carrier they would have a right to infer that they continued so when received by defendants below, unless evidence was given which showed the contrary. The court also told the jury that if they found it necessary to consider the testimony given by the agents and employees of the railroad, they should bear in mind the interest they have in protecting their company and shielding themselves from blame. In doing this a very similar statement was made concerning the testimony of the packers in New York.

While there may appear on the trial on direct or cross-examination such bias or behaviour as would authorize comment by counsel to the jury, we think it is not within the province of a court to instruct a jury, or suggest to them, that any suspicion attaches to the testimony of agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses. Even

interested witnesses are now let in by statute, and the policy pointed out by the statute indicates that the old presumption that interest will necessarily or probably lead to falsehood, was unjust and untrue. But none of these witnesses could have been excluded under the most rigid common-law rules, and whatever license of criticism may be allowed to counsel, it was not, we think, legally justifiable to invite the jury to look upon such testimony with disfavor. There is no legal presumption against it.

Upon the other question we think that the ruling was also wrong. The case comes directly within the principle laid down by this court in *M., H. & O. R. R. v. Langton* 32 Mich. 251, where it was sought to hold these same parties responsible for delivering hay in a damaged condition, by showing that it was in good condition when delivered to a previous carrier at Sheboygan. In that case as in this the court below held that such a showing shifted the burden of proof upon the railroad company, and we held that this was error, and that the plaintiff was bound to show affirmatively that the hay was delivered in good order at Marquette, to the railroad.

We think this rule is just, and are not at all disposed to depart from it. A carrier has no means in a case like this of opening packages and examining their contents. Unless there is some outward token which is suspicious, he may and must take the articles and forward them on the usual terms. He is bound in law to deliver them in the condition in which he receives them. But there can be no further responsibility; and any rule of law which would make him responsible actually or presumptively for the conduct of previous independent carriers, would be grossly unfair, and subject him to losses against which he could have no protection. He has nothing to do with any of the previous dealings with the property, and no means of informing himself about them. We cannot see how this case is different from what it would have been if the plaintiffs themselves had delivered the boxes to the company at Marquette. In law the Transit Company acted merely as plaintiffs' agent in turning them over, and

cannot be treated as representing the Marquette Railroad Company for any purpose without reversing the whole order of business. *Fitch v. Newberry* 1 Doug. (Mich.) 1.

In view of our previous decision we should not feel justified in going into this question at all, if it did not seem to be imagined that if the case of *Laughlin v. Railway* 28 Wis. 204 had been fully called to our attention it might have changed our views. The other cases cited on the argument, except one from North Carolina following it, do not have any particular bearing. In that case the court, treating it as a question not directly covered by previous precedents, held that it would be more convenient and less onerous to the owners of goods to adopt such a rule as is contended for by the plaintiffs below. The only ground discovered for it was the presumption that things remain as they once have been shown to exist. The cases cited as resting on that presumption were not at all in point except by some assumed analogy.

We certainly have the highest respect for the decisions of the court which so decided. But we cannot convince ourselves that the decision is well founded on legal analogies, or correct in principle.

The presumption that things remain unchanged applies in such a case as the present just as forcibly backward as forward. It may quite as reasonably be presumed that the goods were delivered at Negaunee and Ishpeming in the condition in which they were received at Marquette, as that they came to Marquette as they left New York. The goods were certainly damaged when they reached their destination. To assume that they were damaged after they left Marquette, and not on any of their previous removals, is to make a very arbitrary assumption which has no more foundation in probability than any other. If it were worth while to enlarge on what is confessedly a presumption not resting on any sure foundation in experience, it might very well be questioned whether such a presumption is admissible at all as applied to things the position of which does not remain either fixed in place or free from disturbance by human agencies. But we

need not enlarge on this because the nature of the suit itself raises different presumptions which are well recognized.

This suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than the rule that any one who claims a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he received safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved.

In a somewhat similar case, *Muddle v. Stride* 9 C. & P. 380, Lord Denman told the jury that if it were left in doubt what the cause of damage was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as the other, then also the defendants will not be liable for negligence."

In *Gilbart v. Dale* 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And in *Midland Railway v. Bromley* 17 Q. B. 372, the same principle was affirmed, and it was held that if the evidence was as consistent with the claim of one side as with that of the other, the plaintiff must fail, because he must make his proof preponderate.

There is no reason for presuming that the Marquette Railroad did the mischief, that would not arise with equal force, according to the Wisconsin decision, against either of the previous carriers had they been sued instead. Had the first

carrier been sued it would unquestionably have been bound to show a safe transit, because that carrier received the articles in actual good order. A presumption that has no better foundation, and that applies to one as readily as to another, ought not to prevail to raise a further presumption of negligence without proof.

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

The other Justices concurred.

ADELLE ENGLE v. JAMES H. HALL.

Tender—Demand for discharge of mortgage

Where the discharge of a mortgage is demanded on the ground of a tender, the evidence of tender must be clear and put defendant plainly in the wrong, especially where demand is made for the statutory penalty.

The purpose of the penalty imposed by statute for refusing to discharge a mortgage on tender of the amount due, is not only to indemnify the mortgagee for his trouble but to act as a punishment.

Costs as for a full hearing are granted on the submission of a case on briefs.

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

BILL to compel discharge of mortgage and payment of statutory fine for refusing to discharge it on tender of the amount due. Complainant appeals. Dismissal affirmed.

Geo. S. Engle and *Winsor & Snover*, for complainant.

James H. Hall and *Atkinson & Atkinson*, for defendant.

COOLEY, J. This is a bill filed by the owner of the equity of redemption in certain lands, to compel a mortgagee thereof

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to discharge the mortgage and to pay the statutory penalty for a previous refusal to do so. The grounds on which the discharge is demanded are *first*, that the amount due has been tendered to the mortgagee and its acceptance refused; and *second*, that the lien of the mortgage is discharged by an arrangement between the mortgagor and mortgagee, whereby the latter, after complainant became owner of the land, and without her consent or knowledge, gave an extension to the mortgagor in consideration of money then paid to him.

The fact of an extension in consideration of a payment of money is not made out on a preponderance of evidence, and we pass that part of the case without further notice. Regarding the tender, defendant says in his answer "that the amount tendered by said complainant was not sufficient to pay the amount due for principal and interest on said mortgage, but this defendant to avoid trouble offered to receive the same and to discharge the mortgage, and he now renews his offer to do so."

When the discharge of a mortgage is demanded on the ground of a tender, the evidence in support of the tender ought to be very clear and satisfactory, and ought to place the defendant distinctly in the wrong. *Potts v. Plaisted* 30 Mich. 149 Especially should this be the case when the statutory penalty is demanded; for although this is paid to the complainant in consideration of his trouble and annoyance, it is meant also for a punishment. In this case we do not find the evidence satisfactory. The case rests in the main upon the testimony of defendant and of complainant's husband, and the one makes quite as good a showing in his own discharge as the other does in support of complainant's case. And much reason is found in the record for believing that personal feeling, rather than any substantial difference between the parties respecting their rights, lies at the root of this litigation.

The decree of the court of chancery dismissed the bill, and it must stand affirmed with costs.

The other Justices concurred.

Afterward, at the January term, 1881, complainant moved for a re-taxation of costs, objecting that they were taxed as for a *hearing*, whereas the case was submitted on briefs in the absence of counsel. Submitted and denied January 4, 1881.

George S. Engle, for the motion.

THE COURT said it was the practice to treat the submission of briefs on both sides, as an argument of the case, and not as an *ex parte* submission of it without argument.

Denied, without costs.

IRA JEFFERY ET AL. BY LOUISA JEFFERY, THEIR GUARDIAN v. ELIZABETH HURSH ET AL.

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Grantor's continued possession—Tax-titles.

A grantor's continued possession is presumed to be in subordination to his own conveyance, unless, while he is allowed to remain as apparent owner, third persons have in good faith and relying on appearances, acquired rights under him.

Where there is a *bona fide* controversy as to a title and one of the claimants is in possession, he owes no duty to the other to keep the taxes paid, and he may therefore strengthen his claim by procuring tax-titles. But if a claimant cannot rely on a title purchased by himself, he cannot make use of one obtained by another.

Whether one in possession of land and neglecting to pay the taxes on it can rely on a title derived from a sale for such taxes, for the purpose of defeating a conveyance which he had previously made but has not perfected by delivery of possession—Q.

Where the validity of a tax-title held by a stranger to the case, is an incidental question, as where it is relied on in defense to an action of ejectment as paramount title in a third person, *it seems* that the owner should be impleaded.

Error to Isabella. Submitted October 29. Decided November 10.

EJECTMENT. Plaintiffs bring error. Reversed

Spaulding & Cranson, for plaintiffs in error.

Brown & Leaton, for defendants in error.

COOLEY, J. This is an action of ejectment. The plaintiffs are heirs at law of John Jeffery, deceased, and claim the land under a deed to their ancestor from the defendant Elizabeth Hursh. This deed bears date November 23, 1872. The record in error does not show whether Elizabeth Hursh ever gave possession to John Jeffery, but it is admitted that the other defendants are now in possession claiming to hold under her, and that all the defendants hold or claim adversely to the plaintiffs.

What foundation there is for the adverse claim of defendants does not appear, as none of them on the trial made any attempt to show title in Hursh, as a justification for their holding. The only facts we have respecting the original claim of title are that in 1872 Hursh was owner and conveyed to plaintiff's ancestor, and when suit is brought she is found in possession, claiming title but not explaining it. The defendants, however, did show that a sale of the land was made for delinquent taxes of 1877; that one Dusenbury became the purchaser and received the Auditor-General's deed, and they rely upon this as an outstanding and paramount title in a third person, to defeat the action.

Presumptively, while this tax title was accruing Hursh was remaining in possession in subordination to her own conveyance. *Bloomer v. Henderson* 8 Mich. 395; *Humphrey v. Hurd* 29 Mich. 44. If it had appeared that she had been suffered to remain in possession as apparent owner, and that the other defendants had *bona fide* acquired rights under her, relying upon appearances, the case might be different (*Bennett v. Robinson* 27 Mich. 26) but nothing of the kind is shown, and no explanations are made. The question then seems to be, whether one in possession of land and neglecting to pay the taxes upon it, can rely upon a title derived from

a sale for such taxes to defeat her own conveyance which she has not perfected by a delivery of possession.

The case does not raise the question whether the mere fact of possession while the taxes remain unpaid, will disqualify the possessor from acquiring or relying upon a tax title. We may, therefore, concede for the purposes of this case, that when there is a *bona fide* controversy respecting a title, and one of the claimants is in possession, he owes no duty to the other to keep the taxes paid, and may therefore strengthen his claim by procuring tax titles. *Coxe v. Gibson* 27 Penn. St. 160; *Blackwood v. Van Vleit* 30 Mich. 118. There is no showing here which puts the defendants or either of them in a position that would permit them to raise that question, and we pass it without further notice. It is plain that if they cannot rely for their defense on a title purchased by themselves, they cannot make use of one purchased by another.

In the court below the jury were instructed to return a verdict for the defendants. The record does not show that the point above mentioned was considered by the court, and it probably was not. Apparently the sole question raised and discussed was, whether the assessment roll which constituted the basis for the tax title, was not void for defects appearing on its face. Nevertheless, the point is in the case, and we cannot affirm the judgment without holding that the defendants were at liberty to rely upon the tax title. If they are not, the validity of the title in Dusenbury is an abstract question, and is too important to be considered and passed upon when the party chiefly concerned is not before the court.

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

The other Justices concurred.

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William H. Cleveland v. Charles Newsom.

Liability of master for servant's negligence in driving — Res gestæ—Judicial notice as to frequent use of street.

Where a boy who had driven against a foot passenger on the street immediately stopped his horse and came back and said he did not mean to, the fact was *held* to be as much a part of the *res gestæ* as an exclamation would be if made at the moment of the accident.

Where a servant, while on an errand for his master, drove against a foot passenger, it was *held* that the plaintiff in an action for the injury had the burden of showing that the servant was not engaged in the course of his employment, but was driving around for pleasure.

A master is liable for an injury done by his servant in the course of his employment, where the latter acted carelessly and recklessly and in negligent disregard of his master's instructions, but not if the injury was wanton, willful and intentional. Recklessness is only a high degree of negligence, and the master's responsibility is not affected by the degree.

It is not necessarily negligence to walk in the traveled part of a city street if it is not shown that it is usually so occupied with teams as to make foot travel imprudent.

A court cannot take take judicial notice as to how much a particular city street is used.

Error to Lenawee. Submitted October 29. Decided November 10.

Case. Defendant brings error. Affirmed.

Hadley & Goff for plaintiff in error.

Millard & Bean for defendant in error.

Cooley, J. Newsom sued Cleveland to recover for an injury received by plaintiff in being run over by a horse of defendant, driven by a boy, who, it was alleged, was at the time in defendant's employ. The evidence tended to show that the plaintiff was walking along in the public highway, when the boy drove up behind him in a sleigh, and called out to another boy, "Shall I run over him?" or perhaps, as one

witness says, "Will I run over him?" and before plaintiff could get out of the way, he was struck by one of the thills to the sleigh and injured. Plaintiff testified that he had not heard the vehicle coming until the boy called out. After the plaintiff was struck, the boy stopped the horse and came back and said he did not mean to do it. Proof of this last fact was objected to, but received. The evidence that the boy was in the employment of the defendant at the time was from witnesses who testified that he was on an errand to a cooper shop to get butter tubs for defendant, but whether he was on the direct route to or from the shop was not shown.

1. There was no error in receiving in evidence the statement of the boy that he did not mean to run over the plaintiff. It was made immediately after the collision, and as nearly as possible at the same time. It was as much a part of the *res gestæ* as would have been an exclamation at the very instant the plaintiff was struck. *Hyatt v. Adams* 16 Mich. 180; *People v. Pitcher* 15 Mich. 397; *Lambert v. People* 29 Mich. 71.

2. The evidence that the boy was acting in his employment at the time was ample. It is suggested that he might have been driving about for his own pleasure, away from the road to the cooper's shop, but the court or the jury could not assume this without evidence. The proofs showed an employment and an act done or being done in the course of the employment; and if the defense proposed to raise any question of his having departed from the employment for his own pleasure or on his own business, it was necessary that they take the burden of showing the fact.

3. The defense insisted that the evidence showed that the injury was purposely inflicted; and the defendant himself was examined as a witness to show that he took pains to give the boy such directions as if obeyed would have precluded any such occurrence. The defense then requested the court to charge that the liability of the master does not ensue when the servant has intentionally or recklessly stepped aside from his employment to commit a tort, which the master neither directed in fact, nor could be supposed, from the nature of

the employment, to have authorized or expected the servant to do. This instruction the judge refused to give, but instructed the jury instead that if the boy "drove in a careless and reckless manner, he would be acting within the scope of his master's employment; but that if he wantonly, wilfully and intentionally run over the plaintiff, he would not be acting within the scope of his master's authority. But if he carelessly, unintentionally and accidentally run over the plaintiff, then the plaintiff should recover."

This instruction was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible. If it was a case of negligent disregard of the master's instructions whereby the injury occurred, the defendant was responsible. Recklessness is only a high degree of negligence, and the degree has nothing to do with the master's responsibility.

4. The defense requested instructions that defendant was not liable if the plaintiff was guilty of any degree of contributory negligence. The judge gave instructions somewhat different from those requested, but we do not think the case called for them. There was no evidence of contributory negligence. The plaintiff was walking in the public highway; and unless this of itself was negligence, his right of action was undoubted. It is true the highway was a city street; but it was not shown that it was commonly so occupied with teams as to make foot travel imprudent. We cannot take judicial notice how much a particular city street is used. Many public ways in the country are as much used as some city streets.

We find no error in the record and the judgment must be affirmed with costs.

The other Justices concurred.

JANUARY TERM, 1881.

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CORINNE BILLINGS, ADM'X v. AMOS BREINIG.

Jurisdiction of maritime torts—Forfeiture not triable as a collateral issue—Ferry franchise—Negligent injury.

State courts may take jurisdiction of an action for a maritime tort where there is a remedy at common law and the wrong is made actionable by State legislation.

Forfeiture of a franchise can only be determined in a direct proceeding, and not as a mere incident of an action in tort for the purpose of showing that the party injured was attempting to exercise rights which he had lost.

The franchise of keeping a rope-ferry is property having the valuable incidents of other kinds of property and transferable subject to conditions lawfully imposed and to such governmental control as results from its public nature.

It is negligence to disregard a positive regulation that boats moving at night shall exhibit lights, even though the practice may have been otherwise; and if injury is done, it is for the jury to determine how far it was connected with such negligence.

In an action for negligent injury the plaintiff must show that the person injured had exercised due care and had not contributed to the injury; this need not be shown by direct evidence, but may be inferred from the circumstances.

Error to Mason. Submitted October 7, 1880. Decided January 5, 1881.

CASE. Plaintiff brings error. Reversed.

White & McMahon for plaintiff in error, to the point that the case was not exclusively within the admiralty jurisdiction, cited *Brig City of Erie v Canfield* 27 Mich. 483; *State of Pennsylvania v. Wheeling etc. Bridge Co.* 13 How. 561;

Hoffman v. Union Ferry Co. 47 N. Y. 176; *Lambert v. Staten Island R. R. Co.* 70 N. Y. 104; 2 Parsons on Admiralty 498–9; and that the death of plaintiff's husband was not too remote a consequence of the negligence to be a cause of action: *Castello v. Landwehr* 28 Wis. 522; *Hoyt v. Jeffers* 30 Mich. 181–200; *Metallic Comp. Co. v. Fitchburg R. R. Company* 109 Mass. 277: 12 Am. 689; *Cook v. Parham* 24 Ala. 21; *The Clarita and the Clara* 23 Wallace 1; that it was negligence in defendant to omit to display lights as required by U. S. Rev. Stat. p. 821, Rules 3, 5, 7: *Ure v. Coffman* 19 Howard 56; *Taylor v. Harwood* Taney's Decisions 437; *The Fenham* 23 Law Times 329; *The Pennsylvania* 19 Wallace 136; *McCall v. Chamberlain* 13 Wis. 637; *Messenger v. Pate* 42 Iowa 443; *Moore v. Moss* 14 Ill. 106; *Moody v. Osgood* 60 Barb. 644; *Directors of North Eastern Railway v. Wanless* 9 Eng. 1; *Britton v. Great Western Cotton Co.* 1 Eng. 381; *Bill v. Smith* 39 Conn. 206; *Bigley v. Williams* 80 Penn. St. 107; *Foster v. The Miranda* 6 McLean 221; *Waring v. Clarke* 5 Howard 441–465; or to sound a whistle: *The Gray Eagle* 9 Wallace 505–511; *Chamberlain v. Ward* 21 How. 548–567; *The Continental* 14 Wall. 359; *The Favorita* 18 Wall. 598; that negligence is a question of fact where men of ordinary prudence might differ as to the necessary care: *Thurber v. Harlem, B., M. & F. R. R. Co.* 60 N. Y. 326; *Hays v. Miller* 70 N. Y. 112–116; *Lambert v. Staten Island R. R. Co.* 70 N. Y. 104–108; *Langhoff v. Mil. etc. R. W. Co.* 19 Wis. 489–497; *Ewen v. Chicago & N. W. Ry Co.* 38 Wis. 613–628; *Gaynor v. Old Colony etc. R. R. Co.* 100 Mass. 208; *Sutton v. The Town of Wauwatosa* 29 Wis. 21–33.

Fitch & Samuels for defendant in error. Locality is the test of jurisdiction in cases of tort: *Ins. Co. v. Dunham* 11 Wall. 1; *Waring v. Clarke* 5 How. 441; *De Lovio v. Boit* 2 Gall. 465; and the jurisdiction of an act done on the water is not changed by the fact of its taking effect on the land: *Davison v. Sealskins* 2 Paine 324; the omission of a precaution required by statute is not of itself evidence

of negligence and does not dispense with the need of diligence and reasonable precaution on the part of others: *C. C. C. & I. R. R. v. Elliott* 28 Ohio St. 340; *Wilcox v. Rome and Watertown R. R.* 39 N. Y. 358; *Galena and Chic. R. R. v. Dill.* 22 Ill. 271; *Steves v. Oswego and Syracuse R. R.* 18 N. Y. 422; *Artz v. Chic. Rock Island and P. R. R.* 34 Iowa 154; *Spencer v. Ill. Cent. R. R.* 29 Iowa 55; *Chic. and Rock Island R. R. v. McKean* 40 Ill. 218; *C. B. & Q. R. R. v. Harwood* 80 Ill. 88; *Ernst v. Hud. River R. R.* 39 N. Y. 68; *Havens v. The Erie R. R.* 41 (Hand) N. Y. 296; *Gorton v. Erie R. R.* 45 N. Y. 660; *St. Louis, Jacks. & C. R. R. v. Terhume* 50 Ill. 150; *Bellefontaine R. R. Co. v. Hunter* 33 Ind. 335; *Leavenworth, Lawrence, etc. R. R. v. Rice* 10 Kans. 426; *Baxter v. Troy and Boston R. R.* 41 N. Y. 502; Wharton on Negligence, § 384; Cooley on Torts, 680; *Salter v. U. & B. R. R. Co.* 75 N. Y. 273; contributory negligence bars the right to recovery: *Kelly v. Hendrie* 26 Mich. 256; *Underwood v. Waldron* 33 Mich. 238; *Williams v. Mich. C. R. R. Co.* 2 Mich. 259; *Lake Shore & Mich. South. R. R. v. Miller* 25 Mich. 274; *Balt. & Ohio R. R. v. Breinig* 25 Md. 378; *Lafayette & Ind. R. R. v. Huffman* 28 Ind. 287; *McGrath v. Hud. Riv. R. R.* 32 N. Y. 144; *Carroll v. Minn. Valley R. R.* 13 Minn. 30; *Salter v. U. and B. R. R. Co.* 75 N. Y. 273; *Mich. Cent. R. R. Co. v. Coleman* 28 Mich. 440; *Mabley v. Kittleberger* 37 Mich. 360; *Le Baron v. Joslin* 41 Mich. 313; however slight it may be, if a proximate cause of the injury: *O'Brien v. Phil. Wilm. & Balt. R. R.* 3 Phila. 76; *Potter Admr. v. Chic. & North. West. R. R.* 21 Wis. 372; *Rathbun and West v. Payne et al.* 19 Wend. 399; *Barnes v. Cole and Fitzhugh* 21 Wend. 188. The plaintiff in an action for fatal negligence must not only prove defendant's negligence, but prove that the deceased was not to blame. *Owings v. Jones* 9 Md. 108; *Mich. Cent. v. Coleman* 28 Mich. 440; *Murphy v. Deane* 101 Mass. 455; *Dickey v. Maine Tel. Co.* 43 Me. 492; *Warner v. N. Y. Cent. R. R.* 44 N. Y. 465; *Pendleton, etc. R. R. v. Stallmann* 22 Ohio St. 1; *Galena, etc. R. R. v. Fay* 16 Ill. 558; *I. & St. L. R.*

R. Co. v. Evans 88 Ill. 63; Cooley on Torts 673; *Rail Road v. Miller* 25 Mich. 274; *Le Baron v. Joslin* 41 Mich. 313; and if both are to blame, neither can bring an action. *Hawkins v. Cooper* 8 C. & P. 473; *Trow v. Vt. Cent. R. R.* 24 Vt. 487; one who places himself in a dangerous position and suffers injury in consequence contributes to it. *Railroad Co. v. Jones* 95 U. S. 439; *Goldstein v. C. M. & St. P. R. R.* 46 Wis. 404; one who might have avoided an injury by ordinary care is treated as having sufficiently contributed to it to defeat a right of recovery. *Collgrove v. N. Y. and N. H. R. R. Co.* 20 N. Y. 492; *Sherman v. Fall River Iron Works*, 2 Allen 524; *Hoben v. Burlington, etc. R. R. Co.* 20 Iowa 562; *Bigelow v. Reed* 51 Me. 325.

GRAVES, J. A wire rope being stretched across an expansion of the river Marquette at Ludington for ferrying purposes and connected on shore with a fixed windlass to elevate it for use and drop it in the water to avoid vessels, the defendant in the early evening of October 17, 1878, ran his tug against it. At the same time the decedent was in temporary charge of the ferry and was at the windlass for the purpose of dropping the rope out of the tug's way; he having repaired to the spot therefore in great haste on learning that the vessel was moving towards the rope and was near to it. The rope was still up, but decedent was in act of lowering it as the tug struck. The violent strain whirled the windlass crank with great suddenness and force and caused it to strike the plaintiff's husband on the head, killing him instantly.

The plaintiff brought this action under a statute of 1848 (Comp. L. §§ 6724, 6725), as amended in 1873 by Act No. 94, to recover such damages as should be "fair and just, with reference to the pecuniary injury resulting from such death, to those persons * * * entitled to such damages when recovered."

The circuit judge took the evidence from the jury, and in substance and effect directed a verdict for the defendant. In so proceeding he seems to have considered that, whatever view the jury might take of the defendant's conduct, the showing

was conclusive that the catastrophe was owing in part at least to the want of due care on the part of the decedent.

The plaintiff now questions the ruling on a bill of exceptions. The defendant's counsel not only support the opinion of the circuit judge, but urge independent objections against the action. Three points may be first noticed. It is objected that the suit is for a maritime tort where the remedy is by statute, and that the jurisdiction rests in the courts of the United States and cannot be exercised by the state tribunals. The point is not well taken. Rev. Stat. U. S. § 563, subd. 8. The common law gives the right of a common-law remedy to redress the grievance which is made actionable by the state statute, and this brings the case within the saving provision of Congress. *Steamboat Co. v. Chase* 16 Wall. 522; *Leon v. Galceran* 11 Wall. 188; *Brown v. Gilmore* (Penn. St.). See also *Brig City of Erie v. Canfield* 27 Mich. 479; *McDonald v. Mallory* 77 N. Y. 546; *Schoonmaker v. Gilmore* 102 U. S. 118, and *Brown v. Davidson* 102 U. S. 119.

It is next objected that decedent's death came about by his acting as a ferryman, and that he was so acting under one Christian, whose authority was under a license granted to his lessor by the board of supervisors of Mason county, who at the time of the license had no authority, because the control of the ferry had prior thereto been given by the Legislature to the city of Ludington in the grant of city government in 1873. The record fails to sustain the objection in the matter of fact.

The trial was in February, 1880, and the proof was positive that the ferry had been then established seventeen years at least, and the license must therefore have antedated, so far as appears, the charter of the city more than ten years. The Legislature had no power, and seems not to have assumed any, to abrogate any existing license. At the time of the occurrence the ferry had been held and occupied under color of a grant from competent authority during the long period mentioned, without any question being raised as to the existence and regularity of the franchise. The public authorities and the public generally had acquiesced. No one suggested

any defects. It was not doubted but that the grant was legal, and it will not be contended by any one that mere matter of forfeiture could be investigated in this action. A direct proceeding would be indispensable. *Harrell v. Ellsworth* 17 Ala. 576; *New Albany, etc., R. Co. v. Huff* 19 Ind. 315; *Mackall v. Chesapeake, etc., Canal Co.* 94 U. S. 308; *Thompson v. R. R. Co.* 3 Sandf. Ch. 625. The franchise is property, and it possesses the valuable incidents of other species of property (*Conway v. Taylor's Ex'r* 1 Black 603; *Lippencott v. Allander* 27 Iowa 460) and subject to that power of control by the government which results from sovereign duty in reference to matters of a public nature, and subject to such conditions as are lawfully imposed, it may be passed from the original grantee to others. *Lippencott v. Allander* supra; *Bowman's Devisees and Burnley v. Wathen* 2 McLean 376; *Peter v. Kendal* 6 B. & C. 703; *Felton v. Deall* 22 Vt. 170; *Ladd v. Chotard* 1 Minor (Ala.) 366; *Biggs v. Ferrell* 12 Iredell 1; *Lewis v. Intendant and Town Council of Gainesville* 7 Ala. 85; *Benson v. Mayor, etc. of N. Y.* 10 Barb. 223; *Willoughby v. Horridge* 12 C. B. 742: 16 E. L. & E. 437; *Pim v. Curell* 6 M. & W. 234; *Bridgland v. Shapter* 5 M. & W. 375.

There is no suggestion of the existence of anything to hinder a transfer by the first proprietor of this ferry, nor prevent subsequent proprietors from leasing it, and as before stated, the public authorities have manifested no disapproval of the changes which seem to have taken place. So far as appears, the right was in being and in the lawful enjoyment of the decedent's employer when the injury was done.

But were the facts sufficient to raise a question against the regularity of the steps taken to confer the franchise, it cannot be taken for granted that this defendant would be entitled to make use of the circumstance as matter of defense against the present cause of action. The attempt would encounter strong objections. *Peter v. Kendal* supra; *Conner v. Paxson* 1 Blackf. 168. No decision of the question, however, is now needful.

That the defendant was guilty of negligence seems not to

have been questioned. The evidence tended to show that he knew very well the character of the ferry and its position, and that having that knowledge he moved the tug after dark directly across the ferry track without previous warning by light or whistle. True, there was evidence to the effect that at least one former ferryman had always kept the rope down at night, unless he indicated by his lantern to tugs and other vessels that it was up; so that those directing craft might understand from the absence of such light that the rope was down, and no one claimed that any ferry light was shown on the occasion in question.

The fact remains, however, that under positive provisions it was the absolute duty of defendant to make a seasonable display of certain lights, and a neglect of this duty cannot be answered by saying that he relied on the continuance of a former voluntary practice by some ferrymen to show a light whenever the rope was up, and under which practice he was accustomed to disregard his duty and trust altogether to the spontaneous precaution of the ferrymen. How far his reliance on the practice mentioned, if he did rely upon it, ought to absolve him from the severe moral blame which attaches to reckless, wanton or cruel inattention to duty, it is not worth while to speculate about. The law made it incumbent on him, and without any condition, to exhibit lights, and it gave him no dispensing power. Had this been done, the decedent, as the jury may be led to find on the evidence, would have had such notice of the position and approach of the tug as would have enabled him without haste and without injury to drop the rope. Of course the connection of the defendant's negligence with what happened to decedent would be for the jury. *Willy v. Mulledy* 78 N. Y. 310.

Upon the other branch of the case but little need be said. It was part of the plaintiff's case to satisfy the jury that decedent, under the circumstances, was in the exercise of due care and was not, consequently, in part the producer of what happened. Such is the established rule in this State. *Drew v. Steamboat Chesapeake* 2 Doug. (Mich.) 33; *Lake Shore etc. R. R. Co. v. Miller* 25 Mich. 274; Cooley on Torts, 673

But it was not required that this should be made out by direct evidence. If the occurrence itself and the surrounding circumstances, after due allowance for conflicting considerations, were capable of breeding an inference of it, and a jury might draw it in the proper exercise of their function, it was sufficient. *Bridges v. Directors etc., of N. London R'y Co.* L. R. 7 H. L. 213: 9 Eng. 165; *Cordell v. N. Y. C. & H. R. R. R. Co.* 75 N. Y. 330. In this aspect of the case the circumstances were not of that certain and decisive character, which, without discussion, would at once conduct many different minds to the same conclusion.

It is impossible to say what view under proper instructions the jury would have taken, and the controversy appears to be of that class where investigation falls under the province of the usual triers of ambiguous facts in actions at common law.

The author referred to on the law of Torts observes: "If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary he should say to them. 'In the judgment of the law this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence or the want of it as one of law. * * But in the great majority of cases the question of negligence on any given state of facts must be one of fact. And in no case where the facts are in dispute can the judge take the case from the jury and decide against negligence, as matter of law, unless there is a want of evidence fairly tending to establish the negligence which is counted on." Cooley on Torts, 670. And "where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon the credibility of witnesses, or inferences from facts and circumstances about which honest, intelligent

and impartial men might differ, such a case should be submitted to the jury." *Swoboda v. Ward* 40 Mich. 420; and see *Bridges v. Directors, etc., of N. L. R'y Co.* supra; *Robson v. N. E. R'y Co.* 2 Q. B. Div. 85: 19 Eng. 228; *Directors, etc., Dublin, Wicklow & Wexford R'y Co. v. Slattery* 3 Appeal Cases, H. of L. 1155: 24 Eng. 713; *Tarner v. Walker* L. R. 2 Q. B. 301; *Lambert v. Staten Island R. R. Co.* 78 N. Y. 104; *The Pennsylvania* 19 Wall. 125; *The Wanata* 95 U. S. 600; *Stackus v. N. Y. C. & H. R. R. R. Co.* 79 N. Y. 464.

We think the jury should have been charged with the facts. It is not expedient, and indeed could not be safe, to anticipate the showing to be made hereafter, and propose in advance a specific rule for the jury on this question of contributory negligence. In all these cases, the instructions, to be exempt from all tendency to confuse or mislead, and at the same time to afford that judicial assistance which the trial judge in contemplation of law ought to give, should not consist of a string of abstractions or vague generalities, but be framed with careful reference to the exact state of facts adduced, and it is not unreasonable to suppose that another trial of this action may show such deviations or differences from the present record, though actually very slight, as would call for modified advice and directions to the jury.

On the same ground of prudence, it is unadvisable to discuss the evidence in the present record bearing on the question of contributory negligence. It might be made use of against the duty of the next jury.

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

The other Justices concurred.

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JULIET TAYLOR v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY.

Municipal ordinances—Private actions do not lie for breach of public duties.

An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises.

Breaches of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; though when the duty imposed is for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution.

When a municipal charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for the default in neglecting to observe such regulations, no action against a lot owner can arise, if at all, until after the city has been held liable in a suit against it.

Error to the Superior Court of Detroit. Submitted October 15, 1880. Decided January 5, 1881.

CASE. Plaintiff brings error. Affirmed.

Griffin & Dickinson and *Henry M. Campbell* for plaintiff in error. The breach of a duty imposed by statute for the benefit of individuals will sustain a remedy at common law if an individual is thereby injured: *Couch v. Steel* 3 El. & Bl. 402; *Chicago & Alton R. R. v. Engle* 76 Ill. 317; *Correll v. B. C. Railroad* 38 Iowa 120; *Jetter v. N. Y. C. & H. R. R. R.* 2 Keyes 154; *Willy v. Mulledy* 78 N. Y. 310; *Dudley v. Mayhew* 3 N. Y. 15; *Augusta &c. R. R. v. McElmurry* 24 Ga. 75; *Wakefield v. Conn. &c. R. R.* 37 Vt. 330; 1 Addison on Torts, § 59; where an action lies against a city for an injury caused by neglect to observe an ordinance and the city can recover from the individual from whose default the injury arose, the person injured may

bring suit against the individual in the first instance. *Lowell v. Spaulding* 4 Cush. 277; *Payne v. Rogers* 2 H. Bl. 350; *Boston v. Worthington* 10 Gray 496; *Kirby v. Boylston Market Association* 14 Gray 249; *Milford v. Holbrook* 9 Allen 18.

Ashley Pond, for defendant in error, cited against the right of action *Flynn v. Canton Co.* 40 Md. 312; *Van-Dyke v. Cincinnati* 1 Disney 532; *Heeney v. Sprague* 11 R. I. 456; *Keokuk v. Independent District* 52 Iowa (5 N. W. Rep. 559).

Cooley, J. The plaintiff sues the railroad company to recover compensation for an injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of premises occupied by defendant in the city of Monroe, and which the defendant had failed to remove as required by law. It is not claimed that any such action would lie at the common law, and the right of recovery is supposed to arise from certain state and municipal legislation.

The state legislation in question is the general act for the incorporation of cities, passed in 1873, under which the city of Monroe is now organized. Chapter XXIII of this act relates to the sidewalks. Section one gives the city council control of all sidewalks, with power to construct and maintain the same and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks. Section two empowers the council to require the owners and occupants of adjacent lots to construct and maintain sidewalks, and section three is as follows: "The council shall also have power to cause and require the owners and occupants of any lot or premises to remove all snow and ice from the sidewalks in front of or adjacent to such lot and premises, and to keep the same free from obstructions, encroachments, incumbrances, filth, and other nuisances."

Section four provides that if any owner or occupant shall fail to perform any duty required by the council in respect to sidewalks, the council may cause the same to be performed,

and levy a special assessment to meet the expense on the lot or premises adjacent to and abutting on the sidewalk.

Section six is as follows: "If any owner, occupant, or person in charge of any lot or premises shall neglect to repair any sidewalk in front of or adjacent to such premises, or to remove any snow or ice therefrom, or to keep the same free from obstructions and incumbrances, in accordance with the requirements of the ordinances and regulations of the council, he shall be liable to the city for the amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect." General Laws 1873, pp. 244, 325, 326.

Acting under the authority conferred by this act, the city council adopted an ordinance whereby it was provided that the owner or occupant of any house or building, or person entitled to the possession of any vacant lot, or person in charge of any church or other public building, or any street, alley or public space, shall not permit the sidewalk and gutter adjoining the same to be obstructed by snow, ice, filth, dirt or other incumbrance, and where ice is formed on any sidewalk and gutter, such owners, occupants, or persons having charge, or entitled to possession of property adjoining, as above provided, shall within twenty-four hours after the same has formed remove the same or cause sand, sawdust or ashes to be strewn thereon.

The defendant, it is alleged, failed to remove within twenty-four hours as required by this ordinance, the ice which had formed on the sidewalk in front of its premises, and the plaintiff sustained a severe injury by slipping and falling thereon.

It is said on behalf of the plaintiff that the obligation to keep the sidewalks free from snow and ice is imposed as a duty to all persons who may have occasion to use the walks in passing and repassing, and that the neglect to do so, in consequence of which any one lawfully using the walk is injured, is a neglect of duty to him, and entitles him on well-recognized principles to maintain an action. *Couch v. Steel* 3 El. & Bl. 402; *Aldrich v. Howard* 7 R. I. 214.

To maintain this proposition it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. *Atkinson v. Water Works Co.* L. R. 6 Exch. 404.

The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. In this case the duty was to keep the sidewalks free from obstructions. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walks.

An obstruction by snow or ice may make the use of a walk dangerous, or may wholly preclude its use for the purpose for which walks are constructed. If the duty to keep the walk free from obstructions is a duty to individual travelers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of use but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction, as by one who slips and falls in a dangerous place. Moreover as the lot owner is required to keep the walk free from all nuisances, an individual traveler who can maintain the proposition that this is a duty to him must be entitled to bring suit whenever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot owner would add greatly to his common-law liabilities,

and it is not easy to draw the line which should definitely limit and confine his liabilities.

But if we look a little further into the statute under which the city is incorporated, we shall see that all its provisions respecting sidewalks, so far as they impose duties upon the owners of adjoining or abutting lots, have one common object, namely, to provide suitable and safe passage-ways for foot passengers by the side of the public streets, and to keep these in condition for safe use. The expense of such ways is imposed on the owners of adjacent lots, and these owners must keep them free from encroachments. Will it be claimed that if the city council shall require a lot owner to construct a sidewalk in front of his premises, and he shall fail to obey the requirement, every person who should come upon the street desiring to pass on foot where the walk should be, and who shall be precluded from doing so by the walk not being constructed, may bring suit against the lot owner for the neglect to build it as a neglect of duty to the traveler himself? He is damnified in that case as clearly as when he falls upon a dangerous walk and is hurt; though the damage may perhaps be insignificant.

But it is clear, we think, that the duty to build the walk is only a public duty, and the duty to keep it in condition for use is also a public duty. Exactly what force is to be given to the provision of statute that the lot owner shall be liable to the city for all damages which the city may be compelled to pay for his default, we need not consider in this suit. It is enough to say here that an action grounded on that particular provision of the statute could only arise after the city had been rendered liable in a suit against it.

If the statute contemplated public duties only, the city ordinance could not go further and give individual rights of action. But neither, we think, has it attempted to do so.

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

The other Justices concurred.

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THE COUNTY TREASURER OF BERRIEN v. THOMAS A. BUNBURY ET AL.

Suits on official bonds—Pleadings.

In an action at law, tried without a jury, it is for the trial judge, and not for the appellate court, to hear argument as to the force of the evidence and as to inferences and presumptions, and to draw therefrom and state the necessary conclusions of fact.

In an action by a public officer upon a bond running to him in his official character, the objection that it is not enough to designate the plaintiff by his official title alone, but that his individual name should be given, is one that must be taken before pleading to the merits, and cannot be raised for the first time in the appellate court.

Pleading in the name of a public office without adding the name of the officer, if a defect, is amendable.

Where a statute designates a public officer as the obligee in a bond required from another officer for the public security, he becomes the proper person to bring suit on the bond in the absence of statutory provisions.

All public officers, even if not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties.

A city treasurer's bond to the county treasurer, after stating the duty covered by the obligation, added the words, "reference being had to the warrant of the supervisor of said township attached, or to be attached, to the assessment roll of the year 1872." This clause was in excess of the statutory terms of the bond. *Held*, that it was surplusage and a nullity, and that the absence of a warrant could not make the bond inapplicable to moneys actually received on the roll.

A city treasurer who has given bond to the county treasurer on being notified of the amount of state and county taxes apportioned to his district, is bound in the absence of protest from taxpayers, to pay over to him what he has received in payment of such taxes, even though the authority for their collection was irregular and informal.

Sureties on a bond given by a city or county treasurer are not liable in an action thereon for moneys not collected, or moneys lawfully accounted for.

Error to Berrien. Submitted Oct. 15. Decided Jan. 5.

DEBT on bond. Plaintiff brings error. Reversed.

Edward Bacon and *Jacob J. Van Riper*, prosecuting attorney for Berrien county, for plaintiff in error. The want of a tax warrant in connection with an assessment roll does not invalidate the voluntary payment of a legal tax. *Robbins v. Barron* 33 Mich. 126; it may be a defence in an action for neglecting to collect, but not for neglecting to pay over what has been collected, *Weimer v. Bunbury* 30 Mich. 201; *Mason v. School District* 34 Mich. 233; *Nickodemus v. East Saginaw* 25 Mich. 458; *Fake v. Whipple* 39 Barb. 339; *Looney v. Hughes* 30 Barb. 605; *Hancock v. Hazzard* 12 Cush. 112; *Bellwinkel v. Guttenberg* 17 Wis. 585; *State v. Cunningham* 8 Blackf. 339; *Wilson v. Burfoot* 2 Gratt. 134; *Orono v. Wedgewood* 44 Me. 49; *Kellar v. Savage* 2 Appleton 199; *Sandwich v. Fish* 2 Gray 298; *Hubbard v. Winsor* 15 Mich. 154; *Stockle v. Silsbee* 41 Mich. 619; *Snell v. State* 43 Ind. 360; *Armington v. State* 45 Ind. 10; Cooley on Taxation 500–504, 562–6; the obligation to pay it depends on parties and not on the warrant: *State v. Jackson Township* 50 Ind. 505; *Bell v. Railroad Co.* 4 Wall. 602; *People v. Vilas* 36 N. Y. 459; *People v. Pennock* 60 N. Y. 424; *Spence v. Perry* 18 Mich. 399; *Detroit v. Webber* 26 Mich. 291; 29 Mich. 28.

H. H. Coolidge, *O. W. Coolidge* and *T. G. Beaver* for defendants in error. If a warrant for the collection of taxes has not been delivered to the tax-collector by the proper official authority, the latter's sureties are not liable on his bond for moneys received by him from tax-payers: *Frankfort v. White* 41 Me. 537; *Whitfield v. Wooldbridge* 23 Miss. 183; *Rochester v. Symonds* 7 Wend. 392; *Munic v. Flint* 7 U. C. 449; *Quynn v. State* 1 Har. & J. 36; *Ellicott v. Levy* id. 359; the sureties of an officer who collects money without a warrant thereto, are not liable on his bond for failure to pay it over to the proper authority: *United States v. Cranston* 3 Cr. 289; *Henckler v. County Court* 27 Ill. 39; *Sample v. Davis* 4 Greene 117; *Com. v. Stockton* 5 T. B. Mon. 193; *Dane v. Gilmore* 51 Me. 544; *Dean v. Governor* 13 Ala. 526; *Pettyjohn v. Hudson* 4 Harr. 178:

McDonald v. Bradshaw 2 Ga. 248; *Carmichael v. Governor* 4 Miss. 239; *Mills v. Allen* 7 Jones (N. C. L.) 564; *Haley v. Greenwood* 28 Tex. 680; *Hill v. Kemble* 9 Cal. 71; *King v. Baker* 7 La. Ann. 570.

GRAVES J. This action was brought on the official bond given by Thomas A. Bunbury as treasurer of the city of Niles to Samuel Hess the county treasurer of Berrien connty "and his successor or successors in office forever." It was commenced by declaration to which the defendants pleaded the general issue. The judge heard the case without a jury, and on certain findings of fact rendered judgment for the defendants. The case is brought up on exceptions to the findings of law. The judge seems to have formed a theory which, in his opinion, justified a partial finding of facts and enabled him to dispose of the case without a finding of certain facts which would be indispensable in case the view of the law on which he acted should turn out untenable. The findings appear below.*

On scanning the declaration it appears that all the breaches sufficiently assigned to admit evidence are averred as having consisted of neglect and refusal to account for and pay over money received as taxes. Under the charter of

*I find as matter of fact in this case, that said Thomas A. Bunbury was elected treasurer of the city of Niles, on the first Monday in April, 1872, and that on the 23d day of November, 1872, he gave a bond to Samuel Hess, the county treasurer of the county of Berrien, in the sum of $17,313, the condition of which bond is as follows: "The condition of the above obligation is such that if the above named Thomas A. Bunbury shall duly and faithfully perform the duties of his office of treasurer of the city of Niles, in the county of Berrien, as required by the provisions of law which regulate the collection and return of taxes, reference being had to the warrant of the supervisor of said township attached or to be attached to the assessment roll for the year 1872, the obligation be void, etc."

I find the city of Niles was then divided into four wards, numbered first, second, third and fourth. That separate assessment rolls were made for the second and third wards, and the first and fourth wards. That the amount of the state and county tax apportioned to be spread upon the roll, for the second and third wards, was $4965.47; that the amount of the state and county tax apportioned and spread upon the roll for the first and fourth wards was $3305.87. That Thomas A. Bunbury, the treasurer, or those representing him, paid into the county treasury the sum of $3382.72, an amount greater than the amount to be collected in the first and fourth wards.

Niles the treasurer is to perform the same duties in relation to the collection and return of taxes for state, county and school purposes, assessed and levied within said city as is required of township treasurers and in the same manner, with the like restrictions and under the same liabilities. Act No. 134, Laws 1859, § 21, p. 372. He is required to give the same bonds as township treasurers (§ 40, p. 383) and to discharge the duties in regard to school moneys which in townships are devolved on treasurers. § 46, p. 385.

A township treasurer is required to give a bond to his township for the faithful discharge of the duties of his office and that he will faithfully and truly account for and pay over according to law all moneys which shall come into his hands as such treasurer (Comp. L. § 713) and this bond is to be given within ten days after he is notified of his election (§§ 712, 681). But after notification by the supervisor of the amount of state and county tax apportioned to his township and on or before the 25th of November he must give another bond. This is to be executed "to the county treasurer and his successors in office" and "in double the amount of state and county taxes" and "conditioned that he shall duly and faithfully perform the duties of his office." § 1000.

The bond in question was given in compliance with this

I find from receipts given by the treasurer or his brother that there was collected by said treasurer, or those acting under him, from the taxpayers of the second and third wards, the sum of $3459.38. I find that about the 28th day of January, 1873, that said Thomas Bunbury left the city of Niles, absconded, and that on or about the 4th day of February, 1873, the council of said city appointed Henry C. Platt city treasurer of said city, and that there was afterwards collected by him, said Platt, on the assessment roll for the second and third wards, the sum of about $220. I also find that the warrant of the supervisor of the first and fourth wards was attached to the rolls of said wards, but that no warrant of the supervisor of the second and third wards was ever attached to the assessment rolls for said wards until after the appointment of Henry C. Platt as treasurer, said warrant being attached March 6, 1873.

I find as matter of law arising upon the foregoing facts:

First: That the securities upon the bond of the treasurer are not liable upon said bonds for the moneys received by said Thomas Bunbury, treasurer, for taxes in the second and third wards, there being no warrant of the supervisors attached to the assessment roll for the collection of said taxes.

Second: That the amount paid into the county treasury should be held to be paid upon the roll of the first and fourth wards to which the supervisor's warrant was attached.

last provision and not as answering to the first bond, which in the case of township treasurers is to run to the township.

It is very apparent that the action on this bond has no reference to any cause of action by the city of Niles against Bunbury for failure to pay over or account for anything belonging to the city. The suit has no such scope, if any such were possible.

The briefs of counsel seem to imply that questions in regard to evidence can be examined. Of course this is not so. It was for the circuit judge to hear what might be said on the state of the evidence, and in respect to inferences and presumptions, and thereupon to find the necessary conclusions of fact. If there was presumptive evidence to make out any such fact it was for the judge to consider it and spread the result upon the record as a fact which he found. No such process is here admissible. It is confined to the court of original jurisdiction and we cannot pay attention to arguments to the contrary.

The brief of defendant's counsel contains the general objection that the action was commenced by an improper party,—by a party having no interest in the bond nor in its collection. Perhaps the bare name of office was not sufficient, and that the individual name of the treasurer should have been used with the office by way of addition. *Commissioners of Highways of Cortlandville v. Peck* 5 Hill 215; *Supervisor of Galway v. Stimson* 4 Hill 136; *Agent of Mount Pleasant Prison v. Rikeman* 1 Denio 279; *Overseers of the Town of Hebron v. Ely*, Lalor's Supp. to Hill & Denio 379. But if so, the point is not available. The defendants should have taken the objection before pleading to the merits. It does not appear to have been raised below and it cannot be urged here for the first time. The fault, admitting it to be one, is curable by amendment. *Barber v. Smith* 41 Mich. 138 and cases; *Johr v. St. Clair Supervisors* 38 Mich. 532; *Agent of Mount Pleasant Prison v. Rikeman*, supra.

If the gist of the objection is that the treasurer is not in law competent to be plaintiff the position is not valid.

There is no provision which in express terms confers the power, but none is necessary. There is no statute against it, and when the giving of the bond is prescribed as a piece of security for the safe-keeping and payment of the state and county taxes, and the county treasurer is designated as the one to be obligee, the law points him out as the one to be invested with the legal interest and as the proper party plaintiff in case of a suit. A different construction would lead to the awkward conclusion that the Legislature carefully exacted an obligation to protect the public interests and then allowed it to be waste paper for want of some provision identifying the party plaintiff to enforce it. The rule is general that all public officers, though not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties. *Supervisor of Galway v. Stimson*, supra.

The condition of the bond in question after stating truly, though in a somewhat enlarged form, the duty covered by the obligation, went on to say: "Reference being had to the warrant of the supervisor of said township attached, or to be attached, to the assessment roll for the year 1872." And as one of the two rolls which Bunbury held never had a warrant, it is contended that the bond was not applicable to any money which went into his hands on that roll. The answer to this is, that this passage in the condition is a harmless excrescence. It is something beyond the statute terms. Moreover, as a paragraph in an obligation executed by the city treasurer of Niles to the county treasurer, it is nearly devoid of sense. No warrant of a township supervisor could be attached. It would be necessary to regard the word "township" as used by mistake for the word "city." Otherwise the supposed qualification would be mere nonsense. But the passage is a nullity and it was proper to reject it as surplusage. *Dixon v. United States* 1 Brock. 177; *United States v.* —— —— id. 195; *Grocers' Bank v. Kingman* 16 Gray 473.

The objections against the action which are grounded on irregularities and the lack of a warrant on the roll for the

second and third wards are not sufficient to defeat recovery. The suit is not founded on any default in making collection. Neither is it an action against delinquent tax payers. Its object is to recover from the officer and his sureties, for the benefit of the state and county, the very money which he as treasurer actually received for them and wholly fails and refuses to account for and pay over. The money went into his hands. He received it in payment of taxes, and as money belonging to the public. Whose money is it? Those who were assessed voluntarily paid it in satisfaction of their tax dues and in the discharge of their duty as citizens, and he as city treasurer accepted and received it as money of the public which it was his official duty and province to receive and take care of for the public benefit. It was not his when it was paid and received and has not become his since. It belongs to the State and county. Can it be an answer to this suit brought for its recovery to say: true, the money was so paid and received and has not been accounted for; but it could not have been obtained if the tax payers who freely paid and do not complain had held back for compulsory measures? We think not. Whether it went into Bunbury's keeping by the right hand or the left, on papers regular or irregular, with or without a warrant, makes no difference. Its ownership in equity and his legal responsibility were the same. It was paid and received as tax money, and it was covered by his duty as city treasurer and by his bond. The doctrine rests on policy, reason and authority. *King v. United States* 99 U. S. 229; *Gwynne v. Burnell* 7 Clark & Finn. 572; *Mason v. School District* 34 Mich. 228; *Clark v. Fredenburg* 43 Mich. 263.

We have referred already to the peculiarity of the judge's findings. He was of opinion that the sureties were not liable for any amounts received for taxes in the second and third wards because no warrant was attached to the roll for those wards, and that the amount found to have been paid over was required to be credited against the roll for the first and fourth wards on which there was a warrant. He found, as matter of fact, that an amount was actually paid over not

only equal to the whole sum spread on the roll for the first and fourth wards ($3305.87) but $76.85 in excess, and that there was collected from the tax payers of the second and third wards on the part of Bunbury $3459.38 and by Platt, his successor, $220.

The judge's theory of the law enabled him to dispense with further facts. Holding that there was no liability on account of the second and third wards because there was no warrant, and that the amount paid in cancelled the entire assessment in the first and fourth wards where there was a warrant, the sum collected in the latter wards was immaterial. He therefore made no finding of the amount actually collected in such wards. But as this court finds the law to be, it is necessary to have a finding on that subject, and we think it must be practicable. The sureties are not liable in this action for moneys not collected, nor for moneys lawfully accounted for, and as the finding now stands it carries with it an assumption that the sureties may be charged, not merely for what was collected in the first and fourth wards, but for the entire amount assessed, whether collected or not. The probabilities are very great that much less than the whole assessment was in fact collected.

The aggregate of collections in both districts, as well as the aggregate of payments over, ought to appear. Otherwise there can be no accurate basis for a judgment.

The case might have been sent back without discussion on the points of law, and such would have been the usual course. But as the controversy is one of public importance, and has been pending many years, and further litigation may possibly be averted, we have deemed it expedient to express our opinion on the ruling questions because we have no doubt about them.

The case must go back, and in case the parties think best to continue the litigation there must be another trial. The treasurer will recover his costs of this court.

The other Justices concurred.

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113 455

The Michigan Central Railroad Company v. Moses A. McNaughton.

Ejectment—Plea puis darrein demurrable generally.

The right of action in ejectment is not lost by conveying the premises after suit is brought; and a plea of such conveyance *puis darrein continuance* is demurrable generally.

The rule invalidating a conveyance if the grantor is not in possession and the property is held adversely by another, is not in force in Michigan.

Ejectment under Michigan statutes is substantially a real action and is a proceeding to try titles as well as to determine who has the right of possession. It applies where the remedy formerly was a writ of right. It is the only action for determining titles to land.

Comp. L., § 6232, in providing that if the title of plaintiff in ejectment expires after the commencement of the suit and before trial, he is still entitled to judgment for his damages, contemplates cases in which terms and rights expire, and not to cases where the right or title is simply transferred.

Judgment in ejectment relates back to the beginning of suit.

Error to Jackson. Submitted Oct. 20. Decided Jan. 5.

Ejectment. Defendant brings error. Affirmed.

Gibson & Parkinson and *G. V. N. Lothrop* for plaintiff in error. The plaintiff in ejectment must not only have a right of possession on beginning suit, but at the time of trial: 3 Wait's Actions 11; Tyler on Ejectment 75–7; Adams on Ejectment 32; *Doe v. Lewis* 29 Ga. 45; *Cheney v. Cheney* 26 Vt. 606; *Cresap v. Hutson* 9 Gill 269; *Alden v. Grove* 18 Penn. St. 377; *Torrance v. Betsy* 30 Miss. 129; *M'Culloch v. Cowher* 5 Watts & Serg. 427; *Munsel v. Sanford* 1 Root 257; *Lathrop v. Demont* 9 Johns. 55; *City of Cincinnati v. Lessee of White* 6 Pet. 441.

John D. Conely for defendant in error. Ejectment under Michigan statutes is a real action, *People v. Judge of Wayne* 24 Mich. 42; *Beebe v. Elliott* 4 Barb. 457; *Briggs v. Wells* 12 Barb 567; *Bates v. Stearns* 23 Wend. 481; a statutory provision that where the right of plaintiff in ejectment has

terminated since action was brought verdict shall correspond, does not refer to a mere transfer of title (*Moss v. Shear* 30 Cal. 467). See generally as to the case, *Miles v. Caldwell* 2 Wall. 35; *Jordan v. Ping* 32 Iowa 64; *Hearne v. Erhard* 33 Tex. 60; *Jenney v. Potts* 41 Mich. 52.

GRAVES, J. McNaughton brought an action of ejectment against the railroad company for certain premises in Jackson and the usual plea to the merits was regularly interposed. Subsequently and after the lapse of a term the company by leave of the court introduced a new plea which set up a conveyance by the plaintiff, after the last continuance, of all his estate in the premises to Mary R. McNaughton. The plea prayed judgment that the plaintiff be not allowed to further maintain the action. The plaintiff filed a general demurrer to the plea and demanded judgment for the premises and the railroad company joined in the demurrer. The circuit court sustained the demurrer and entered final judgment that the plaintiff recover in fee, that being the estate claimed in the declaration. The case comes up on a writ of error brought by the railroad company.

Formerly ejectment was a mere possessory action which concluded no one either as to the title or possession exclusive of the period between the day of the demise and the recovery. The very party defeated might immediately bring a new action and litigate relative to the possession as often as he thought proper. In the form which it acquired later the machinery of the action was made to embrace a series of legal fictions in the place of certain of its early actualities. The real claimant was supposed to have entered on the land and there made a lease, and thereupon to have retired leaving his lessee in possession under the demise and that the person previously in possession or some casual ejector came thereupon and expelled, ejected or ousted him. These supposed proceedings were necessary to satisfy the theory of the action, and being assumed, a ground was presented for inquiring into the right of possession, the contest being in form between a fictitious lessee and the ejector, but in substance

and effect between the lessor, the real claimant, and the true tenant or adverse holder. This mere glance is hardly sufficient to convey a distinct idea of the nature of the former action. But a full explanation would be tedious and the case does not call for it. The learning of the bar will supply everything.

It was a part of the same system of law, which still prevails in New York and in most of the other states, that a conveyance by a party out of possession and during the existence of an adverse possession against him, was void. This principle was not allowed, however, to operate against the actual or ideal lease by the real claimant in ejectment. But wherever it obtains it is an insuperable obstacle to a conveyance by the plaintiff in ejectment. A mere release has not been considered as within the rule. The decisions can only be understood by reading them in the light of the law relating to real property and of the procedure for its recovery where they are made

Where a general demurrer was put in to a plea *puis darrein continuance*, setting up that one of the two separate lessors had released to the defendant, the court, in sustaining the demurrer, observed that as long as the remedy by ejectment was held a legal fiction and not a mere equitable remedy it seemed impossible to maintain the plea which was in effect that, after the lessor had made a lease and parted with his interest to the lessee, he made a release of the lessee's interest. *Doe ex dem Byne v. Brewer* 2 Chitty 323.

In *Robinson v. Campbell* 3 Wheat. 212, the lessor conveyed pending the action. The deed was offered in evidence and refused, and the question was saved by an exception. The court said, although an action of ejectment is founded on fictions, yet to certain purposes it is considered in the same manner as if the whole proceedings were real; for all the purposes of the suit the lease is to be deemed a real possessory title. If it expire during the pendency of the suit the plaintiff cannot recover his term at law without procuring it to be enlarged by the court, and can proceed only for antecedent damages. In the present case the lease is to be

deemed as a good subsisting lease, and the conveyance by the plaintiff's lessor during the pendency of the suit could only operate upon his reversionary interest, and consequently could not extinguish the prior lease. The existence of such a lease is a fiction; but it is upheld for the purposes of justice, and there is no pretense that it works any injustice in this case. See also *Jackson v. Bell* 19 Johns. 169; *Jackson v. Leggett* 7 Wend. 377; *Hubbard v Trustees* 2 J. J. Marsh. 81.

The rule for invalidating a conveyance in case the grantor is not in possession, and the premises are held adversely by some one other than the grantee, is not in force in Texas (*Lee v. Salinas* 15 Texas 495) nor in Ohio (*Lessee of Hall v. Ashby and Craven* 9 Ohio [Ham.] 96), and it is not in force here. Comp. Laws, § 4209. The Supreme Court of Texas held on full consideration, in the case cited, that conveyance by the plaintiff *pendente lite* was not an interruption of the suit, and in *Lessee of Dawson v. Porter*, the Supreme Court of Ohio decided that a deed by the lessor of the plaintiff, made after suit was brought, was not evidence to defeat recovery by the plaintiff (2 Ohio [Ham.] 304), and the ruling was subsequently approved in *McChesney's Lessee v. Wainwright* 5 Ohio (Ham.) 452.

Our statute has substantially superseded the old action of ejectment with its fictions and wearisome forms (§§ 6208, 6209), and has given under the same name a much broader and more potent remedy. As marked out by the Legislature it has the effectiveness of a real action. It is a proceeding to try titles as well as to determine who has the right of possession. It is made applicable to cases where formerly a writ of right was the appointed remedy, and it is the only action for the determination of titles to land.

The common law made it a general rule that the judgment in a real action should be rendered upon the title as it was at the date of the writ (*Hooper v. Bridgewater* 102 Mass. 512), and according to the statute the question on the trial in our ejectment is, whether the plaintiff had a right to recover at the time of the commencement of the suit (§ 6206), and the

right of possession to be established is referred to the same time. § 6226.

The verdict must in all cases specify the estate or right belonging to the plaintiff, whether it be in fee or for life or otherwise (§ 6231, subd. 7), and in case the plaintiff's estate expires after the commencement of the suit and before trial, he is still entitled to judgment for his damages. § 6232. In providing for the termination of the plaintiff's right or title the transfer of it is not intended. This clause contemplates those cases where terms and rights expire or come to an end and not to cases where the right or title is simply passed from one to another. The provision had its origin in New York where the law was against a transfer.

The judgment is made operative upon the title as against the defeated party and all others claiming from, through or under him by title accruing after the commencement of such action, unless in case of a new trial. §§ 6238, 6239. It relates, therefore, to the commencement of the action. An alienation by the defendant after the commencement of the suit, if he was in possession, or in receipt of the profits, is not allowed to bar or delay proceedings. § 6392.

In view of the nature of the action as it exists here, and considering the force and bearing of the provisions specially referred to, it seems impossible to carry out the statute, and at the same time construe the plaintiff's conveyance *pendente lite* as a bar to the further prosecution of the suit. It is possible that eventualities may disclose embarrassments which are not so evident now. But, be that as it may, the meaning of the action, as we find it, is too strong for the plea, and the judgment must be affirmed with costs. The case will take the usual direction to enable the company to sue for a new trial under the statute, and to allow such other proceedings to be had as may be proper in the court below.

The other Justices concurred.

Luther Beecher v. John Dacey, Sr.

"Orders" in payment for labor—Accommodation paper—Payment in paper.

A mercantile firm delivered goods to the laborers of a mining corporation upon orders drawn in the following form: "[Date and number]. Due John Dacey, Sr., for labor, from the Marquette & Pacific Rolling Mill Company, four dollars, in goods, at the store of E. H. Mead & Co. $4.00. W. W. Wheaton, Treasurer, by C. S. W. Rice:" and on delivery of goods to the amount so called for, the firm stamped each order "paid." It was apparently understood that the firm should receive and honor the orders of the corporation, and that the latter should settle with it every month and pay the amount of the orders taken by it. The firm became insolvent and had among its assets a large number of these orders, on which suits were brought as for labor debts, and for the use of the persons to whom the orders were drawn, against one of the stockholders of the corporation. *Held*, that these actions would not lie; that the orders could not be treated as having been merely assigned to the firm by those in whose favor they were drawn; and that the use of the words "for labor" in the orders was simply to indicate the nature of the service for which they were given, and not to keep them alive as against stockholders.

A corporation organized for mining purposes would have no authority to issue accommodation paper and deliver it to strangers.

Where a corporation gives its paper to a firm which holds orders issued by it, payable in goods, and there is no evidence that the paper was given or received in payment of the orders, the transfer of the paper must be held to be no payment.

Paper given to be applied upon a debt cannot be considered as accommodation paper.

Error to Marquette. Submitted October 20 and 21, 1880. Decided January 5, 1881.

Assumpsit. Defendant brings error. Reversed.

Atkinson & Atkinson, J. P. Whittemore, F. A. Baker and *H. M. Cheever* for plaintiff in error. The receipt of goods upon the labor certificates in this case discharged the claim for labor (*Shepard v. Cross* 33 Mich. 96), and the certificates were mere requests to deliver goods on the credit of the corporation which gave them (Morse on Banking, 30;

Mandeville v. Union Bank 9 Cr. 9; *Thatcher v. Bank* 5 Sandf. 121; *Griffin v. Rice* 1 Hilt. 184), and not due-bills of the corporation: *Vance v. Bloomer* 20 Wend. 199; *Lobdell v. Hopkins* 5 Cow. 516.

Griffin & Dickinson for defendant in error.

MARSTON, C. J. This is a test case, as a number of similar cases in all essentials await the result in this. Considering the character and importance of the questions raised, and the amount involved, the case becomes one of more than ordinary importance, and demands careful consideration.

The discussion in this court was able and exhaustive, and although quite a number of interesting questions were presented, yet in our opinion the case must ultimately be disposed of upon the legal construction of the labor certificates, so-called, that were issued, in view of the undisputed fact that Mead & Co. delivered goods thereon to the holders thereof. To pass by this question at the present time, or leave the proper construction of the certificates a matter of doubt or uncertainty, would be but to prolong needless litigation at great expense to all parties; and this should be avoided, especially where the case must inevitably reach a stage where the question could no longer be evaded.

The legal effect of the certificates, construed in the light of certain indisputable facts, must determine the respective rights of these parties.

The plaintiff below, John Dacey, Sr., was employed by and performed services as a laborer for the Marquette & Pacific Rolling Mill Company, a corporation, during the years 1876–7. Certain certificates were regularly issued to him, from time to time, all of which were in the following form, except as to the number, date, and amount.

"No. 4585. MARQUETTE, Dec. 14, 1876.

"Due John Dacey, Sr., for labor, from the Marquette & Pacific Rolling Mill Company, four dollars, in goods, at the store of E. H. Mead & Co.

"$4. W. W. WHEATON, Treasurer.

"By C. S. W. RICE."

Wheaton was treasurer and general agent of the corporation from the spring of 1873 up to December, 1877. The firm of Mead & Co. was organized in June, 1876, and was composed of E. H. Mead, and John Scudder, who was secretary of the Rolling Mill Company, as general partners, and Mrs. W. W. Wheaton as a special partner.

Certificates of the same form as the above were given other laborers of the corporation, to an amount aggregating upwards of eighty thousand dollars, which Mead & Co. received and delivered goods on to the full value thereof. The firm of Mead & Co. ceased to do business in August, 1878, at which time they made a general assignment for the benefit of their creditors; and certificates then in the possession of Mead & Co. to the amount of some fifty thousand dollars, passed in some way under the control of their creditors, and this action is brought for their use and benefit. In this action it is sought to hold Beecher, one of the stockholders of the corporation, liable as for a labor debt.

The firm of Mead & Co. did not at any time have any goods or funds on hand, or at their store, belonging to the Rolling Mill Company, and it was claimed on the trial, and Mead, Scudder and Wheaton so testified, that no agreement existed or was ever entered into between Mead & Co. and the Rolling Mill Company, under which the firm was to pay these certificates in goods or otherwise. It was shown that the Rolling Mill Company had no credit for goods or commercial credit in Marquette, where Mead and Co's. store was located, but that it was heavily in debt, which was well known to Mead & Co. That Mead & Co. advanced Dacey goods on the strength of his labor debt, or claim for labor against the corporation, knowing that the corporation stockholders were legally liable therefor and pecuniarily responsible.

These certificates were from time to time presented at the store of Mead & Co. by the holders thereof, and usually goods to the full amount thereof delivered thereon; if not, a store due-bill for the difference would be given the person presenting the certificate, which would be redeemed in goods

on presentation, and on receipt of each certificate by Mead & Co. they would stamp in red ink across the face thereof the word "PAID." This they testify was done to prevent the re-presentation of the certificates in case of their loss.

If a laborer desired goods, and had no certificate, or store due-bill, and goods were given him, they would be charged him on their books, and on afterwards delivering them a certificate for the amount thereof, such charge would be marked paid. Goods delivered upon certificates were not charged to the persons named therein, but were credited to merchandise, and the certificates charged to the Rolling Mill Company.

To show still more clearly the surrounding circumstances and the practical construction placed upon these certificates by the parties, and especially as it was claimed that no agreement existed under which these orders were to be so drawn and taken by Mead & Co., we will quote from the testimony of the plaintiffs' witnesses at some length, as all the testimony is given in the bill of exceptions.

Mr. Wheaton, the treasurer and general agent of the corporation, was examined as follows:

Q. Will you state whether you made any arrangement, or whether there was any arrangement with Mead & Company, by which Mead & Company should give the company credit for the goods given to laborers? A. There was no arrangement of that kind made.

E. H. Mead was examined and testified as follows:

Q. Will you state whether the Marquette & Pacific Rolling Mill Company had any arrangement of any kind with E. H. Mead & Co. whereby Mead & Co. should give goods to their laborers, and charge them to the company? A. No.

In this connection it may be proper to say that Mead also testified: "Dacey asked me, and I trusted him for goods, and took his labor certificate, knowing that the stockholders of the company were good, not trusting the company."

John Scudder was examined and gave testimony as follows:

In speaking of certain entries made upon the books of

Mead & Co. showing a monthly settlement and surrender of certificates, which will again be referred to, he testified:

"All the entries were made this way, with the understanding that Wheaton was to settle once a month with E. H. Mead & Co. and when he failed to do that, these due-bills were not given up." * * * "I made the entry with the understanding that Wheaton was going to take up these due-bills once a month; and when the end of the month came, I made the entry as if the due-bill would be given up; and they would be, provided he would take them." * * * *Question.* Didn't you say that Mr. Wheaton was to settle with you once a month on behalf of the Marquette & Pacific Rolling Mill Company? *Answer.* Yes, sir; he was to settle with Mead & Co. *Q.* When I say 'you' I mean, Mead & Co. Was that the agreement? *A.* That was the understanding." * * * *Q.* You say you talked it over with Wheaton. Give us the details of that agreement with Wheaton, on behalf of the Marquette & Pacific Rolling Mill Company, to pay these orders, take care of them. What was the agreement? *A.* The agreement was that Wheaton was to pay cash for all accounts, that is, for all goods that the Marquette & Pacific Rolling Mill Company got for its own use as well as these certificates. *Q.* The agreement was cash in this instance—nothing else? *A.* Yes, sir, cash. *Q.* Weren't they settled at the end of the month? *A.* Not quite at the end of the month but to make a monthly settlement. *Q.* In other words, the agreement was that at the end of the month, or when the month came around, that they would pay cash, and take up these orders and due-bills, and pay also for what goods they had themselves? *A.* Yes, sir. *Q.* And wasn't it under this arrangement that you went on and accepted these certificates or due-bills and paid goods out on them? *A.* I think it was. *Q.* You know it was, don't you? *A.* Knowing that the certificates were good. *Q.* You knew the Marquette & Pacific Rolling Mill Company were perfectly good? *A.* I knew the Marquette & Pacific Rolling Mill Company were not good. *Q.* But you knew Marquette & Pacific certificates were good? A. I knew the stockholders were good."

This is all the direct evidence we have touching the fact whether there was an agreement or not. The orders upon their face would imply an agreement of some kind, as it would seem highly improbable that they would be drawn in

such manner in the absence of some understanding in the first instance. But the practice at first was strictly in accordance with such an agreement, except perhaps as to the full payment being made in cash. And the books of Mead & Co. in reference to their dealings for 1876 show that they had received from Mr. Wheaton for the Rolling Mill Company, cash, notes and drafts, sufficient to balance the amount of orders, due-bills and certificates received by Mead & Co., and their books were in that way balanced. In this connection Mr. Scudder also testified that although the books were so balanced, their claim was not considered paid, and the certificates were not all surrendered. So monthly statements were made upon their books, showing a surrender of the certificates after 1876, but subsequently changed.

It also appeared, and was not controverted, that the total amount of labor certificates taken by Mead & Co. was upwards of eighty thousand dollars; that they also had other claims against the Rolling Mill Company; that they received from the Rolling Mill Company over thirty-five thousand dollars in cash, and over sixty-eight thousand dollars of the paper of the Marquette & Pacific Rolling Mill Company, which if paid would have left a balance due Mead & Co. of less than two thousand dollars.

Of the paper of the Rolling Mill Company some was used and some was not, and a large amount was afterwards returned; all that had not been used was returned, some of it having been held but a day or two; some that had been used was returned, and some used was to be returned, so as to leave the balance against the corporation about fifty thousand dollars.

In case of doubt as to the proper construction of the certificates, it becomes the duty of the court to construe them in the light of the surrounding circumstances and of the practical construction given by the parties, by their course of dealing, and certainly in so far as the facts were undisputed there was nothing to submit to the jury.

The controversy after all was not so much upon the facts as the legal effect thereof. There was no controversy as to

the form of the certificates or the total amount issued and taken by Mead & Co., or as to the amount of cash and paper of the corporation paid to or received by Mead & Co., or as to the manner in which they kept their books in the main, or as to the returns of a large amount of the paper of the Rolling Mill Company. Whether the paper of the corporation was given to and received by Mead & Co. in payment of these certificates, or on account thereof, or merely as accommodation paper, was controverted, and we may as well dispose of this part of the case here as at any other time.

This paper was not given or received as payment of the certificates: there is no evidence showing that it was, and in the absence thereof it must be held no payment. It is equally clear that it was not given as mere accommodation paper, within the customary meaning of that term. A corporation organized for mining and manufacturing purposes would have no authority to issue and deliver to third parties accommodation paper, and we cannot attribute any such unauthorized dealings to these officers, so long as a legitimate reason is apparent.

That there was an agreement made in the first instance, that certificates should be issued payable in goods at Mead & Co.'s store; that they were to deliver goods thereon, and that the corporation should settle with them monthly and pay the amount thereof, can scarcely be said to admit of any doubt or question. That the corporation failed to make such cash payments is equally clear; and that in lieu thereof it gave its paper to Mead & Co. is also beyond controversy, but such paper was given upon and because of the claims held by Mead & Co. It was given to them so they might use it, and to this extent was a benefit or accommodation to that firm, but because of the debt of the corporation upon which it was given and to be applied if paid, it was not what is known as accommodation paper.

The agreement entered into and course of dealing thus far referred to would indicate pretty clearly that Mead & Co. did look to the corporation for the payment of these certificates, and not exclusively to the stockholders. The fact that

there was no formal assignment of these certificates, or of the labor debt, also tends strongly in the same direction. It would be almost incredible to suppose that Mead & Co. possessing, as we may fairly presume, ordinary business prudence and sagacity, would take over eighty thousand dollars in claims against an insolvent corporation, intending to rely upon their right and ability as assignees thereof to collect from the stockholders, and yet have taken no formal assignment.

In this connection the written agreement of January 4, 1878, a copy of which is given below, should not be overlooked. It is true the evidence is that this agreement did not go into effect because never delivered, but whether delivered or not, the terms thereof were understood, so that it did not misrepresent the parties thereto, to say the least.

By this agreement the corporation was to deliver one hundred tons of ore "for each and every seventy-five dollars of due-bills, *payable in goods at their store* in Negaunee or Marquette, issued by W. W. Wheaton, treasurer, *in payment for labor at said Rolling Mill mine*, and taken up and *paid* by said E. H. Mead & Co. during the months of January, February, March and April, 1878."

The corporation was also after the opening of navigation to deliver a like quantity of ore for a similar amount "of such due-bills taken up and paid by them thereafter, until enough ore shall be delivered to pay said due-bills, *and other labor due-bills* of the said party of the first part, held by the said E. H. Mead & Co."

This indicates pretty clearly that even at the date of this agreement the parties understood that the laborers had been paid in goods, and that Mead & Co. looked to the corporation. And this undoubtedly was the understanding from the first. The orders as taken by Mead & Co. were marked "paid." There is no doubt that thus marking them paid would prevent a re-presentation thereof, had they been lost, yet this is hardly the word that would have been used for such purpose alone, especially where the order was not for any purpose to be considered as paid.

If, therefore, we look at all the facts and circumstances, and in the light thereof give a construction to these certificates, we can come to no conclusion favorable to the plaintiff's right to recover in the present action.

Let us however look at the order. It is not merely evidence of indebtedness given by the corporation: it is more than this. Nor is it a general order that might be taken to any store and traded off for goods; nor is it a general order payable in a particular way, from a fund owned or controlled by the corporation, or in goods owned by it, but is an order upon a certain firm to be honored in a particular manner. It may be a matter of some doubt whether if these certificates had been presented at any other store and goods delivered thereon, the parties taking them could have had any claim against the corporation, without at least showing that Mead & Co. had refused to honor them.

These certificates are orders upon Mead & Co. to deliver goods to the amount specified to the holders thereof, the persons named therein. Dacey after accepting such a certificate, until after a demand for the goods and refusal, could not have sued the corporation and recovered the amount thereof; and on receiving the goods upon such certificates, Mead & Co. would have no claim therefor upon Dacey, and Dacey none against the corporation for his wages. In so far as Dacey was concerned, on receiving the goods his claim against the corporation became extinguished; it was paid as provided for in the order he had received and used.

Was there an assignment by Dacey to Mead & Co., and if so of what? Take John Dacey's testimony:

Question. "State to the jury what the arrangement was, if any, with Mr. Mead. *Answer.* He told me he would collect the money and I told him YES. *Q.* Collect the money for what? *A.* For the goods he had given them. *Q.* What arrangement, if any, was made with reference to the labor debt which was due you; what was said between you and Mr. Mead there at the time you first went there to trade about the labor debt due from the company? *A.* He asked me would he collect the money. I said YES, you have a right to collect the money. It is your place to collect the money. I

know you will get it and it is stopped from me in the office. He took the due-bill from me and then gave me the stuff, and that is all I have to say about it."

C. H. Mead testified as follows:

Question. "State the circumstances under which Mead & Co. advanced goods to John Dacey, Sr.? *Answer.* I advanced him goods on the strength of the labor debt. *Q.* Will you state what took place? *A.* Mr. Dacey came into my store with a labor certificate, and wished to purchase goods, and I asked him if I should collect that. Dacey asked me, and I trusted him for goods, knowing that the stockholders of the company were good, not trusting the company. *Q.* Did you have any authority from Dacey to collect the debt of the company? *A.* Mr. Dacey authorized me to collect the debt against the stockholders, or whoever I had a mind to."

Again, when speaking of Dacey bringing the first certificate to the store, and asking for goods, he is asked

Question. "What else did he say in relation to that transaction? *Answer.* He told me to collect it. *Q.* Is that all? *A.* I asked him whom I should collect it of. *Q.* What did he say? *A.* Of the company, stockholders or anybody I had a mind to. I think he used some such words. *Q.* This is the substance of the words he used? *A.* Something to that effect."

Taking all this testimony together, and it is all there is that can possibly be claimed to have any tendency to show an assignment, and can it fairly be said to tend to show an assignment of a labor debt against a stockholder?

Bearing in mind the fact that this certificate was an order from the corporation to Mead & Co. to pay or deliver to Dacey goods to the amount specified therein, and the question of an assignment assumes a somewhat different aspect. Dacey presented the order at the place and to the firm where it was intended to be available to him. Mead & Co. could honor it or decline to deliver any goods thereon. But could they deliver goods thereon as requested by the corporation, and at the same time, enter into a new agreement with the holder thereof, thereby creating another and different liability, one not contemplated by the corporation issuing it?

We are clearly of the opinion they could not. To hold that they could, would enable them to pay an order in accordance with the terms thereof, and at the same time create a new and enlarged liability thereon in their favor. This would operate as a direct fraud upon the stockholders. It would enable Mead & Co. to accumulate orders, which upon their face would indicate a payment to the laborer, while in fact there was no payment to him but a purchase of his claim against the surety of his principal. The corporation, in issuing these certificates, with knowledge that Mead & Co. were delivering goods thereon according to the terms thereof, could not have intended, or supposed, the stockholders would be held liable thereon.

We place no particular significance on the words "for labor" in the certificates. They were not in our opinion inserted for the purpose of giving currency or adding value to the certificates, or to keep alive the claim for labor against the stockholders, but as indicating the kind of service performed by the person named therein—distinguishing it from services of a different kind or for property purchased, and to enable the corporation to properly keep its accounts. To hold that these words were inserted for the purpose now claimed, would be to charge the treasurer and general agent of the corporation with issuing these certificates in this form, in contemplation of the fact that the corporation would not pay them; that they would accumulate in the hands of Mead & Co. who as assignees thereof would enforce them against the stockholders, and yet the stockholders would have no notice thereof, while an inspection of the orders and books of Mead & Co. would show directly the contrary. Surely a fraud of this character foreseen and deliberately planned and put in force by an officer of a corporation, whose duty it was to protect the stockholders by the payment of such debts by the corporation, and to see that they were not misled to their prejudice by false appearances, should not be charged against the treasurer of the Marquette & Pacific Rolling Mill Company. Not even the remote interest he may have had in the success of the firm of Mead

& Co. would justify an assumption of such extraordinary conduct on his part.

Against a course of dealing such as is relied upon in this case, the stockholders would be utterly unable to protect themselves. An examination of the books of the corporation would show that orders had been issued to the laborers; the orders would show that they were to be paid in goods by a firm therein named; following up the inquiry, an examination of the orders received by such firm would show them with the word "paid" stamped thereon; their books would show their merchandise account credited with the goods delivered on the orders, and the orders charged to the corporation issuing them; a monthly settlement of accounts, and a receipt in cash, drafts and notes of the corporation, to almost the full amount of the orders received. The changes made in their books and paper returned were too late in point of time to have afforded the stockholders any protection even if brought home to them.

It follows from what has been said that the judgment must be reversed with costs, and under technical rules which give us no discretion a new trial must be ordered.

The other Justices concurred.

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LUTHER BEECHER v. THE MARQUETTE & PACIFIC ROLLING MILL COMPANY ET AL.

Corporation mortgages and bonds—Statutory "invalidity"—Creditor in possession not necessarily a mortgager.

Comp. L., § 2888, forbids a manufacturing corporation to mortgage its property unless authorized thereto by vote of stockholders holding three-fifths interest and notified of the object of the meeting called to obtain such vote; and it provides that, without such notice, proceedings shall not be valid. Where notice was given of a meeting to authorize the issue of bonds to the extent of $100,000, secured by mortgage, and the meeting actually authorized an issue to the amount

of $150,000, it was *held* that so long as the corporators raised no obection to the proceedings, no one else could.

An act which the Legislature declares void on grounds of general policy, is void to all intents; but if the manifest purpose of the law is to protect certain individuals in their own rights, they only are entitled to take advantage of it.

Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but were in fact pledged to a creditor as collateral to corporate notes held by him, the objection that this disposition of them is unlawful is one that is open only to the corporation or its stockholders, unless it also affected some existing right; it cannot be raised by one who holds the property of the corporation under a voluntary conveyance or by a purchaser, at execution sale, of the equity of redemption.

A creditor of a corporation, who held its bonds as collateral security, guaranteed its performance of a contract, and the corporation contracted with him to carry on its business and apply the proceeds to that purpose and to its current working capital, and agreed that any surplus might be applied to the payment of current indebtedness. The bonds were secured by mortgage. *Held*, that this did not fix the character of his possession of the corporate property as that of mortgagee, and that the proceeds received by him did not apply as payment on the mortgage, and could only be so applied as set-off.

Appeal from Marquette. Submitted October 21 and 22, 1880. Decided January 5, 1881.

FORECLOSURE. Defendant Parks appeals. Decree entered.

F. A. Baker, *J. P. Whittemore* and *John Atkinson* for complainant: Ownership of a debt carries with it the title to the mortgage by which it is secured, and entitles the holder to foreclosure. Story's Eq. Pl. § 209; *Cooper v. Ulmann* Walk. Ch. 251; *Russell v. Clark* 7 Cr. 97.

Parks & Mapes, *F. O. Clark* and *Hampton & Dalzell* for defendant Parks. The holder of a valid second mortgage on corporate property may avail himself of the invalidity of previous bonds and of the mortgage collateral to them, even though the corporation does not seek to repudiate them (*Com. v. Smith* 10 Allen 448); a holder of corporate bonds secured by a mortgage to trustees is not usually allowed to sue the

corporation with respect to matters within the trust, unless the trustees neglect to act or have taken a position prejudicial to the bondholders' interests, or there is a vacancy in the office: *Knapp v. R. R.* 20 Wall. 117; *Coal Co. v. Blatchford* 11 Wall. 177; *Galveston R. R. v. Cowdrey* 11 Wall. 479.

COOLEY, J. The mortgage which this suit is brought to foreclose was given by the Marquette & Pacific Rolling Mill Co. to secure the payment of thirty bonds of five thousand dollars, dated July 1, 1871, payable to Sidney D. Miller, trustee, ten years after date, with eight per centum interest, payable semi-annually. The mortgage contained a provision that in case the interest should at any time be overdue for sixty days, the principal should, at the election of the trustee, become immediately due and payable. Complainant files the bill as holder of a part of the bonds, the trustee having declined to do so.

The Marquette & Pacific Rolling Mill Co., the mortgagor, makes no defense, and the sole contestant of complainant's rights is William H. Parks, who is grantee of the parties who purchased the equity of redemption at execution sale. He claims—*first*, that the mortgage never had any validity; and *second*, that if it had validity in the hands of the trustee, complainant has never acquired any rights under it, for the reason that his demand was not such an one as the mortgage was intended to secure, and he is not in position to claim as a *bona fide* purchaser or holder of negotiable paper. Peter White, who is made defendant, claims rights under the mortgage which do not antagonize those asserted by the complainant.

I. The mortgage is said to be invalid because never authorized by the corporation giving it. The Rolling Mill Company was organized under the statutes for the incorporation of mining and manufacturing companies, which are collected in chapter 95 of the Compiled Laws of 1871. By one of the sections of this collection it is provided that "No alienation, diversion, sale or mortgage of any or any part of the mine works, real estate or franchise of any corporation men-

tioned in the first section of this act shall have any force or effect, or pass any title thereto, or interest therein, unless expressly authorized by the vote of three-fifths in interest of the entire stock of said company actually present or legally represented at some meeting of stockholders called and notified" as required by law, with an exception not important here. The provision in respect to notice is that 'No meeting of stockholders shall be or be held to be legal or valid, or the proceedings thereof of any force or effect, unless the directors or other parties or officers calling the same shall cause a notice of the time, place and object of holding the same to be published two weeks for any annual meeting and four weeks for any special meeting previous thereto in some newspaper published in the county * * * and shall also cause a copy of such notice to be sent by mail to each stockholder of record, at his usual place of residence, twenty days before the time of such meeting.' Comp. L., §§ 2888, 2887. The authority, such as it was in this case, was given at a special meeting, and it is claimed—1, there is no sufficient proof that the meeting was duly notified; and 2, that the notice actually given was insufficient to justify what was done at the meeting.

The evidence of the giving of notice of the meeting seems to us ample. It comes from William Burt, who testifies with much confidence to having caused notice to be published in a newspaper of the county, and produces a copy of the one published. He also testifies that as agent for the company he paid for the publication, and served notice by mail on the several stockholders. He gives reasons for his belief that all this was done in compliance with the statute, and the reasons are satisfactory. We discover no defect here.

The fact that the action taken did not correspond with the notice is more important. The notice is given in the margin,*

*Office of the Marquette & Pacific Rolling Mill Company, Marquette, Dec. 15th, 1870.

At a meeting of the directors of the Marquette and Pacific Rolling Mill Company, this 15th day of December, A. D. 1870, it was ordered that a meeting of the stockholders of this company be called and held on Monday, the 16th day of January, A. D. 1871, at 10 o'clock A. M., at the

and the object of the meeting is stated to be "for the purpose of electing a new board of directors, and to authorize the issue of bonds to the extent of one hundred thousand dollars, to be secured by mortgage on the company's property, and for such other business as may lawfully come before said meeting."

The meeting was duly convened and no question is made that the stock was sufficiently represented. After electing directors, the record states that "The meeting then proceeded to consider the issue of one hundred and fifty thousand dollars of first mortgage bonds upon the property of the company, and upon a vote, unanimously authorized and instructed the treasurer to make such issue."

The object of the meeting, as testified, is thus seen to have been to authorize bonds and a mortgage to the extent of one hundred. thousand dollars, and the authority actually given was to issue bonds and give mortgage for one hundred and fifty thousand dollars. The explanation of this action, which is given on the part of complainant, is that the corporation was already indebted to the amount of fifty thousand dollars secured by mortgage of part of their property, and the new bonds and mortgage were intended in part to provide for that, so that the debt would be increased one hundred thousand dollars only, and the notice be complied with in spirit though not in letter. But in behalf of defendant Parks it is insisted that the motive, not disclosed by the record, is immaterial; the fact being that one thing was proposed and another thing done; and this, according to the express provisions of the statute, cannot be "legal or valid," or "of any force or effect."

These are strong and seem very imperative words, and if full effect is given to them it may be difficult to support this mortgage. But we are not hastily to conclude that words

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office of the said company in the village of Marquette, Michigan. Said meeting is called for the purpose of electing a new board of directors and to authorize the issue of bonds to the extent of one hundred thousand dollars, to be secured by mortgage on the company's property, and for such other business as may lawfully come before said meeting of stockholders.

JOHN BURT, President.

thus apparently imperative are to be given a literal interpretation and enforced accordingly. Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to avoid them. Legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this: that at the option of those for whose benefit the provision was made it shall be voidable, and have no force or effect as against his interests. This was found to be the meaning in the mind of the legislature in enacting the Massachusetts usury law. It was declared in most positive terms that mortgages on usurious considerations should be "utterly void;" but a consideration of its purpose, which was to protect debtors against the enforcement of unconscionable demands, made it clear that it never was intended that strangers to the title should be at liberty to question such a mortgage. *Green v. Kemp* 13 Mass. 515. Mr. Justice Bayley in one case intimated that the word *void* in a statute might be construed *voidable* where the provision is introduced for the benefit of parties only, but not where it is introduced for public purposes and to protect those who are incapable of protecting themselves (*Rex v. Hipswell* 8 B. & C. 466, 470), and though this distinction has been questioned (*Rex v. St. Gregory* 2 Ad. & El. 99, 107), much good reason lies at the foundation of it. If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it. A statute would strike blindly if the letter alone were to be regarded, not the spirit. A statute declares that certain indentures not made as by the statute provided should "be clearly void in law to all intents and purposes;" and it was nevertheless held that, if acted upon, the apprentice gained a settlement thereby. *St. Nicholas v. St. Peter*, Strange 1066. And in Ohio a purchase at a judicial sale by one who acted as appraiser of the

property, though the statute declared it should be "considered fraudulent and void," was held to be voidable only on an interposition or proceeding by a party in interest, directly for the purpose of avoiding it. *Terrill v. Auchauer* 14 Ohio N. S. 80. This subject is considered at length and many authorities examined in *State v. Richmond* 26 N. H. 232, to which we refer.

The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong, direct or indirect, is done to any human being if conveyance is made or mortgage given without the exact notice required, unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose.

In this case the stockholders acted deliberately in sanctioning the giving of the mortgage, and they now make no complaint. The bonds and mortgage were given, and have been acted upon. Complainant has loaned money in reliance upon them. Interest has fallen due and he has filed his bill to foreclose, and neither the corporation nor any of its stockholders has seen fit to make defence. The corporators may possibly have had a right to take advantage of the exact words of the statute, repudiate their action, and treat the mortgage as of no force or effect, but they had an equal right to treat it as effective and valid. They have chosen the latter course, and this is conclusive upon the corporation and upon any one claiming under it. What would have been the result had no corporate meeting ever been held we do not consider.

II. The corporation became debtor to Beecher in five notes of ten thousand dollars each, each of which was secured

by the deposit of three of the bonds as collateral. Two of the notes have been paid and three remain unpaid. The bonds were issued on an explicit understanding that they were to be sold for cash. This is apparent from the proceedings of the company and its officers as they are exhibited in the record of the case. It is contended on the part of defendant Parks that the pledge of the bonds to Beecher was unlawful because in violation of the understanding under which they were authorized. But here again Parks attempts to make an objection which is only available to the company or its stockholders. He has purchased only the equity of redemption, and not any right the corporation or its stockholders may have had to complain of an abuse of trust on the part of the corporate officers. He is in no better position than he would be if he held by voluntary conveyance from the company; in which case it is plain that he could not make this objection. *Fairfield v. McArthur* 15 Gray 526; *Gale v. Gould* 40 Mich. 515. It would of course have been different if the transaction had at the time affected some existing right; as was the case in *Van Deusen v. Frink* 15 Pick. 449, and some others which are referred to in the briefs.

III. It is also urged that Beecher has been in possession of the mortgaged property as mortgagee, and has received in person or through his agent a large amount of money and other personal property which he must account for on the mortgage, and which, if accounted for, will more than extinguish the three notes which he now holds.

The facts which are supposed to give ground for this position are that in December, 1872, Beecher gave a guaranty to the Western Transportation & Coal Co. of the performance of a contract made by the Marquette & Pacific Rolling Mill Co. to deliver ten thousand tons of iron ore, and the latter company, in a contract reciting that fact, and also the indebtedness of the company to Beecher and the delivery to him of collateral bonds, stipulated with him that he should carry on the business of the company; that the proceeds to accrue from said sale of ore should be applied by Beecher or his agent

"from time to time in working the mine of said company, rebuilding its furnace and its current working capital;" and that in case "any surplus accrues in the course of the business of said company above the amount necessary to provide for working the mine of said company, rebuilding its furnace and its current working capital, such surplus may be used and applied for the payment of current indebtedness." There is nothing in this that fixes the character of Beecher's possession as that of mortgagee. He was in as contractor, and bound under his contract to account to the company. But the rents, profits or proceeds received did not apply as payment on the mortgage and could only be applied by way of set-off. No offer has been made to apply them in this suit.

This disposes of the defences which are set up to the complainant's demand. The claim of White remains for examination.

IV. The claim of White arises upon the following facts: Hiram A. Burt as well as complainant was guarantor of the performance of the contract made with the Western Transportation & Coal Company as above stated. He was also indorser for the Marquette & Pacific Rolling Mill Co. on paper held by a bank of which White was president, in the amount of thirty thousand dollars. In the agreement of December, 1872, between Beecher and the Rolling Mill Co., it was agreed that the bonds for one hundred and fifty thousand dollars and the mortgage collateral thereto, should be held by the trustee for the payment of fifty thousand dollars prior mortgage and interest, and the thirty thousand dollars and interest which then remained unpaid to Beecher of his fifty thousand dollars loan to the Rolling Mill Co., and also for the full liquidation and discharge of any liabilities of any kind to which Beecher might be subjected by reason of his guaranty of the contract with the Transportation and Coal Co. By another contract between Beecher and Burt, bearing the same date with the contract above mentioned, Burt was made agent for Beecher at the mine, and Beecher agreed that whatever was received by him under his contract with the Rolling Mill Co. should be held and controlled by him

for the protection of Burt as guarantor as aforesaid, and also to such extent as might be necessary to protect Burt for all amounts due or to become due to him from the company, and for liabilities thereafter incurred, etc. Upon the indebtedness of the company to the bank Burt was thereafter sued and judgment recovered, whereupon White assumed the indebtedness and Burt assigned to him all his rights in the contract of December, 1872, made with complainant as above stated. The board of directors of the Rolling Mill Co. formally approved of the contract between Beecher and Burt, so far as it undertook to give to Burt security, and authorized Beecher "to hold the securities therein referred to for the joint benefit of said Burt and said Beecher as therein stated."

It is contended on the part of both complainant and defendant Parks that the contracts and the action of the directors upon them do not secure Burt for pre-existing liabilities and consequently that White can claim nothing under them. We have examined the contracts with care and must admit that the construction is not free from all difficulty; but we are satisfied the intention was to give Burt full protection. There was no just reason for restricting his protection to his guaranty on the contract with the Transportation and Coal Co. and to accruing indebtedness, and it is not likely he would have been content to take security thus restricted. In the light of all the facts it seems to us apparent that the intention was Burt as well as Beecher should be protected to the full extent that whatever was pledged to Beecher could give protection.

V. Complainant, by reason of the failure to pay interest, elects to treat the principal sum represented by the bonds as now due. The mortgage gives this election to the trustee, and though he declines to foreclose, it is insisted no one else can elect for him. The point has not been discussed, and we do not pass upon it, as we conceive it to be unnecessary. The principal sum will be due before foreclosure can be completed, and an election will be of no moment.

Decree will be entered in accordance with these views.

The other Justices concurred.

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The Connecticut Mutual Life Insurance Company and John Hebert v. Christian Bulte.

Agency—Ejectment against later mortgagee holding under a tax-title—Relation.

The general attorney of an Insurance Company, after foreclosing a mortgage in its name, took a tax-deed of the property, and after the tax-title became absolute gave a quit-claim to the company which it accepted. *Held*, a recognition of his agency in making the tax purchase.

A second mortgagee who has foreclosed and bidden in the premises can obtain a tax-title to them, and if it is allowed to become absolute he has a right to use it as a defense to an action of ejectment brought by the first mortgagee, unless the latter tenders re-payment.

A tenant who has covenanted to pay the taxes cannot, after neglecting to do so, take a tax-title and cut off his landlord's rights: nor can a purchaser in possession under an executory contract so cut off his vendor's rights, nor a mortgager those of his mortgagee. A purchase made under such circumstances will be conclusively presumed to have been made in the performance of duty and not in repudiation of it.

A second mortgagee is under no obligation to protect the lien of the first mortgagee by payment of taxes or by purchasing the premises for his benefit at a tax-sale; but if he does pay or purchase, the act *ipso facto* constitutes a protection.

A mortgagee does not owe any duty to a subsequent mortgagee or to the owner, to protect the latter's lien as against tax-sales: the duty is to the State, which will sell the interest of all if neither pays.

The duty to pay taxes on mortgaged land is primarily on the mortgager, but if he makes default any mortgagee may pay, and if no one does so the land will be sold and his lien extinguished. But a payment by a mortgagee is allowed to increase the amount of his incumbrance in order to secure its re-payment by the mortgager.

A tax-deed giving a *prima facie* title constitutes at law a perfect defense to an action of ejectment.

Foreclosure cuts off a subsequent mortgage, but where the amount of a tax-purchase has been added to the later incumbrance the additional lien therefor is not extinguished with the mortgage.

A tax-title relates back from the time it becomes absolute to the time of the tax-purchase for all purposes of substantial justice, but not

otherwise; and it cannot be used to divest rights acquired since the period to which it would relate.

Error to Wayne. Submitted Oct. 22. Decided Jan. 5.

EJECTMENT. Defendants bring error. Reversed.

Moore, Canfield & Warner for plaintiffs in error. One is not estopped from purchasing tax-titles who is under no obligation to pay the tax: *Sands v. Davis* 40 Mich. 14; *Moss v. Shear* 25 Cal. 45; *Bowman v. Cockrill* 6 Kan. 331; *Stubblefield v. Bordus* 92 Ill. 279; Blackwell on Tax-titles (2d. ed) 400; a mortgagee can buy an outstanding title, *Ten Eyck v. Craig* 2 Hun 452: 62 N. Y. 406; *Trimm v. Marsh* 54 N. Y. 599; *Williams v. Townsend* 31 N. Y. 411.

Geo. H. Lothrop, Edwin F. Conely and *G. V. N. Lothrop* for defendant in error. The attorney of a mortgagee who has foreclosed in the mortgagee's name cannot take a tax-title on the property, and if he does so, must deed to his client: *Matthews v. Light* 32 Me. 305; *Oldhams v. Jones* 5 B. Monr. 458; *Krutz v. Fisher* 8 Kan. 90; *Bernal v. Lynch* 36 Cal. 135; *McMahon v. McGraw* 26 Wis. 614; *Barton v. Moss* 32 Ill. 50; *Schedda v. Sawyer* 4 McLean 181; *Jewett v. Miller* 10 N. Y. 402; *Linsley v. Sinclair* 24 Mich. 380; *Bartholemew v. Leech* 7 Watts 472; title cannot be obtained by a tax purchase made by the owner, after neglecting to pay the tax, for the purpose of divesting the interest of a grantee or mortgagee: *Jones v. Davis* 24 Wis. 229; *Swift v. Agnes* 33 Wis. 228; *Woodburn v. Farmers & Mech. Bk.* 5 W. & S. 447; *Gardiner v. Gerrish* 23 Me. 46; *Fuller v. Hodgdon* 25 Me. 243; *Frye v. Bank of Illinois* 11 Ill. 367; *Porter v. Lafferty* 33 Iowa 254; nor by a tenant for life, to the prejudice of the reversioner: *Phelan v. Boylan* 25 Wis. 679; *Prettyman v. Walston* 34 Ill. 175; *Higgins v. Crosby* 40 Ill. 260; *Varney v. Stevens* 22 Me. 331; *Burhans v. Van Zandt* 7 N. Y. 523; *Cairns v. Chabert* 3 Edw. Ch. 312; nor by tenants for years: *Carithers v. Weaver* 7 Kans. 110; *Blake v. Howe* 1 Aikens 306; *Shepardson v. Elmore* 19

Wis. 424; nor by a tenant in common, to divest the title of others interested: *Williams v. Gray* 3 Me. 207; *Willard v. Strong* 14 Vt. 532; *Adm'rs of Downer v. Smith* 38 Vt. 464; *Brown v. Hogle* 30 Ill. 119; *Chickering v. Faile* 38 Ill. 342; *McConnel v. Konepel* 46 Ill. 519; *Busch v. Huston* 75 Ill. 343; *State v. Williston* 20 Wis. 228; *Van Horne v. Fonda* 5 Johns. Ch. 388; *Brittin v. Handy* 20 Ark. 381; *Lloyd v. Lynch* 28 Pa. St. 419; *Maul v. Rider* 51 Pa. St. 377; *Baker v. Whiting*, 3 Sumn. 475; *Roberts v. Thorn* 25 Texas 728; *Frentz v. Klotsch* 28 Wis. 312; *Flinn v. McKinley* 44 Iowa 68; *Page v. Webster* 8 Mich. 263; *Butler v. Porter* 13 Mich. 292; *Cooley v. Waterman* 16 Mich. 366; *Dubois v. Campau* 24 Mich. 360; whether a tenant in common can divest his co-tenant by purchasing a tax-title, without collusion, after it has become absolute, *quere: Lewis v. Robinson* 10 Watts 354; *Kirkpatrick v. Mathiot* 4 W. & S. 251; *Reinboth v. Zerbe Run Improvement Co.* 29 Penn. St. 139; *Roberts v. Thorn* 25 Tex. 728; *Wright v. Sperry* 21 Wis. 331; *Frentz v. Klotsch* 28 Wis. 312; *Dubois v. Campau* 24 Mich. 360; *Sands v. Davis* 40 Mich. 14; a vendee in a land contract stipulating that he shall pay the taxes, or in possession without such stipulation, cannot neglect to pay them and thereafter acquire title at the tax sale: *Gardiner v. Gerrish* 23 Me. 46; *Haskell v. Putnam* 42 Me. 244; *Coxe v. Wolcott* 27 Penn. St. 154; *Quinn v. Quinn* 27 Wis. 168; *Voris v. Thomas* 12 Ill. 442; *Glancy v. Elliott* 14 Ill. 456; *Oliver v. Croswell* 42 Ill. 41; *Miller v. Corey* 15 Iowa 166; *Hunt v. Rowland* 22 Iowa 53; nor can an occupant claiming title: *Douglas v. Dangerfield* 10 Ohio 152; *McMinn v. Whelan* 27 Cal. 300; *Coppinger v. Rice* 33 Cal. 408; *Barrett v. Amerein* 36 Cal. 324; *Garwood v. Hastings* 38 Cal. 216; *Bassett v. Welch* 22 Wis. 175; *Whitney v. Gunderson* 31 Wis. 359; *Lacey v. Davis* 4 Mich. 140; but see *Moss v. Shear* 25 Cal. 38; *Bowman v. Cockrill* 6 Kansas 311; *Blakeley v. Bestor* 13 Ill. 708; *Blackwood v. Van Vleit* 30 Mich. 118; nor can an heir prejudice the rights of others interested by taking a tax deed, where the ancestor has neglected to pay taxes: *Choteau v. Jones* 11 Ill. 300; *Piatt*

v. St. Clair's Heirs 6 Ohio 93; *Taylor v. Snyder*, Walk. Ch. 490; nor a purchaser from a devisee bound by the will to pay the taxes (*Chamber v. Wilson* 2 Watts 495), nor can a purchaser at an administrator's sale thus cut off a prior mortgage, *Edgerton v. Schneider* 26 Wis. 385; one who obtains an injunction against the enforcement of a mechanic's lien cannot meanwhile procure and assert a tax-title against the defendant (*McLaughlin v. Green* 48 Miss. 175); nor can one in possession of premises under execution title take a tax deed during time of redemption and assert title as against the owner: *Kelsey v. Abbott* 13 Cal. 609; tax-title obtained by a party in collusion with owner for the purpose of defrauding mortgage creditor, was held bad: *Hibernia Savings Society v. Ordway*, 38 Cal. 679; one who, in 1865, took out valid tax deeds based upon sales for the taxes of 1858 and 1861, and went into possession under them, was under no obligation to pay delinquent taxes of the years 1859 to 1864 inclusive; and he might take deeds upon sales for such taxes, and maintain proceedings to quiet title: *Lybrand v. Haney* 31 Wis. 230; defendant had tax title, but went into possession under the widow of mortgager who was entitled to the possession, agreed to pay mortgage, and induced her by words and acts to suppose that he held of her until the three years' limitation had expired: *Held*, that he could not assert title: *Schumaker v. Hoeveler* 22 Wis. 43; where the tax is assessed on the land while the mortgagee has an interest therein, he cannot, in the event of the non-payment of such tax and the sale of the land therefor, purchase the lands at such sale, and acquire title thereby: *Smith v. Lewis* 20 Wis. 350; *Sturdevant v. Mather* id. 576; *Avery v. Judd* 21 Wis. 262; *Fisk v. Brunette* 30 Wis. 102; *Anson v. Anson* 20 Iowa 55; *Porter v. Lafferty* 33 Iowa 254; *Stears v. Hollenbeck* 38 Iowa 550; *Fair v. Brown* 40 Iowa 209; *Garrettson v. Scofield* 44 Iowa 36; *Brown v. Simons* 44 N. H. 475; *Williams v. Townsend* 31 N. Y. 411; if the mortgagee takes a tax deed, it operates as the payment of the tax, and inures to the benefit of all, and the mortgagee can enforce repayment by enforcing his lien therefor upon the land: Comp. L. § 1102;

Williams v. Hilton 35 Me. 547; *Mix v. Hotchkiss* 14 Conn. 32; *Brown v. Simons* 44 N. H. 475 and authorities cited: *Kortright v. Cady* 23 Barb. 491; *Rakestraw v. Brewer* 2 P. Wms. 511.

Cooley, J. Bulte brought ejectment against the Insurance Company and one Hebert, its tenant, to recover certain lots in the city of Detroit. The facts out of which the litigation arose are the following:

On September 14, 1872, the lots were owned by one John F. Mack. On that day he executed to the plaintiff Bulte a mortgage on the lots for the sum of $4750, and on November 25, 1874, he gave another mortgage to the Insurance Company for $9000. Both mortgages were duly recorded. In May, 1877, the Insurance Company foreclosed its mortgage by *ex parte* proceedings and became the purchaser at the sale, and received a deed which became absolute May 26, 1878. In October, 1877, the land was sold for delinquent state and county taxes assessed in 1876, and William A. Moore became purchaser, subject to a year's redemption. No redemption ever took place. In December, 1877, Bulte foreclosed his mortgage by *ex parte* proceedings, became the purchaser and took a deed which became absolute December 15, 1878. December 21, 1878, Moore gave a quit-claim deed to the Insurance Company. His relations to the company at that time are explained in his evidence, which, being important, and all there was on the subject, is given in full.

Mr. Moore testified that he was a lawyer by profession; that he had made loans for the Connecticut Mutual Life Insurance Company since 1871; that he had been their attorney in some suits at law, and had had some suits against them; that he did considerable general business for them as attorney; that the firm of Moore, Canfield & Warner, with which he is connected, have been the attorneys for said company in many cases for six or seven years past; that he negotiated the loan to Mack from the said company; that after making said loan the papers were all sent to the office of the company at Hartford, and the money was all payable

to them there; that if the money was not paid they generally wrote him to induce collection or payment by law or persuasion; that he looked after the loans of said Insurance Company in respect to the condition of the property, taxes, etc., to see that the property was not sold, to see that the titles did not accrue in other hands against the company; that he generally bid in the lands in his own name, but by no special arrangement or anything of the kind; that he generally quit-claimed to the company when the property was sold; that he never executed a quit-claim to the company that he recollected, except this one, of any property that he ever bid in himself; that some property had been sold, and where property had been sold he conveyed to the party who purchased, by deed or assignment of the certificates, whatever was necessary; that he generally drew his own check and paid the taxes himself; that in some cases he had been re-imbursed by the company, and in some not; where the company has held title he has been re-imbursed; that for a year and a half or two years past the firm of Moore, Canfield & Warner had had the charge of the property and paid the taxes and rendered the regular accounts and the company re-imbursed them from time to time; that the mortgage came to him to be foreclosed after a portion was due; that he advertised it and conducted the proceedings to an end; that the property was advertised for foreclosure prior to the bidding in on the tax sale; that when he undertook to buy in the tax title he was conducting the business of the company in respect to foreclosing their mortgage; that in purchasing property on tax sales he would not make a title adversely to the company; that he never would have assigned to anybody else; that he purchased the tax-title because he thought under the circumstances he ought to do it; that he did not intend to create any title against the Connecticut Mutual Life Insurance Company, but that he did that as he did every other; that he did not go into the business of buying tax-titles; that he should not have permitted a title against the company; that he did not buy the title under any arrangement whatever with the company; that he did

not receive anything from the company when he quit-claimed to it.

On cross-examination witness testified that at the time of the purchase of this tax-title he had no contract or arrangement with the Connecticut Mutual Life Insurance Company with regard to the purchase of this tax-title and no understanding with them about it; that the company knew nothing about it, and that the company never made any objection to his obtaining or holding title under the tax deed; that after he had conveyed to the company he told the president that he had done so.

On redirect examination witness testified that he did not consult with the company in each particular case of a tax-title.

November 29, 1878, the Insurance Company leased a portion of the premises to Hebert, who took possession, and this suit was subsequently brought. On the trial the controversy appears to have centered entirely on the tax purchase by Mr. Moore, and the effect of the subsequent conveyance by Mr. Moore to the Insurance Company.

The following instruction, requested by the defendant, the circuit judge refused to give:

"The tax deed offered in evidence by the defendants is *prima facie* evidence of title in fee to the premises in question in William A. Moore, and the Insurance Company, as the grantee of said Moore, is entitled to assert all the title which the tax deed vested in said Moore."

The following, requested by the plaintiff, was given:

"If the jury find that at the time William A. Moore bid the premises off at tax sale, and took the tax deed, he was acting as the agent of the Connecticut Mutual Life Insurance Company, in reference to its mortgage interest in the premises, and in reference to its foreclosure by said company, and really acquired said tax bid and tax deed for the protection of the interests of said company, such tax deed vested no title or interest in Mr. Moore or in the defendants which will prevent the recovery by the plaintiff in this action."

The jury returned a verdict for the plaintiff.

The defendants, now plaintiffs in error, insist that the circuit judge wholly misapprehended the law; and that he erred both in holding that Bulte was at liberty to rely upon Moore's agency for the Insurance Company by precluding his making a purchase and acquiring a title in his own name at the tax sale, and also in ruling that the Insurance Company could not acquire and hold a tax-title as against a prior mortgagee.

We shall spend no time on a discussion of Mr. Moore's relations to the Insurance Company, because we think his deed to the company and the acceptance thereof was a recognition of his agency in the purchase and renders immaterial the question what would otherwise have been the rights of Bulte. It will therefore be assumed in whatever we shall say of the case, that the question of the right of a second mortgagee to rely upon a tax purchase as against the right of the first mortgagee to recover in ejectment after foreclosure, is the question, and the only question in the case.

It is conceded that there are a great many cases in which parties standing in particular relations to the land, or to the owner or other person interested therein, are not suffered to acquire tax-titles and rely upon them as against other claimants. Some of those are very plain, and it is quite unnecessary to do more than name them. A tenant for example, who has covenanted to pay the taxes cannot be suffered to neglect this duty, and then acquire a tax-title which shall cut off the title of his landlord. Neither shall the purchaser in possession under an executory contract be allowed to cut off the rights of his vendor by a like purchase, nor a mortgagor that of his mortgagee. A tax purchase made while such a relation exists is made in wrong; and the law in circumvention of dishonesty will conclusively presume that it was made in the performance of duty, and not in repudiation of it. But other cases are not so plain. A tenant in common, for example, who finds his interest taxed inseparably with that of his co-tenant, may advance plausible reasons why, if he buys the whole land at the tax sale, he should be at liberty to claim title to the

whole. His duty is limited to paying the tax on his share only; and if the co-tenant neglect to pay for himself, what right has he to demand that those who happen to have interest with him in the land shall be excluded from the number who may take advantage of his default? The reason usually assigned for not permitting such a purchase is that the sale is based in part upon the purchaser's own default, but it is also true that in a great proportion of such cases the parties stand to each other in confidential relations; and it may without much violence to the facts be assumed that they do so in all cases. No doubt the rule that precludes their speculating in each other's defaults is grounded on sound policy. Still the purchaser does not lose what he pays beyond what is needful for discharging the lien upon his own interest; his co-tenants must refund to him such portion as is found to be just: *Baker v. Whiting* 3 Sumn. 476; *Burhans v. Van Zandt* 7 N. Y. 523; *Phelan v. Boylan* 25 Wis. 679; *Chickering v. Faile* 38 Ill. 342; *Anson v. Anson* 20 Iowa 55. The purchaser is trustee for the others, but they must repay their proportion of his advances: *Lloyd v. Lynch* 28 Penn. St. 419; *Maul v. Rider*, 51 Penn. St. 377; *Flinn v. McKinley* 44 Iowa 68.

But it is possible for parties to have antagonistic claims in lands, which place them neither actually nor constructively in confidential relations. In some such cases no doubt either is at liberty to strengthen his title as against the other by a tax purchase: *Blackwood v. Van Vleit* 30 Mich. 118. It is claimed that a second mortgagee occupies this position in respect to the first mortgagee, and if the latter does not protect his lien by payment of the taxes or by attending as purchaser at the tax sales, the former is under no obligation to do so for him. And it is no doubt true that he is under no obligation to protect the first mortgagee; but the real point in controversy is, whether, if the second mortgagee pay the taxes or bid off the land, the payment or purchase will not *ipso facto* constitute a protection?

It certainly cannot be said that the second mortgagee owes any duty to the first mortgagee to protect his lien as against

tax sales. Neither on the other hand does the first mortgagee owe any such duty to the second mortgagee, or to the owner. To the State each one of the three may be said to owe the duty to pay the taxes; and the State will sell the interest of all if none of the three shall pay. As between themselves, the primary duty is upon the mortgagor; but if he makes default, either of the mortgagees may pay, and one of the two must do so or the land will be sold and his lien extinguished. But in such cases, where each has the same right, payment by one is allowed to increase the amount of his incumbrance; for in no other way could he have security for its repayment by the mortgagor, who ought to protect the security he has given. When therefore each mortgagee has the same interest in making payment of the tax, and the same right to do so, and the same means of compelling repayment, it may well be held that a purchase by one shall not be suffered to cut off the right of the other, because it is based as much upon his own default as upon that of a party whose lien he seeks to extinguish. It is as just and as politic here as it is in the case of tenants in common, to hold that the purchase is only a payment of the tax.

But in equity this can only be so when the party paying is in position to add the amount of the payment to the amount of his lien. It is never held that any other person can have the benefit of the mortgagee's payment or purchase without being under any obligation to repay him the cost. *Horton v. Ingersoll* 13 Mich. 409, on which much reliance is placed, is far from so holding. In that case the owner of an interest in the equity of redemption was also owner of a tax-title. By reason of his tax title he denied the right of the mortgagee to make him defendant to a bill to foreclose. The court decided he was a proper party by reason of his interest in the equity of redemption; and there was also a *dictum* that the tax title he had purchased "simply inures to the protection, not the destruction, of the regular title." The *dictum* is sound, but it falls short of the necessities of this case.

In this case the second mortgagee had acquired a tax-title,

which became absolute in October though the deed was not obtained until December 16, 1878. This by the express provisions of the statute was *prima facie* a valid title. No doubt the first mortgagee had a right to insist that the purchase was in part for his protection, and to treat it as a payment merely; but this was at his option, and it stood as a good purchase as to all the world except as to those who might have equities in respect to it, and who should see fit in proper mode and by the observance of suitable conditions, to assert their equities. And one fundamental condition in every such case must be, that the party claiming the benefit of the purchase shall do what is equitable in respect to it.

Bulte acquired his title December 15, 1878. On the supposition, apparently, that his foreclosure had extinguished both the Insurance Company mortgage and the tax purchase, and that the tax deed was wholly inoperative as against him, Bulte brought ejectment, without tendering any repayment of the tax or of any part thereof, but leaving the whole to be borne by the Insurance Company as a total loss. Is there any equity in this? Can a principle of law which purports to be an equitable principle support his suit? Why should the Insurance Company be charged as trustee for Bulte, and required to bear the burden of the trust for a party who takes all the benefits and assumes no part of the obligations?

There is no answer to such questions. Sometimes a party by the force of circumstances is placed in a position where another may take the profit of his losses without being under obligation to make return; but the adjustment of legal rights on equitable principles is never meant to work such a result. The foreclosure of Bulte's mortgage no doubt would cut off that of the Insurance Company, but when he claims anything more than that, it is necessary to look about and see how and why he becomes entitled to it. The tax purchase was made before the sale on his foreclosure, but Moore, not the Insurance Company, was purchaser, and whatever the equities between him and the company, it cannot be pretended that Moore was obliged to resign to the company, and the company to take and pay for the tax title in order that Bulte

might obtain the benefit of it for nothing, and compel the company to add the cost to the loss of its mortgage. Moreover the purchase in Moore's hands was subject to redemption until October, 1878, by either Mack or Bulte, and it was only after time for redemption had expired that the sum paid at the tax sale could be deemed paid by the Insurance Company in satisfaction of the tax. Had redemption been made by any one, the effect upon the rights of parties respectively would be determined by the relation of the party redeeming to the title and the interests of others.

Had Bulte redeemed, the question now presented would not have arisen. He did not redeem his purchase on foreclosure and at the time his title became absolute the tax-title had become perfected. This title would relate back to the tax purchase in October, 1877, for all purposes of effecting substantial justice, but the fiction of relation will not be suffered to work a wrong: *Blackwood v. Brown* 29 Mich. 483; *Flint & Pere Marquette Railway Co. v. Gordon* 41 Mich. 420. If Bulte took the land discharged of the Insurance Company mortgage he had no shadow of claim to take it discharged of the tax purchase also. If the tax purchase attached itself to the Insurance Company mortgage as so much money, it would leave the mortgage, at least to that extent, unextinguished by the Bulte foreclosure, and if Bulte repudiated the tax purchase, and refused to recognize it as having been made for the common benefit, and made no offer to assume the expense, it would stand as a tax purchase against him. And at law, the tax deed giving a *prima facie* title, would constitute a perfect defense to the action of ejectment.

This disposes of the present suit. It seems proper to say, however, in view of all the facts, that there seems to be no difficulty in each party preserving all his equities. If Bulte claims that the tax purchase was made for the common protection of all interests in the estate, and proposes to accept all the burdens and responsibilities that flow from that fact, the Insurance Company cannot insist upon the tax-title as a title against him. But he will make the claim for the first

time after his mortgage has been foreclosed, and the claim itself will be an admission that when the Insurance Company took the tax purchase off the hands of Moore, the amount paid went to increase its mortgage, and left it then a living and unextinguished lien. If it was cut off, there was nothing to which to add the cost of the tax purchase, and moreover if it was cut off, the Insurance Company was no longer mortgagee, and there was no equity entitling Bulte to insist that the purchase of the tax-title was a payment of the tax. Bulte's position therefore necessitates the admission that the equity of redemption is still in the Insurance Company; for if this is denied, there is nothing to preclude the Insurance Company buying and holding a tax-title, as any mere stranger to the title might do. The inability to do so springs from the relation of mortgagee exclusively.

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

MARSTON, C. J. and GRAVES, J. concurred.

CAMPBELL, J. did not sit in this case.

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ENOS PUTMAN ET AL. v. TOWNSHIP OF FIFE LAKE.

Suit by township treasurer for unpaid tax—Certificate to tax-roll, etc.—Taxation of business stock.

Debt or *indebitatus assumpsit* is the proper form of the action which a township treasurer may bring in the name of the township, for the amount of taxes assessed against an individual: the counts of the declaration should briefly explain the subject matter of the debt, though a special declaration is not needed. By GRAVES, J.

Comp. L. § 1016 provides that where a personal tax is returned for nonpayment, the township treasurer may sue for it, and proof of the tax-roll and warrant shall *prima facie* attest the legality of the assess-

ment. *Held*, that a certificate that "the foregoing is a true transcript of the tax-roll * * and the warrant thereto attached," did not cover a return endorsed upon the transcript, and that the whole document should have been excluded on objection if the offer was made as a unit and embraced the tax-roll, warrant and return together. By GRAVES, J.

A township treasurer cannot sue for the amount of a tax after his warwarrant for collecting it has expired, and his warrant cannot be extended beyond the next annual session of the board of supervisors. By GRAVES, J.

Where the stock of a firm of lumber dealers is sold at their general place of business, but is sawed and shipped elsewhere, it is taxable at the general place of business, and not in the township where it is manufactured.

Error to Kent. Submitted Oct. 22. Decided Jan. 5.

ASSUMPSIT. Defendants bring error. Reversed.

Simonds & Fletcher and *M. J. Smiley* for plaintiffs in error. The tax-roll is a sufficient warrant for the collection of a tax: *Staley v. Columbus* 36 Mich. 38; *McCallum v. Bethany* 42 Mich. 457; the personal property of a firm is taxed at their actual place of business, and not where it may incidentally be stored: *Peabody v. County Commissioners* 10 Gray 97; *Palmer v. Kelleher* 111 Mass. 320; *Campbell v. Machias* 33 Me. 419; *Little v. Cambridge* 9 Cush. 298; *Lee v. Templeton* 6 Gray 579; *Loud v. Charlestown* 103 Mass. 278; *Huckins v. Boston* 4 Cush. 543.

E. S. Eggleston & Wesley W. Hyde for defendant in error. The personal property of a firm should be taxed where it is stored and delivered to purchasers: *Gray v. Kettell* 12 Mass. 160; *Little v. Greenleaf* 7 Mass. 236.

GRAVES, J. The township treasurer of Fife Lake brought this action to collect a tax assessed in 1876 on certain lumber owned by the firm of E. Putman & Company and manufactured in the township for them. The firm was composed of the plaintiffs in error and they all resided in Grand Rapids. The court below allowed the township to recover, and exceptions are urged.

First. It was objected that no evidence was admissible on the ground that the declaration was bad. In ruling against the objection the court committed no error.

The treasurer is allowed to sue in the name of the township and to "take all lawful ways and means provided by law for the collection of debts" (Comp. L. § 1014), and the theory of the proceeding is that an obligation is cast by statute on the party to pay a specific sum of money to the township officer, and that on the strength of this legal liability a proper action may be maintained. What is the proper action in the particular case? It is debt or *indebitatus assumpsit*, the count explaining briefly the subject-matter of the debt. A special declaration is not required; though one, if drawn according to the legal effect of the statutory provisions, might not be ruled out. Each count in this declaration is in substance an *indebitatus* count. There is some foreign matter which is merely surplusage. It should have been omitted. But the plaintiffs in error reserved objection until the case was before the jury; and were the defect more serious we should not be inclined to listen to the exceptions based upon them.

Second. The statute makes provision that when a tax having been assessed on personal property "shall be returned by any township treasurer for non-payment * * * it shall be lawful for such treasurer to sue, in the name of such township, the person or persons against whom such tax was assessed" (§ 1014), and that "the production of any tax-roll on the trial of any action * * * for a tax therein assessed may, upon proof that it is either the original tax-roll and warrant or a duly certified copy thereof, * * * be read and used in evidence; and, if it shall appear from said assessment roll that there is a tax therein assessed against the defendant * * * it shall be *prima facie* evidence of the legality and regularity of the assessment of the same; and the court before whom the cause may be pending shall proceed to render judgment against the defendant, unless he shall make it appear that he has paid such tax." § 1016.

Instead of offering in evidence the original roll, warrant

and return, the township produced what was claimed to be a copy of the same. The record states that the plaintiff offered in evidence what purported to be a certified copy of the assessment roll of Fife Lake for the year 1876, the tax-roll, the warrant of the supervisor to collect the same and the return of the township treasurer thereto. The offer was entire and embraced a copy of the roll, warrant and return as one piece of evidence, and was so understood evidently. No attempt was made to exhibit a copy of each proceeding separately.

The certificate relied on to show that the roll and warrant exhibited amounted to a "duly certified copy," was in these terms:

"COUNTY TREASURER'S OFFICE,
STATE OF MICHIGAN, GRAND TRAVERSE COUNTY.

"I, John T. Beadle, treasurer of said county, do hereby certify that the foregoing is a true transcript of the tax-roll of the township of Fife Lake for the year 1876, and the warrant thereto attached now on file in my office, and of the whole thereof, and that I have compared said transcript with said roll.

JOHN T. BEADLE, County Treasurer."

Preceding this original certificate of the county treasurer, and written on the paper containing the copy of the roll referred to, there appeared what purported to be a copy of the township treasurer's return to the roll. It was as follows:

"The following personal taxes are uncollected, and the persons against whose property the same were assessed had no personal property out of which I could collect the same:

Frank Johnson,	$5.06,	nothing to levy on.
Erastus Cornell,	1.07,	" " "
Putman & Co,	265.52,	lumber.
	$271.65	

Overseer sued for highway tax of Putman & Co., and prosecuting attorney refused to take the case in court.

C. C. BAILEY, Township Treasurer."

There was evidence that the paper to verify the copy of the roll and warrant, was itself genuine.

In reply to this offer of the copy of the roll, warrant and return the defendant's counsel made objection: *First*, that the county treasurer's certificate of the correctness of the copies was not sufficient, for the reason that it did not show that he compared the original warrant with the copy, and further because it did not refer at all to the township treasurer's return; *second*, that if what was offered as a certified copy of return by the township treasurer was well shown to be a true copy by the certificate of the county treasurer, still the return itself was not good as a legal preliminary to a suit for the tax, (1), because it bore no date and afforded no evidence that the act was in due time for the purpose of founding an action; and (2), because it did not show that the parties sued had no property out of which the tax could have been collected. The objections were set aside and the offer sustained.

It is now contended that by the form given to the objections they did not apply to the township treasurer's return, but only to the roll, and to that on the ground that the attesting certificate made no reference to it, and it is said that this objection was not a good one to the roll and warrant, because they were admissible whether a return by the township treasurer was indorsed or not.

This is not a correct view of the proceedings. As before intimated the offer of evidence was a unit. It tendered what was written as a document duly certified to be a true copy of an original in the office of the county treasurer and comprising a roll, warrant and township treasurer's return, and the general objection went to the whole offer, and in support of it certain grounds were specified. One was that the paper included in the offer as a copy of the township treasurer's return was not accredited at all. The court overruled the objection and sustained the entire offer. There seems to have been no misunderstanding. The counsel for the township might have changed the offer and reduced it to one only covering the roll and warrant. But it was not done. Under the course which was pursued it was the duty of the court to reject the whole offer if any of the included matters were at

the same time inadmissible under a proper objection and were so objected to.

The ruling is again defended on the claim that the effect of the county treasurer's certificate was to duly certify the township treasurer's return. The substance of the statement is that in contemplation of the provisions for collecting taxes by actions at law the return of the township treasurer is an integral part of the roll and warrant; and that where the county treasurer's certificate, without mentioning such return, sufficiently verifies certain copies of the roll and warrant as true, it thereby operates to verify as true a writing on the roll which purports to be a copy of the township treasurer's original return.

This position is not assented to. The statutes referred to do not regard the roll, warrant and return as consolidated into one document for the purpose of suits for taxes. They are spoken of as distinct legal entities. They arise in different ways and emanate from different sources. The return is referred to as a condition precedent to the right to sue for the tax. § 1014. It is expressly named and the provision that a duly certified copy of the roll and warrant may be read and used in evidence does not suggest that the return is considered merged and open to proof by copy under a certificate which in terms only attests that the copies of the roll and warrant are true ones.

Assuming but not deciding that the township treasurer's return may be satisfactorily proved in such a case by means of a copy certified as correct by the county treasurer, yet the fact that the copy tendered is actually so certified ought not to be left equivocal. However reasonable and convenient it may be to prove such documents by copies satisfactorily verified as correct, it is neither safe nor agreeable to law to consider the verifying certificate as applying to substantive and distinct doings that are not clearly enough within its apparent bearing to fairly exclude uncertainty. In sustaining the offer in question the court erred.

The objections to the substance of the return itself require no special attention. It is not certain that evidence might

not be adduced to fix the date of the return with legal accuracy if any occasion for it should appear, and it is not to be assumed that inability to collect the tax under the supervisor's warrant during the time allowed before action could not be well shown.

Third. The tax roll on being delivered to the township treasurer for collection is accompanied by the supervisor's warrant returnable on the first day of February. This warrant bears some analogy to an execution, and the power of the township treasurer to collect the taxes is confined to such time as the warrant is allowed to run.

The board of supervisors may prolong the time originally given by an extension of two months, and in case of neglect by the board to grant such extension any township board or common council of a city in the county may extend the time for collection for one month. § 1004. This is the general regulation.

We may next notice provisions for special cases. Whenever the treasurer "shall not *be able to collect* any tax on personal property on account of the absence of the person so taxed, or for any other cause, the county treasurer, if required, shall issue a new *warrant* to the treasurer of the township *for such tax*, and it shall be the duty of the township treasurer to renew his official bond; and thereupon the said warrant shall be and remain in force, for the purposes of *such collection*, until the next annual meeting of the board of supervisors, unless the tax is *sooner collected;* and the said township treasurer shall charge fifteen per cent. *interest on all such taxes, from the first day of February until the day of collection:* provided, said bond shall not be renewed unless the tax uncollected shall exceed five dollars." § 1013.

The next section provides that in case a tax assessed on personal property shall be returned by a township treasurer for non-payment, it shall be lawful for him to sue in the township name the person or persons against whom the tax was assessed, "and to have, use, and take all lawful ways and means provided by law for the collection of debts, to *enforce the payment of any such tax.*"

When the various provisions are compared and the scheme is understood it will be seen that the power of the township treasurer to take steps to gather or collect taxes is limited. His authority ceases at the expiration of the first warrant, whether that be on the first of February or one or two months later in virtue of an extension, unless indeed he is within § 1013 and has not been able to collect some tax on personal property and obtains a new warrant therefor, and, if the amount exceeds $5, renews his official bond; in which case he becomes empowered to enforce payment of the delinquent tax. Unless his authority is kept alive or renewed by a new warrant as provided in this section, the circumstance that he is township treasurer does not enable him to collect a tax after the expiration of the first warrant.

If without a warrant he is without the requisite legal com mission to effect collection. He is in no better plight than a constable without process. His power as a collecting officer is at end. He can neither collect by making a distress nor by bringing an action. The law foresees that the tax left uncollected may be a large sum and it does not leave the treasurer to act on his own responsibility. It deems it necessary for the public safety to keep a check on his power in the matter of collecting, and to exact suitable security for the tax when collected. Hence the arrangement for a new warrant and new security. That the method is by action and not by distress makes no difference. The township is put to more risk where the treasurer proceeds by action than where he proceeds by distress, and the person assessed incurs the chance of much more expense, and if collection is effected the need of security is the same.

The conclusion is that the treasurer in this case had no authority to put the court in motion and institute this suit.

There was no showing of a new warrant. Moreover the tax was assessed in 1876 and the action was only commenced in August, 1879. The law gives no power to prolong the township treasurer's authority to collect a tax assessed on personal property beyond the annual session of the board of supervisors for the year next succeeding that in which the

tax is assessed. Hence the treasurer of Fife Lake in 1879 could not have had any authority to sue for this tax which was assessed three years before. The rule of evidence in § 1016 has no bearing on this question. That relates to "the legality and regularity of the assessment," and not to the competency of a township treasurer to sue for a tax at any distance of time subsequent to its assessment. The plaintiff in error requested the court to instruct the jury that under the testimony the township was not authorized to bring the suit, and could not recover. The request should have been given.

Fourth. The evidence was uncontradicted that the plaintiffs in error were residents of Grand Rapids in May, 1876. The lumber on which the tax in question was imposed was at Fife Lake, and it should have been assessed at Grand Rapids and not elsewhere unless the circumstances presented a case, under §§ 974 and 978, or under one of them, for its assessment at Fife Lake. The former section provides that "all goods, wares and merchandise, or stock in trade, including stock employed in the business of the mechanic arts, in any township other than where the owners reside, shall be taxed in the township where the same may be, if the owners hire or occupy a store, mill, shop or warehouse therein, and shall not be taxable where the owners reside." Subdivision 1. Section 978 reads as follows: "Partners in mercantile or other business, whether residing in the same or different townships, may be jointly taxed under the partnership name, in the township where their business is carried on, for all the personal property employed in such business; and, if they have places of business in two or more townships, they shall be taxed in those townships for the proportion of property employed in such townships respectively; and, in case of being so jointly taxed, each partner shall be liable for the whole tax."

The judge in charging the jury assumed that there was evidence they might consider that the plaintiff in error on the second Monday of May, 1876, had a place of business within the meaning of these provisions, at a mill yard at Fife Lake where the lumber was, and this is alleged as error. The

point is well taken. The evidence was that the plaintiff in error had a contract with certain mill owners at Fife Lake to saw lumber for them and that they generally kept a man there to attend to piling the lumber and to see to its shipment as directed by the owners at Grand Rapids, and that this man, on one or two occasions and without any authority, sold a few feet at the yard. It further appeared that the quantity cut was very large and that pursuant to orders and directions forwarded by plaintiffs in error from their place of business at Grand Rapids it was shipped from time to time to Southern Michigan and to several states south and east. The bias of the evidence could not be mistaken. It had no tendency to make out the case required by the statute.

In making the property taxable away from the owner's residence, as belonging to an independent enterprise having a local center, the law refers to an actual business seat or establishment capable of being contemplated as a local concern possessing an identity of its own. It was not intended to include the numberless activities and operations constantly going on in all directions, and which lack this local, fixed and individual character. To have done so would have resulted in unparalleled confusion.

It is unnecessary to go further. The case might have been decided on a single point and in a few words. But as several questions were raised, not only novel but having a public bearing of some importance, the course usually pursued has been departed from, and questions not necessary to the disposition of the case have been dwelt upon.

Whatever fate may attend the suit hereafter, we can do nothing else than reverse the judgment with costs, and grant a new trial.

CAMPBELL, J. Without definitely expressing an opinion upon the other main questions in the cause, I am of opinion that upon the facts as shown the parties were not liable to taxation in the township where they were assessed.

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

ANN ACKERMAN v. JOHN ACKERMAN.

[MEMORANDUM.]

Appeal from Genesee. Submitted October 26, 1880. Decided January 5, 1881.

DIVORCE. Bill dismissed. Complainant appeals. Affirmed.

Newton & Howard for complainant.

E. H. Thompson for defendant.

MARSTON, C. J. The decree of the court below dismissing the bill of complaint was unquestionably correct. The testimony of complainant's witnesses, standing alone, would fall far short of establishing a case sufficient to justify a court in severing the marriage relation between these parties. The testimony we need not discuss. Much of it bears no relation to the issue and is disgusting in character.

The decree must be affirmed.

The other Justices concurred.

THE AMERICAN NATIONAL BANK v. JOSEPH BUSHEY.

Suit for deposits—Evidence—Res inter alios—Judicial notice of usages in banking business—Authority to sign checks—Burden of impeaching an account stated.

A bank was sued by a depositor for moneys paid out on checks signed in his name by other persons: *Held*, that plaintiff's testimony that when sick he signed checks himself, and that he never authorized his daughter and others who attended to writing his letters, to do so, had no tendency to show that he never gave such authority to the signer of the checks, and was inadmissible for that purpose.

In an action by a depositor against a bank for moneys paid out on checks signed in his name by another person direct evidence of the incidents of another suit brought by the plaintiff against that person but to

which the bank had not been a party, was inadmissible to affect this litigation.

Judicial notice must be taken of the ordinary rules and necessities of banking business.

Banks have a right to expect their depositors to know and conform to the ordinary usages of business, and they may rely to a reasonable extent on the presumption that their customers deal with them accordingly.

A depositor, long after he had supposed he had withdrawn all his deposits, sued the bank for a balance which the bank claimed he had drawn, and part of which had been paid out on checks signed by another person in his name. But it appeared that the depositor had been in the habit of checking out the whole of a deposit shortly after making it, and had neglected to present his bank book for balancing, or to withdraw his checks. *Held*, that it was misleading to treat this as bearing only on the probabilities as to whether the third person who had signed the checks would have risked detection by acting without authority, and not upon the probabilities as to whether the depositor in checking out had overlooked comparatively large sums and failed to find it out, or whether he had authorized another to sign.

A depositor who had been in the habit of checking out all his money shortly after he deposited it, was notified of a balance long after he supposed he had exhausted his account, and immediately withdrew it. He made no inquiry or objection but sued the bank, nearly two years afterwards, for an alleged balance including sums which had been paid out on checks signed by another in his name. The trial court charged that the bank had the burden of showing that these checks had been signed by authority. *Held*, that the depositor's course in withdrawing the balance on notification of it, was a strong case of acquiescing in an account stated, which required him to bring himself within some rule that would allow him to impeach it, and that he had the burden of impeaching it.

Error to Superior Court of Detroit. Submitted November 9, 1880. Decided January 5, 1881.

Assumpsit. Defendant brings error. Reversed.

E. Y. Swift and *F. A. Baker* for plaintiff in error.

Don. M. Dickinson and *Griffin & Dickinson* for defendant in error.

CAMPBELL, J. Bushey sued the American National Bank of Detroit to recover a balance of deposits which he claimed was never checked out. It appears without dispute that he began to deposit with this bank in June, 1868, but no bank-book is produced running back of April, 1870, and no checks were produced by him prior to that month. The bank book indicates from its leaves and a printed heading that it could not have contained any earlier entries. This is manifest beyond a doubt. The bank books show a previous closing of accounts and return of checks, which Bushey disputes. The principal importance of this testimony is that it is claimed these old checks would show that Bushey allowed one Campau to sign for him. Beyond this these matters are of secondary importance.

The course of the accounts shows that in April, 1870, Bushey deposited $325, which was all drawn out within three weeks. On December 30, 1870, he made his next deposit of $1000. This was all checked out by the 20th of February, 1871. One of the checks of $300 is now disputed as forged. He made his next deposit in August 1871, of $290, which he drew out in four days. He made no other deposit for about a year. In August, 1872, he deposited $1300, and on September 25th, deposited $700. All of this but $50 he drew out by the seventh of October. On the 18th of October he deposited $900 and drew it out in the course of three weeks.

At this period he stopped dealing with the bank and made no further deposits or checks.

Three years thereafter, in November 1875, he was notified by the bank that he had a balance of $50 on deposit not drawn out. He at once drew this out and had no further communication with the bank until sometime in July, 1877, when, for some reason that is not very clearly explained, but which may have arisen from a litigation then pending with one Charles F. Campau, he went to the bank and got his checks included in the entries in the bank book from April, 1870, returned, and the book written up.

Two of the returned checks were signed in his name in

the handwriting of Campau, and these Bushey asserts to have been forgeries. Of the remainder some were filled out by Campau and some by other persons, but all were signed by a signature meant to represent the name of Bushey and appended by himself. He could not write, but had learned —at some period which is disputed—to make this signature. There was some testimony tending to prove that he learned to make it about the time of his banking business; other testimony puts it earlier. There was also testimony that Campau had signed checks for him on other occasions. Bushey denied this, and the absence of the old checks became important on this inquiry.

The two checks which were disputed were one of $300, January 7, 1871, and one for $50, September 7, 1872. Each of these was at a period when the bank books show the accounts were drawn down in such a way as to balance by allowing them as genuine, and the larger check was followed by two fully-balanced transactions, succeeded by long periods when no new deposits were made; and when such were made they were speedily drawn out. The only instance during the entire dealings when anything remained on credit as not drawn out soon after depositing was the balance of $50, which Bushey drew out in November, 1875, when notified it stood to his credit.

In this interval between the last deposit and the return of the checks in July, 1877, there were changes in the bank tellers, but three were examined who had to do with the business. Their testimony tended to show the improbability of paying the two checks in question without Bushey's authority. Upon the question whether Campau had been authorized or allowed to sign there was a conflict. Bushey's testimony was the evidence on which the jury must have found in his favor. On the trial Bushey was allowed, for the purpose, as was claimed, of corroborating his denial of Campau's authority, to show that when sick he signed checks himself while in bed, and also to show that his daughter and others attended to writing his letters, but that, although she could write, he never authorized her to sign checks.

This was erroneous. It had no tendency whatever to show that he never authorized Campau to do so. A bank would not pay checks without some knowledge or supposed knowledge of their authenticity, and it could get no such knowledge if checks were signed by any one who might happen to be present, and confided in, at any particular time. A man who cannot write and who draws checks, must confide in somebody for some purposes, and it must depend on testimony to be established what persons are trusted and to what extent. Authority or the want of it as to one throws no light on dealings with others.

We do not think it was competent to introduce direct evidence concerning what took place at the trial of a suit on behalf of plaintiff below against Campau, as that controversy can have no bearing on the merits of this. There may no doubt be occasion at times to cross-examine a witness concerning his own conduct or statements on other occasions, but the existence or nature of that suit, to which the bank was not a party, could not be allowed to affect this. There was some testimony concerning the loss of a stub-book, in which Bushey was allowed to go beyond this rule. We think when he had stated that he had been unable after search to find the book, he could not be allowed on direct examination to bring into this case insinuations and statements about it that could only be understood by getting before the jury in some way the character of that contest, as affecting this. The bearing of that might have been material against him if Bushey had sued Campau for the money covered by these checks. That would show the checks legally drawn. But Bushey did not undertake to prove this, and plaintiff in error did not.

There are several points in the record which do not strike us as very important in themselves, and which may not come up again. There is, we think, a serious difficulty in the way in which the case went to the jury.

The court put the case to the jury upon the distinct grounds that there must be proof of either original authority or ratification of the execution of the checks, in order to

defeat plaintiff's right of recovery, and that the defendants below had the burden of proof to make out this authority by a preponderance of testimony. In referring to the testimony on this authority the facts concerning the deposits and their speedy withdrawal were treated as only bearing on the likelihood of Campau's risking detection; and the balancing of the account in November, 1875, was entirely disregarded. As the charge referred somewhat particularly to the various facts for and against ratification these matters became important in more than one light.

We are bound to take knowledge of the ordinary rules and necessities of business, and to deal with controversies in view of these. Banks have a right to expect their depositors to know these usages, and to conform to them. And they have a right to rely to a reasonable extent on the presumption that their customers are thus dealing with them.

We think that the fact that Bushey on so many different occasions drew checks which exhausted his apparent balances precisely, and that he did not quarterly or otherwise present his book for balancing, or withdraw his checks, was in itself very strong evidence that the account was correct, and should have been so treated. The intrinsic improbability that a small depositor could in a few days forget nearly a third of his single deposits and draw out precisely the remainder, and suppose it exhausted, cannot be separated in this instance from the subsequent failure to find it out, and the neglect to make reasonable inquiry into the state of his bank debits and credits. To leave this all out of the category of evidence of authority, and treat it merely as bearing on the likelihood that Campau would have dared to run risks of discovery, was in our opinion misleading. We are not called upon to consider to what extent, if any, such conduct would operate as an estoppel, because the subsequent dealings in November, 1875 make this unimportant.

When Bushey was notified by the bank that on his account there was a balance in his favor of $50, his attention was necessarily called to the entire account, and it became his duty to examine it. He was not told, and there was no occa-

sion on the part of the bank to tell him, how this balance arose. The bank had a right to assume that he kept accounts himself and had the means of tracing out the items, and that if he had not full *data* he would resort to the bank to get them. He made no inquiry or objection, and at once acted on the notification and drew out the admitted balance, and for nearly two years never interfered further. There could not very well be a stronger case of acquiescing in an account stated.

Without now considering whether under such circumstances of acquiescence and delay the estoppel would be absolute, there is no doubt of its effect on the burden of proof.

In every case, in a very important sense, the plaintiff always has the burden of establishing his cause of action by a preponderance of all the evidence in the cause. In a more limited sense each party has a right to rest on such presumptions as have been raised in his favor until overthrown. But there is no question as to the presumption in favor of an account stated and acted upon by both parties. If one does not choose to look over the items it can make no difference. When, as in this case, the depositor ought to know from his own accounts and vouchers the precise state of things, his concurrence merely assumes a more convincing form to the other party. The impossibility that clerks and tellers in the management of business involving such a multitude of small details could remember individual instances, is a very strong reason for requiring diligence in the single depositor to take no misleading step.

The court should have held this account stated as such evidence as called upon plaintiff to bring himself within some rule that would allow him to impeach it, and that the burden was on him to impeach it.

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

The other Justices concurred.

Sarah A. Holmes v. Egbert Rice and Burr Dayton.

Infant's incapacity to contract no defence for third persons.

The statutory recognition of an infant's incapacity to make a contract is for the infant's protection and cannot be pleaded by a stranger, and especially by a wrong-doer, to protect himself.

An infant's contract is not void but is merely voidable, and may be avoided or ratified by the infant at his option; it is valid as to third parties who are strangers to it and do not claim under either party.

Error to Ingham. Submitted Nov. 10. Decided Jan. 5.

Trover by Sarah A. Holmes, against Rice and Dayton for the conversion of a fanning mill. Defendants pleaded in justification a judgment in favor of Rice against Lorenzo Holmes, the plaintiff's husband, and a seizure of the property by Dayton, as constable, to satisfy the execution. Plaintiff showed that the mill belonged to her minor daughter, Ella M. Parks, whose guardian she was, and who had executed to her a bill of sale of it, before suit was brought, and had also assigned her right of action. The bill of sale and assignment were excluded from evidence on objection that being an infant and under plaintiff's guardianship she could not convey a title upon which action could be maintained. Plaintiff brings error. Reversed.

M. V. & R. A. Montgomery for plaintiff in error.

J. C. Shields and *M. M. Atwood* for defendants in error.

Marston, C. J. The law in recognizing the incapacity of infants to enter into certain contracts and declaring such contracts voidable does so for the infant's protection. Their contracts are not void but voidable, and it is for the infant to avoid the contract or ratify it, and not within the power of a stranger—certainly not of a wrong-doer—to set up the infant's incapacity to contract as a protection to himself. The contract, though voidable at the option of the infant, is

valid as to third parties who are strangers to both parties to the contract, and not claiming under either.

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

The other Justices concurred.

45	143
105	370
45	143
104	425
45	143
106	386
45	143
113	549
45	143
123	325
45	143
124	2
45	143
126	505
45	143
f151	1562

LEE C. HUTCHINSON v. AMASA DUBOIS.

Execution for individual's debt not leviable on joint property—Replevin by single partner for firm property.

An execution for an individual debt cannot be levied on specific articles of property in which defendant's only interest is that of a partner or joint owner.

One partner has presumptively an equal interest with another in the partnership property and an equal right to share in it when the partnership is dissolved; it is not, however, an interest in specific articles, but in the surplus that remains after the firm debts are paid, and as he has no separate property in the assets of the firm, his share is not separable from that of his partner, and is subject to the final adjustment of accounts between the partners themselves, when it may amount to little or nothing.

If an execution against a partner for his individual debt can be levied at all on partnership property, it can be levied only on his interest in it, subject to all partnership debts and to the final accounting between the partners.

A partner is not merely part owner of the partnership property; he has an entire as well as a joint interest in the whole of it, and is in some sense a trustee of the partnership assets as a trust fund for the payment of creditors. One partner is, therefore, entitled to bring replevin for the whole property if it is seized on execution for the individual debt of another.

A jury cannot guess at a fact if the evidence furnishes no basis for a judgment thereon.

Error to Ingham. Submitted Nov. 10. Decided Jan. 5.

REPLEVIN. Defendant brings error. Affirmed.

M. V. & R. A. Montgomery for plaintiff in error.

Smith & Smith and *J. C. Shields* for defendant in error.

COOLEY, J. In the circuit court, where the positions of the parties were reversed, Dubois had brought replevin for a number of horses, carriages and other property constituting a livery stock in Williamston, and he gave evidence tending to show that he was sole owner of all the property at the time the suit was commenced; that a few days previously the defendant seized it and took it out of his possession and removed it from the barn and premises where it had constituted the stock of a livery for some three years, to another barn some thirty rods away, on another street, and had and exercised exclusive control over it, and refused to deliver it to plaintiff on demand.

The defendant justified as deputy sheriff under a judgment and execution against one Van Etten, by virtue of which he had made a levy upon the property, and he gave evidence tending to show that Van Etten "had an interest in such property as a partner or part owner with the plaintiff." And the evidence being closed the defendant requested the court to charge the jury that "if the defendant in the execution, Van Etten, owned any undivided portion of the property replevied when the execution was levied, the verdict must be for the defendant." The court declined this request, and instructed the jury that the plaintiff, if sole owner, was entitled to recover, and that he was also entitled to recover even though Van Etten had an interest in the property, at the time of the levy, as a partner or joint owner with the plaintiff. Under this instruction the plaintiff had judgment.

It is to be observed that defendant did not give evidence tending to show that Van Etten was tenant in common with the plaintiff in the livery stock, nor evidence tending to show that he was partner with the plaintiff. He aimed to show that he was one or the other, but without distinguishing which, and the jury had no basis for determining that Van Etten was tenant in common rather than partner, or partner rather than tenant in common. At most the jury could only

say he had an interest of some sort, if they believed the defendant's evidence; but it was not their province to guess what the interest was when the evidence afforded no basis for a judgment. The defendant, therefore, has no ground of complaint of the instructions unless it shall appear that whether Van Etten's interest was that of tenant in common or of partner a levy might be made and possession taken as was done in this case.

There is no doubt whatever that if Van Etten had an interest it was subject to his debts. The question is, how it may be reached. If he was a partner, he was presumptively an equal partner with Dubois, and had an equal right to share with him in the property when the partnership should be dissolved. But his interest would not be an interest in the specific articles belonging to the firm, but only an interest in the surplus that should remain after the debts of the firm were paid. *Hankey v. Garratt* 1 Ves. Jr. 236; *Taylor v. Fields* 4 Ves. 396; *Skipp v. Harwood* 2 Swanst. 586. Meantime his share is not separable from the share of his copartner, for he has no separate property in the assets of the firm. *Newman v. Bean* 21 N. H. 93, 98. His share is also subject to the final adjustment of accounts between the partners themselves. *Sirrine v. Briggs* 31 Mich. 443. And it may appear on that accounting that his interest is insignificant, or is nothing.

If any levy of an execution upon such an interest can be made, it must be so made and enforced as to protect all rights of others. One man's interest must not be sacrificed because another who is associated with him in business happens to be in debt. Specific chattels must not be taken on the execution, because the specific chattels are owned by the firm and not by either of the partners. *Gibson v. Stevens* 7 N. H. 352; *Morrison v. Blodgett* 8 N. H. 238; *Treadwell v. Brown* 43 N. H. 290; *Brewster v. Hammet* 4 Conn. 540; *Matter of Smith* 16 Johns. 102; *Wiles v. Maddox* 26 Mo. 77. The utmost extent of the officer's right—if he can levy at all—must be, to seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the

final accounting. *Church v. Knox* 2 Conn. 514; *Tappan v. Blaisdell* 5 N. H. 193; *Sirrine v. Briggs* 31 Mich. 443; *Reinheimer v. Hemingway* 35 Penn. St. 432; *Knerr v. Hoffman* 65 Penn. St. 126. Whether in such a case the accounting should not be had before a sale, or whether on the other hand the officer might at once proceed to sell that which he has levied upon, namely, the undivided, unsettled and undetermined interest of the judgment debtor, is a question that has troubled many courts before this case arose, but which is not involved in this case and will not be discussed until a record is before us presenting it, and counsel have had an opportunity to be heard upon it.

The sheriff in this case seized and took possession of specific articles and removed them altogether from plaintiff's control. It seems probable, though the evidence does not distinctly show, that he took possession of the whole livery stock, and broke up the plaintiff's business. But whether he took the whole or only part is immaterial; in either case he seized specific articles when he had a right to seize an undivided and indefinite interest only. He did this also in total disregard of the plaintiff's rights; for whereas the judgment debtor as partner could only have had joint possession with the plaintiff, the officer, levying on his right, assumed to take exclusive possession and remove the property to another place. As was said by Mr. Justice Campbell in *Haynes v. Knowles* 36 Mich. 407, 410: "The partner not sued cannot on any principle of justice be placed in any worse condition by a creditor of his partner than he could have been by his own partner." At most for the purposes of his writ the officer only takes the debtor's place, and seizes an interest that can only be measured by final account. *Vandike v. Rosskam* 65 Penn. St. 330.

But it is said that if this be admitted the action must still fail, for the plaintiff is but part owner, and only one having ownership of the whole may bring replevin. The mistake here is in supposing a partner to be merely a part owner. Each partner "has an entire as well as joint interest in the whole of the joint property. A levy, then, to affect the

interest of a partner, cannot touch a specific proportion of the goods, nor the whole, because others have property in every part, as well as the whole, coupled with a right, resting in contract, to use them for the purposes for which the partnership was instituted." *Deal v. Bogue* 20 Penn. St. 228, 233. And see *Atkins v. Saxton* 77 N. Y. 195. Moreover the partnership assets constitute a trust fund for the payment of creditors, and each partner is in a sense trustee of the fund until the creditors themselves intervene. If Van Etten is a partner, it might perhaps have been proper to join him as plaintiff in the case, but Dubois does not concede that Van Etten has any interest whatever, and therefore could not join him. There is no plea of non-joinder, and the plaintiff, if he recovers, and if in fact he is a partner, will hold the property as he did before, in trust for the parties whose claims are paramount to those of the creditors of either partner. *Newman v. Bean* 21 N. H. 98.

How far the case would be different if Dubois and Van Etten were tenants in common is immaterial.

The judgment must be affirmed with costs.

The other Justices concurred.

JOHN C. GALE v. JAMES R. HAMMOND, EMLINE GOULD AND LUMAN A. FOWLER.

Mortgagee cannot file bill in aid of execution on the mortgaged premises.

The grantor of land gave a mortgage on it, after the deed had been recorded, to a third person whose assignee obtained a judgment against him for the debt secured thereby, and while insisting on the validity of the mortgage, filed a bill against the grantee in aid of his execution, claiming that part of the debt antedated the deed. *Held*, that under Compiled Laws, §4667, which forbids the sale of a mortgager's equity of redemption, the bill would not lie.

Appeal from Ingham. Submitted November 10. Decided January 5.

BILL in aid of execution. Dismissed. Complainant appeals. Dismissal affirmed.

M. V. & R. A. Montgomery, for complainant.

Henry A. Shaw, for defendants.

CAMPBELL, J. Gale filed his bill in aid of an execution levied July 9, 1879, on a judgment against Hammond upon certain lands which he claims were conveyed by Hammond to defendant Gould in October, 1868, the deed being recorded on the 25th of October, 1868; and complainant alleges it was made to defraud the creditors. Gale's cause of action in the suit in which he obtained judgment was a bond dated November 30, 1869, given by defendant Hammond to Joseph Gale, who assigned the same to complainant October 3, 1872. This bond was secured by mortgage on the land levied on. The bill claims that the bond included an indebtedness which existed before the deed from Hammond to Mrs. Gould. Fowler is claimed to have no superior equities. The bond was to secure $1000 in two years from November 30, 1869.

Among other defences it was set out and appeared that in 1876 Gale filed a bill in chancery in aid of a title obtained by statutory foreclosure under this same mortgage, in which he attacked the Gould deed for the same fraud, and in which it was finally decided by this court that no fraud was made out as against complainant. The case is reported as *Gale v. Gould* 40 Mich. 515.

It was suggested to counsel on the argument that under section 4667 of the Compiled Laws it is provided that when a judgment is recovered for a debt secured by a mortgage of real estate, "it shall not be lawful for the sheriff or other officer to sell the equity of redemption of the mortgagor, his heirs or assigns, in such estate, by virtue of any execution upon such judgment." It was claimed, however, that there

were matters in the record which possibly would obviate this difficulty.

We do not discover any ground on which to raise any distinction between this and any other cases. The levy is claimed to be on the land mortgaged and the mortgage has always been insisted on as valid and it is sought to be enforced on the ground that so far as complainant is concerned no valid transfer of the land was ever made to Mrs. Gould. This appears to be a fatal objection to the bill. We do not see how we are at liberty to limit the effect of the statutory prohibition when the mortgage is relied upon, nor do we discover any distinction between cases of fraud and others.

Upon a careful inspection of the record, there seem to be difficulties in reaching the question of fraud, even if it could be considered under the statute. Not only has the controversy been already passed upon and adjudicated, but it appears distinctly that the conveyance to Mrs. Gould was recorded a year before complainant's assignor took his mortgage. It also appeared that he had actual notice of the state of the title, and paid up a mortgage made by Mrs. Gould to one Leonard, and this payment was a part of the consideration of the mortgage now in controversy. While there is reason to believe the Gould transfer was understood by all parties to be merely colorable, Joseph Gale knew that it stood as an absolute title, and did not see fit to protect himself by getting Mrs. Gould's transfer or concurrence in any proper form. He may have been under some mistake of law, but he is quite as likely to have trusted that all would be made right. There is nothing indicating that any deceit was practiced on him.

There is no good cause for granting relief, and the bill was properly dismissed. The decree must be affirmed with costs.

The other Justices concurred.

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121 240

William Lampson v. Drain Commissioner of Ingham County.

Proceedings to lay out ditch—Notice of application for appointment of commissioners.

Proceedings to lay out a drain were quashed because the record did not show that notice had been given that application would be made to the probate judge for the appointment of the commissioners to determine the necessity for constructing the ditch and to assess the consequent damages.

Certiorari to bring up proceedings for laying out a ditch across the premises of the petitioner, under the County Drain Law, Comp. L. ch. 47. Submitted November 10, 1880. Decided January 5, 1881.

J. C. Shields for plaintiff in certiorari.

Marston, C. J. The record does not show any notice whatever that application would be made to the probate judge for the appointment of commissioners, and they having been appointed and acted without such notice having been given or waived, the proceedings cannot be sustained, but must be quashed, with costs.

The other Justices concurred.

Eva E. Palmer v. Levant D. Palmer.

Divorce—Extreme cruelty—Execution for temporary alimony not issuable.

A wife went to the house of her parents to be confined, and did so against the objection of her husband who, however, was living with his own parents, and whose household arrangements were not therefore interfered with. When she was confined she sent word to him, but he did not go to see her at first, and when he did go in reply to a

reproachful letter from her, he told her he had received a letter from her full of lies, and had come to warn her that if she was not back before the issue of the next week's paper he should advertise her; he also intimated that the child was her father's and not his own, saying that if it had been, it would have been born at home, but now it had been delivered where it belonged. *Held*, a case of extreme and wanton cruelty entitling the wife to a divorce.

Execution cannot be awarded under Act 44 of 1877, to enforce the collection of temporary alimony.

Appeal from Ingham. Submitted Nov. 10. Decided Jan. 5.

DIVORCE. Defendant appeals. Affirmed.

H. P. Henderson for complainant. The facts are within the definition of extreme cruelty. *Cooper v. Cooper* 17 Mich. 205; *Goodman v. Goodman* 26 Mich. 417; *Bennett v. Bennett* 24 Mich. 482.

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

COOLEY, J. This is a bill for divorce on the ground of extreme cruelty. The parties were married in October, 1874. In October, 1875, a child was born to them, and in 1877 complainant was pregnant a second time, and went to the house of her parents a few miles away to remain until after confinement. The husband seems to have objected to this, but nevertheless went with her, and then returned to his own residence. When the second child was born she sent him word, but he did not come to see her, and in a few days she sent her father over to ascertain why he did not come. The father testifies that "he said we had undertaken to run his business, and we might continue to do so: he should not run after her: she might go to the devil." This was repeated, and as the father was going away he said if his wife was not back as soon as she could come he should commence legal proceedings. When this was reported to complainant she wrote him a reproachful letter, and he then went to see her. According to the evidence he commenced the conversation by saying he had just got a letter from her full of lies, and he had come to warn her that if she was not

back before the next week's paper was issued he should advertise her. He then turned to go away and she called him back, but this only made matters worse, for before he left he by indirection charged her with incest with her father, intimated that the child just born was not his own, and said that if it had been it would have been born at home, but now it had been delivered where it belonged. At this time the wife was still confined to the bed. He actually went then, as he had threatened, and advertised her in the next issue of a local paper as having deserted him.

In the evidence produced nothing appears to justify or excuse the defendant's conduct, unless it is to be found in the wife's desire to be confined at her mother's notwithstanding his wish that she should remain and be confined at home. They were then living with his parents, and there was nothing unnatural or unreasonable in her desire to be with and have the assistance of her own mother. Few men under like circumstances, it is to be hoped, would have made objections. It put him to little or no trouble, and to no cost, and it did not interfere with ordinary household arrangements. His failure to visit his wife immediately on receiving notice of her confinement stands wholly unexcused, and his conduct when he did so fully justifies us in holding that it makes out a case of extreme and wanton cruelty, and would entitle the complainant to a divorce without any aid from the subsequent insult in the newspaper. If she was a decent and self-respecting woman—and there is no evidence to the contrary—she could not with comfort cohabit as wife with the defendant afterwards. *Briggs v. Briggs* 20 Mich. 34. The decree granting a divorce must be affirmed.

An order for temporary alimony was made before final decree, and an execution issued for its collection. This is supposed to be authorized by Public Acts 1877, p. 32, but that statute applies to permanent alimony only. The order, so far as it awards execution, will therefore be reversed. The circuit court reserved the question of permanent alimony, and the custody of the children, and the record will be remanded that they may be dealt with.

The other Justices concurred.

45 153
82 388
45 153
88 10
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91 417
45 153
94 385
45 153
d139 s162

CHARLES E. DAYTON, impleaded with JOHN B. HOOKER, v. HIRAM B. FARGO.

Right of action for deceit not assignable.

A right of action either at law or in equity is not assignable if it does not, directly or indirectly, involve a right of property.

In Michigan equity will not enforce an assignee's claim of a right to sue for a fraud to his assignor if that is the sole ground of the action.

A right of action in trespass on the case for damages from deceit is not assignable.

A new trial is not granted on reversal where the count of the delaration on which the verdict rests presents no cause of action, even though the plaintiff might have recovered on some other count.

Error to Ingham. Submitted Nov. 10. Decided Jan. 5.

CASE and TROVER. Defendant brings error. Reversed.

M. V. & R. A. Montgomery for plaintiff in error.

J. C. Shields and *H. P. Henderson* for defendant in error.

CAMPBELL, J. Fargo, as assignee of Henry Hart, sued Dayton jointly with one John B. Hooker, under a declaration containing two counts—one in case for obtaining property under false pretenses, and the other in trover for the conversion of the same property. No process was served upon Hooker and it does not appear from the printed record that there was any return of not found.

The jury found a verdict for Fargo upon the first count and not upon the second. It is necessary therefore to examine into the nature of the count on which recovery was had, in order to see the bearing of some of the errors assigned.

It sets forth a bargain between Hart and both defendants, whereby Hart was to sell certain lumber to them and take in payment a note of Hooker alone. It avers that defendants caused Hart to sell the lumber by fraudulently repre-

senting that the note was good and Hooker responsible, and that Hart, confiding in the representations, delivered the lumber and took the note in payment, and that Hooker was worthless and the note valueless. It then avers an assignment of all claim for the price and value of the lumber, and of the cause of action growing out of the transaction, and that by reason of the premises plaintiff has been deprived of the use and value of the property, and that "defendants on the said sale falsely and fraudulently deceived the said Henry Hart, as aforesaid, out of the said lumber," etc.

The only effect which can be given to the count is that it is an action on the case for deceit, to recover damages for the fraudulent representations whereby Hart was induced to part with his property without any valuable consideration.

It is claimed that this cause of action was not assignable.

The general doctrine both at law and in equity has always been that nothing is assignable that does not directly or indirectly involve a right of property. It has been held repeatedly in this state that equity will not enforce the demands of an assignee of a right to sue for fraud, when the cause of action is confined to that. *Carroll v. Potter* Walk. Ch. 355; *Morris v. Morris* 5 Mich. 171; *Brush v. Sweet* 38 Mich. 574; *Dickinson v. Seaver* 44 Mich. 624. In *Final v. Backus* 18 Mich. 218, it was held that under our statute authorizing suits by assignees of rights in action, the general doctrine is that actions for torts are not assignable, and that only such as survive to the personal representatives of the injured party could be sued for by an assignee. That was an action of trover, and it was held properly brought because the statutes had expressly taken it out of the common law rule. This case has been followed and affirmed in other decisions. *Brady v. Whitney* 24 Mich. 154; *Grant v. Smith* 26 Mich. 201.

By section 5828 of the Compiled Laws it is provided that "In addition to the actions which survive by the common law, the following shall also survive, that is to say: actions of replevin and trover, actions for assault and battery, or false imprisonment, or for goods taken and carried away, and

actions for damage done to real or personal estate." Except in cases of assault and battery and false imprisonment (which cannot by any construction be treated as rights touching property), the actions saved had been preserved by English statutes, and had been quite generally recognized as belonging to executors, although not surviving by the old common law. Assignments of such rights have not been held unlawful universally, although there may be some cases so holding.

We have found no support for the doctrine that causes of action on the case for deceit are assignable. There are not many cases bearing on the subject, and this is, no doubt, because the common law rule has met with general acquiescence. The case of *Zabriskie v. Smith* 3 Kernan 322, is directly in point against the validity of such an assignment, and is a stronger case than the present. There the deceit was practiced against a commercial firm of several members, and the action was brought by the remaining members to whom an outgoing partner had transferred his interest in the assets. It was held by the Court of Appeals that nothing passed by the assignment, and that the right was not assignable. The case is instructive on the whole subject, and points out quite clearly the distinction between personal torts and property interests.

This case was, however, relied on by defendant in error on the present record, as holding that all objection to the assignment was waived by pleading in bar. No such decision was made. It was held that the omission of one of several joint parties when all should have sued together was not fatal unless pleaded in abatement. This is familiar doctrine. The plaintiffs there were all original parties aggrieved. The only defect was that there was one more aggrieved person. If Fargo and Hart had been partners and Fargo had sued alone, the cases would have been parallel. But in the case before us Fargo never had any cause of action alone, or jointly with Hart, until Hart assigned to him. It is not a case of non-joinder, but a suit by a party who in the eye of the law was never injured. The defense in *Zabriskie v. Smith*, it was suggested, should have been by demurrer, but it was pointed

out that this method had been substituted by the Code for a plea in abatement in cases where the defect appeared in the complaint.

The count in trover was correct, and had the jury found a verdict based on that, the recovery must have stood unless some other error appeared. We do not know how it happened that they found for the defendant below on that issue. They have done so, nevertheless, and the plaintiff below has taken no exception to any ruling that they may have imagined interfered with such a finding. From the testimony on the record we should have supposed them more likely to find the second count established than the first, which sets out the contract as joint throughout, concerning which there was controversy.

As the record is presented we must reverse the judgment. As the only count on which the verdict rests fails to show any cause of action, there can be no new trial, and plaintiff in error is entitled to costs in both courts.

The other Justices concurred.

45	156
122	76
45	156
123	541
45	156
127	195
45	156
138	3223

SARAH M. PERKINS v. EMANUEL NUGENT.

Case made—Exception to special finding—Ejectment not barred unless possession was adverse—Presumption of validity of tax-title—Assessments.

A special exception to the conclusions of law, where the case is tried without a jury, and the judge makes a special finding, is sufficient, on case made, to raise the point that the facts do not support the judgment. Circuit court Rules 89 and 90.

Neglect to serve a statement of errors relied on in taking up a case made was overlooked by the court where the omission had not been complained of.

An action of ejectment is not barred after ten years occupancy by defendant if it does not appear that his possession was adverse to the plaintiff.

A proceeding against the validity of a tax-title on the ground that for a portion of the period covered by it a part of the lands in the same township had not been assessed, was not sustained where it did not appear that such lands were worth anything during that time, and it was shown, on the other hand, that certain classes of real estate were then exempt.

The presumption that a public officer had done his duty, applies to an assessor who has omitted lands from assessment, if the facts as shown do not exclude it.

Case made from Kent. Submitted November 10, 1880. Decided January 5, 1881.

EJECTMENT. Plaintiff had judgment below. Reversed.

G. H. White for plaintiff. Where exceptions are not based on objections and do not refer to the grounds therefor, there can be nothing before an appellate court on case made. *Tuxbury v. French* 39 Mich. 190; *Turner v. Grand Rapids* 20 Mich. 390; *Wilkinson v. Earl* 39 Mich. 626; *Campbell v. People* 34 Mich. 351; *Probasco v. Cook* 39 Mich. 714; *Turner v. People* 33 Mich. 363.

Taggart & Wolcott for defendant. The omission of lands from an assessment roll does not necessarily invalidate it. *Weeks v. Milwaukee* 10 Wis. 242; *Dean v. Gleason* 16 Wis. 1; *Smith v. Smith* 19 Wis. 615; *Williams v. School District* 21 Pick. 75; *Watson v. Princeton* 4 Met. 599; *Schofield v. Watkins* 22 Ill. 66; *Dunham v. Chicago* 55 Ill. 357; *Muscatine v. Railroad Company* 1 Dill. 536; Blackwell on Tax-titles 114 n. *b*; Cooley on Taxation 154.

GRAVES, J. This is an action of ejectment which the court tried without a jury and decided in favor of the plaintiff. The defendant asks a review on a case made. The plaintiff's counsel objects that the record fails to raise any point for the reason that no objections appear as a basis for the exceptions. This position is not tenable. The circuit judge made a special finding and the defendant specially excepts to the conclusions of law. The steps taken are

sufficient to entitle him to contend that the facts do not support the judgment. Rules 89 and 90 of the Circuit Court. The omission to comply with amended Rule 84 is not complained of, and as the court finds no difficulty in seeing what is relied on as error, it is thought best to consider the case.

The judge found that the plaintiff received a patent from the State on the 9th of October, 1850, for the land in question; that George H. White bought the premises at tax sales for the taxes of 1850, 1859, 1862, 1863, 1864, 1865 and 1866, and received deeds from the Auditor General in completion of the sales; that in October, 1859, Mr. White contracted the premises to the defendant, and the latter agreed to pay all taxes which should be assessed thereafter. The land was wild and unoccupied, and finally the defendant in August, 1866, took possession of it and enclosed it with a fence and has since continued in exclusive possession; that in July, 1868, White quitclaimed to defendant.

The suit was commenced in August, 1877. The defendant insists that under the finding the plaintiff was barred by the limitation of ten years prescribed by the second subdivision of section 7137 of the Compilation. It is a sufficient answer to this argument that there is no finding that the defendant's holding was adverse to the plaintiff. Some circumstances possessing value as evidence on the question are set forth, but the fact itself is neither affirmed nor negatived. For aught that appears the holding by the defendant may have been in harmony with the right asserted by the plaintiff. *Yelverton v. Steele* 40 Mich. 538; *Hamblin v. Warner* 30 Mich. 95. Of course a possession which is reconcilable with the right of the other party is not within the statute.

The second and remaining position is that in view of the facts found the defendant is entitled to judgment on the strength of the tax-title. It is unnecessary to advert to the facts on which the judge ruled against the deeds representing the sales for the taxes of 1850 and 1859. He found that in each of the remaining years from two to twelve parcels of land within the township, and which in previous years had been assessed, were omitted from the assessment roll, and in

connection with such finding observed: "No evidence was offered as to how these omissions came to be made. The bare fact was shown that they appeared on the face of the rolls, and I conclude from the foregoing facts that such omissions were through negligence rather than accident."

There is nothing further in the case to impugn the deeds given on the sales for taxes subsequent to 1859. The meaning of this finding and explanation is that as there was no evidence one way or the other the judge held an opinion that as a matter of law or of fact it was correct to impute negligence to the assessing officers and thereupon overturn the sale sof lands in that township for those years. It seems quite obvious that the opinion in question is not tenable. Whether if correct, it would be possible to use it as a finding of fact is not certain. During the years in question several classes of real estate was exempt, and amongst others certain lands held by the state and by cities, villages, townships and school-districts, and by library, benevolent, charitable and scientific corporations, and land occupied by houses of public worship.

There is no finding and there seems to have been no evidence that the omitted parcels belonged to the class of lands liable to be rated, and as the law itself made exemptions which for aught that appears may have covered all the parcels left out, there was nothing to warrant the observation that their being left out was due to negligence. It appears affirmatively in the finding as matter of fact that there was no evidence tending to prove it; and moreover the circumstances in point of law permitted a presumption that the assessors discharged their duty and hence that the parcels left out were omitted because it was proper to omit them. That in former years they had been rated either properly or improperly did not explain their condition and show that they were taxable in the years in question.

It is further noticeable that there is no finding that these lands possessed any known value in the years when they were not assessed, and the fact cannot be arbitrarily assumed here. If they were worthless, their omission was not important.

We think the court erred in ruling against the tax title arising on the sales for taxes after 1859 on the facts as found, and that judgment ought to have been given for the defendant.

Claims for valuations were filed under the statute, (Comp. L. §§ 6252, 6253, amended in 1873; 1 Sess. Laws 1873, p. 472,) and the circuit judge made the necessary findings on them. But the view taken of the case leaves them without utility.

The judgment must be reversed and one entered here in favor of the defendant with the costs of both courts.

The record will be remanded however to enable the plaintiff to proceed under the statute for a new trial as he may be advised and as shall be agreeable to law.

The other Justices concurred.

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84 247

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90 30

45 160
94 513

JOHN SHERBURNE RELATOR v. ROBERT J. HORN, FRED DENNY LARKE ET AL.

Mandamus to issue certificates of election.

Mandamus to compel a county clerk to issue a certificate of election to a person shown by the returns to have been legally elected, was denied when it would not have given substantial relief, and the question might be raised again in an issue as to the accuracy of the returns or by proceedings in the nature of *quo warranto*.

Mandamus to compel the board of county canvassers to canvass certain votes which they had rejected, and to issue a certificate to the relator of his election as sheriff. Motion for the order to show cause submitted and denied Jan. 7, 1881.

J. C. Shields and *Turnbull & McDonald* for the motion.

MARSTON, C. J. Relator asks for an order requiring the respondent Denny Larke, clerk of the county of Presque Isle,

to show cause why he should not issue and deliver to relator a certificate of his election as sheriff of said county, it appearing, as claimed, that the returns on file in the clerk's office show him to have been legally elected, it farther appearing that a certificate has been issued and delivered to another person.

Were it clear that this matter could be disposed of from an inspection of the returns we should be disposed to grant the order. The party who has received the certificate may deny the correctness of the returns, and thus an issue would be raised which would have to be sent down for trial. Or if an opportunity were not given him in the present case to do so, and a certificate were given the relator, still the controversy would not necessarily be ended, and a resort to proceedings in the nature of a *quo warranto* would inevitably follow. Under such circumstances the only benefit relator would gain by the present proceedings would be a certificate of election *prima facie* entitling him to the office:—in other words a shifting of the burthen of proof. It is not advisable to resort to *mandamus* unless substantial if not final relief can be given, and under all the circumstances, as the issuing of such a writ is discretionary, we think it best not to grant the order.

The other Justices concurred.

AUDITOR GENERAL, RELATOR, v. STATE TREASURER.

Constitutional construction—"Extinguishment" of debt.

The Michigan Constitution provides that certain revenues shall be applied to paying the interest upon educational funds and the interest and principal of the State debt "until the *extinguishment* of the State debt" when they shall constitute a part of the Primary School Interest Fund (Art. xiv., § 1). *Held* that for the purposes of the requirement, the debt is to be considered "extinguished" when there is

money enough in the State treasury, not subject to other claims, to pay it, even though it has not matured and has not been actually paid.

Mandamus to the State Treasurer to transfer the surplus of specific taxes in the treasury to the Primary School Interest Fund. Submitted Oct. 20, 1880. Granted Jan. 7, 1881.

Ashley Pond for relator.

Attorney General *Otto Kirchner* for respondent.

GRAVES, J. This is an amicable application to the Court to obtain an interpretation of an important part of Article 14 of the Constitution.*

The question raised is whether that portion of the pledged specific taxes not required for interest on the educational funds, and which the treasury is to collect and hold for State indebtedness, and which has now outgrown that indebtedness, is so controlled by the words of the Constitution that it must hereafter be allowed to keep accumulating in the treasury, not only until the whole debt is due in 1890, but until it is entirely extinguished, however remote the event, and notwithstanding the amount of accumulation may prove to

*ARTICLE XIV.

SECTION 1. All specific State taxes, except those received from the mining companies of the Upper Peninsula, shall be applied in paying the interest upon the Primary School University, and other educational funds, and the interest and principal of the State debt, in the order herein recited, until the extinguishment of the State debt, other than the amounts due to educational funds, when such specific taxes shall be added to and constitute a part of the Primary School Interest Fund. The Legislature shall provide for an annual tax, sufficient, with other resources, to pay the estimated expenses of the State government, the interest of the State debt, and such deficiency as may occur in the resources.

SEC. 2. The Legislature shall provide by law a sinking fund of at least twenty thousand dollars a year, to commence in eighteen hundred and fifty-two, with compound interest at the rate of six per cent per annum, and an annual increase of at least five per cent, to be applied solely to the payment and extinguishment of the principal of the State debt, other than the amounts due to educational funds, and shall be continued until the extinguishment thereof. The unfunded debt shall not be funded or redeemed at a value exceeding that established by law in one thousand eight hundred and forty eight.

be many times larger than the debt for the satisfaction of which the provision was intended.

In October last the State debt was $905,149.97 and the balance to the credit of the sinking fund was $1,208,895.27, and should the present practice continue of adding the residuum of the specific taxes, the amount in 1890 will probably exceed $3,000,000.

The attorney general, speaking on the side of the State treasurer, argues that the words of section one must be taken literally, and that they unavoidably require that the specified annual residuum of these taxes shall be added without interruption or abatement to the fund for the discharge of the State debt and interest, whether needed therefor or not, until they are extinguished.

The relator's counsel, admitting the literal sense of the provision to be as represented, yet strongly contends that there are insuperable objections to the adoption of a literal meaning. He argues that an attempt to carry out such a construction can end only in rendering the article hopelessly impracticable; that the case is one where it is indispensable to deviate from the literal import and to seek for and accept that ulterior sense which is called for by the end intended; that if this rule is observed all difficulties will disappear, and it will be found that the real object was to make sure provision for meeting the public obligations by means of a scheme imbedded in the Constitution, and that there was no ground or motive for a regulation to gather and impound a fund of indefinite amount, and which could not be put to any use connected with the object of the provision, and would most likely, under the theory of literal interpretation, be screened from any other, and that an intention to effectuate such a state of things ought not to be imputed.

The question is one of high practical importance, but the ground of discussion is very narrow. It is fully opened by the statement of the points.

Neither the condition of the finances nor the state of public opinion in 1850 will facilitate a solution. It might be expected that the proceedings of the Convention would

give some clue to the precise manner in which it was understood this section (§ 1, Article 14) should actually operate in the contingency which has occurred, but they do not. True, a member suggested that a surplus might arise, but the remark was made and understood evidently as a mere casual observation in the course of debate and too fanciful to be noticed, and it seems not to have been noticed.

There was much difference of opinion relative to the proper disposition of the specific taxes. Some thought they ought to be used exclusively to pay the interest on the State debt, and to cancel the principal. Others believed they should be devoted wholly to the primary school and other educational funds.

A further question was whether specific taxes from corporations in the Upper Peninsula should be included in the general disposition, or be so left that the legislature might, if it was deemed best, appropriate them, or a part at least, to local objects of necessity in that territory; and lastly, it was strenuously urged by several gentlemen, that certain corporations paying specific taxes and holding large amounts of property in particular localities, ought to be subject to municipal taxation in common with other property holders in the same vicinity.

The entire Convention was earnestly in favor of placing the educational system on a high and sure foundation, and the plan of free schools had the support of a large majority. It was believed by many of its supporters that full operation of the scheme would be much hastened by a liberal application of these taxes in favor of education, and they were anxious to make that the chief, if not the exclusive purpose to which they should be devoted. But this was resisted by those who contended that the State debt was to be preferred, and also by others who wished to leave the subject to legislation. The result was in effect a compromise.

It was ruled by the majority that the specific taxes on mining companies in the Upper Peninsula should be left to legislation, and that for the time being the interest accruing on the educational funds should be first paid out of the other

specific taxes, and that what might remain, if anything, should be absorbed by the interest on the State debt, and by the debt itself, so long as it should exist. The claim for local taxation on companies paying specific taxes was not embodied.

The Convention proceeded under the evident belief that the interest on the educational funds would so nearly consume the taxes that the residue would not be enough to make any serious impression on the principal of the State debt, and that its final extinguishment would ensue from other resources devised and contemplated by the Constitution. The expedient of a sinking fund as marked out in section two was viewed as being the main and efficient instrumentality for effacing the existing general debt. No one seems to have made a methodical calculation of probabilities respecting the time in which the debt, funded and fundable, and then being $2,529,872.87, would be paid under the scheme of the Convention. But all considered that its extinguishment could not be expected in less than a quarter of a century, and one gentleman observed that before it could be accomplished the Constitution would be again revised, and opportunity would be thus presented for contriving such a disposition of these taxes as might be deemed best. There were proposals that their application on the State debt should come to an end in 1852, in 1855, in 1865, and in 1880, and 1852 was agreed on. It was already understood that whenever such application should cease, they were to pass to the Primary School Interest Fund, and without being charged with the interest on the other educational funds. Some members who felt particular solicitude about this interest, and several who felt that these taxes, or at least a portion of them, had been devoted by the legislature to the payment of the State debt, were, as may be gathered from the proceedings, not satisfied with this arrangement. The latter in particular were apprehensive that so early a withholding the whole of these taxes from application on the State debt, however meager the resource they might afford, and without reference to the forwardness of the means of payment through other

channels, would appear like bad faith to the public creditors. After some consideration and the lapse of a short time, and at the instance of the chairman of the committee, the fixed date was dropped and the present phraseology inserted.

Turning from the debate to the final work of the Convention, it seems certain that as to the question before us the language was not cautiously chosen. The expressions in section one cannot be allowed to carry their literal sense without leading to confusion and involving various consequences too unreasonable to be defended; and it would be an affront to common sense to suppose that any such result was intended. As argued by counsel, the extinguishment spoken of, if contemplated in the dry and strict sense of the word and in reference to the subject-matter, would be an actual satisfaction by means of payment; and as nothing more could be applied in paying the debt than the amount of the debt, and nothing could be so applied in actual satisfaction before the maturity of the debt unless by the voluntary assent of the holders, and the full amount of the debt being already obtained in advance of its arrival at maturity, and the holders not consenting to receive payment in fact, the application of an accruing excess must be and remain naturally impossible.

The second section, which is closely associated in purpose with the first, required the legislature to create a sinking fund of $20,000 a year, commencing in 1852, with compound interest at six per cent., and an annual increase of at least five per cent. to be applied solely to the payment and extinguishment of the principal of the State debt, and declared it should "be continued until the extinguishment thereof." This requirement, it was expected, would be met by taxation. No other resources could have been contemplated.

It was a matter of plain sense that whenever the sinking fund should come to be equal to the principal of the debt nothing would be left to which a further accumulation could possibly apply. Such would be the natural effect. The specification of the object and the express declaration that it should be used therefor would moreover bespeak a purpose

to exclude whatever might be accumulated, from any different use. And it was not impossible that the fund might grow to an equality with the debt before the latter would mature and long before it would be possible to cancel every fraction of it.

Yet by the terms of the section literally expounded the process of accumulation was not to cease on the acquisition of enough to satisfy the debt and on occasion of the complete exhaustion of the object, but was to be kept up so long as the debt, for any reason, accidental or otherwise, should remain uncancelled. Now, in devising this plan, was it the meaning of the Convention that after the obtainment of a sufficient sum to fully and effectually clear off the debt, and whilst holding the means on hand for actual application, there should be no pause, and the inflow should be hence maintained with entire indifference to the fact of the fund being full already, and should be continued so long as a particle of the debt should happen to escape positive extinguishment? If so, the conclusion could scarcely be avoided that there was a covert purpose in the Convention to create by vague provisions and under a deceptive color what, in effect, would be a second fund not appointed to any use and of indefinite amount and enveloped in doubt respecting its legal availability even if admitted to be accessible without an amendment of the Constitution. Grant that the literal sense is the true one, and the difficulties indicated are irrepressible. A fund must be drawn from the people for no other end than to be locked up in the treasury until the debt for which it is not needed is finally satisfied by other means, and in the interim, which cannot be measured, the Primary School Interest Fund must be deprived of the incalculable aids which would naturally flow from it if allowed to receive it. The same narrow sense being appropriated to the *status* of the accumulated excess, and the fund cannot escape being regarded as devoted by the Constitution to an object which, so far as concerns the possibility of application, has no existence.

It is required that the entire amount brought in under the

provision shall be "applied solely to the payment and extinguishment of the principal of the State debt." The right to make use of the whole or of any part for any different purpose is excluded. But the amount necessary to take up the debt being on hand under the proper regulation, no debt remains to receive the application. Speaking potentially, it is paid. Among the consequences, therefore, of a literal reading in the case actually before us, we see that the treasury must accumulate what in substance is the same as two funds, one to be the full equivalent of the State debt, being the clear and unquestioned object of the Constitution, and the other an anomaly without utility or object, involving loss to the community and burdening the treasury with care and responsibility without any sound reason.

This view cannot be maintained, and being rejected, we have not far to seek the natural alternative. What was the substantial object of the Convention as disclosed by the debates and evinced by the result, and what is the spirit and essence of the constitutional provision?

The final purpose, so far as it concerns our present inquiry to refer to it, was to make certain the preservation of the public faith and the punctual payment of the existing State debt, together with the interest. And as subsidiary to this end the State was placed under many restrictions to prevent it from running into new debts, or in any way impairing its ability to maintain financial independence and discharge its obligations. And as the most pregnant parts of the policy directed to the end here mentioned, the Convention ordained the creation of the sinking fund, and as a sort of supplementary or superadded security, devoted to the same important object whatever remnant there might be of the specific taxes in question, after payment of the interest on the educational funds. Their eventual application exerted influence.

It was not difficult, in view of the various other provisions destined to facilitate the payment of the debt, for those who made it a leading object to secure the permanent addition of these taxes to the Primary School Interest Fund, to accept as a condition that full application to the fund should be deferred

until such time as the means of discharging the State debt should be in the treasury, and either waiting for it to mature, or waiting for the lawful evidences to be presented. But they would never have consented that such application should not only be delayed until the debt should be so met, but for such further and uncertain time as might elapse before the literal extinguishment of the last dollar of it. Against a condition not only so impolitic and so uncalled for but so repugnant to common sense, they would have raised objections equally plain and decisive.

Further enlargement on the question is not deemed needful. The result reached is that there being no arrears of interest on the State debt in question, and the fund accumulated being sufficient for the payment of the principal, and being now held in the treasury applicable thereto and in readiness therefor whenever the creditors will receive it, any excess, apart from what shall be annually required to meet the annual interest accruing on the debt, must be held applicable under the Constitution, so long as there is no failure in the fund for the payment of the principal, to the Primary School Interest Fund, and ought to be assigned thereto.

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

CAMPBELL, J., dissenting. I regret that in a matter of so much importance I cannot agree in the result arrived at by my brethren. But I am unable to do so.

If there were any ambiguity in the language of the Constitution, there would, perhaps, be room to consider what may be supposed to have been contemplated by the Convention as necessary to be provided for in order to secure the public credit, and to get as near to that result as the language would allow. But it must be remembered that the adoption of the Constitution by the popular vote was the adoption of the language as written, and of nothing else. So far as this particular provision is concerned it has not been suggested or supposed that it was ever discussed before the people as a separate clause at all. Neither have I been able to find any-

thing to indicate that any member of the Convention failed to suppose the language would be literally construed. The debates, as referred to by my brother Graves, indicate clearly enough that the possibility, at least, of an accumulated surplus existed. The real difficulty seems to me to be no more than this—that if the Convention had foreseen the amount of this accumulation, it would have been limited in some way. But this will not warrant us in imposing a limitation which, as I read the Constitution, is not to be found there. While I do not conceive that any result arising from the terms of that document can be evaded, and while, therefore, I build no argument upon its reasonableness, I do not think the provision, even in the light of the facts shown by the record, so remarkable as to lead to anything absurd or grossly unreasonable.

The clause is express that the fund shall not be impaired until the "*extinguishment*" of the State debt, aside from that due to the educational funds. It cannot be claimed that the debt is extinguished until it is paid or released. It seems to me that it cannot be said that a State debt is extinguished when money enough is saved to meet it, any more than that a private debt is extinguished by a similar accumulation. And the distinction between payment and mere ability to pay is too obvious to have escaped the notice of the Convention. If they had meant to confine the accumulation to the amount of the debt, it is hard to suppose they would not have said so. But it is enough that they did not say so, but on the contrary required the debt to be extinguished before applying the fund elsewhere.

It was suggested on the argument that this would enable any single creditor, by withholding his bonds, to prolong the delay indefinitely. This is not so. As soon as the debt is due it is clearly competent for the legislature to compel the creditor to present his claim or have it paid by deposite in some appointed place. The legislative power can provide for such cases, and has done so in many instances. It is a very common practice where private property is taken for public use, and is neither anomalous nor unjust.

I have suggested that the clause does not appear to me so unreasonable as counsel seem to regard it. And while, as before stated, the reasonableness or strangeness of an unambiguous clause is no legal cause for failing to enforce it, it is nevertheless proper to consider the circumstances of its enactment, as well as the contingencies which may arise concerning the fund itself. The Convention, as is universally admitted, meant that there should be no question about the payment of the State debt, so far as they could secure it. Without reference to other possibilities there are two that have actually become facts which, if existing on a somewhat larger scale, would have prevented this accumulation. In the first place a very large defalcation occurred at the close of 1860 by the embezzlement of a part of this very fund. All that was then on hand in the treasury was taken. The same possibility and the same disposition at this time would have saved the necessity of the present application.

In the second place there is no constitutional limit to the amount of debt that may be incurred for war purposes and the defense of the State. We made a considerable addition to our debt in that way, and the public credit, which the Constitution has pledged as secured by this fund, might easily have needed all and more than all of the earnings, had not other resources diminished the amount necessary to be borrowed. This is a necessity which is not likely to arise often, but which was distinctly provided for and guarded.

As for the circumstances under which the Convention acted, they are no less significant. The public debt then existing had been incurred chiefly for internal improvements, and the honor of the State had been specifically pledged to apply the avails of the improvement funds to the payment of the debts. This was partially done by allowing the purchasers of the railroads when sold, to pay for them in bonds. But this did not pay off the whole debt, and while the funds had been frittered away to a large extent this very fact showed the duty of the State to provide some adequate security for its creditors. This was found possible only by

pledging some specific source of revenue. The specific taxes were tangible and they were the only State revenues that were. A sinking fund was also made subsidiary. This requiring legislative action was not strictly obeyed, and no court could coerce the legislature. The specific taxes, so long as levied, could be reached.

The special charters providing for specific taxes, and which as contracts could not be changed, were very few in number, and the taxes were not large in amount. They would never have sufficed to pay principal and interest on the debt. The Constitution prohibited any future special charters, and no contract was thereafter possible. The legislature could impose and abolish specific taxes on all future corporations at its pleasure. It was therefore entirely competent at any time to prevent the overgrowth of this fund by legislation.

It was also competent, and it is evident from the Constitution, as well as from the debates, that it was thought likely that the Constitution might be amended, if not remodelled, long before any possible accumulation would need attention. While the legislature cannot by its own action change the Constitution, it can propose changes which the people can adopt. There has never been a time when this remedy was not available, if generally desired.

Under all these circumstances it is not strange that the Convention refused to limit the accumulation, and required it to continue until suspended by the amendment of the Constitution. Beyond what is written we have no means of knowing what was thought or what would have been done, had the Convention seen into the actual future. The accumulation which they absolutely required would even now be entirely inadequate. It is only because specific taxes have been multiplied that we have any surplus. The legislature have seen fit to add to the fund, and have not seen fit to take any measures to procure a change of its constitutional uses.

I think the meaning of the Constitution is not open to any construction which will allow the fund to be diverted or used in the manner asked by the relator.

In the matter of Patrick Ryan.

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Commitment to Ionia Reformatory—Repeals by implication.

Persons convicted under Comp. L., ch. 53, cannot be sentenced from another county to the State Reformatory at Ionia as provided by act 110 of 1879, § 12, as chapter 53 permits their discharge on obtaining sureties, and this right would be practically destroyed if they were removed from the county.

Repeals by implication are not favored.

Habeas Corpus. Motion for discharge submitted and granted January 11.

William O. Webster for the motion.

Per Curiam. Ryan was by a justice of the peace of Saginaw county committed to the State house of correction, etc., at Ionia as a disorderly person, in default of finding sureties. He now applies for his discharge. The command by the justice was to detain Ryan until he should find sureties or be thence discharged by due course of law. The statute under which these proceedings were taken is chapter 53 of the Compiled Laws, which points out a way in which the person may be discharged. These proceedings are to be taken in the county in which the person was tried, and contemplate his continual presence in such county.

Act No. 110 of the Session Laws of 1879, § 12, provides that persons convicted under said chapter 53 of the Compiled Laws may be sentenced to the reformatory at Ionia. The effect of such a sentence is to cut off and leave the person so sentenced without any means of giving security as provided in chapter 53, and we are all of opinion that this could not have been the intention of the legislature. No such serious results should be arrived at unless inevitable. There is no express repeal of any of the provisions in chapter 53, and repeals by implication are not favored. The petitioner could not be deprived of the rights thus given him, in this way, and we are of opinion he should be discharged.

Thomas Preston v. Catherine Ryan.

Growing crops—Sale on execution—Comp. L., § 4667.

Growing crops, though part of the realty, are treated as personalty for the purposes of levy and sale on execution.

Comp. L. § 4667 forbids selling the equity of redemption when execution is levied on premises mortgaged for the debt; but it does not prevent a sale of a growing crop under such execution. Whether a conveyance of the equity of redemption by the mortgagee could be fraudulent as against the mortgage creditor—Q.

Error to Washtenaw. Submitted June 10, 1880. Decided January 11, 1881.

Replevin by Catherine Ryan against Preston for nine stacks of wheat. Catherine Ryan had lent money to Margaret Tobin for which she took the latter's note secured by mortgage on a farm which was also covered by a prior mortgage securing a debt of her husband's to another person. Suit was brought on the Ryan note and on the same day a bill was filed to foreclose the earlier mortgage. A few days later Mrs. Tobin deeded the land to her husband, who died shortly afterward. Catherine Ryan recovered judgment in her action against Mrs. Tobin, and took out an execution which was levied Nov. 19, 1877, on a crop of wheat sown by Tobin after the land was deeded to him. At the execution sale, July 20, 1878, she bid off the wheat, which was partly harvested. But at an administrator's sale of Tobin's personal property, January 29, 1878, Preston, who knew nothing of the execution levy, had bid off the same crop, then growing, and to recover possession, Catherine Ryan brought this suit in replevin against Preston, and recovered. Preston brings error. Affirmed.

Sawyer & Knowlton for plaintiff in error.

E. D. Kinne for defendant in error.

COOLEY, J. The doubt I have had in this case has sprung from that section of the statute which provides that "when a judgment shall be recovered for a debt secured by mortgage of real estate, or for any part of such debt, it shall not be lawful for the sheriff or other officer to sell the equity of redemption of the mortgagor, his heirs or assigns, in such estate, by virtue of any execution upon such judgment." Comp. L., § 4667. I have had some question whether a conveyance of the equity of redemption could be fraudulent as against the mortgage creditor while this statute was in force. Reflection has satisfied me, however, that a sale of growing crops on mortgaged land is not forbidden by this statute. It is only the equity of redemption in the land that cannot be sold on execution; and while it is quite true that the growing crops are a part of the realty, yet for the purposes of levy and sale on execution they are suffered to be treated as personalty. Comp. L., § 6100. And while reasons may be suggested why a sale should not be suffered when the judgment was for a debt secured by mortgage on the land where the crops grew, there are also reasons in its favor. It would certainly save expense in many cases, especially when the mortgage debt is small.

But whatever may have been the reasons influencing the legislature, it is certain that in enacting this statute they have not, *in terms*, prohibited the sale of anything which may be sold as personalty, and I am not satisfied that they have intended to do so. The verdict finds in effect that the transfer of the land was colorable merely, without actual change of possession, and the crop raised was therefore subject to sale unless a sale is forbidden by statute. Not finding that such is the case, I am of opinion that the judgment should be affirmed with costs.

The other Justices concurred.

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Russell Cobb, William King and John J. Watkins v. Peter Slimmer.

Abatement of mill-dam.

An injunction to abate a dam which had existed about thirty years and had been erected under permission to raise the water to a certain height, was *denied* where the proofs did not conclusively show that the height agreed upon had been exceeded. But as the case contained facts that might properly be submitted to a jury, the denial was without prejudice to any proceedings at law, or to proceedings in equity if these facts should be found against defendant.

Appeal from Lapeer. Submitted Oct. 22. Decided Jan. 12.

Injunction. Dismissed. Complainants appeal. Affirmed.

Wm. Hemingway and *W. W. Stickney* for complainants.

Geer & Williams for defendants.

Graves, J. August 2d, 1876, the complainants filed this bill to restrain the defendant from keeping a dam below their premises on Farmer's Creek in Hadley, Lapeer county. The defendant answered on the 12th, and proofs were subsequently taken at great length. In January last the case was heard on the merits, and after taking time to consider, the court on March 2d dismissed the bill with costs. The precise grounds of dismissal are not explained in the record. An appeal was then taken on the part of complainants. King seems to have transferred his interest to a Mr. Tubbs since the commencement of the suit.

The premises described as belonging to Watkins, and being those chiefly exposed, were originally, with others now claimed by Pierson, possessed by the late William Hart who purchased and settled on them in 1835. The premises said to be owned by Mr. Cobb abut on the west, but being higher up and more remote are far less in danger. The general features of the place are such as are often met with. There

seems to be a marl or hard-pan basin of irregular outline and containing between two and three hundred acres, and nearly filled with muck and bog except a distant point at the north where there is a small area of open water called Duck Lake. On the west side of this little pond and also at the northwest extremity or arm of the basin is a fringe of tamarack trees. The rest, with the exception of two or three small islands of timber, is what is called open marsh.

Several small streams approaching from different quarters and draining a considerable part of the township of Hadley pour their waters into this reservoir. One stream forms the outlet of the little lake. The most important courses are two, now known as Hamlin and Beden creeks. The marsh narrows at the east end nearly to a point and the surplus waters are there voided through an outlet which is not deep enough to empty the basin and not wide enough, in case of an unusual accumulation, to prevent an overflow. There seems to be a rim which prevents the free passage of the water in the outlet and causes at certain stages what are called ripples. Several rods below where the water leaves the marsh the outlet is crossed by the main street of the village of Hadley, and the stream is spanned by a bridge, and a short distance further down is the dam in question. A small pond is formed embracing from six to ten acres and extending from the dam to a point a little way above the bridge.

In recent years and including a part of the interval since the institution of the suit, the complainants and Mr. Tubbs have made several ditches in the marsh, and in some places new channels have been constructed for the natural courses, making the passages shorter and the beds narrower and deeper. At the time the suit was commenced the dam had been maintained on the same site about thirty years. The witnesses differed in their recollection as to the precise year in which it was first put up. The exact time is not important. It was then erected by a man by the name of Fortune, and it seems that it was agreed between him and William Hart at that time that he should have the right to set the water back to a certain point, and that Hart in 1859 com-

plained that Fortune ceased to regard the agreement and was raising the water above the point established. The consequence was that Hart brought an action in the circuit court for the alleged unlawful flowing. But the case was taken out of court and the controversy submitted to the determination of five neighbors, and they made a decision in which all acquiesced.

They selected a stump situated in the pond near the mill to serve as a fixed gauge of the height the water should not exceed. This high-water mark, as the witnesses call it, was either the top of the stump or a shoulder cut in about eight inches below the top, and on this point the evidence is utterly conflicting. The complainants' witnesses who testify on the subject, describe the mark as a place in the side of the stump about eight inches below the top, and those of defendant, including the two arbitrators sworn, say the top of the stump was to be the water mark. Some attention at the time of the arbitration seems to have been given to a place in the outlet of the marsh spoken of as a rapid or "ripple." But the witnesses differ about that. Those for the complainants fix it at a point about due south of the old log house of William Hart, and those for defendant between thirty and forty rods further up the outlet. The difficulty of identification is much enhanced by the fact that a new channel has been made opposite the old one at the point indicated by complainants' witnesses. Much is said about the depth of water at the "ripple" at different times, and the depth given in case of the mill pond being at the high-water mark fixed by the arbitrators at the stump, and the true position of the ripple is chiefly important as bearing on the value of these comparisons. A comparison or an offer of one which contemplates the ripple as at a place directly south of the site of the old log house can be of little, if any, value if the facts are not sufficient to fix it there and show that the other is not the true locality. It does not appear from the case that the arbitrators designated the ripple, whether situated at one spot or the other, as a mark for high water.

The claim for an abatement of the dam on the ground of

its being a source of disease is not supported by the evidence, and moreover the case in that view of it is not urged.

The complainants' proofs are very full to the effect that their premises are not injured or liable to be injured by the dam unless the water is raised higher than the mark which the arbitrators fixed. Their position seems to be however that in this they mean the mark as they insist the arbitrators placed it, some eight inches below the top of the stump, and they contend that defendant has been accustomed to raise the water to the top of the stump. As the defendant claims that the arbitrators made that the limit, he no doubt has generally raised the water to it. But whether the line designated by the arbitrators was on a level with the top of the stump or with a point eight inches lower, or whether those preceding defendant were governed by the one or the other, the implication is very strong that complainants regarded the limit which was actually applied as one which gave no cause for complaint, and this state of accord seems to have continued for more than ten years subsequent to the arbitration. Again, it is a part of the case made by complainants' evidence that Fortune and those succeeding him down to the time of defendant, habitually observed the decision of the arbitrators, and that during their holding the back flow was not injurious. And on the other hand the defendant makes proof that during his holding the water has been raised no higher at the stump than it was by his predecessors.

The defence contends further that the opening at the bridge is not sufficiently capacious, and that if the dam were wholly pulled down the bridge would hinder the water from passing off faster than at present. The ditching is also mentioned as largely contributing to the conditions to which complainants object. It is said to have been so designed and executed as to derange the natural circulation and disturb the balance between the inflow and outflow to the detriment of the latter, and it is claimed also that a portion of the ditches have been suffered to form bars in some places and choke up in others. In reply to these considerations it is contended by complainants that their evidence proves that

the objectionable conditions are directly owing to the state of water in the pond. That every change there is immediately followed by a corresponding change on the marsh.

It is unnecessary to pursue the various facts and contending views. The essence of the controversy is whether complainants are right in their claim that the defendant raises the water above the old mark originally assented to and which the arbitrators caused to be indicated permanently on the stump. Because if they are not correct in this, and the defendant does not exceed the old limit, there is no foundation in the case for equitable interference. Indeed this may be regarded as virtually conceded. The actual extent of use formerly acknowledged to be right, seems not to be controverted. The alleged grievance is that it is exceeded. Coming then to the substantial question—is the state of the proofs such as to justify the Court in reversing the decree below and in proceeding to grant a decree here in favor of complainants? A thorough examination and re-examination of the record leads to an answer in the negative. No solid ground of definite relief can be deduced from the proceedings. At least there is no such distinct and certain showing as would warrant the Court in setting aside the decision of the circuit judge and in giving a decree against the defendant.

There are two or three questions of fact, which, in case it were necessary to have them settled, might with great propriety be submitted to a jury, and after much consideration it is thought best to make the dismissal without prejudice to any future proceedings at law, nor to any proceedings in equity in case the facts shall have been decided by a jury adversely to the defendant. The defendant will recover his costs.

The other Justices concurred.

JOSEPH BUSHEY, SMITH R. WOOLEY AND DON M. DICKINSON v. PETER RATHS.

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Attachment released by appeal—Place of seizure—Amendment of constable's return—Debt on appeal bond—Keeping animals taken on attachment.

An appeal bond releases the lien of a justice's attachment.

If a constable's return to a justice's attachment is silent as to the place of seizure, it is presumed to have been, as directed by Comp. L., § 5275, "within the county."

Whether there need be notice of an amendment of a constable's return to a justice's writ of attachment, where the writ was not personally served and the defendant has not appeared—*Q.*

Special appearance in a justice's court for the sole purpose of moving to quash a writ, gives no right to thereafter serve the attorney with notice of an amendment of the constable's return.

An action of debt lies upon a bond given on appeal from before a justice, where the effect of the appeal is to release an attachment lien, or to delay the levy of execution.

A constable has no authority to work animals which he has taken on an execution, to pay the expense of keeping them.

Error to Wayne. Submitted Oct. 22. Decided June 12.

DEBT. Defendants bring error. Affirmed.

Griffin & Dickinson for plaintiffs in error.

James H. Pound for defendant in error. Delay occasioned to an obligee in a bond is a sufficient consideration for an action upon it: *Crist v. Burlingame* 62 Barb. 357; *Locke v. McVean* 33 Mich. 473; *White v. Reed* 15 Conn. 457; *Bell v. Bruen* 1 How. 169; *Hall v. Fowler* 6 Hill 630; *Leonard v. Speidel* 104 Mass. 356; *Thomas v. Hubbell* 15 N. Y. 405; *Rapelyer v. Prince* 4 Hill 119; *Iredell v. Barbee* 9 Ired. 234; *Coleman v. Bean* 3 Keyes 94; *Franklin v. Depriest* 13 Grat. 257; *People v. Norton* 5 Seld. 179; *Norton v. Mulligan* 4 Strobh. 355; *Outlaw v. Yell* 8 Ark. 352; *Bruce v. United States* 17 How. 437;

Brandt on Suretyship §§ 20, 30, 31; *Allbee v. People* 22 Ills. 533; *Redfield v. Haight* 27 Conn. 31; *Remsin v. Graves* 41 N. Y. 471. The execution of a bond precludes the parties thereto from denying the jurisdiction to proceed against the assets released by it: *Pritchett v. People* 1 Gilm. (Ill.) 525; *Morse v. Hodsdon* 5 Mass. 341; *United States v. Linn* 15 Pet. 290; *Leonard v. Vredenburgh* 8 Johns. 29; *Thompson v. Buckhannon* 2 J. J. Marsh. 416; *United States v. Tingey* 5 Pet. 115; *Decker v. Judson* 16 N. Y. 439; *Hill v. Burke* 62 N. Y. 116; *Gibbons v. Berhard* 3 Bosw. 685; *Prentiss v. Holbrook* 2 Mich. 372; *Lothrop v. Southworth* 5 Mich. 436, 48; *Dorr v. Clark* 7 Mich. 310; *Goebel v. Stevenson* 35 Mich. 172; *Trimble v. State* 4 Blackf. 435; *Sherry v. Foresman* 6 Blackf. 56; *Sumpter v. Wilson* 1 Ind. 144; *Sammons v. Newman* 27 Ind. 508; *Speake v. United States* 9 Cr. 28.

Marston, C. J. On the 28th day of February, 1877, Peter Raths commenced an action by attachment in justice's court against Joseph Bushey; property was attached under the writ, but no personal service, and on the 9th day of April, 1877, judgment was rendered therein against the defendant. April 14th, 1877, defendant filed with the justice an affidavit for a special appeal and bond, and a return thereto was made on the 17th. September 17th, 1878, the appeal was by the circuit court dismissed because the entry fee had not been paid; and on the next day an execution was issued by the justice upon the judgment rendered by him, and returned November 17th unsatisfied, no goods having been found. September 25, 1878, the case was re-instated in the circuit court, upon condition that appellant should pay $10 costs, waive his special appeal, and proceed to trial on the merits at the then term of court. And December 16th, 1878, this order not having been complied with, was vacated. February 1st, 1879, an *alias* execution was issued by the justice, returned April 2d, 1879, unsatisfied. The present action was thereupon brought upon the appeal bond, trial

had, judgment for the plaintiff and the cause brought here on writ of error.

The defence relied upon in the court below and in this court is, that the justice did not acquire jurisdiction of the person of defendant Bushey, the return of the constable being defective. The defendant appeared specially in the justice's court and made a motion based on such defective return, which was overruled. An amendment of the officer's return was afterwards, on the adjourned day, in the absence of defendant, and without notice, permitted and made, but this also, it is claimed, even if properly made, was insufficient to give the court jurisdiction.

Where a constable returns that he has attached goods and chattels by virtue of a writ of attachment issued out of a justice's court, and the return is silent as to the place of seizure, we must presume that the officer did not violate the provisions of the statute which commands him to take the property of the defendant "within his county."

It is only from an inspection of the affidavit for appeal, of defendant Bushey, that we are enabled to ascertain what amendment was permitted by the justice and made by the constable. The return made by the justice on the appeal shows the amended return only, which on its face, as printed, does not indicate an amendment. The amended return in my opinion was sufficient in substance to give the court jurisdiction, and for the reasons hereinafter given, I do not consider it necessary to pass upon the power of a justice to permit an amendment without notice. Our statute in reference to amendments is very broad and has always been construed liberally in furtherance of the objects thereof, and whether the same rule would apply in justice's court as in the circuit, requiring notice to be given in a case where the defendant had not been personally served with process and had not appeared, may at least be a matter of doubt, as to require notice would be to deny the power of amendment in all such cases. The defendant's appearance on the return-day by attorney, for the sole and special purpose of a motion to quash, would not authorize the service of notice upon

such attorney thereafter, within the ruling in *Watson v. Hinchman* 41 Mich. 716. And upon the assumption that the defendant could not be found, then no notice of such proposed amendment could be given. But as already said the necessity for such notice in a justice's court, in a case like the present, we do not pass upon.

Irrespective of what the result might have been in the Circuit Court upon the special appeal, had it been pressed by the appellant, I think we cannot say, from an inspection of the files and record of the justice as returned by him to the Circuit Court, that the judgment rendered by him could be considered a nullity for want of jurisdiction, or that the plaintiff therein might not, could he have promptly sued out an execution thereon, have obtained satisfaction thereof in whole or in part. He had, by virtue of his attachment, obtained a lien upon certain personal property of the defendant, out of which he might have realized.

But it is urged in this case, that the motive which influenced the sureties to execute the appeal bond was the fact that this property was in the hands of the officer by virtue of the writ of attachment, and would or should be held by him to wait an execution. There is no evidence tending to show what became of the property attached. The executions were not delivered to the same constable who served the writ of attachment. The property attached consisted of a horse, cow, wagons and other personal property.

Where a justice's court attachment is delivered to a constable the statute commands him to attach so much of defendant's goods and chattels as will be sufficient to satisfy the demand, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff therein. 2 Comp. L. § 5274. In cases commenced by attachment, execution shall, on application of the person in whose favor the judgment was rendered, be issued forthwith, unless stayed. § 5394. In suits commenced by attachment, where animals are seized and expense incurred in the keeping thereof, it is made the duty of the justice, upon the trial of the suit, to examine witnesses as to such expense, from the time of seizure up to and

including the day of trial, and to determine and adjudge the amount thereof, and incorporate the same into the judgment as a part thereof, in case judgment is rendered for the plaintiff, and the docket shall contain an entry of the amount so determined. § 5518. When cattle or live stock are taken on execution, the justice may allow the constable a reasonable compensation for keeping the same. § 5419.

These several provisions clearly indicate that the lien acquired by virtue of a writ of attachment is to remain in force only a reasonable time after the rendition of the judgment. They are to be safely kept to satisfy the judgment, and the plaintiff could not, after recovering a judgment, with the right of issuing execution thereon, permit the property to remain indefinitely upon expense in the officer's hands under the writ of attachment. The statute farther provides that after an appeal has been taken, on a proper showing thereof being made to the officer holding the execution, he shall forthwith release the property that may have been taken, or the body of the party against whom the writ was issued. § 5440.

If an appeal releases property taken on an execution, why should property held on an attachment not be released? The object a plaintiff has in attaching property is to secure satisfaction of any judgment he may thereafter recover, and property is taken upon execution for the satisfaction of the judgment. When, however, an appeal is taken, the bond given is presumed to insure satisfaction and there is no longer any object in retaining the property levied upon for such a purpose, and certainly this applies with at least equal force to property held under an attachment.

It is true the statute does not in express terms provide for the release of property held upon attachment as it does when held under execution; but was this necessary? The lien by virtue of an attachment holds only a reasonable time after a judgment has been recovered and a right to execution exists, and this the statute permits being done immediately upon the recovery of judgment in such cases. We do not wish to intimate that execution must issue at once on rendition of

judgment, or even within the time limited for the taking of an appeal, in order to protect the lien, or in cases where the plaintiff as the aggrieved party appeals. But where the defendant appeals, before the execution has been issued and the property attached taken thereon, we cannot suppose that the legislature contemplated that the property should be retained upon expense during the pendency of the appeal. In my opinion, whether the property is held under the attachment or execution, the appeal, when taken, causes its release, and the plaintiff thereafter looks to the appeal bond for his protection.

Any other rule, it seems to me, would work great injustice, as the owner of the property would not only be deprived of its use during the pendency of the suit, but the expense of keeping it in many cases would exceed the entire value thereof, and thus the judgment remain unsatisfied.

I am also of opinion that it may fairly be inferred from the record in this case that the property levied on was released during the pendency of the suit in justice's court. Sec. 5277 provides that the goods and chattels levied upon shall not be removed if a bond is given conditioned that they will be produced to satisfy any execution that may be issued or any judgment recovered by the plaintiff in the attachment. So if any person other than the defendant claims the goods attached, he may execute a bond, conditioned that in a suit to be brought thereon, he will establish ownership therein at the time of the seizure. § 5278. And upon either of such bonds being given the constable shall deliver up the property to the obligor. § 5279. And as the bond provided for in Sec. 5278 might be given after the return of the writ, the fact that such a bond had been given would not appear thereby.

As already referred to, the cost of keeping any animals attached may be proven on the trial and allowed, and the docket of the justice is to contain any entry of the amount thereof. § 5518. The docket of the justice, as appears by his return, contains no such entry, although animals were taken by the constable; and as he would have no authority to work them for their keep, even did it appear that he could

have done so, we should, I think, assume that the animals taken by the constable were not held by him under the attachment at the time of the rendition of the judgment. If they were not, defendant's motive in executing the bond could not have been the existence of such property in the constable's hands under the attachment. If they were in the constable's hands, and the taking of an appeal and giving a bond thereon operated as a release of the property, of which I have no doubt, then their motive, based upon a retention of the property by the constable, was wrong and could not benefit them.

If the property was in the constable's hands, and the effect of the appeal was to release it, surely this would be such an injury to the plaintiff as would entitle him to maintain this action. If it was not in the officer's hands, the delay caused by the appeal may have caused the plaintiff an injury. Had no appeal been taken, a prompt and vigorous prosecution of his remedy by execution might have enabled him to find property to satisfy the judgment, and which a delay might have deprived him of.

But even did it appear from an inspection of the files and record of the justice that the judgment was so far void that it could be attacked collaterally, I am by no means satisfied that the plaintiff could not maintain this action. The defendant therein was not willing to risk his rights upon the assumption that the judgment was absolutely void and could afford no advantage to the plaintiff. Had he done so the plaintiff might have abandoned his judgment, commenced another action, and collected his claim. The defendant, by taking an appeal, prevents this by agreeing in his bond to prosecute his appeal with all due diligence to a decision in the Circuit Court, and if a judgment should be rendered against him therein, to pay the same, or if the appeal should be discontinued or dismissed, then that the judgment of the justice should be paid. Here was an agreement entered into voluntarily. It has not been observed. Why then should it not be enforced according to the letter thereof? The defendant has obtained the benefit of delay by this means and injured

the plaintiff to a corresponding extent. The defendant at the time he took this appeal may have had sufficient goods and chattels out of which plaintiff could have collected his claim either in that action or in another which he might have brought. The delay may have cut off this right, or barred his claim under the statute of limitations.

View the case in any way, I am of opinion the defense relied upon cannot be sustained, and that the judgment should be affirmed with costs.

The other Justices concurred.

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LUTHER BEECHER ET AL. v. EDWARD A. BUSH ET AL.

Constructive partnership.

A partnership cannot be implied, as matter of law, from a business relation, if the parties thereto have not made or intended to make a partnership contract and if they have done nothing to estop them from denying the existence of a partnership.

Partnership involves community of interest in some lawful commerce or business for the conduct of which the parties are mutually agents for each other but with general powers within the scope of the business, which powers they can restrict by agreement to the extent of making one the sole agent of the rest and of the business.

An arrangement by which one man "hires the use" of another's building from day to day and opens and keeps it as a hotel, paying the owner daily a sum "equal to one-third of the gross receipts and gross earnings," does not of itself constitute them partners.

There can be no such thing as a partnership as to third persons when there is none as between the parties themselves, and third persons have not been misled by concealment of facts or by deceptive appearances.

The test of partnership, as between the parties themselves, is their intent.

Participation in profits does not of itself make one a partner.

Error to Superior Court of Detroit. Submitted October 29, 1880. Decided January 12, 1881.

Assumpsit. Defendant brings error. Reversed.

Henry M. Cheever (*John Atkinson* and *Jos. P. Whittemore* with him) for plaintiffs in error. Community of interest in the profits is the only essential to a partnership (Lindley on Partnership, 10); an agreement to carry on the business and divide the gross earnings equally does not constitute a partnership as to third persons: *Ambler v. Bradley* 6 Vt. 119; so also where the share of gross earnings was to be paid as compensation: *Dry v. Boswell* 1 Camp. 330; nor does a share in profits as compensation for services make one a partner: *Reed v. Murphy* 2 Greene (Ia.) 574; nor an agreement to pay, instead of a commission, the entire proceeds of a sale less a certain proportion: *Benjamin v. Porteus* 2 H. Bl. 590; nor an agreement to divide profits with a broker on a sale made by him of wheat bought with the money of the other party: *Hanna v. Flint* 14 Cal. 74; nor an agreement to share gross returns: *Gibson v. Lupton* 9 Bing. 297 (23 E. C. L. 588); *French v. Styring* 2 C. B. (N. S.) 357; *Mair v. Glennie* 4 M. & S. 240; *Wilkinson v. Frasier* 4 Esp. 182; nor an agreement to share or divide either profits or returns: *Blanchard v. Coolidge* 22 Pick. 151; *Cutler v. Winsor* 6 Pick. 335; *Denny v. Cabot* 6 Met. 82; *Turner v. Bissell* 14 Pick. 192; *Newman v. Bean* 21 N. H. 93; *Miller v. Van Beuren* 15 S. & R. 137; *Hodges v. Dawes* 6 Ala. 215; *Ogden v. Astor* 4 Sandf. 311; *Vanderburgh v. Hull* 20 Wend. 70; *Burckle v. Eckhart* 3 Comst. 132; *Bradley v. White* 10 Met. 303; *Polk v. Buchanan* 5 Sneed 722; *Moore v. Smith* 19 Ala. 774; *Bull v. Schuberth* 2 Md. 38; *Bowman v. Bailey* 10 Vt. 170; *Fawcett v. Osborn* 32 Ill. 411; *Rawlinson v. Clarke* 15 M. & W. 292; *Barklie v. Scott* 1 Huds. & Br. 83; *Stocker v. Brockelbank* 3 Mac. & G. 250; nor an agreement to pay a mate a specific share of the profits of the voyage: *Coffin v. Jenkins* 3 Story 108; *Wilkinson v. Frasier* 4 Esp.

182; *Baxter v. Rodman* 3 Pick. 435; *Rice v. Austin* 17 Mass. 197; nor an agreement to furnish a farm with teams and labor, and to give labor, manage the farm, and divide the crop: *Blue v. Leathers* 15 Ill. 31; nor to furnish manufactured merchandise at prices to be paid out of the proceeds, the manufacturer to find the labor and material and receiving as compensation for his skill and the rent of a storehouse a commission of fifty per cent. on the net profits of the sale: *Dunham v. Rogers* 1 Penn. St. 255; a distinction between profits, as such, and the payment of a sum equal to a share of the profits is made in *Brockway v. Burnap* 16 Barb. 309; there must be such a vested interest in profits as will entitle one to an accounting, to constitute a partnership, and this is not found when a party is only entitled to compensation in proportion to a certain share in the profits: *Heimstreet v. Howland* 5 Den. 68; *Catskill Bank v. Gray* 14 Barb. 471; *Champion v. Bostwick* 18 Wend. 175; *Stocker v. Brockelbank* 5 E. L. & E. 67; *Loomis v. Marshall* 12 Conn. 69; *Hodyman v. Smith* 13 Barb. 302; Gow on Partnership 19; Story on Partnership 59 *et seq.;* the distinction between a share in the receipts or profits, and a compensation measured by receipts or profits, is admitted by Lord Eldon, in *Ex parte Hamper* 17 Ves. 404, and appears in *Denny v. Cabot* 6 Met. 82; 1 Pars. Cont. 161, n.; an agreement to receive for rent a portion of the profits of a hotel leased to another does not make a partnership: *Perrine v. Hankinson* 6 Halst. 181; *Holmes v. Old Colony R. R. Co.* 5 Gray 58; one who shares in the profits, though not in the losses, is a partner as to third persons, as creditors are thereby deprived of part of the means of payment: *Hinman v. Littell* 23 Mich. 484; *Sager v. Tupper* 38 Mich. 265; where one owning land contracted with another to cut posts on the lands at his own expense, on shares, the owner of the land receiving half the posts, no inference of a partnership could be drawn: *St. Denis v. Saunders* 36 Mich. 369; and there was none where hay was delivered to be carried to market and sold at not less than a fixed price, out of which the seller was to take a specified portion and pay the balance to the owner,

but if sold for more the balance was to be equally divided: *Morrison v. Cole* 30 Mich. 102; and where a firm contracted to get out lumber during a specified season for a person who was to receive a fixed proportion of the net profits of the job, above expenses, the parties were not partners, as to third parties, in an action brought for supplies furnished to the firm, if at all, except during the time they were getting out the lumber: *Hall v. Edson* 40 Mich. 651.

William B. Jackson and *C. I. Walker* for defendants in error. A partner is liable, though the fact of partnership be unknown and credit be given solely to the ostensible partners: Story on Partnership 363; Collyer on Partnership 384, 537; Parsons on Partnership 62 and note; *Bromley v. Ellis* 38 N. H. 302, 306; *Parker v. Canfield* 37 Conn. 254; *Cox v. Hickman* 8 H. of L. Cas. 273; *Pratt v. Langdon* 97 Mass 94; and even if the ostensible partner had agreed with the dormant partner to contract no debts: Story on Partnership § 126; *Everitt v. Chapman* 6 Conn. 347; *Hickman v. Cox* 3 C. B. (N. S.) 553; *Judge v. Braswell* 13 Bush (Ky.) 67; persons who may not have intended to be partners, and may have expressly agreed that they would not become so, may be made partners, so far as third persons are concerned, by the very terms of their agreement: Parsons on Partnership 58 n., 86–7; Collyer on Partnership §§ 78, 83; *Hinman v. Littell* 23 Mich. 486; *Manhattan Brass Mfg. Co. v. Sears* 45 N. Y. 797; *Leggett v. Hyde* 58 N. Y. 278; *Parker v. Canfield* 37 Conn. 252; *Pooley v. Driver* L. R. 5 Ch. Div. 483; if one receive a portion of the gross proceeds, rather than a portion of the net proceeds, he is still a partner: Parsons on Partnership 88, 91 n.; *Waugh v. Carver* 2 H. Bl. 235; *Cheap v. Cramond* 4 B. & Ad. 663; *Musier v. Trumpbour* 5 Wend. 274; *Champion v. Bostwick* 18 Wend. 175; *Farmers' Insurance Co. v. Ross* 29 Ohio St. 429; *Eastman v. Clark* 53 N. H. 284–5; nor is it necessary to a partnership that each should bear the loss, if any be incurred: Parsons on Partnership 41,102; Story on Partnership 23, 32 n., 55; *Sager v. Tupper* 38 Mich. 265; sharing the profits has been

made the test of copartnership, so far as applicable to dormant and secret partners: *Grace v. Smith* 2 W. Bl. 998; but this doctrine has been greatly modified: *Cox v. Hickman* (1860) 8 H. L. Cas. 273; *Bullen v. Sharp* (1865) L. R. 1 C. B. 102, 109; *Pooley v. Driver* (1876) L. R. 5 Ch. Div. 458; *Ex Parte Tennant* (1877) 6 Ch. Div. 303; *Ex Parte Delhasse* (1878) 7 Ch. Div. 511; *Hart v. Kelley* 83 Penn. St. 286; *Harvey v. Childs* 28 Ohio St. 319; *In Re Francis* 2 Sawyer 286; *Boston Smelting Co. v. Smith* 11 Cent. L. J. 211; contra: *Leggett v. Hyde* (1874) 58 N. Y. 281; *Hinman v. Littell* 23 Mich 486; *Sager v. Tupper* (1878) 38 Mich. 265; it is conceded that if one receives a portion of the profits of a business simply in compensation for services, he does not thereby become a partner: Parsons on Partnership 58 n., 68, 70; *Parker v. Canfield* 37 Conn. 266; *Bullen v. Sharp* L. R. 1 C. B. 124, 125; nor if he rent land or a hotel to another, and receive *for rent* a certain proportion of the gross proceeds, or of the net profits: Parsons on Partnership 143, 144; *Perrine v. Hankinson* 6 Halst. 181; *Blue v. Leathers* 15 Ill. 31; *Holloway v. Brineley* 42 Ga. 226; but wherever it is apparent from the nature of the contract, that the landlord is endeavoring to obtain the advantages of a copartnership without incurring its liabilities, the contract will be held one of partnership: Parsons on Partnership 80, 143, 144 and note; *Tibbatts v. Tibbatts* 6 McL. 80; *Catskill Bank v. Gray* 14 Barb. 471: *Allen v. Davis* 13 Ark. 28; *Dalton City Co. v. Dalton Mfg. Co.* 33 Ga. 253; *Adams v. Carter* 53 Ga. 160; *Brownlee v. Allen* 21 Mo. 123; *Rowland v. Long* 45 Md. 439.

Cooley, J. The purpose of the action in the court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. The facts are all found by special verdict, and are few and simple. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in

the course of the business made this purchase. The proposals are set out in full in the special verdict.

The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership, these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the most common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities.

It is nevertheless possible for parties to intend no partner-

ship and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should "carry the doctrine of constructive partnership so far as to render it a trap to the unwary." Kent, C. J., in *Post v. Kimberly* 9 Johns. 470, 504.

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law.

What then are the *indicia* of partnership in this case; the marks which force that construction upon the court irrespective of the intent of the parties; that in fact control their intent, and give to the parties bringing suit rights which they were not aware of when they sold the supplies?

In the elaborate and able brief which has been presented in behalf of the defendants in error it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day, would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of

partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in *Hinman v. Littell* 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions. *Eager v. Crawford* 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportioned to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received, was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words. *Loomis v. Marshall* 12 Conn. 69, 79.

In *Cox v. Hickman* 8 H. L. Cas. 268, 306, Lord Cranworth stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests whether a person not ostensibly a partner, is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This no doubt is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When

that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

It is said, and we believe justly, in *Bullen v. Sharp* L. R. 1 C. B. 86, that the decision in *Cox v. Hickman* brought back the law of England to what it should be, and Mr. Baron Bramwell, referring to what was declared to be law in *Waugh v. Carver* 2 H. Bl. 235, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books." p. 128. It is certainly overruled very conclusively in Great Britain. *Kilshaw v. Jukes* 3 B. & S. 847; *Shaw v. Gault* 16 Irish C. L. R. 357; *Holme v. Hammond* L. R. 7 Exch. 218; *Ex parte Delhasse* 7 Ch. Div. 511. And though in New York the courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in *Cox v. Hickman* to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. Indeed that is very well shown in *Eastman v. Clark* 53 N. H. 276, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. A few cases may be mentioned which in their facts have a resemblance, more or less strong, to the one before us.

Champion v. Bostwick 18 Wend. 175, was a case where parties who were severally owners of horses and stages on different parts of one stage line made an arrangement that the fares received by both should be divided between them in proportions agreed upon. This was held to constitute them partners, so that a third person injured by the carelessness of a driver employed by one might bring suit for the negligence of all. But in the somewhat similar case of *Eastman v. Clark* 53 N. H. 276, the conclusion of partnership or no partnership, it was said, must be drawn as one of fact. "The real and ultimate question," says Smith, J. (p. 289), "in all cases like the present, is one of agency. Did the person sought to be charged stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of that question, 'except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business.' Whether such relation existed is a question of fact. * * * There is no sound foundation for an arbitrary rule of law requiring courts or juries to regard participation in the profits as a decisive test which will in all instances necessitate the conclusion that the participator is liable for the debts."

In *Farmers' Ins. Co. v. Ross* 29 Ohio St. 429, it appeared that by arrangement one party furnished the ground and the material for making brick, and also the fuel, and another was at the expense of burning the brick. The brick were then to be divided, the former receiving one-fourth and the latter three-fourths, and the latter was also to pay the former ten dollars on each one hundred thousand bricks. This was held to create a partnership, and *Musier v. Trumpbour* 5 Wend. 274, and *Everitt v. Chapman* 6 Conn. 347, were relied upon as authority.

The New York cases might support this decision, but the case of *Loomis v. Marshall* 12 Conn. 69, can hardly be considered in accord with it. The facts were these: B. had a cloth factory. A. agreed with him to furnish a full supply of wool for two years, B. to devote the factory for two years

exclusively to manufacturing, and the net proceeds, after deducting the incidental expenses and costs of sale, were to be divided in the proportion of 55 per centum to A. and 45 per centum to B., and the cost of manufacture was to be shared in like proportion. This was held no partnership. Says Huntington, J.: "This community of profit is the test to determine whether the contract be one of partnership; and to constitute it, a partner must not only share in the profits, but share in them as a principal; for the rule is now well established that a party who stipulates to receive a sum of money in proportion to a given quantum of the profits, as a reward for his labor, is not chargeable as a partner." And of the share set off to B. he says it "is not expressed in terms to be for such compensation; but this is its legal meaning." pp. 77, 79. *Moore v. Smith* 19 Ala. 774; *Bowman v. Bailey* 10 Vt. 170, and *Price v. Alexander* 2 Greene (Ia.) 427, may be referred to for similar views.

One of Chief Justice Gibson's short but very lucid opinions is in point here. Between Bronson, a manufacturer, and Dunham, a country merchant, there was an agreement that the former should furnish wooden handles made to order to the latter, at a tariff of prices to be paid out of the store, on the proceeds of the handles; Bronson finding the labor and stuff, and receiving a further compensation for skill and the rent of the store-house, in the form of a commission of fifty per centum on the net profits of the whole. It was sought to charge Dunham as a partner with Bronson for the price of raw material the latter had bought. Upon these facts it is said: "Now, it has been so often and so invariably ruled in England and America, that a commission on profits is not such an interest in the concern as constitutes partnership, that the point is at rest. What staggers the mind in this instance is the apparent shallowness of the distinction when it is considered that a commission of fifty per cent. is no more nor less than an equal division of the profits; but it must not be forgotten that the distinction is an arbitrary one, resting on authority, not principle; and that, whatever be the proportion, the relation produced by a compensation

in the form of a commission is in every instance the same. But by the terms of the contract Bronson and not Dunham was to procure and pay for the stuff; and they were not to be partners in that part of the business. This provision I admit would be inoperative against strangers, if the parties had held themselves out to the public as partners, both in buying and selling; but assuming for the moment, that there was indeed a partnership in the handles when furnished, and in the store when stocked with goods, yet it is to be borne in mind that the handles as well as the store-goods, were to be put into the concern as separate contributions to the joint-stock; and that, as the stuff for the handles was to be procured by Bronson it was consequently to be paid for by him, just as the store goods were to be procured and paid for by Dunham, having been purchased on separate account. There may be a partnership for selling and not for buying; or for buying and not for selling; or for both buying and selling, which is the most usual: as if several put separate quantities of wheat into a common stock to be ground into flour and sold on joint account; or agree to buy jointly and divide the article when bought; or agree to buy and sell on joint account. In the first case each would be liable for his own purchases only; but in the second and third cases, each would be liable for the whole. Now if there were any partnership in this instance it would be of the first class; and in any view of the case the defendant would not be liable." *Dunham v. Rogers* 1 Penn. St. 255, 262.

Not dissimilar to this is the case of *Denny v. Cabot* 6 Met. 82, which was also a case in which one party supplied the raw material and another manufactured it, and was to receive one-third part of the net profits. This proportion, it was found, was to be received by the manufacturer only as a compensation for his labor and services; and it was held perfectly competent to provide for making compensation by such a standard without constituting a partnership. *Perrine v. Hankinson* 11 N. J. 181, is relied upon as authority, among other cases. The same doctrine was reiterated in *Holmes v. Old Colony R. R. Co.* 5 Gray 58; *Bradley v.*

White 10 Met. 303; and by Day, J., in a careful opinion in *Harvey v. Childs* 28 Ohio St. 319, already referred to.

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the mutual arrangement does it appear that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams

saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive, or receive one that Williams rejected as unfit? In short, what one act might he do or authority exercise, which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and therefore have not deemed it necessary to exclude.

On the other hand what single act are we warranted in inferring the parties understood Williams was to do for, and as the agent of, Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be met by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of his contract. If the business was managed badly Beecher might be a loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies or overrule his judgments. He did indeed agree

to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of their plain intent that none shall exist. If therefore we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies

or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams' assent was required.

There is another view of this case that seems to us conclusive. It is urged on behalf of defendants in error that Beecher was a dormant partner. Now a dormant partner is a secret partner; one who becomes such by a secret arrangement, while his associate is held out to the world as sole proprietor and manager of the business. Was this the case here? Nothing in the record indicates it. Beecher was in possession of the hotel, and we must suppose had his clerk there. These were facts open and patent to the whole world who had occasion to go there or to deal with Williams. They naturally suggested the inquiry what was the arrangement between the parties; and there is nothing in the case to indicate that plaintiff in error would not have learned all the details of the arrangement had they made the necessary inquiries. There is no indication anywhere of intended secrecy. If, therefore, there was any partnership at all, it existed because the contract and the open and public conduct of business under it created one, and the right of the defendants in error to recover must depend upon whether they had a right, with the contract before them, to understand that they were furnishing supplies on the credit of Beecher? Would they have had this right? If so, no interference of Beecher, and no notice to them not to sell to Williams relying on Beecher's credit, would have been of the least avail. If he had said to them, "Gentlemen, by our contract Mr. Williams furnishes all the supplies; I do not and cannot control in respect to quality, quantity or cost; he alone, by our understanding, is to pay for them, and I forbid you to sell on my credit;" it would all have been useless. On their view of the case he was bound by an iron rule of the law, from which it would have been impossible to rescue his credit until the arrangement with Williams should in some manner be terminated. And this would have been the case also even if the arrangement with Williams had been a secret one, and

Beecher had attempted to protect himself by disclosing its terms. This is as much as to say that parties are not at liberty to contract as they please, even when they propose nothing wrong and do nothing unfair to any one. But we cannot bring our minds to this result.

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died, the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

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

The other Justices concurred.

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CECILIA VAN NORMAN v. THE CIRCUIT JUDGE FOR JACKSON COUNTY.

Attachment of corporate stock—Mandamus vacating injunction.

Mandamus lies to vacate an injunction where the bill upon which it was granted was devoid of substance, and could not therefore support the application for the writ.

Whether a bill in equity can lie to protect and enforce the lien of an attachment—Q.

Attachment is a special and extraordinary remedy, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms.

Shares of corporation stock are intangible entities, and at common law are incapable of caption by levy; they cannot be subjected to legal process without specific legislation prescribing in substance all necessary procedure.

The actual state of the law is not changed by any misapprehension of the Legislature concerning the real fact; and legislation enacted on the assumption that a certain remedy exists cannot establish such remedy.

Executions and attachments cannot be levied on shares of corporation stock if the debtor is not himself the legal possessor of the interest, or where he has only an equitable right or has regularly assigned his interest.

An attachment cannot be levied on corporate stock previously assigned by the defendant to his wife; and as a bill cannot lie to protect the lien of such an attachment by enjoining the payment of dividends to the holder, such an injunction, if granted, can be vacated by mandamus.

Mandamus to require respondent to vacate an injunction whereby the relator was restrained from proceeding with an action. Submitted November 9, 1880. Decided January 12, 1881.

Don. M. Dickinson and *Alfred Russell* for relator.

Edwin F. Conely for respondent.

GRAVES, J. This is a hearing on an order to show cause why a mandamus should not issue to require an order for an injunction to be vacated.

For an understanding of the case a reference is necessary to the main circumstances. In 1873 the relator's husband, Arthur Van Norman, was a stockholder in the private corporation in Jackson known as the Central Car & Manufacturing Company, and held 917½ shares of the capital stock, of the face value of $22,937.50. Sometime about the month of August, 1877, said Arthur Van Norman and one Hiram Gay began negotiations with Luther Beecher for the occupation on special terms of his establishment known as the "Biddle House," and they at length ripened into a contract which was reduced to writing and executed by the parties February 14, 1878; and on or about March 27, 1878, they received

possession of the real estate and also of certain personal property which the arrangement likewise covered.

Up to February 19, 1878, or until four days after the execution of said agreement and a little more than a month prior to possession under it, the said Arthur Van Norman continued his ownership of said stock. But at that date he returned the certificate thereof to the company's secretary, and with assignments indorsed which purported to convey the stock to relator, and the company immediately issued new certificates to her in place of the old ones. There appears to be no question of the sufficiency, in form at least, of this transfer.

January 31, 1879, Beecher obtained possession of the "Biddle House" property. But about two weeks earlier and on the 18th of January he began a suit by attachment in the circuit court for the county of Jackson against the said Arthur Van Norman and Hiram Gay for an indebtedness he alleged had accrued to him against them under the contract, the ground for the writ, as set up, being that the transfer of said stock to relator was made with intent to defraud his creditors. The sheriff executed the writ by levying on this stock as though it belonged to the defendant Arthur Van Norman. Subsequently and on the 7th of March, 1879, the company declared a dividend of twenty per cent. and directed payment on all shares except those in question, and ordering that payment on those should be withheld until a determination should be reached of the dispute about their ownership.

In July, 1880, the relator sued the company at law for the dividend, and in August following Mr. Beecher filed his bill on the equity side of the court having cognizance of the law cases.

The bill seems to be one of first impression and the pleader would probably concede that some matters pertinent to its theory are omitted and that others not needful to it are inserted. But that is perhaps not important now. It contemplates that by the levy of the attachment Mr. Beecher obtained a positive lien on the stock and on the accruing dividend, and it proceeds upon the idea that the aid of equity as here involved is requisite to protect and enforce this lien.

It will not escape notice that if the case requires as an equitable basis that a lien was created by the levy, the necessity would hardly be met by taking the existence of the lien for granted. It might well be argued that whether there be a lien or not is a vital question, and to assume its existence as a ground of equity is to assume the essential point in controversy. If the attachment were considered as well laid the lien would be merely provisional. It might cease before the determination of the action. But if not, it might then turn out that there had never been any just foundation for it, and the authority of equity to intermeddle for the supervision of such a lien is not so clear as to be assumed. There are many cases where the service of *mesne* process will bind personally for the time being without creating a lien properly subject to equitable protection and enforcement. According to the theory of the bill the dividend was bound equally with the stock, and one is supposed to be in the same plight as the other, and if the case called for it, it might be useful to inquire into the necessity for the bill on its own principle. If a lien was established by the levy, or if the levy bound the stock and dividend as is claimed, the occasion for the suit in equity on its own facts is not self-evident. These observations on the character of the bill are merely incidental and are mine only.

An injunction was sought against the relator and the company, and in relation to her the prayer was that she "be enjoined and restrained from prosecuting her said action in relation to said dividend and from commencing or prosecuting any and all other suits or actions in relation to said stock or dividend, or any other dividend thereon, against the said company or any other party or parties pending the determination of this your orator's suit, or until this court shall make further order herein, and that she be perpetually, or until the determination of said attachment suit, enjoined and restrained from so doing by the final decree of this court herein, and that she be restrained from transferring or assigning said stock until further order of this court." In regard to the company the prayer was that it "be enjoined and restrained

from paying over to said Cecilia E. Van Norman, or to any one for her, said dividend or any other moneys due or which may become due upon said stock until this court shall make further order herein."

On or about August 7, 1879, a preliminary injunction was allowed according to this prayer, and April 27, 1880, the relator moved its dissolution. May 11, 1880, the motion was denied and soon thereafter the present application was made to this court.

Were the question to be examined under an assumption that the attachment was well laid, it would not follow as of course that the case made by the bill might be deemed sufficient to serve as a basis for the exercise of discretion on the application for an injunction, but no investigation of the controversy in that aspect is deemed necessary. *Fox v. Willis* 1 Mich. 321; *Williams v. Hubbard* Walk. Ch. 28; *Beck v. Burdett* 1 Paige 305.

If the levy was not of force to bind the stock at all, the bill as one for an injunction against intermeddling with it, is devoid of substance, and there was no foundation to support an order for the writ, and it should be vacated. Was the levy good? The attention is first drawn to the special character of the various proceedings. The remedy by attachment is highly artificial and in this State is considered as "*special and extraordinary.*" The statutory provisions relating to it have invariably been subjected to strict construction, and the rule is fairly established that unless the case is plainly within the terms expressed it cannot be considered as embraced. The leading cases are *Greenvault v. Farmers' & Mechanics' Bank* 2 Doug. (Mich.) 498, and *Buckley v. Lowry* 2 Mich. 419.

The same doctrine applies with great force to the subjection of shares of stock in incorporated companies to *mesne* process. They are not leviable at common law, and positive provisions are requisite to enable a court of common law to apply its power to them. They are intangible entities and incapable of caption by the gross methods of that system. In order that they may be safely proceeded against without

going into a court of equity it is indispensable that the legislature provide specifically therefor and prescribe in detail, or at least in substance, all the means necessary for the object. *Blair v. Compton* 33 Mich. 414; *Denton v. Livingston* 9 Johns. 96; *Howe v. Starkweather* 17 Mass. 240; *Williamson v. Smoot* 7 Mart. O. S. (La.) 31; *James v. Pontiac & Groveland Plank-road Co.* 8 Mich. 91.

It was in contemplation of the inadequacy of the methods of the common law that equity came forward to afford redress to the creditor against such property, and our legislature proceeded on the same principle when it passed Comp. L. § 5060. It was considered that equity ought to have jurisdiction to afford relief when it was well shown that the law had exhausted its power; and it was also considered that such condition would be so shown, and only so shown in respect to such property, by the due return unsatisfied of a legal execution. The Revised Statutes of 1846 made provision for subjecting to execution any share or interest of a stockholder in any bank, insurance company, or any other joint-stock company incorporated under the authority of, or authorized to be created by any law of this State, "in the following manner." Comp. L. § 6112. "The officer shall leave a copy of the execution, certified by him, with the clerk, treasurer, or cashier of the company, if there be any such officer, and if not, then with any officer or person who has, at the time, the custody of the books and papers of the corporation; and the *property shall be considered seized on execution* when such copy is left." § 6113. "The officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein, shall, upon exhibiting to him the execution, be bound to give a certificate of the number of shares or amount of the interest *held* by such *judgment debtor*." § 6114. "A copy of the execution and the return thereon, certified by the officer executing the same, *shall*, within fourteen days after the sale, be left with the officer of the company whose duty it may be to keep a record of the transfer of shares; and the purchaser shall thereupon be entitled to a certificate or certificates of the

shares bought by him, upon paying the fees therefor, and for recording the transfer." § 6115. Having enacted these regulations the legislature seem to have assumed that the suit might happen to be commenced by seizure of the defendant's share or interest on attachment; and proceeding under that impression it was declared in the next section that if the shares or interest "shall have been attached in the suit in which the execution issued, the purchaser shall be entitled to all the dividends which shall have accrued after the levying of the attachment." § 6116. It is unquestionable, however, that no provision was attempted to be made for attaching such property until 1877, and that the supposition that a suit could be so commenced at the date of the previous enactment was a plain error. Of course this mistaken view by the legislature worked no change in the law. *Talbot v. Seeman* 1 Cr. 1–25.

In 1877 it was enacted that "in attaching shares of stock, or the interest of a stockholder in any corporation organized under the laws of this State, the levy shall be made in *the manner* provided by law for the seizure of such property on execution." Pub. Acts 1877, p. 3. There is no other authority for levying an attachment on shares in domestic corporations than is found in this provision. The circumstance that it does not directly and affirmatively enact that such property shall be subject to attachment is not overlooked. The point is not considered important. The aim of the provision is to give a mode for attaching a debtor's shares or his interest in shares in a domestic corporation in the same cases in which an execution would be authorized, and the right to make seizure by attachment is thus confined and can be carried no further. Whether in strictness it can have equal latitude need not be discussed.

Now in giving the right to levy executions on corporation shares the law confines it to cases where the debtor's *status* is that of stockholder and legal possessor of the interest. *Newberry v. Detroit & Lake Superior Iron Co.* 17 Mich. 141. In case his right is merely equitable, or in case he has regularly passed to another the legal title so that, as against him,

the transfer is good and is one the company is bound to recognize, the shares are not leviable on attachment or execution issued against his property. *Newberry v. Detroit & Lake Superior Iron Co.* supra.

In such circumstances the process of a court of common law is powerless. The property is beyond its scope. Its statutory energy is only capable of applying when the interest is found standing as the property of the debtor. The statute has made no provision for seizing under an attachment against one a share belonging *prima facie* to another, as an expedient to enable the attaching creditor to contest the title of the apparent owner, and, as before suggested, the remedy is one depending on the statute and not to be in anywise enlarged by construction. If the apparent owner holds by a title in which the creditor, in his character of creditor, can overreach, he must put himself in a situation to assail it in some other way.

In the case before us the stock was found regularly standing in the relator's name and as her property on the stock-book. The company knew she was a regular assignee. She was *prima facie* owner. *Turnbull v. Payson* 95 U. S. 418; *Nat. Bank of New London v. L. S. & M. S. R. Co.* 21 Ohio St. 221. And all admit that her title is good against every one except creditors of her husband. She is a stockholder in the company, but her husband is not. She has the legal title, and under the terms of the statute the stock was not subject to levy on the attachment issued against him.

I think the writ should issue and that the relator should be allowed her costs of the application.

The other Justices concurred.

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MICHIGAN CENTRAL R. R. Co. v. JOHN L. SMITHSON.

Negligence—Injury to employees—Coupling cars.

An employer cannot be punished in damages for injuries received by employees who have voluntarily assumed the risks of the employment with full knowledge of the methods employed.

Business establishments are not bound at their peril to use only the best machinery and implements and the safest methods.

It is not negligence for a railroad company to use machinery that is a necessity of its business and which all persons in its employment must be presumed to know is a necessity.

A switchman has his hand crushed while coupling a freight car furnished with double deadwoods and received from another road where such a contrivance was generally used. He had not been expressly notified that he would be required to handle such cars, but in the course of commerce and as a matter of business necessity as well as of statutory obligation they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon. *Held*, that the switchman could not maintain a suit against the company as for negligent injury in receiving the cars or in omitting to notify him thereof.

It seems that a master need not expressly notify his servant of a risk where the nature of the business and of the risk is such that the only effective notice he can have is from his own general experience and the visible presence of that from which the danger is to be apprehended.

Error to the Superior Court of Detroit. Submitted November 9, 1880. Decided January 12, 1881.

CASE. Defendant brings error. Reversed.

Henry Russel and *G. V. N. Lothrop* for plaintiff in error, cited as in point on the facts: *I. B. & W. R. R. v. Flanigan* 77 Ill. 365; *Way v. Ill. Cent. R. R.* 40 Ia. 341; *Baldwin v. C. R. I. & P. R. Co.* 50 Ia. 680; *Conway v. Ill. Cent. R. Co.* id. 465; *Ft. W., J. & S. R. R. v. Gildersleeve*, 33 Mich. 133; *Hulett v. St. L. K. & N. Ry. Co.* 67 Mo. 240; *Smith v. St. L., K. & N. R. R.* 69 Mo. 32; *Toledo*,

Wabash & Western Ry. v. Black 88 Ill. 113; *T. W. & W. Ry. v. Asbury* 84 Ill. 434; *Wonder v. B. & O. R. R.* 32 Md. 411; *Warner v. Erie Ry* 39 N. Y. 471; and as to the employee's assumption of risk: *Cagney v. H. & St. J. R. R.* 69 Mo. 416; *Lovejoy v. B. & L. R. R.* 125 Mass. 79; *Pennsylvania Co. v. Lynch* 90 Ill. 334; *Clark v. C. B. & Q. R. R.* 92 Ill. 44; it is not negligence to use dangerous machinery: *Ladd v. New Bedford R. R.* 119 Mass. 412.

Don M. Dickinson and *Griffin & Dickinson* for defendant in error. A party entering upon a particular employment assumes the risks and perils usual thereto, where the machinery used is not defective either in its construction or from want of proper repair, and where the usual and customary means are adopted to guard against accidents; if wanting in either respect there is an increased risk, and if the servant is injured in consequence thereof, the master must be held responsible therefor: *Swoboda v. Ward* 40 Mich. 423; a man cannot be understood as contracting to take upon himself risks which he neither knows nor expects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than on the part of the servant to run the risk of them: Cooley on Torts 550–6; the servant stands towards the master with respect to an injury, outside the usual and ordinary risks of his employment, in the same position as a stranger: *Smith Admr's v. N. Y. & H. R. R. Co.* 19 N. Y. 127; *Smith v. N. Y. & H. R. R. Co.* 6 Duer 225; a railroad company is bound to see to it that its road is in good condition and safe, and the engines are perfect and properly constructed, according to the present improvement in the art, and if any injury is occasioned to an employee by an imperfection in the road or machinery, the company will be held responsible, provided it had knowledge of the defect: *Nashville & C. R. R. Co. v. Elliott* 1 Cold. (Tenn.) 611; it is the duty of those using hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves from time to time of every improved invention

to lessen the danger to others; great danger demands higher vigilance and more efficient means to secure safety: *Frankford, etc., Turnpike v. Phil.* 54 Penn. St. 345; it is the imperative duty of railway companies to discard all unsafe or dangerous cars and machinery, or such parts thereof as may be dangerous to use, and to adopt and use all improvements in cars and machinery which are calculated to insure the safety of employees and passengers: *St. Louis & S. E. R. R. Co. v. Valirius* 56 Ind. 511; the care which is required of the master extends not merely to furnishing safe machinery of proper construction, but also extends to providing other means, like notices, which an ordinarily prudent and careful man would provide for the safety of employees; Thompson on Negligence 979; where there are special risks in an employment of which the employee is not from the nature of the employment cognizant, or which are not patent in the work, it is the duty of the employer especially to notify him of such risks, and on failure of such notice, if he is hurt by exposure to such risk, he is entitled to recover from the employer in all cases where the employer was either cognizant of or ought to have been cognizant of the risks: Wharton on Negligence § 206; *Malone v. Hawley* 46 Cal. 409; *Wonder v. R. R.* 32 Md. 411; such knowledge will be implied from facts; see *Walsh v. Peet Valve Co.* 110 Mass. 23; *Baxter v. Roberts* 44 Cal. 187; even if an employee is proved to know of the existence of the defect, yet under circumstances of haste in the employment requiring prompt attention, "it cannot be justly inferred that this knowledge was present to him at this particular time:" Wharton on Negligence § 219; *Greenleaf v. R. R.* 29 Iowa 47; *Snow v. Housatonic R. R.* 8 Allen 441; *Patterson v. P. & C. R. R. Co.* 76 Penn. St. 389; the want of proper rules and regulations published to employees, is negligence, also; *Cooper v. Iowa Central* 44 Iowa 134; *Chicago Ry v. Taylor* 69 Ill. 461; *Vose v. Lancashire R. R.* 2 H. & N. 729.

Cooley, J. Smithson sued the Railroad Company to recover damages for an injury alleged to have been caused by the

company's negligence. He was a switchman in the employ of the company, and had been for about a month, when in an attempt to couple two freight cars his hand was caught between them and he was seriously hurt. He had been a switchman and brakeman for several years on the Grand Trunk Railway of Canada before entering the service of defendant. 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 among railroad men as double dead-woods. A car of this construction has a horizontal timber at the end with projecting blocks bolted to each end of the timber, and the draw-bar for coupling extends but little beyond the faces of these blocks. In coupling, the blocks come together and receive the blow of the cars. The coupling-pin is dropped between the blocks from above.

Distinguished from the car with double dead-woods is that known as the single dead-wood, which dispenses with the projecting blocks, and leaves the draw-bar to receive the concussion when the cars are coupled. The cars of the defendant are single dead-woods, and so perhaps are four-fifths of all the cars which pass over its road. Several long lines, however, use the double dead-woods exclusively, and among these are the Pennsylvania Railroad Company's lines, those of the Delaware, Lackawanna & Western, and the Pittsburgh, Fort Wayne & Chicago. The New York, Lake Erie & Western Railroad Company has adopted the double dead-woods, but have some old cars not of that style.

The gravamen of the plaintiff's complaint is that he was employed by the defendant in making up trains and coupling cars; that the existence and use of double dead-woods was unusual and in the highest degree dangerous to the life and limb of persons so employed as the defendant well knew, and that on the 9th day of March, 1879, the plaintiff, in and about the ordinary course of his said employment, "and when the plaintiff did use due care, was coupling certain cars, which said cars by the carelessness, negligence and default of the defendant, had been introduced and used upon the said

railroad by the defendant, then having and bearing such unusual attachments called dead-woods, so as aforesaid placed and being, which the defendant well knew, but of which the plaintiff was wholly ignorant, without using reasonable and ordinary care to notify its employees or the plaintiff of the existence of such attachments thereon so placed and being, and without providing reasonable and ordinary means and appliances for the protection of its employees, and especially the plaintiff, in coupling the same, was caught between the dead-woods so placed and being upon said cars, and being so held the said cars were driven and run against plaintiff, and a portion of his hand was destroyed," etc.

The coupling of cars on the road of defendant appears to be done with the hand alone, without the assistance of any mechanical implement. There is some evidence that what is called a "stick" is sometimes made use of in coupling the double dead-woods, but the evidence is very slight, and scarcely intelligible, and it does not appear that the use of such an implement is general anywhere. The plaintiff gave evidence that tended to show that the coupling of the double dead-woods belonging to the New York, Lake Erie & Western Railway Company is always dangerous; one witness going so far as to testify that the man attempting it is more apt to be caught than to escape with safety. It was also shown that the construction of these cars differed from double dead-woods in general; the blocks being higher and nearer together; and there was considerable evidence that this difference increased the danger. On the other hand it was shown that the New York, Lake Erie & Western Railway Company deliberately adopted this peculiar form "as the result of some twenty years' experience," and that many of the cars of that company are passing over the road of defendant constantly. Four hundred and seventy-six passed over in the first ten days of plaintiff's service, but how many of these were double dead-woods, or how many it was necessary to couple, did not appear.

The case was submitted to a jury who returned a verdict for the plaintiff, assessing his damages at $5000. It is

claimed in this court that there was nothing to submit to the jury.

Nobody disputes 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 any accidental injury. In *Davis v. Detroit, etc., R. R. Co.* 20 Mich. 105; *Quincy Mining Co. v. Kitts* 42 Mich. 34, and other cases, we have said all that can be needful on the subject, and shall not repeat it here. Nobody disputes either 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. This is amply explained in *Chicago, etc., Railway Co. v. Bayfield* 37 Mich. 205; and in *Swoboda v. Ward* 40 Mich. 420, it was held in an opinion by Mr. Justice Marston, that 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. We abide by all these decisions, and new cases must be governed by them as the facts may require.

If the only question before us were whether it was prudent and safe to introduce and use the cars with the coupling arrangement now complained of, we should perhaps be compelled upon the evidence before us to decide that it was not. The preponderance of evidence that they are more dangerous than the single dead-woods is very decided, and makes us regret that we are without explanation as to what it was in the twenty years' experience of the New York, Lake Erie & Western Railroad Company that led the company to adopt this style of car. It is not likely that the consideration of safety escaped attention, because it should have had great if not controlling weight; but it must be admitted that the evidence presented in this record tends to establish the fact that all double dead-woods are more dangerous to the man called upon to couple them than are the single dead-woods, and that the form adopted by the New York, Lake Erie & Western is most dangerous of all. There is nevertheless some evidence the other way.

But if it be conceded the double dead-woods are so dangerous, the concession does not dispose of this case. This is a question of negligence. The charge is that defendant has been guilty of a breach of duty to one of its servants in permitting the cars of the New York, Lake Erie & Western Railroad to come upon his own road, and to be handled and coupled by its switchmen, without warning them of the peculiar construction and without furnishing them with appliances to make the coupling safe. There is no dispute regarding the main facts bearing upon this question. The company owning these cars have many thousands of them in use, and probably several hundred are coupled together every day. No doubt accidents sometimes occur, for the act of coupling cars of any pattern is always hazardous; but the evidence of persons having actual knowledge does not show that they are more frequent on that road than on others. When a witness testifies from mere inspection, as one does, that the chances of injury are greater than the chances of escape, we have a right, and indeed are compelled, to receive his opinion with many allowances, and to suspect that he has either misspoken or used words without fully apprehending their meaning. If this opinion even distantly approached the truth, a single day's destruction of life and limb from the use of these cars would startle the country, and be surely followed by desertion of laborers and quite as surely by prohibitory legislation. Any form of car a railroad company may select for use must be one that with care can be coupled safely, or the company could not afford to operate its road by means of them. With needless exposure of its men to danger by the use of unsuitable cars, the company would inevitably subject itself to public odium and disfavor; casualties to property would be increased, and if it could succeed in manning its road with laborers, it must pay them wages increased by the risks of danger. These are patent facts, and they justify an inference when a particular form of car is deliberately chosen and adhered to, that it is believed by those who make use of it to be as safe as any other. It is no doubt true that a company may make serious mistakes in

such a case. It is quite possible for a company to adhere unreasonably to something which has been thoroughly demonstrated to be dangerous; and the mere fact that it does so cannot be conclusive in its favor of the want of negligence. But on the other hand no railroad company, and no manufacturing or business establishment of any kind, is bound at its peril to make use only of the best implements, the best machinery and the safest methods. The State does not require it, and could not require it, without keeping such minute and constant supervision of private affairs, and interfering with such frequency as under all circumstances would be irritating and damaging, and in many cases would become intolerable. In the main the State must leave every man to manage his own business in his own way. If his way is not the best, but nevertheless others, with a full knowledge of what his way is, see fit to co-operate with him in it, the State cannot interfere to prevent, nor punish him in damages when the risks his servants voluntarily assume are followed by injuries. *Hulett v. St. Louis, etc., R. R. Co.* 67 Mo. 240; *Lovejoy v. Boston, etc., R. R. Co.* 125 Mass. 79.

But it is said that even if it be not negligence in another company to use these cars, it is negligence in defendant to receive them among other cars, and to send its switchmen to make up trains with them without giving them notice of the difference. The desirability of notice is manifest, but how it is to be given is not so plain. It appears that the company inspects every car offered to it by another for transportation, and marks for rejection all that are considered unsafe, and sets them aside; and it is said that the company should mark in the same or some similar way all the cars which do not couple like its own, and then brakemen would be put upon their guard. As coupling is required to be done at all hours of the day or night at all points on defendant's line, and often under circumstances of great haste, the marking would need to be something the switchman would instantly perceive without groping about for it, and in respect to which there could be no confusion and no mistake. The best marking might perhaps be a placard of some sort at the end of each

car, where it would readily attract the attention of the coupler; and as there are several different kinds of car, so there would need to be as many different placards. The differences in these would be confusing and likely to lead to mistakes. But we have had produced for our inspection, on the argument, a model of the double dead-woods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double dead-woods, or to approach them for the purpose, with any degree of attention, without observing it. This is so whether the coupling is done in the day-time or night-time; for in the night every switchman has his lantern with him, or should have it on all occasions. If therefore a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him.

Moreover the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation;

for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it.

It is said the defendant should have reduced the danger to a minimum by furnishing each man with what is known as a "stick" to assist him in coupling. Our information on this subject is too meager to enable us to determine what force there may be to this position when the facts are fully shown. We do not know that any implement of the kind is in use by any company, or that the men would be willing to use it and keep it by them ready for use at all times if required to do so. No jury with the little information on the subject which this record gives could draw an inference of negligence from the failure to adopt this implement.

The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so—*First*, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to any one. It is compelled to do so, *second*, by its own interest. To attempt to stop every car offered to it at its own *termini*, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business for which it must increase its charges to make up if possible for what it would lose. But *third*, the statute itself requires it. It is provided

by General Laws 1873, p. 99, that "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 necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the State to punish could hardly fail to be speedy and effectual.

It does not follow that laborers must sacrifice life or limb in order to meet this great public necessity. It is certain that there must be brakemen and switchmen, and that these must be called upon to perform the somewhat hazardous act of coupling cars, and of making up trains of cars of different constructions. But the act is dangerous—*First*, because inevitable accidents will sometimes occur; and, *second*, because even in the most exposed positions men will sometimes be wanting in ordinary prudence. But when accident or negligence intervenes, any business is dangerous; the difference in danger is only one of degree. There are more risks in operating a mill by steam than by water, but this does not prove the use of the steam engine to be negligence in the mill-owner. The same remark may be made of different cars; one construction of car may render necessary a higher degree of care in coupling than another calls for; but there is no ground whatever for imputing to this defendant, or to any other railroad company, legal negligence for that which was a necessity of its business, and which all persons in its employ must be presumed to have known was a necessity. *Indianapolis, etc., R. R. Co. v. Flanigan* 77 Ill. 365; *Toledo, etc., R. R. Co. v. Black* 88 Ill. 112; *Baldwin v. Chicago, etc., R. R. Co.* 50 Iowa 680.

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

The other Justices concurred.

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JOHN C. GRAM v. GEORGE E. WASEY ET AL.

Extension of time for settling case—Signing transcript nunc pro tunc—When time is essential in a contract—Acquiescence in forfeiture—Costs.

The Supreme Court will extend the time for settling a case in which the proofs were taken in open court, if the failure to settle it within the prescribed time could not have been prevented by the appellant.

Where return has been made to a chancery appeal, the Supreme Court having obtained jurisdiction, will give opportunity to make good such defects as were not due to appellant's negligence; and if the transcript has not been signed, it will allow the filing of a certificate from the trial judge that the case was settled and the proofs are correct.

A contract for the sale of timbered land required the purchaser to pay current and back taxes, and an instalment of the price, annually, but stipulated against waste. Time was made essential, and the contract was subject to forfeiture on default. The purchaser did not pay the taxes, but within the first year cut a large quantity of pine which he sold, besides selling a parcel of the land on time. The vendors also, within the year, sold their interest to W., who went on the land and began to lumber it without any objection from the original contract purchaser, who did not make any offer of payment, but some time afterwards assigned all his rights to G., who had full knowledge of the facts. G. then filed a bill against W. to restrain him from exercising acts of ownership. *Held* that the bill could not be maintained and that complainant must be held responsible for all the expenses incident to the litigation, including charges to which the suit gave rise against lumber cut by W., who could include such charges in his costs.

In Michigan time is not usually so far of the essence of a contract that failure to perform within the time fixed will necessarily forfeit it; but when a vendee fails to perform his obligations relief is not a matter of right and will not be granted if, under all the circumstances, including the conduct of the parties, it does not seem just and reasonable.

Equity relieves against forfeiture, when it would be oppressive or fraudulent not to.

Contemporary parol agreements cannot be set up in violation of express written contracts.

Appeal from Alcona. Submitted Nov. 10. Decided Jan. 12.

Motion to remand the record to obtain the judge's certificate of settlement. Submitted October 19, 1880. Decided October 26, 1880.

Beakes & Cutcheon for the motion.

MARSTON, C. J. Where proofs have been taken in open court in a chancery cause, an appeal taken, and an effort made to have the case settled under and within the time fixed by the statute, but which failed or was imperfectly done from circumstances not caused by or within the control of the appellant, such as the failure of a stenographer to furnish a copy of the testimony, or of the Circuit Judge to properly settle or certify to the same, the appellant may in this Court have an order extending the time to perfect his appeal, or if return has been made, the proper certificate may be obtained from the Circuit Judge and filed with the record, that the case was settled and that the proofs returned are correct. In such cases this court having obtained jurisdiction of the cause, an opportunity will be afforded the appellant to correct such defects as were not caused solely by his own negligence.

The other Justices concurred.

INJUNCTION, accounting, etc. Defendant appeals. Reversed.

Hatch & Cooley for complainant. Strong equities must be shown before a court will refuse to enforce a written contract for the conveyance of land: *Rogers v. Odell* 36 Mich. 411; *Fitzhugh v. Maxwell* 34 Mich. 138; a court of equity has no jurisdiction to enforce forfeitures: *Hall v. Delaplaine* 5 Wis. 215; time is not usually of the essence of a contract: *Wallace v. Pidge* 4 Mich. 570; *Bomier v. Caldwell* 8 Mich. 463; *Morris v. Hoyt* 11 Mich. 9; *Richmond v. Robinson* 12 Mich. 193; *Converse v. Blumrich* 14 Mich. 109; *Shafer v. Niver* 9 Mich. 257; notice of default should give reasonable time for performance: *Hogsett v. Ellis* 17 Mich. 351; the vendee in a land contract is a tenant at will: *Dwight v. Cutler* 3 Mich. 566; *Crane v. O'Reiley* 8 Mich. 312.

R. Z. Roberts and *Beakes & Cutcheon* for defendants. It is lawful to make time of the essence of the contract, and agree that if a vendee does not pay at the time specified the vendor's obligation to sell shall be terminated: *Benedict v. Lynch* 1 Johns. Ch. 375; *Lloyd v. Collett* 4 Brown Ch. 469: 14 Ves. 430; *Webb v. Hughes* L. R. 10 Eq. 284; *Boehm v. Wood* 1 Jacob & Walker 420; *Williams v. Edwards* 2 Sim. 83; *Alley v. Deschamps* 13 Ves. 225; *Hunter v. Daniel* 4 Hare 423; *Parkin v. Thorold* 2 Sim. N. S. 1: 16 Beav. 59; *Wells v. Smith* 7 Paige 22; *Domnick v. Michael* 4 Sandf. Sup'r Ct. 374; *Kirby v. Harrison* 2 Ohio St. 332; *Heckard v. Sayre* 34 Ill. 150; *Stow v. Russell* 36 Ill. 33; *Ahl v. Johnson* 20 How. 521; *Hansbrough v. Peck* 5 Wall. 505; *Grigg v. Landis* 4 C. E. Green 350; *Reynolds v. Nelson*, 6 Madd. 20; 3 Pars. Cont. 383; Adams' Eq. (4th Am. ed.) 254; 1 Sugd. Vend. 444.

CAMPBELL, J. This is a bill in the nature of a bill for specific performance, to restrain vendors from exercising acts of ownership over certain lands which had been contracted for sale, and on which they had re-entered after the vendee's default.

The original contract was made October 14, 1878, between two tenants in common, each named George W. Moore, residing in Detroit, and Robert Goodfellow. The lands sold were in Oscoda county, and consisted of nine parcels in town 26 North, of range three East, containing in all 1480 acres, and lying in one tract. The terms of sale were that the purchaser should pay $1108, of which eight dollars were paid down, the remaining $1100 to be paid in yearly instalments of $100, with seven per cent interest on the whole principal, payable October 17th of each year. The purchaser was to pay up all taxes then unpaid, and to pay all future taxes of every kind, the past-due taxes being applicable on the last instalments of purchase money. Goodfellow was by the contract to be let into possession and remain so long as he fulfilled it, and no longer, but was restricted from committing

any waste beyond cutting fire-wood or other wood for his own use, or while clearing for cultivation.

The contract was subject to be terminated by any default or violation of its terms, and time was declared to be of the essence of the agreement, and, unless in all respects complied with, the vendee was to lose all claims under it.

Goodfellow paid down the eight dollars referred to, and went at once into possession, built a log house and made a small clearing about it. He undertook to sell a parcel of 160 acres to one Coursier on five years' time, and Coursier also went into possession and built a log house on his tract. Goodfellow paid no taxes, either old or current, and during the winter after he entered cut 104,000 feet of Norway and white pine which he sold to complainant for something over $300, aside from running expenses. During the summer or early fall of 1879 Moore & Moore sold out to Wasey their lands in three adjoining townships in Oscoda, including the lands contracted to Goodfellow. On the 18th of October, 1879, Wasey with the concurrence of Moore & Moore (who had told him when he purchased that they understood Goodfellow did not intend to carry out his contract) prepared a notice to terminate the agreement and quit the premises, and sent it up to be served on Goodfellow if he failed to perform. The notice was served October 23d, on Goodfellow in person on the premises, and Wasey's men in a few days went on the lands, established their lumber camps and went to lumbering, and had cut about a million and a half feet, being the principal part of the pine lumber of all sorts, before this bill was filed.

Goodfellow made no protest or resistance, and made no offer of payment. At the end of December he entered into negotiations with complainant and executed an assignment which did not cover the timber cut by Wasey and his associates. The testimony tends to indicate that this arrangement was for an interest on shares. On the 23d of January, 1880, an absolute assignment of everything was made for the expressed consideration of $300, and the testimony indicates

that this was subsequently satisfied by various payments and dealings.

Gram filed his bill in this cause on the 26th of January, 1880, and obtained an injunction against cutting more timber or disposing of that already cut. Under a subsequent modification the timber cut was boomed in the Au Sable river. The case was heard on proofs taken in open court, May 5, 1880, when the Circuit Court for the county of Oscoda decreed in favor of complainant authorizing a receiver to sell the logs, and dispose of the proceeds in the following manner: *First*, to pay boom charges and receiver's expenses with $5 a day as compensation for his services; *second*, to pay defendants $4.40 a thousand as their actual outlay in getting the timber out and taking it to where it would go forward to market; *third*, to pay defendants what was due on the contract, not however declaring how much was so to be paid; *fourth*, to reserve $1500 to be held to secure future instalments as they should come due; *fifth*, to pay the balance to the complainant.

This order included two million of feet. Defendants claim, and we think they are borne out by the proof, that all the logs beyond 1,500,000 feet were cut from other lands.

From this decree defendants appealed, and claim that complainant made out no case for relief whatever. It is claimed not only that no case was made out by proofs, but that the bill itself does not state the case either fully or truly. It is necessary in the first place to look at the bill.

The contract as set forth in the bill makes no reference to any of the clauses and conditions which forbade the commission of waste, and left out also all the default clauses. It sets out the payment of eight dollars down, and avers that Goodfellow entered the lands and built a house, barns and outbuildings, and made other valuable and permanent improvements, and occupied with his family.

The bill sets out the notice given by Wasey as in pursuance of a previous purchase made with intent to defraud Goodfellow, and avers that the defendants, being in business under the name of the Oscoda Salt & Lumber Company, immediately entered on the land about October 20, 1879, and have

ever since been lumbering there and have cut off pine and other lumber; that the land without the timber is worth $3000 and the pine was worth from $7000 to $9000.

That on December 31, 1879, Goodfellow sold to complainant all his rights in the land and lumber for $300, and that on the 23d of January, 1880, he paid that sum to Goodfellow.

That January 8, 1880, he paid all the unpaid taxes amounting to $241.60, and that on the 13th day of January he tendered Wasey $180, being the whole amount then due, but Wasey refused to accept it. The bill offers to pay any moneys due or to become due thereafter.

The answer relies on Goodfellow's violation of the contract in various ways, including his cutting and selling lumber, his sale to Coursier, his failure to pay taxes outstanding, and his failure to pay the October instalment, and their understanding, when Wasey bought, that he had wrongfully cut timber, and did not expect to fulfill.

The refusal to accept tender is admitted, but the payment of taxes is denied, and complainant is left to his proof concerning the assignment, but they deny that he paid the consideration.

The answer claims the bill makes out no cause of action, and insists on the benefit of a demurrer. No amendment was ever made to the bill.

As the bill makes no averment that Goodfellow had performed any part of the contract beyond the preliminary payment of eight dollars, and makes no excuse for his non-performance, and contains no averment that he ever meant or desired to perform it, it rests on the theory that his rights were of such a nature that they were not imperilled by any default in the execution of the conditions. It does not set out the conditions of forfeiture or against waste at all, and therefore gives no explanation or excuse for that. This last matter of course does not affect the bill as demurrable, but it bears on the effect of some proof on which reliance is placed.

It has been held in this State that time is not generally so far of the essence of a contract that a failure to perform

within a period specified will necessarily preclude a party from being allowed to perform subsequently. *Richmond v. Robinson* 12 Mich. 193.

But on the other hand, when a vendee has failed to perform his obligations, relief is not a matter of right, and while unimportant omissions may be disregarded, relief will not be granted when, under all the circumstances, including the conduct of the parties, it does not appear just and reasonable. The ground on which equity relieves against forfeitures is that it would operate oppressively or fraudulently to refuse. But no one can ask relief to which he has lost his strict right when his own conduct renders it unjust that he should have it. *Smith v. Lawrence* 15 Mich. 499; *Truesdail v. Ward* 24 Mich. 117; *Hawley v. Jelly* 25 Mich. 94.

In the present case no more was paid down than a merely nominal sum, which would not more than pay the preliminary expenses of the bargain. The land at that time had been sold for taxes and bid in by the State for the taxes of several different years, to an amount, with interest to that time, of probably in the neighborhood of one hundred and seventy-five dollars, having been more than two hundred in January, 1880. Any person could buy up these titles and obtain conveyances presumptively valid and possibly valid in fact. These tax encumbrances made a part of the consideration of the contract, and the amount paid on them was to be allowed on the last payments under the contract. The contract price drew only seven per cent. interest, whereas interest was running on the State bids at the rate, in some instances, of fifty per cent., and in all cases of much more than seven per cent. The agreement to pay these taxes was one which may fairly be regarded as intended in lieu of any large payment down, and required performance within a reasonable time, which could not be a long time without subjecting the vendors to the double risk of having their purchase money largely reduced, and having their security put in peril.

The chief, and as was supposed, nearly the only value of the land was in the Norway pine, which had not been

stripped, and the small amount of other timber remaining on the premises. The purchase price being a very low one is in accordance with all the proofs concerning the elements of value. The contract expressly prohibited any waste, and the nature as well as large extent of the lands indicated that the purchaser could not have expected to pay for the land out of his earnings on it. It appears that in fact he had other means of employment, and did not rely on farming or the ordinary resources of clearing land outside of valuable timber. The contract expressly made time of its essence, and both from the running of taxes which the vendors did not desire to be compelled to pay themselves, and the danger of fire which the complainant lays some stress upon in the testimony on his part, such a provision was not necessarily so unreasonable that circumstances might not authorize the court to pay some regard to it.

When Goodfellow received notice of the termination of the contract at the end of the year, he had made no improvements which had cost much time or much money. The only buildings he put up were the log buildings which every settler in the woods finds it easy to finish in a very short time, and such as any tenant would readily complete for his occupancy. They were not such as would add materially to the value of the whole tract or of any part of it. In the meantime, in direct violation of the agreement he had committed waste by cutting off more than a hundred thousand feet of the best timber for which he received in cash enough to pay the taxes and a considerable share of the first annual payment. He was therefore at the end of the year not only in default for the payment then due (which standing alone and apart from the other conditions might not be very important), but also for the payment of taxes and for the actual misconduct of cutting timber, whereby the value of the land had been directly impaired. He had paid nothing whatever beyond eight dollars for the benefit of his year's occupancy, and he had received three hundred dollars from sales of timber, and while he had paid taxes on his personal property, he had paid none whatever, either current or back taxes, on the land.

There is some testimony from him that at the time he made the contract Moore & Moore gave him permission to cut timber. No such permission was set up by way of amendment to the bill, although the answer relied on the violation of the agreement not to cut. As the testimony was taken in open court and defendants had not been notified of this claim, there was no opportunity to meet this testimony by examining the vendors. But we do not think this evidence is either admissible or reliable for the purpose for which it was put in. A contemporary parol agreement cannot be set up in variation of the express writing, and the bill was filed to enforce the writing and not any change from it. If such permission was given it was plenary, and it is impossible to suppose the vendors would allow the land to be stripped of all that made it valuable, when they had received no payment, and retained no control over the lumber which might be cut. We do not think we can assume that such permission was granted. And we think that if granted, as complainant claims, to enable Goodfellow to meet his payments, it would seriously aggravate his default in not making them.

We do not think that Goodfellow had made any *bona fide* preparation to comply with his agreement. His testimony on this head is somewhat contradictory, but there is nothing that satisfies us he had any reasonable assurance of money, or had made any proper effort to get it. And it is not claimed he expected to raise, if he could, any more than the first annual instalment. The taxes he left without any attention. When defendants warned him of their termination of the agreement, he made no claim that he had adverse rights, and he allowed them without objection to form their lumber camps and make all their preparations; and until a large portion of the land was cleared off they received no hint from any one that they were regarded as intruders. They had a right, therefore, to make all their business arrangements with this understanding, and with the expectation that they could deal with the lumber as they should see fit. If the case were more doubtful than it is, this course of Goodfellow should

estop him, because it is impossible to reckon by the mere expense of cutting and running logs the damage done to parties who have based business calculations on the ownership of the property lumbered.

Complainant can have no better claim than Goodfellow. When he purchased of the latter, it was in full view of the facts, and of the nature of the litigation that must arise. Defendants perhaps are not interested very directly in questions of consideration between him and Goodfellow, but they have a right to have the real parties impleaded. There is little if any doubt that the first arrangement with Goodfellow was champertous. The testimony does not show the second assignment to have been so, but it does not explain Goodfellow's continued possession of his dwelling. The bill avers distinctly and under oath that the consideration of $300, which was a very small portion of the alleged value of the land and lumber, was paid before suit commenced. This is clearly disproved. It also appears distinctly that complainant's tender to defendants was made before the last assignment, and did not include any discharge of taxes.

The bill also avers payment of all back taxes. The proof shows that instead of paying them before the bill was filed most of them were not paid at all, but complainant bought up the State titles more than two months after the bill was filed; and the taxes on which no sales were made were not paid until March, 1880. The carelessness of such averments under oath, especially as they were conditions precedent to any relief, renders the testimony on other points subject to some scrutiny in matters of doubt.

It appears then that complainant himself had not, when the bill was filed, put himself in a condition to seek relief. Defendants were not bound to accept the annual payment until they were secured against the taxes.

Upon the whole record we think complainant has shown no equities. Goodfellow's failure was in a most serious matter affecting defendant's security. He had committed waste to a considerable amount and thus injured the land. He acquiesced in the re-entry and they incurred risks and liabili-

ties and spent money on the faith of it. He never notified them of his purpose to contest their doings, and their first knowledge came from an assignee who had acquired no personal equities and who had none on any theory when the bill was filed.

We think the contract was terminated in October, 1879, and that defendants are rightly in possession. The decree must be reversed with costs of both courts and the bill dismissed. The lumber, or its proceeds if sold, must be returned to defendants clear of any charges created by this suit, and any such charges actually incurred and paid by them must be included in their costs. Complainant must be held responsible for all the expenses incident to the litigation.

GRAVES, J., concurred.

MARSTON, C. J., concurring. I concur in the result arrived at in this case by my brother Campbell upon the ground that Goodfellow acquiesced in the possession taken and cutting of the timber by defendants, and thus in effect abandoned the contract and his rights thereunder. He certainly, if he wished to insist upon his rights, could have acted much more promptly and at least made some protest.

I do not think that the small amount paid down or the character of the improvements made should have any particular weight in this case. To Goodfellow these may have been of considerable importance, and the small payment and inprovements of a settler in a new part of the country may not be measured by the same rule that would be applied to those of more pecuniary ability.

COOLEY J. did not sit in this case.

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Elvira Elliott v. Benjamin E. Hart.

Replevin—Identification of property—Variance—Venue.

Replevin was brought for a building that had been sold on execution. The writ described it as on lot 7 of block 6 while the certificate of levy and notice of sale referred to it as on lot 8. *Held* that the variance would not exclude evidence of the proceedings on execution, and that parol evidence was admissible to identify the property actually taken.

Where a writ of replevin describes a building to be replevied as on a specified lot, it speaks from time of the issuing of the writ; and the fact that at the time of suit the building was elsewhere does not defeat the proceeding.

The omission, from a justice's execution, of the name of the county or of any township or city does not invalidate it, at least where the defendant does not complain of it; and as against a stranger resisting the claims of the execution purchaser the defect may be cured and the judgment identified by parol evidence.

Error to Ingham. Submitted Nov. 10. Decided Jan. 12.

Replevin. Defendant brings error. Affirmed.

S. L. Kilbourne for plaintiff in error.

M. V. & R. A. Montgomery for defendants in error.

Graves, J. Hart brought replevin against Mrs. Elliott and Charles C. Curtis for a building, and was allowed to recover, and she alleges that errors were committed. The building being personal property and capable of being moved from one locality to another the declaration and other proceedings in order to identify it described it as being on lot seven of block six of the city of Lansing, and in speaking in this manner about the place where the building stood, the time referred to when it was so situated was the time when the proceedings were instituted. The meaning is the same as though in each instance the reference had been express to

the occasion of taking out the writ. The statement has no bearing on the site the building may have occupied at any other date, earlier or later.

Hart traced his title through a sale on justice's execution. The judgment on which the execution issued was rendered by one Charles Campbell, a justice of the peace in the city of Lansing, in favor of Orlando Button and against Richard Elliott, and the sale was made to Button by a constable named Rogers. Hart bought of Button. The proceedings on the execution being offered in evidence, and it appearing that the certificate of the levy and the notice of sale each referred to a *building* on lot *eight* of block six instead of one on lot *seven*, as in the writ of replevin, the evidence was objected to on account of this difference. The constable was then allowed against objection to identify the property now in question as the same he sold on the execution.

The objection went upon the theory that the site spoken of in the action was an inherent part of the description and a permanent mark of the property. Of course the assumption was fallacious. The building being a mere chattel was liable to be shifted about from one lot to another, and at the time of the objection it had not been shown that no move had taken place subsequent to the levy and sale. On the contrary there was ground for inference that a change had occurred. According to Hart's testimony given afterwards the statement in the levy and notice that the building was on lot eight was a mistake. It was on lot seven. But there was no mistake in regard to the building. The same erection which was levied on and sold to Button and by him transferred to Hart is the same sued for and described in this case. The parol testimony to identify it was not incomplete. *Borland v. Stewart* 4 Wend. 568; *Jackson ex dem. Hunter v. Page* id. 585. Had the property been a horse which the officer had mentioned as being in stall number 8 when in fact he was in the adjoining stall number 7, no one, I imagine, would have supposed the mistake to be fatal or to be not explainable by parol. The facts here are no more favorable to the plaintiff in error.

In filling up the blank execution the justice by an evident mistake neglected to insert the name of the county, and it did not contain the name of any township or city. Parol evidence was admitted to prove that the execution was issued on the proper judgment and emanated from the justice who gave the judgment, and that the levy and sale were made pursuant to it. The execution was objected to as invalid and the parol testimony as incompetent.

The writ was not void. It was issued on a lawful judgment by the proper officer and in due time, and was made returnable within sixty days. It described the judgment and required the officer to collect it. The only material defect was the omission of the name of the county, and this was a clerical irregularity apparent on the face of the writ, and which in the case of a justice's execution, and as against a stranger to it resisting the claim of a purchaser under it, was curable by parol evidence. *Perkins v. Spaulding* 2 Mich. 157; *Stewart v. Stocker* 13 S. & R. 199; *Lewis v. Avery* 8 Vt. 289; *Morgan v. Evans* 72 Ill. 586; *Blaine v. The Ship Charles Carter* 4 Cranch 328; *Webster v. Farley* 6 Blackf. 163; *Lessee of Matthews v. Thompson* 3 Ohio 272; *Douglas v. McCoy* 5 Ohio 523; *Phelps v. Ball* 1 Johns. Cas. 31; *Inman v. Griswold* 1 Cow. 199; *Ross v. Luther* 4 Cow. 158; *Porter v. Goodman* 1 Cow. 413; *M'Intyre v. Rowan* 3 Johns. 144; *People v. Dunning* 1 Wend. 16; *Stone v. Martin* 2 Den. 185; *Dominick v. Eacker* 3 Barb. 17; *Park v. Church* 5 How. Pr. 381; *Pierce v. Alsop* 3 Barb. Ch. 184; *Averill v. Wilson* 4 Barb. 180; *Berry v. Riley* 2 Barb. 307; *Peck v. Tiffany* 2 Comst. 451; *Bacon v. Cropsey* 3 Seld. 195; *Holmes v. Williams* 3 Cai. 98; *Lyon v. Fish* 20 Ohio 100.

How the case might stand in a direct controversy between the parties to the execution is a question which does not arise. The contest here is between one holding under the execution sale and one deriving title by a purchase from the execution debtor prior to the levy. The execution defendant has made no objection to the execution, and if he does not see fit to complain of the irregularity, there seems to be no

ground under the authorities, of which several are cited, on which the plaintiff in error could be heard to do so. The jury negatived her title, and her position on the record is that of one holding without right and opposing Hart's title on the ground of an irregularity in the execution which is part of his title, and of which irregularity the execution debtor is not minded to complain.

What has been said disposes of the case. There is nothing to warrant interference with the judgment and it must be affirmed with costs.

The other Justices concurred.

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CALVIN GOODSPEED, IMPLEADED WITH GEORGE W. FALES v. THE SOUTH BEND CHILLED PLOW COMPANY.

Partnership note after dissolution—Action for debt for which a note was given.

A firm dissolved after ordering a lot of merchandise, but it was all forwarded before the assignors knew of the dissolution, and after they learned of it, they took a note, made in the firm name by the remaining partner, for the amount due. They afterwards brought suit against both partners on the common counts, and on the note. *Held* (1), that the retiring partner could not be held upon the note against his objection, as after the dissolution the other could not bind him; but (2) that an action on the common count for goods sold and delivered would lie against both for the debt.

Where a firm agreed to settle for merchandise with a note, and after dissolution a partnership note is given by the remaining partner, the other can repudiate his liability thereon, and if he is released, the vendor can treat the note as different from that agreed on, and it cannot then be regarded as payment.

Error to Ingham. Submitted Nov. 10. Decided Jan. 12.

ASSUMPSIT. Defendant Goodspeed brings error. Affirmed.

M. V. & R. A. Montgomery for plaintiff in error.

Cowles & Cahill for defendant in error. The incapacity of a partner to give the firm note after dissolution exists only where it would be making a new contract: Story on Partnership § 328; *Jenness v. Carleton* 40 Mich. 343; and if the note is invalid action, lies for the debt. *Adler v. Foster* 39 Mich. 87.

GRAVES, J. The Plow Company sued Fales & Goodspeed on the common counts and on a promissory note bearing date May 1st, 1879, subscribed "Fales and Goodspeed," and purporting to have been made by them to the Company for $281.37, payable September 1st after the date at the "Lansing National Bank," with exchange on New York or Chicago, and providing for interest at ten per cent per annum after maturity and "attorney fees," and "waiving all relief whatever from valuation or appraisement laws." Goodspeed pleaded the general issue and denied under oath that the note was executed by him or on his authority. Fales seems to have made no defence. The jury found in favor of the Company for $219, and Goodspeed brought error.

From some time prior to January 20, 1879, until the 13th of February following, Fales and Goodspeed were co-partners under the firm name of "Fales & Goodspeed," and carried on business at Lansing. On said 20th of January Fales, in the firm name, made a written order on the Company for a quantity of plows to be delivered on board cars at South Bend. The order contained special terms. One of the provisions was in these words: "We agree to make settlement with four months' note, without interest until after maturity, made payable at ——— Bank of Lansing, on receipt of your monthly statement: provided we do not take the benefit of your cash discount, in which case we agree to remit by the 15th of the month following the shipment." The order was accepted and the Company made four shipments; two in January and two in March, amounting to $281.37. Goodspeed had no personal knowledge of the order or of the shipments. February 13, 1879, the firm dissolved. The Company first learned of the dissolution in March, but not until after

the shipments. In June following, an agent of the Company received from Fales, who subscribed it, the note before mentioned, on the account for the plows. The agent, on taking the note, receipted and surrendered to Fales a statement of the account.

The circuit judge was of opinion that recovery upon the note was not allowable against objection on the part of Goodspeed, and this view was a correct one. According to the record, when Fales gave the note he had no power to bind Goodspeed and make him liable as maker. The agency necessary therefor ceased when the dissolution was effected. Moreover the note given was in substance not identical with the note provided for by the legal meaning of the firm agreement. The Company by that agreement could not insist upon ten per cent. as the rate of interest to be inserted nor on a provision for exchange on New York or Chicago.

His objection against recovery on the note having been sustained, the plaintiff in error then urged that as the account was given up and the note taken with knowledge of the dissolution and of the facts, the account became cancelled and no recovery could be had on that. This view was presented in requests for instructions, but the court rejected it and told the jury that if they were satisfied the goods were shipped in pursuance of the order before the dissolution of the partnership was known to the Company, they ought to allow for the goods so shipped. The verdict was for the agreed price of the plows delivered, less a certain sum which had been paid.

It is now insisted that it was practicable for the Company to give up the account for a note taken in satisfaction of it, and that this was done without intervention of any fraud or misunderstanding; and that, although the note was given by Fales in the firm name without authority and was repudiated by Goodspeed, its reception and the delivery of a copy of the account receipted were sufficient to release Goodspeed from all liability and preclude recovery on the account. It is impossible to assent to this position. The controversy in all its parts is between the original parties. No new interest has appeared, and it is part of Goodspeed's contention that

neither mistake nor fraud has affected the transaction. What then is the case? When the note was given, Fales and Goodspeed were joint debtors to the Plow Company for the plows as goods sold and delivered. They did not make payment in cash. But Fales gave this note as the joint obligation of the parties, and as such joint obligation the Company received it, and not otherwise. Whether this was business prudence is of no consequence. Each was liable for the whole consideration to the Plow Company, and Goodspeed might acquiesce in Fales' act in giving the note. The term of credit expired, but neither debtor paid the demand. The Company sued the debtors jointly and counted on the note, and also on the original consideration.

Goodspeed in substance refused to consider the note as payment. It was given and received as the joint note of Fales and Goodspeed and not as the separate note of Fales, and under Goodspeed's objection it failed to be such a note, and the effect in point of law on the right of the Plow Company to refuse to rest upon it, was just the same as though both debtors had repudiated it. With Goodspeed's liability stricken out it was not the note agreed upon, and the company were at liberty to treat it in that way. He refused to be bound by the note, and if he was not bound by it he could not make use of it to confine the Company to it and screen himself from all liability. These views are advanced under the assumption that Goodspeed's counsel was right in claiming that the note was passed and received by way of payment. Because if it was not so taken there could be no occasion to speak about the right to recover on the original consideration. No one in that court and on this record would doubt the regularity of such a recovery. The correctness of the assumption is not material. It is made for the purpose of meeting the position of the plaintiff in error.

The note fell through under Goodspeed's objection, but the debt remained and each was liable for the whole. The count for goods sold and delivered was maintainable. The authorities, if any are needed, are full and explicit. *Plimley v. Westley* 2 Bingham's N. C. 249; *Fry v. Hill* 7 Taunton

397; *Burden v. Halton* 4 Bing 454; *Hickling v. Hardey* 7 Taunton 312; *Farr v. Ward* 3 M. & W. 25; *Burchfield v. Moore* 3 El. & Bl. 683; 25 E. L. & E 123; 1 Saund. Pl. & Ev. 110; Benj. on Sales § 765; 2 Chitty on Contracts (11th Am. ed.) 615, and note and cases.

The result reached was correct in point of law, and the judgment must be affirmed with costs.

The other Justices concurred.

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SARAH SCOTT v. JOHN FINK AND MARY FINK.

Revoked will not revived by cancelling later will.

A will is not revived by the destruction of a subsequent will when the latter or any intermediate will had contained a clause revoking all former wills.

Error to Ingham. Submitted Nov. 10. Decided Jan. 12.

APPEAL from probate. Proponent brings error. Affirmed.

J. C. Shields and *H. P. Henderson* for plaintiff in error. The cancellation of a later will revives a former will if not destroyed: 1 Redf. Wills 308, 312, 321, 375; 1 Jarm. Wills 123, 158; *Linginfetter v. Linginfetter* Hardin (Ky.) 119; *Marsh v. Marsh* 3 Jones (N. C. L.) 77; *Taylor v. Taylor* 2 N. & McC. 482; *Lawson v. Morrison* 2 Dall. 286; *Rudy v. Ulrich* 69 Penn. St. 177.

M. V. & R. A. Montgomery for defendants in error. A will actually revoked can be revived only by re-publication: *Bohanon v. Wolcot* 1 How. (Miss.) 337; *James v. Marvin* 3 Conn. 576; *Major v. Williams* 3 Curt. 453; *Exp. Hellier* 3 Atk. 798; *Walton v. Walton* 7 Johns. Ch. 268; *Goodtitle v. Meredith* 2 M. & S. 12; 1 Powell on Devises 309.

GRAVES, J. Sarah Scott propounded for probate an instrument purporting to be the last will of her father John Fink. Opposition was made by John Fink, the half brother, and by Mary Fink, decedent's widow, and the step-mother of said John and Sarah. The Court of Probate admitted the instrument as decedent's last will, and the contestants appealed from the decision. An issue seems to have been made up in the Circuit Court, but the record fails to explain its shape. Enough appears to indicate that proponent affirmed the instrument in question as the last will of the deceased John Fink, and that the contestants alleged revocation by means of a later will. The form given to the altercation is not important because it is manifest no one was misled. The contest was before a jury and they decided against proponent, and she then brought error.

The surrounding facts are not disputed. At the time of his death the decedent had been three times married. The contestant John was a child by the first wife, and the proponent Sarah a child by the second. There was no issue by the third. In 1869 the decedent removed with the second wife and their daughter Sarah to Williamston in Ingham county and there established his residence on a small place of between seventeen and eighteen acres, the family consisting of the three. His entire estate was worth something more than $10,000 and was all personal except the little farm place just mentioned. Soon after he took up his residence in Williamston, and on the 15th of November, 1870, he made and published the will sought to be established. He brought it home from some place after it had been drawn and executed, and delivered it to his wife who read it and then passed it to her daughter, the proponent, to take care of. After providing for the payment of debts and expenses it purported to give his son, the contestant John, $300 and all the remainder of his property to his then wife, Anna Fink, for life, and remainder in fee to his daughter, the proponent Sarah.

He appointed proponent's mother Anna sole executrix. He subsequently made another will containing similar pro-

visions. It was executed within a year or less after the first. The first will fixed the time for payment of the legacy to John at two years after the testator's death, and the second one extended the time to three years, and also stated by way of explanation for not giving more to John, that the testator had previously helped him. The second will differed in no other respect from the first.

September 1st, 1875, Anna Fink, proponent's mother, died. Shortly after that event decedent made and published a third will. It was drawn by Mr. Smith and the scheme was altered to meet the change which had taken place. The decedent took it home and showed it to his daughter, the proponent, and she read it and he placed it among his private papers. And on that occasion he burned the second will. His daughter, the proponent, was named executrix in the third will. There was no controversy at the trial about the formalities of the first will. Had nothing occurred after its publication to impair it, it must have been regarded as its author's last will. This is virtually conceded.

The proponent was sworn as a witness on the part of contestants, and she testified concerning the second and third wills. Indeed the entire history of the second will was derived from her. She also explained how her father brought home the third will, and how she examined it, and what its provisions were. She testified that she was named executrix; that three hundred dollars were given to her half brother and the remainder to her; that there were no other bequests, and that she cannot tell whether it contained a clause of revocation or not. She also mentioned that there had been rumors of the destruction of the third will. She did not swear it was still extant. On the contrary, she testified that she did not see it destroyed, and that all she knew about its destruction was, that after her father's death the report went out that it was destroyed, but that she did not know from whom.

It is not unworthy of notice that the deposition of proponent established the existence of the third and latest will, and showed that its provisions were inconsistent with the

first, and hence sufficient to work a revocation of it, and moreover, that so far as she knew, it was still in existence. At the conclusion of her evidence, therefore, the third will was presumptively on foot, and there was a *prima facie* case of revocation of the first. But the contestants proceeded with commendable fairness to explain all the facts.

In July, 1876, the decedent intermarried with the contestant, Mary, in Oswego county, New York, and she returned with him to Williamston, where they resided together as husband and wife, until his death. When he went to New York, he carried his third will with his other papers, and showed it to her, and on his return to Williamston, and whilst looking over his papers, he took the will out and handed it to her with the request to put it in the stove and burn it, and she complied, and it was then burned. The proof was positive that it contained a clause of revocation. The testimony of the gentleman who drew it and of his law partner, who knew its contents when it was executed, was in some respects different from that of proponent in relation to its dispositions, but these variances afford no aid to her case on any theory.

That this third will was destroyed by its author is not disputed. The declarations made to his daughter, the proponent, on the occasion of his bringing home the third will and destroying the second, were adduced in evidence, as were also his declarations to his wife, the contestant Mary, on the occasion of requesting her to burn the third will. But the point in the case is whether the cancellation of the third will was sufficient to restore the first. The proponent insists that it was, and the contestants deny it.

There has been much difference of opinion on the question whether the revocation of a second will is of itself sufficient to revive the first. For the last century those maintaining that it is, argued that the second will is without force against the first unless it becomes effective by being allowed to survive the testator, and the opinion of Lord Mansfield in *Harwood v. Goodright* Cowper, 87, is cited as conclusive. That case originated in the Common Pleas, and is fully reported

in 3 Wilson 497. There was a special verdict. No revocation was found, nor the existence of revocable words, nor what were the provisions of the second will or any of them. And the jury stated expressly that they did not find that the testator cancelled the second will, and that they were altogether ignorant as to what had become of it. The point in question was not in the case, and Lord Mansfield's observations, as reported in Cowper, were purely *dicta*.

A little earlier, and in Easter term of the same year, the King's Bench had the case of *Burtenshaw v. Gilbert* before it. Cowper 49. One Newenden made his will in 1759, in duplicate, giving one part to the scrivener to keep, and retaining the other himself. He observed that it did not suit him, and that he made it to keep his wife easy. His wife died. Thereafter, and in 1761, he produced the part of the old will in his possession, and made another will with different devises. He tore off his name and seal from the part which was present of the old will, and caused the names of the witnesses thereto to be cut off. He made some explanations to the scrivener, and placed the new will in his custody. Some changes occurred thereafter, and one of the objects of his bounty died. He sent for the second will, and afterwards for an attorney to draw another, who however did not reach him until he was too far gone to do anything. After his death one part of the first will and the second will were found together in a paper, both cancelled. The other part of the first will was found uncancelled in the testator's room, with other deeds and papers. The question for the court was whether the first will was revoked. Lord Mansfield observed, among other things, that "if the testator had died immediately after he made the new will, whether he had cancelled the former or not, it would have been revoked; because at the end of the second will, there is a declaration by which he revokes all former wills. Besides this he deliberately cancels that part of the will of 1759 which he had in his own possession. The facts are too many and too strong to admit of a question, but that, at the time of making the second will, the first was upon every principle of law

clearly revoked, and can never be set up again but by a new will." The court takes notice, it is true, of the act of mutilation of the one part of the old will, but the circumstance on which stress is laid is the existence of revocable words in the new will, and there is strong ground for inferring that the result would have been just the same if the act of spoliation of the one part of the old will had not been committed.

In *Goodright on the demise of Glazier v. Glazier*, reported in Burrow 2512, it does not appear that the second will contained a clause of revocation.

There seems to have been a material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it.

In the first case the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his life-time, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its dispositions of property awakened into life, it could have no affirmative operation through its dispositions upon the estate.

In the second case the written declaration is express and in plain terms immediate and absolute. It is a verbal act done solemnly and deliberately for present effect, and not an act contemplating that future circumstances are to determine whether after all it shall have any force. It is not a needful ingredient of the will. That is perfect without it. The addition of it is a mode of immediate cancellation of prior wills, and quite as unequivocal and unambiguous as many others within the statute whose meaning is open to no controversy. It operates at once, and does not apply as a mere contingent caveat against the objects at which it is aimed.

It revokes them without reserve or qualification. And in case the document with which it is connected is itself revoked, that fact can have no effect as a restoration and republication of former revoked wills.

It is only necessary to glance at the authorities to see that judicial opinion, as already suggested, is not harmonious in regard to this question. Much, no doubt, of the diversity may be traced to variety of legislation, but not all. Upon consideration, the doctrine of *James v. Marvin*, 3 Conn., 576; *Boudinot v. Bradford* 2 Dall. 266, and others holding the same views and ruling in accordance with what has just been expressed, appears to be most consonant with our system and with popular understanding, and at the same time the most reasonable and safe. Having reached this result, it is only necessary to add that the proponent has no occasion to complain of the rulings. She was not prejudiced.

The order of the circuit court should be affirmed with costs.

The other Justices concurred.

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ABRAM VANDOOZER v. GEORGE M. DAYTON.

Trespass quare clausum—Proof of defendant's lawful possession.

Comp. L. §§ 5326-9 provides that in any action involving title to land, a defendant, if the suit is before a justice, shall be deemed to admit any claim of title made in the declaration unless, in pleading the general issue, he gives notice that the title will come in question. *Held*, that in an action of trespass *quare clausum* in which such notice was not given, this rule would not preclude defendant's showing that he was lawfully in possession where the declaration did not aver title but merely that defendant broke and entered, etc., "the close of the said plaintiff" and "broke open the house of the plaintiff on said premises," since, for the purpose of the action, the close was that of the plaintiff if he had peaceable possession whether he had title or not, but it was not his close if defendant had peaceable possession.

Tenancy of any sort is a species of title; and where a defendant in an action brought before a justice and involving title, has not given notice that title will come in question, he cannot rely upon his tenancy as a defense. Comp. L. §§ 5326–9.

Error to Ingham. Submitted Nov. 10. Decided Jan. 12.

TRESPASS *qu. cl.* Defendant brings error. Reversed.

E. D. Lewis for plaintiff in error. A defendant in trespass *qu. cl.* is always entitled, under the plea of the general issue, to show actual possession: *Rawson v. Finlay* 27 Mich. 268; *Ehle v. Quackenboss* 6 Hill 537; *Fredonia etc. P. R. Co. v. Wait* 27 Barb. 214; *Dolittle v. Eddy* 7 Barb. 74; *Hastings v. Glenn* 1 E. D. Smith 402; *Hardrop v. Gallagher* 2 id. 523; trespass will not lie against one in actual possession: 6 Waits' Actions 64, 74; Cooley on Torts 332–5; *Van Rensselaer v. Radcliff* 10 Wend. 639; *Livingston v. Haywood* 11 Johns. 429; *Livingston v. Mott* 2 Wend. 605; *Schermerhorn v. Buell* 4 Den. 422; *Campbell v. Arnold* 1 Johns. 512; *Wickham v. Freeman* 12 Johns. 183; *Stuyvesant v. Tompkins* 9 Johns. 61.

M. V. & R. A. Montgomery for defendant in error.

COOLEY, J. This case originated in justice's court. The declaration was in trespass *quare clausum*, and omitting formal parts, was as follows: "For that the said defendant on the tenth day of December, A. D. 1873, and on divers other days and times between that day and the day of September, 1874, the close of the said plaintiff, situate in the township of Locke, in said county, and known and described as being the north-east quarter of section eight, in township four north, of range two east, State of Michigan, broke and entered and with his feet in walking trod down, trampled upon the grass of the plaintiff, growing there, and with his hands, and with axes and other implements, broke open the house of the plaintiff on said premises, and cut, broke and otherwise injured the floor, ceiling, doors, windows, walls,

door-casings and under-casings of said house of the plaintiff, and other injuries to him, the said plaintiff, then and there did, against the peace of the people," etc. The defendant pleaded the general issue merely, went to trial and recovered judgment, and the plaintiff appealed to the circuit court.

The statute provides that in every action where the title to any lands shall in anywise come in question, any claim to title to lands made by the plaintiff in his declaration, and therein described, shall be deemed to be admitted by the defendant, unless he shall give notice under the general issue showing that the title to lands will come in question, and give the bond for which the statute provides, for the transfer of the cause to the circuit court. Comp. L. §§ 5326–5329. The notice and bond were not given in the justice's court in this case.

On the trial in the circuit court the plaintiff gave evidence that he resided in Lansing; that between Christmas and New Year's, 1873–4, he visited the place and found a family in the house named Hilliker. He directed them to get out, and understood that they did so shortly afterwards. In the spring following he went there again and found defendant there, who admitted that he had been making hoops in the house, and also that he put Hilliker in. Plaintiff then described the injury that had been done to the house in making hoops there.

On the cross-examination of the plaintiff and also by his own evidence afterwards the defendant sought to show that plaintiff derived his title to the land from one Case, and that at the time Case conveyed to plaintiff, and also at the time of the alleged trespass defendant was lawfully in possession under Case. All offers of evidence to this effect were objected to and ruled out, though defendant explained its purpose to be to disprove any trespass by showing that he, and not the plaintiff, was in peaceful possession at the time the acts complained of were committed. His counsel also put to him the following question, which was objected to and ruled out: "By what right and under whose authority did

you occupy the premises at the time of the alleged trespasses, if you did occupy them?"

All these rulings of the circuit judge were based upon the assumption that the plaintiff had asserted title in himself by his declaration, and described it, and that defendant had admitted it by his pleading. If the assumption had been well founded, the judge would have ruled correctly in holding that defendant could not show any right or possession in himself as tenant; for a tenancy of any sort would be a species of title. But a reading of the declaration shows that the plaintiff does not assert or describe a title. He alleges that the defendant unlawfully broke and entered his close; and for the purposes of this action the close was the close of the plaintiff if he had peaceable possession, even though he had no title. But it was not the close of the plaintiff if the defendant was in peaceable possession. *Dewey v. Bordwell* 9 Wend. 65.

It is plain from the record that the judge was misled as to the declaration—inadvertently, no doubt—for he lets fall a remark indicating that he understood title in fee had been counted upon, and this was at the time corrected by no one. He would not have made this mistake had he looked at the declaration for himself. This is further manifest from his remarks concerning the case of *Ehle v. Quackenboss* 6 Hill 537, in which he erroneously assumes that the declaration was different. It was correctly ruled in that case that plaintiff under such a declaration relies upon his possession, and defendant is at liberty to disprove it.

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

The other Justices concurred.

STEPHEN M. CASPER, RELATOR v. KENT CIRCUIT JUDGE.

Stipulation by nominal defendant for discontinuance of replevin suit.

An officer who has seized goods by virtue of legal process is a merely nominal defendant to an action of replevin for them, and unless the real party in interest has refused to indemnify him cannot prejudice the latter's rights by stipulating with the plaintiff for the dismissal of the suit without judgment.

A stipulation for the dismissal, without judgment, of a suit in replevin for property taken under a chattel mortgage, leaves the property in the mortgager's hand, releases the sureties on the replevin bond, and, if the property is beyond reach, leaves the mortgagee without adequate remedy.

Mandamus to vacate a judgment in replevin. Submitted on demurrer November 10, 1880. Granted Jan. 12, 1881.

Frank F. Kutts and *D. E. Corbit* for relator. A client can control his case in spite of his attorney. *Parke v. Blighton* 32 Mich. 266; *Wright v. Hake* 38 Mich. 525.

Simonds & Fletcher for respondent.

MARSTON, C. J. It appears that Warren L. Barber held two chattel mortgages given by the relator; that he placed them in the hands of Milton F. Marsh, a constable, for collection; that Marsh took possession of the property described in said mortgages thereunder; that before sale of the property under the mortgages Casper, the mortgagor, brought replevin against the constable for and obtained possession of the property; that after the commencement of such action the defendant therein, the constable, handed over the replevin papers served upon him, to his principal, Barber the mortgagee, to have such suit defended; that thereupon Barber employed attorneys who appeared for defendant Marsh in such replevin suit, and said cause proceeded to issue; that thereafter Marsh the defendant and Casper the plaintiff, the latter by his attorneys, entered into a written stipulation that the replevin

suit be dismissed and discontinued without judgment for the return or value of the property and without costs to either party. No bond of indemnity was asked for by the constable, but after the stipulation referred to had been entered into, one was offered him by the mortgagee Barber.

All these facts having been shown to the circuit court where said replevin suit was pending, that court proceeded with the cause and judgment was rendered in favor of the defendant therein, according to his special interest in the property under the mortgages. Relator now asks that a mandamus issue directing the circuit judge to set aside the judgment so rendered.

The relator cannot have the relief prayed for. The defendant was a mere nominal party, made so because of his actual possession of the property, but known by all parties to be held by him for and as the agent of the mortgagee, and for the sole purpose of foreclosing the mortgages.

The effect of the stipulation if carried out, would be to leave the property in the hands of the mortgagor, release the sureties on the replevin bond, and if the property was beyond reach, leave the real party in interest, the mortgagee, without adequate remedy. A mere nominal defendant should not thus be permitted to prejudice the rights of the real party in interest, and whose rights he represents, at least until the person interested had been given an oportunity and refused to indemnify him.

The writ must be denied with costs.

The other Justices concurred.

CHAMPLIN HAVENS v. WHITNEY JONES AND LOUISA A. JONES. 45 253 114 40

Foreclosure—Showing of defendant's interest—Usury—Personal agreement to pay interest at an increased rate.

A defendant in foreclosure whose connection with the mortgage or the equity of redemption is not shown by the bill, is not a proper party and is entitled so far as he is concerned to have the bill dismissed with costs.

Usury in Michigan is only such interest as exceeds ten per cent.

A mortgagee has a right to stipulate for ten per cent. interest as a condition to extending time of payment, and if paid and applied as interest, the application will not be disturbed.

A note secured by mortgage was indorsed with an agreement to pay a higher rate of interest. *Held* that the indorsement was a mere personal agreement and did not enlarge the mortgage.

A mortgager who has paid interest upon ten per cent. interest, when behind in his payments, is entitled to have it allowed on the principal, as ten per cent. is the statutory maximum of interest that may be taken in Michigan.

Appeal from Ingham. Submitted Jan. 4. Decided Jan. 12.

FORECLOSURE. Defendants appeal. Dismissed as to one and remanded for decree as to the other.

Lucian Reed for complainant.

Jason E. Nichols for defendants.

COOLEY, J. This is a suit to foreclose a mortgage given by Whitney Jones. Louisa S. Jones is made a party defendant, but who she is or how connected with the mortgage or with the equity or redemption the bill does not show. She was therefore not a proper party.

The principal controversy between complainant and Whitney Jones relates to the question whether anything remains unpaid on the mortgage. It was given in 1855 to secure the payment of a promissory note of $5500, and interest at seven per centum. The amount of this note was reduced to $1000 by

payments, at which sum it stood in 1860. From that time until 1876 the mortgagee paid annually $100 as interest, and it was applied as such on the mortgage. He now claims that $30 of this sum should have been applied annually to the principal; and if so applied the mortgage would be more than paid. But we cannot make this application. The mortgagee had a right, if he extended the payment, to stipulate for ten per cent interest; and whether he stipulated or not, the mortgagor might pay it, and the payment would not be a payment of usury; for nothing is usury in this State that does not exceed that rate. So far, therefore, as the application has been actually made, we cannot disturb it.

But the complainant has obtained a decree in which the interest remaining unpaid is computed at ten per centum. To justify this an endorsement on the note, signed by the mortgagor, was put in evidence, which read as follows: "I hereby agree to pay ten per cent interest on the above note since the 14th April, 1860, until fully paid. May 12, 1860." But this was a mere personal undertaking; it did not enlarge the mortgage. Moreover it was not set up and relied upon in the bill as a ground for any relief. *Tucker v. Alger* 30 Mich. 67. The computation should have been restricted to seven per centum.

It is claimed by the mortgagor that he not only paid ten per cent interest yearly, but that he also paid interest upon this interest when payment was not promptly made. If so, he is entitled to have it allowed on the principal, for ten per centum is the statutory maximum of interest that may be taken.

The decree must be reversed with costs, and the cause remanded with directions to enter decree in accordance with these views. The defendant Louisa S. Jones is entitled to a dismissal of the bill in the court below with costs.

The other Justices concurred.

SAMUEL FOSTER v. JAMES MALONE ET AL.

Foreclosure—Decree stands if defendants do not appeal.

A decree in foreclosure cannot be changed in favor of the defendants when they have not appealed.

Appeal from Kalamazoo. Submitted January 4. Decided January 12.

FORECLOSURE. Complainant appeals. Affirmed.

Dallas Boudeman for complainant.

O. W. Powers for defendants.

CAMPBELL, J. The bill in this cause was filed to foreclose a mortgage made in October, 1865, for $600, with interest at ten per cent, payable in three notes of $200 each at 3, 4 and 5 years from date. It has been assumed that the interest was due annually. There may be some doubt about this, but we take the case as the parties have treated it. The mortgage was for part of the purchase money of the land. The remaining sum of $400 was secured by a personal note with sureties, payable in 2 years with interest at 7 per cent. Payments were made from time to time amounting to about $1500, apart from the payments of over four hundred dollars more made by the sureties and by Malone, which were claimed as made on the $400 note.

In September, 1867, before any principal was due on any of this paper, a payment was made of $500, concerning the application of which the parties are directly at variance. Aside from this we are not satisfied from the evidence that any specific agreement was made as to the application of payments. If Malone is correct there was nothing on which to apply them but the mortgage. On several occasions Foster procured from Malone promissory notes, which make no reference to the mortgage or original notes, and which are

claimed to include nothing more than interest at ten per cent on unpaid interest and additional bonuses beyond that. Some of these were secured by chattel mortgages.

In the view we take of the case we are not disposed to examine into the character of these documents. We are somewhat impressed with the idea that they are not only largely if not entirely usurious, but that there are other reasons for doubting their legal quality. But as none of them purport on their face to be at all connected with the securities in process of foreclosure, the parties have not attempted to charge the land with their payment, and whether they are good or bad is not important in this litigation.

The circuit judge in deciding the cause accepted Foster's theory concerning the application of the $500 payment, and also allowed interest on interest in making his computation. He made the balance by this computation amount to $203.96. Complainant has appealed. and claims a much larger sum. On examining the record, which is very blind and unsatisfactory on the theory of accounting, we have not been able, in our own view of the facts, to discover satisfactory grounds for any decree whatever. Of course, as defendants have not appealed, the decree cannot be changed in their favor. Without going at large into the facts, we think that on any theory of applying the payments which leaves out the usurious notes, Malone had paid enough to extinguish the lien on the land. We forbear referring at length to the oppressive and practically fraudulent conduct of Foster in taking advantage of Malone's ignorance and timidity to extort advantages from him. We are satisfied that applying the various payments as Malone meant them to be applied, and as they would have been applied by endorsement if his business ignorance and undue confidence had not prevented, the mortgage would have been paid up. Our own computation leads us to that conclusion.

In the absolute contradiction of witnesses, we do not propose to point out the reasons for crediting this or that piece of testimony. Upon a large portion of the facts there is not much room for doubt.

The circuit court required each party to pay his own costs. We do not think this works any practical injustice. The decree must be affirmed with costs of this court in favor of defendants.

The other Justices concurred.

Board of Health of Buena Vista Township v. The City of East Saginaw et al.

Ejectment for cemetery—Property of township after its division.

Trustees holding the legal title to a cemetery, for burial purposes alone, can bring ejectment for it against a municipal corporation that assumes and exercises an exclusive control adverse to them.

A township's legal identity and property rights remain unchanged after its division, so far as corporate existence is concerned, unless otherwise provided by statute.

Comp. L. § 766 in providing that where a township is divided, its burying ground shall belong to the township in which it lies thereafter, does not apply to a case where the cemetery falls within the limits of a city incorporated from the township.

Where a city is incorporated from part of the territory of a township, the latter's property rights are not affected unless, perhaps, by some specific provision in the charter or some other statute.

Corporate property is not affected at common law by changes which leave the corporate character in existence, and do not destroy the corporate identity; and there is no common law rule by which the property can be transferred to another corporation without grant.

Error to Saginaw. Submitted Jan. 4–5. Decided Jan. 12.

Ejectment. Plaintiff brings error. Reversed.

Tarsney, Tennant & Weadock for plaintiff in error. A municipal corporation may be secured in its property even though territorially divided. *Terrett v. Taylor* 9 Cr. 43; *Windham v. Portland* 4 Mass. 384; *Turst Parish v. Pratt* 4

Pick. 222; *North Yarmouth v. Skillings* 45 Me. 135; *Hartford Bridge Co. v. East Hartford* 16 Conn. 149; *Town of Milwaukee v. City of Milwaukee* 12 Wis. 102; *Hampshire v. Franklin* 16 Mass. 76; *Saginaw v. School Dist. No. 1* 9 Mich 541; grants to private corporations cannot be divested by legislation. *Dartmouth College v. Woodward* 4 Wh. 518; *Fletcher v. Peck* 6 Cr. 87; *Paul v. Clark* 9 Cr. 292.

City Attorney *Lawson C. Holden* for defendants in error. Where a municipal corporation is divided, property falling within that portion which is set off, becomes the property of that portion. *North Hempstead v. Hempstead* 2 Wend. 109; *People v. Morrell* 21 Wend. 580; Dillon Mun. Corp. § 128.

CAMPBELL, J. Plaintiffs in error brought ejectment for a cemetery in the city of East Saginaw, which had been conveyed to them in 1854 in trust for cemetery purposes for the township of Buena Vista. The uses declared in the deed were "in trust for the use of the township as a place of burial for the dead, and to be used by said board and said township as a cemetery and for cemetery purposes, and for no other purposes whatever." In case any of the land should be sold for other purposes, such portion was to revert.

In 1859 the city of East Saginaw was incorporated out of a part of the township, and made to include the cemetery. Subsequently the city undertook to assert ownership over the cemetery, and for several years, and until this suit was begun, claimed the exclusive right and control over it, disposing of burial rights, and managing it as city property.

The court below, upon a finding showing these facts, gave judgment for the defendants.

There can be no doubt that ejectment will lie by the trustees for a cemetery when they hold the legal title. Their position is analogous to that of the holder of the fee of a parish church-yard, where the burial places, although held by right, are not regarded as inconsistent with a legal title in the whole church-yard in the person or corporation vested with the trust. And where, as in this case, the defendant

has assumed and exercises exclusive control, it is equally plain that there has been such an ouster as gives a cause of action. The only important question therefore relates to the ownership of the title. It has never been conveyed away in fact, and the only ground set up as a substitute for a conveyance is the supposed effect of the division of the old township of Buena Vista, whereby the cemetery fell within the city limits.

The statute relied on is the one relating to the division of townships, whereby it is declared that when a township is divided, and contains a burying-ground, it shall belong to the township in which it lies after the division. Comp. L. § 766.

This section is found in a chapter relating entirely to the division of townships. The previous sections provide for the manner in which the property and liabilities shall be apportioned, and adequate provision is made for such an apportionment. The sixth section declares that these previous arrangements shall not apply to burying-grounds, which, as before stated, are made to belong to that one of the town divisions in which they lie.

It is not claimed that this statute refers to cities by name, but it is insisted that the setting apart of a city is equivalent to the division of a township, and comes within the same rules.

It is very clear that the legal identity of a township remains unchanged after division, so far as corporate existence is concerned, unless otherwise provided by law. Our statutes have not extinguished the corporation known as the township of Buena Vista. Its authority as a township does not extend over the city, but its property remains unless divested.

The chapter on the division of towns contains no provision whatever for any division of property, except between the townships created or continued as such by the division. The whole machinery provided for adjusting their respective interests is township machinery. There is nothing in the statute which divests a township of any rights in favor of a city, or provides any means for apportioning property or debts between city and township. And the reason for this is obvious. The whole system of township laws is uniform. It is all governed by general laws. It may very well be

regarded as safe and discreet to leave the arrangements on a division to town authorities, who are all on the same footing and vested with the same powers and duties. But cities are not so created. Each has its own charter, and its boundaries, powers and rights as well as responsibilities have always been fixed in every case by special legislation. Unless the act creating the city, or some other act relating to city matters, contains some provision concerning the transfer or distribution of township rights or responsibilities, the township cannot be affected by the city incorporation in any of its property relations. It is quite unimportant to consider the extent of legislative power in such matters, when no such power has been asserted.

The charter of East Saginaw contains a grant of power to the city to purchase cemetery grounds, but it confers no title to those already vested in the township from which its territory was carved out. Section 6 (Comp. L. § 766), does not stand by itself as a statute relating to burial grounds, but is by its terms applicable as creating an exception to the previous rules which without that exception would require burying grounds to be included among the property apportioned. It only applies to such divisions as under the previous sections give occasion for an apportionment by township boards. Every township is expected under our laws to have a burying ground, and this statute simply provides that where there is one, it shall belong, on a division of the old township, to the town where it lies. But there is nothing in the charter of East Saginaw which adopts this rule, or which is inconsistent with the continued ownership of this tract by the township. The charter expressly authorizes the city to procure burying grounds beyond its own borders. It may procure them in Buena Vista or anywhere else. The same legislature that incorporated East Saginaw expressly changed the old statute so as to allow a township if necessary to procure a cemetery elsewhere. Laws 1859, p. 396 (Comp. L. § 1696). It is manifest that section 766 was merely designed to prevent the confusion that might arise if the division of a township were to subject the cemeteries to

division or disturbance; and was not meant to preclude a township from retaining its property beyond its own limits where not directly covered by some law reaching the case. The law of 1859 certainly indicates that no such general policy prevails now.

There being no statute applying to cities in general, or to this city in particular, the rules applicable to townships, the common law rule, must prevail, which leaves the property of a corporation unaffected by such changes as leave its corporate character in existence, and do not destroy its corporate identity. There is no common law rule which can transfer property from one corporation to another without grant.

It follows that the plaintiff is entitled to recover the premises from the defendant. The judgment below must be reversed and judgment must be given for the plaintiff as owner in fee, with costs of both courts.

The other Justices concurred.

ANNIE W. WRIGHT v. HENRY W. PATTERSON, HARRIET PATTERSON, ALEX'R FINDLATER AND MARY A. FINDLATER.

Redemption from foreclosure—Fictitious purchase.

The owner of premises twice mortgaged conveyed them subject to the mortgages after the first had been foreclosed. Before the time of redemption had expired the grantee paid the mortgage, and having obtained a quit-claim to his wife from the first mortgagee, claimed that she held in her own right under a foreclosure from which the property had not been redeemed, and that the second mortgage was cut off. *Held*, that as her name was only used as a cover where her husband was the real party in interest, and as the transaction was probably understood by the mortgagee as substantially a redemption, no equity was made out in the wife's favor.

Appeal from Midland. Submitted Jan. 5–6. Decided Jan. 12.

FORECLOSURE. Defendant appeals. Affirmed.

John Moore, for complainant, cited *Emerson v. Atwater* 7 Mich. 17: 22 Mich. 35; *Crawford v. Edwards* 33 Mich. 358; *Miller v. Thompson* 34 Mich. 10; *Huxley v. Rice* 40 Mich. 73; *Manwaring v. Powell* id. 371.

James Van Kleeck for defendant, Mary A. Findlater, urged that his client had the same right as a stranger to invest her money in the property redeemed by her husband: *Gantz v. Toles* 40 Mich. 726; and that it would make no difference to the mortgagee whether the mortgage interest was owned by the former mortgagee or by her, as purchaser of it: *Hall v. Harrington* 41 Mich. 146.

CAMPBELL, J. Complainant filed his bill to foreclose a second mortgage made by defendant Patterson to James S. Eastman and another, and ultimately assigned to him. A previous mortgage made to one Jennings was foreclosed by advertisement.

Before this foreclosure became absolute Patterson conveyed the premises, and the remainder of the tract of which they formed a part, to Alexander Findlater, by deed made expressly subject to both of the mortgages. Before the time of redemption ran out, Findlater informed Jennings of his desire to pay the mortgage and told him he wanted Jennings to quit-claim to his wife, which Jennings did, about four months before the redemption expired. Mrs. Findlater now claims that she holds in her own right under that foreclosure as unredeemed, and that the second mortgage was cut off.

We agree with the court below that her name was only used as a cover for a transaction in which her husband was the real party in interest. The transaction was understood by Jennings as substantially a redemption, and had he not so understood it he would not probably have made the conveyance in the form he adopted. We do not think any equity is made out for Mrs. Findlater, and we do not think the place was bought with her money.

The decree must be affirmed with costs.

The other Justices concurred.

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City of Detroit v. Minerva A. Putnam.

Liability for injury from defective sidewalk.

A statutory liability created in derogation of the common law cannot be enlarged by construction.

Act 244 of 1879 gives a right of action against municipal corporations for any injury sustained by reason of defective public highways, streets, bridges, crosswalks and culverts. *Held* that it does not create a municipal liability for injuries caused by defective sidewalks.

Error to Superior Court of Detroit. Submitted January 6. Decided January 12.

Case. Defendant brings error. Reversed.

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

Brennan & Donnelly and *Don M. Dickinson* for defendant in error. A sidewalk is part of the highway: *Bacon v. Boston* 3 Cush. 174; *Brady v. Lowell* id. 121; *Raymond v. Lowell* 6 Cush. 524; *Manchester v. Hartford* 30 Conn. 120; *Hubbard v. Concord* 35 N. H. 52; *Hall v. Manchester* 40 N. H. 415; *Bloomington v. Bay* 42 Ill. 503; *Providence v. Clapp* 17 How. 161; Cooley on Torts 625; Angell on Highways 304; 1 Addison on Torts 328; Dillon Mun. Corporations 907.

Marston, C. J. Defendant in error recovered a judgment against the city for injuries sustained by reason of a defective sidewalk. It is not claimed that the action would lie in this State in the absence of a statute creating the liability. The plaintiff below relied upon act No. 244 of the Laws of 1879, p. 223, which is entitled "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, crosswalks and culverts." The first section of the act creates a liability in favor of persons "sustaining bodily injury upon any of the public highways or streets in

this State, by reason of neglect to keep such public highways or streets, and all bridges, crosswalks and culverts on the same in good repair." The second section creates a liability for damage to any animal, cart, carriage, etc., receiving any injury by reason of neglect to keep in repair any public highway, street, bridge, crosswalk or culvert, and in each section it is the township, village, city or corporation, whose duty it is to keep such highway, etc., in repair, that is made liable. The fourth section makes it the duty of such municipalities to keep in good repair all public highways, streets, bridges, crosswalks and culverts, and when the means provided by law are insufficient for such purpose, they are authorized to levy such additional sum, within certain limitations, as may be necessary.

It is noticeable that sidewalks are not in express terms mentioned in this statute, and that the act is made applicable to townships, villages, cities and corporations whose duty it is to keep the highway in repair. It must be seldom, indeed, if at all, that sidewalks can be found in townships outside of the corporate limits of villages, while crosswalks, bridges and culverts will be found in cities, villages and townships. In the repair and construction of crosswalks, bridges and culverts, the expense or cost is collected by a general tax upon the property within the corporation, or some district therein, and for this reason the authority given in the fourth section to raise an additional sum for such purpose, when necessary, is appropriate. The expense of constructing and repairing sidewalks, however, is not usually paid out of the general highway fund, but is made a charge upon the owners of property abutting thereon, and to this extent the fourth section would have no application.

Again, if sidewalks are embraced in the general terms used, then if an animal is driven on the sidewalk and injured, the municipality would be liable for the damages sustained, if liable under the first section for injuries to persons traveling on the sidewalk, and this evidently could not have been intended by the Legislature.

We have but little doubt that if the liability had been cre-

ated for injuries sustained in consequence of a failure to keep in repair the highways and streets, these terms would have included all within the limits of the line thereof, and thus the sidewalks as well as the bridges, crosswalks and culverts. The special terms used do not enlarge, but limit the force of the general words used. In village and city charters express provisions relating to sidewalks will always be found, and the omission of such in this act is very significant.

As already said, the city would not be liable in the absence of this statute, which creates the liability, and we cannot by construction enlarge the liability. Where a statute attempts, in derogation of the common law, to create a liability, we cannot go beyond the clearly-expressed provisions of the act. Such statutes are not to be extended or enlarged in their scope by construction.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

JAMES B. GOTT, GUARDIAN v. MARY JANE CULP.

Guardian's liability — Accounting — Investments — Claims for expenses — Interest.

In a proceeding between a guardian and ward it is error for the judge to make remarks in the course of the trial favoring the notion that the guardian has been culpably lax in his duties and that relations and others have supported the ward by reason of his neglect, and intimating that the present proceedings can properly be made to deter other guardians from doing as this one did.

A guardian's discretion in respect to the boarding and schooling of a ward stands on a similar footing with a parents. He is not bound to prefer mere economy of cost to the welfare and comfort of the ward.

A guardian's discretion in his expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position, and are made in good faith and do not exceed the ward's means.

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45	265
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73	231
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94	308
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117	209
45	265
124	563
45	265
134	[5]364
134	365
134	[5]366
45	265
138	[11]148

A guardian is not held responsible *ex post facto* on the ground, merely, that some other person might have done better; he cannot on an average be expected to be thoroughly versed in law or business; and honesty, kindness and a very ordinary skill in money matters are the most that can generally be required.

A guardian whose ward's estate is sufficient to furnish an income that will, with economy, maintain and educate her suitably, should not exceed the income, without adequate reason, though if circumstances justify it he may look at future and probable resources as well as at the present and actual income; and though it would be prudent to obtain leave to draw upon the principal, it is not absolutely necessary if the draft is one that ought to be made.

A guardian may properly retain enough of the money of his ward to secure the means of making all necessary outlays; and in investing he may wait until he can find safe investments in sums of reasonable amount, looking not merely to the value of the security, but to the promptness of the borrower.

A guardian intrusted with the investment of a ward's money should not be held for interest not actually received unless his delay to invest has been unreasonable; and he cannot be held for neglect beyond legal interest.

A guardian cannot be censured for honestly investing his ward's money in public securities or at the best legal interest which he finds readily obtainable; he represents the ward in taking securities, and he may turn them.

A guardian's compensation for the care of his ward is not an item of his account but is a matter for the consideration of the court which passes the accounts, and is not in any case to be determined by a jury.

A guardian's duties are personal and honorary and the position is not to be given or assumed with a view of profit; but in Michigan he is entitled to such reasonable compensation as the circumstances warrant, such as the size and character of the estate, the amount and kind of his services, the duration of the trust, the obligation to maintain an oversight of the person, etc.

A guardian's accounting is not a legal, but is an equitable proceeding involving not merely the ordinary items of debit and credit but considerations as to the propriety of charges and investments and the allowance of compensation, with which a jury cannot meddle. It cannot become a common law controversy on removal from the probate court.

Comp. L. § 5220 provides that on appeal from the probate to the circuit court, the latter shall proceed to trial according to the rules of law, and if there be any question of fact it may be submitted to a jury.

Held that this does not contemplate a general trial or a general verdict: the findings of the jury are to aid the court in determining questions that belong to its own equitable discretion.

Act 95 of 1873 requires a guardian to account on citation, but contemplates that he shall do so without; but the failure to do so, if not injurious, is not necessarily a cause of forfeiture.

Error to Washtenaw. Submitted Jan. 6–7. Decided Jan. 12.

Appeal from allowance of guardian's account in the probate court. The guardian brings error. Reversed.

Albert Crane, *Frazer & Hamilton* and *Edwin F. Conely* for plaintiff in error. A guardian is bound to such diligence and prudence as men exercise in ordinary affairs: *White v. Parker* (1850) 8 Barb. 48; *King v. Talbot* (1869) 40 N. Y. 76: he is charged only simple interest for a neglect to invest his ward's money: *Harland's Appeal* (1805) 5 Rawle 323; *Boynton v. Dyer* (1836) 18 Pick. 1; *Pennypacker's Appeal* (1862) 41 Penn. St. 494; he should not be charged with interest until the money has been in his hands a reasonable time: *Hooper v. Royster* (1810) 1 Munf. 119; *Dunscomb v. Dunscomb* (1815) 1 Johns. Ch. 508; *De Peyster v. Clarkson* (1828) 2 Wend. 77; *Armstrong v. Walkup* (1855) 12 Grat. 608; but he is not liable to be charged with any interest except that actually received, while his account is being settled: *Snyder v. Dietetrich* (1847) 5 Penn. St. 67; *Yoder's Appeal* (1863) 45 Penn. St. 394; *McElhenny's Appeal* (1863) 46 Penn. St. 347; *Mott Appeals* (1875) 26 N. J. Eq. 509; a trustee may charge for professional services: *Blake v. Pegram* (1872) 109 Mass. 541; *Lowrie's Appeal* (1856) 1 Grant's Cas. 373; so may an executor: *Wendell v. French* (1848) 19 N. H. 205; a probate court may allow an expenditure by a guardian in his ward's interest, of a portion of the principal of her money, even when made without a previous judicial order: *Wilkes v. Rogers* (1810) 6 Johns. 564; *In re Bostwick* (1819) 4 Johns Ch. 101; *Hayward v. Ellis* (1832) 13 Pick. 372; *Bruin v. Knott* (1845) 1 Phil. Ch. 572; *Shollenberger's*

Appeal (1853) 21 Penn. St. 337; *Smith's Appeal* (1858) 30 Penn. St. 397; *Worthington v. M'Craer* (1856) 23 Beav. 81; *Prince v. Hinly* (1859) 26 Beav. 634; *State v Clark* (1861) 16 Ind. 97; *Kendall v. May* (1865) 10 Allen 59; Schouler's Dom. Rel. 457–9; 3 Redf. Wills 453; *Bond v. Lockwood* (1864) 33 Ill. 212; *Jarret v. Andrews* (1870) 7 Bush. 311; omission to make an annual settlement is not such gross neglect as to be evidence of fraud: *Childress v Childress* (1873) 49 Ala. 237.

Charles S. May, for defendant in error. A guardian must see that the estate of his ward is made productive: *Worrell's Appeal* 23 Penn. St. 44; *Karr v. Karr* 6 Dana 3; *Pettus v. Sutton* 10 Rich. Eq. 356; *Owen v. Peebles* 42 Ala. 338; he should let the latters's money at the prevailing rate of interest: *Frost v. Winston* 32 Mo. 489; if he does not, he must make good the loss in his final accounting, *Hall v. Grovier* 25 Mich. 428; Reeve's Dom. Rel. 467; *Snavely v. Harkrader* 29 Grat. 112; he is presumed to have received interest on it: *Starrett v. Jameson* 29 Me. 504; a guardian should make such disbursements for his ward's support as are suitable: *Freeman v. Tucker* 20 Ga. 6; *Caldwell v. Young* 21 Tex. 800; he must not expend more than the income of the ward's estate for that purpose without judicial sanction: *Gilbert v. McEachen* 38 Miss. 469; *Johnston v. Haynes* 68 N. C. 514; if he wastes the estate he is entitled to no compensation: *McClellan's Appeal* 16 Penn. St. 110; *Reed v. Ryburn* 23 Ark. 47.

Campbell, J. Plaintiff in error was appointed by the probate court for the county of Washtenaw, in 1861, as guardian of defendant in error, then about six years old, her name being then Goodrich. In 1876 she married. Mr. Gott at the end of his trust filed his account, which was allowed as presented, no contest being made in the probate court over its correctness. The ward, however, appealed to the circuit court for the county of Washtenaw, setting up four grounds of complaint, which were in substance that the guardian had

failed to keep money invested, had charged for excessive expenditures and made over-claims for compensation, and had in general disregarded his duty and thereby lost his right to compensation.

No issues were framed in the circuit court, but the appellant demanded a jury. The cause was in advance of any trial submitted to an auditor, Thomas Ninde, who formulated the account and reported it in accordance with the claim of the guardian. On the trial several questions were presented, all supposed to bear upon the grounds of appeal. By stipulation, the auditor's report was made conclusive as to moneys received and expended, leaving the questions open as to the reasonableness and correctness of the payments and charges.

The finding of the jury charged the guardian with nearly twice as much interest as he was shown by this report to have received, the difference being probably intended to include interest which might have been earned by more careful investments. The outlays for the ward and for trust purposes were allowed substantially as charged. His claim for compensation was left out almost entirely. The finding does not show the reasons for any of these results and is silent concerning facts.

As far as we can determine from a comparison of the report, which is part of the record, and the finding, in the light of the bill of exceptions, we infer that while all of the guardian's money expenditures were approved, he was regarded by the jury as having lost all claim to compensation by reason of fault, and as having subjected himself to a charge for interest because he did not invest promptly, and at the best rates.

The exceptions taken on the trial all bear upon the matters involved in these results, and may mostly be included under a few heads. They present the inquiry whether there was culpability in not accounting—whether the guardian could rightly expend more than the ward's income—whether he was not extravagant in allowing or making expenditures—whether he was culpable in the training of the ward—whether he was culpable in not making larger and more lucrative

investments—whether he was entitled to furnish goods himself, or to charge for legal services, and whether neglect in any of the duties of his trust deprived him of a right to compensation. As these are all mixed up with each other in the record, and seem to have gone to the jury together, we shall not take up the exceptions separately when they can be dealt with together. The conclusions at which we have arrived concerning the proper form of the litigation will make some questions unimportant.

Before going into the specific subjects we may properly refer to some points made on the language used by the court during the trial. There is some reason to think that the course taken on the trial created a degree of impatience in the trial judge, which led him to rather sharp comments on facts and testimony, some of which we think had a necessary tendency to prejudice the jury. It is impossible for an appellate court to appreciate all the surroundings of a trial, and we are bound to believe that the trial judge would not intentionally make any remark provoked or unprovoked by the methods of the trial, or by his view of the testimony, which would deprive a party of his rights. We think, however, that remarks were made which could not fail to favor the notion that the guardian was culpably lax in his duties, and that relatives and others had supported the ward by reason of his neglect. This, on any state of testimony, was going too far. It was also error to intimate that proceedings in this case could properly be made to deter other guardians from doing as this guardian did. Every case must stand on its own merits. The effect of these suggestions was manifest from the verdict, which upon some points is not supported at all by proofs.

To appreciate the other questions a brief statement will be required.

The ward, when the guardian was appointed, was of tender years, and not enjoying any parent's care. The guardian made arrangements to have her cared for in the family of an uncle and subsequently in that of an aunt. The estate which she was then presumably to enjoy was not productive or

determined. It was about nine years before any considerable sum came from it into the guardian's hands. In 1871 he received from it $1640, which with a few scattering payments made earlier barely repaid the previous outlays for her board, clothing and other necessaries. After this the guardian received in 1873 from the same estate between four and five thousand dollars, and this was all the funds which at the time of his appointment, and for many years after, he had any right to expect would be received. The child, however, belonged by all her associations to intelligent and reputable people living in a comfortable way, and was entitled if possible to corresponding nurture. In 1873, by reason of the death of a relative in New York, an additional fund was received of about $9000. The death occurred a little earlier, and there were necessary delays in procuring the money, though no litigation. In 1873 the entire funds from all sources were realized.

For his services in going to New York and obtaining the possession of the fund there, the guardian in addition to his outlays charged $500 as extra compensation for his services as a lawyer in connection with his ordinary services as a guardian.

Up to 1871 he charged $25 a year for his services. After that year he claimed $300 a year.

When the ward became of proper age—about 15 or 16 years—he purchased a piano for her. During a portion of her minority he was in mercantile business, and furnished goods himself, instead of buying them. He also sent her to a boarding school in Canada. There was testimony introduced for the purpose of showing that he could have got board cheaper, and that she received more clothing and other supplies than some of the witnesses deemed necessary, and was not careful of them, and gave more or less away.

So far as her boarding and schooling expenses are concerned, we do not think there was anything which ought to have gone to the jury to impugn them. The law is entirely well settled that the guardian's discretion in such matters stands on a very similar footing with a parent's, and that he

is not compellable to prefer mere economy of cost to the welfare and comfort of his ward. He was justified in taking considerable pains to secure the care and oversight of a near relative, and in paying heed to her representations if he really regarded them as trustworthy. There is nothing tending to show any want of good faith in this matter, and the jury should not have been allowed to treat it as if there had been. The choice of a school stands on a very similar footing. He was also quite right in doing what he could to prevent the danger of such alienation of feeling as might impel the ward to resort to deceit or sly conduct. The uncontradicted testimony shows that the young lady was somewhat wayward, and was also lacking in careful management and preservation of her clothing and personal articles. The affirmative proof on this subject and of the efforts of the guardian and judge of probate was not explained or contradicted by Mrs. Culp, and there was an entire absence of any show of want of good faith. The presumption is not against the guardian, and in the present case the auditor's report was of itself *prima facie* evidence, apart from all other considerations.

The claim that the outlay for clothing and other advances was excessive demands a little more attention. The expenditures for such purposes, where the articles are not out of proportion to the ward's social position, if made in good faith, and if not exceeding the ward's means, cannot usually be held improper, under the same discretion before referred to. Aside from their limitation on account of income, upon which we shall remark presently, a *bona fide* discretion cannot be properly reviewed, unless in such extreme cases as seldom can arise with any but large estates.

Whilst it is just and necessary to require guardians to be careful, the law cannot and does not hold them responsible *ex post facto*, merely because some more prudent or sagacious person might have done better. The majority of guardians, especially of persons of moderate means, must be selected from friends or relatives who would take an interest in the child, and not upon mere financial and business principles.

Guardians on the average cannot be expected to be thoroughly versed in the niceties of law, or in the knowledge of business. Honesty and kindness, without more than a very ordinary skill in money matters, are about all that can usually be expected. It would lead to no good result to require such liabilities as would deter ordinary men from accepting such trusts, and would not only tend to keep out of the account the most essential elements of kindliness and sympathy, but would probably have an equal tendency to encourage sharpness in those who are treated as dealing at their peril.

A guardian whose ward's estate is sufficient to furnish an income that will with economy maintain and educate her suitably, should not exceed it without adequate reason. But in this country, while it is prudent to obtain leave in advance, it is not necessary, if circumstances justify the excess. But the rule is always to be applied with some discretion. The guardian is justified by the authorities in looking not merely at present and actual income but at future and probable resources. If the income is narrow he should also look to the future welfare and standing of his ward, which may in his eyes, as in those of a judicious parent, render it wise to secure desirable results by a sufficient outlay. In many if not in most cases, in this country, it is not possible to secure a regular and reliable revenue, which will not at times fail or be delayed. And when the infant's property is too small for the income to furnish reasonable nurture and support, the principal must necessarily be drawn upon.

Upon the present record it is not within our province to pass upon the facts. But it is proper to mention, that the expenses, apart from the guardian's charges, did not average per annum the ordinary legal interest upon the fund received in 1873, and still less on the whole fund received. Moreover during the years when some of the largest outlays became necessary, particularly the piano, the fund was all in perspective, and there was no income to speak of. During the fifteen years of guardianship, there were less than four, when it was possible to have had the principal fund earning inter-

est at all. If this question should ever come up again for serious consideration, all of these matters would have to be looked at. As the jury have found in the guardian's favor on this point, we need not refer to it further.

Upon the guardian's duty to invest, the findings on the record give us no definite *data*. We need only say, therefore, that he should be held for interest not actually received, only when his delay has been unreasonable. He may properly retain enough moneys to secure the means of making all necessary outlays, and he may wait until he can find safe investments in sums of reasonable amount. He should look not merely to the value of the security but to the promptness of the borrower, and need not accept without reference to this. For this reason public securities have always been held lawful. He cannot be censured for honestly investing in these or on any legal interest where it is the best which he finds readily obtainable. He cannot be held for neglect beyond seven per cent. That is the rate imposed by law in the absence of contract. The cases in which compound interest may be charged to a delinquent we need not now discuss.

The question of the guardian's compensation is not put in a satisfactory shape for full consideration. There are, however, some things requiring attention. It seems to be supposed there are some rules of law which on a given state of facts would fix it. But this is a mistake. The matter is one left to the consideration of the court passing the accounts, and the amount has nothing to do with the account as an item of it at all, and cannot in any case be considered by the jury.

By the old law a guardian could get no compensation whatever, but was merely protected in his legitimate expenditures. The modern doctrine, which is recognized by our statutes, regards him as entitled to such reasonable compensation as the circumstances warrant. Many elements may enter into this determination. The size and character of the estate, the amount and kind of services rendered, the dura-

tion of the trust, the duties in the given case as involving oversight of the person to a greater or less degree, may all have their weight. All we can do in a case so imperfectly presented as this is, will be to refer, very generally, to the practice which seems most approved.

If a guardian is a professional man and renders professional services, there is no absolute right to demand pay for them on the same footing as a stranger, and yet in some cases it might be entirely proper. If the estate is large, and if the guardian is appointed chiefly for business purposes, there is no special reason why he should not be paid as a business man. But on the other hand in small or moderate estates, or where the helplessness of the ward and need of nurture and protection may be important elements in the choice, such a rule might be ruinous. Courts can never properly lose sight of the fact that primarily the duties are to be regarded as personal and honorary. Such offices are not to be given or assumed with a view to profit. The compensation must be proportioned not so much to the market or usual value of such services as to the ability of the ward to bear them. A guardian when he has assumed the trust must be as faithful in a small estate as in a large one, without reference to the compensation. He should be paid fairly if the estate will allow it to be done without disproportion or injury. But if it will not, then he must be satisfied with a smaller reward. Upon the present record, if the ward had no estate beyond what was managed by the guardian, we should not regard his claims as made for $300 a year, and $500 extra fees, as reasonable.

We have already hinted that this record is badly framed. It seems to have been assumed that the proceeding in the probate court was one which, when removed into the circuit court, would become substantially a common-law controversy. This is a great mistake, and the statute has been misconstrued. A guardian's accounting is an equitable and not a legal proceeding. It involves not merely the ordinary items of debit and credit, but also considerations as to the propriety of

charges and investments and as to the allowance of compensation, with which a jury cannot meddle. The statute does not in such cases contemplate a general trial or general verdict. It requires such matters of fact as are disputed to be submitted on proper issues to a jury. Comp. L. § 5220. But in such issues as the present, although the findings of the jury, on proper instructions, may be more conclusive than those on a feigned issue, nevertheless they serve no other purpose than to determine definitely such specific facts as, when found, will aid the court in determining those questions which belong to the equitable discretion of the court itself. Such questions of discretion in a case like this, might include the responsibility of the guardian for failure to keep investments, the necessity or propriety of exceeding the income, the rate of compensation, and some others. We are not called on, and it would not be proper, to anticipate what issues ought to be framed in this case. None whatever were drawn up, and the jury proceeded under the rulings to do what belonged to the court.

No ground of appeal pointed out any objection to the securities actually taken, definitely, if at all, and no question was made on the trial concerning them. But the final decree treated all the fund with one or two exceptions as uninvested. The guardian represents the ward in taking proper securities and has a right to turn them over. We have no finding in this case to determine whether they were proper or not.

The failure to account annually, as provided for by the Laws of 1873, is not necessarily to be regarded as a cause of forfeiture. That law in terms only requires accounting on citation, but it undoubtedly contemplates that it should be done without. But it has never been held that such a failure, unless leading to injury, should be visited with serious penalties.

Some other matters were discussed which we need not dwell upon. The case will have to go back and definite issues should be made up before they are submitted again to be disposed of on the facts. There will be no occasion to

disturb the auditor's report which is based on the figures of the accounting.

The order of the circuit court must be reversed with costs, and the cause remanded for further action.

The other Justices concurred.

William McLaughlin v. Dennis Smith et al.

Trover for mortgaged chattels levied upon—Notice of defense.

The assignee of mortgaged chattels holding subject to the mortgage is not prejudiced by a levy on the mortgager's interest.

Where an assignee of mortgaged chattels holds them subject to the mortgage, and they are taken on an execution levied on the mortgager's interest, it is not necessary, in pleading the general issue to an action of trover brought in justice's court by said assignee, to give him notice that the taking will be justified under judicial proceedings.

Error to Muskegon. Submitted June 17. Decided Jan. 19.

Trover. Defendant brings error. Reversed.

Smith, Nims, Hoyt & Erwin for plaintiff in error. The plea of the general issue, in Michigan, is a complete denial of the plaintiff's cause of action and calls on him to prove it: *Ingalls v. Eaton* 25 Mich. 32; *Wilson v. Wagar* 26 Mich. 452; under it a freehold or possessory right may be shown: *Rawson v. Finlay* 27 Mich. 268; in trover it puts in issue the legality of the conversion and not the mere fact thereof: *Young v. Cooper* 6 Exch. 259; the plea in trover is not guilty, and it is unusual to plead anything else except the statute of limitations and a release: 1 Chit. Pl. 498; 9 Bac. Ab. 673; *Hurst v. Cook* 19 Wend. 463.

Keating & Allen for defendant in error. Judgment and execution are not admissible as justification under the plea of the general issue by an officer sued for conversion for

levying upon property: *Osburn v. Lovell* 36 Mich. 250; *Comstock v. Hollon* 2 Mich. 355; *Rosenbury v. Angell* 6 Mich 508; *Cresinger v. Reed* 25 Mich. 450–3.

MARSTON, C. J. March 1st, 1876, John Krebs mortgaged certain goods and chattels to Chester B. Smith, who, April 8th following, assigned the debt and mortgage to Henderson, Smith & Co., defendants in error. March 29, 1876, Krebs sold his interest in the property, subject to the mortgage, to Henry Martins. McLaughlin, as deputy sheriff, by virtue of an execution against Martins, levied upon the property May 15th, 1877. The mortgage to Smith was duly filed, and on the day of the levy, Smith, one of the defendants, made and filed an affidavit showing the amount due on the mortgage. There was evidence introduced tending to show that Martins abandoned or turned the property over to defendants. The time this was done does not clearly appear, and is, in the present aspect of the case, perhaps immaterial. The court excluded the defense because notice thereof was not given with the plea of the general issue. *Fry v. Soper* 39 Mich. 727.

I think there is no injustice in requiring notice of such a defense to be given. It affords to the plaintiff an opportunity to make an examination before trial of the validity of the judgment and proceedings relied upon, and distinctions drawn between cases where such notice must be given and where it need not be, only tend to confusion.

My brethren are of a different opinion, however, and think this case differs from *Fry v. Soper*. In that case the assignment by the attachment debtors to Soper was attacked as fraudulent, while in the present case it is only the interest of the mortgagor that is sought to be reached, and the rights of defendants under the mortgage to Smith assigned to them, are not questioned, and these defendants cannot be prejudiced by the levy and are not entitled to such notice.

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

The other Justices concurred.

Hervey S. Sayles v. John S. Curtis.

Ejectment—Sufficiency of finding of title.

In an action of ejectment a finding tracing title to two persons one of whom conveyed, as sole heir, to the other, is defective if there is no finding that he was sole heir or how he became so.

Where an action of ejectment rests on the title obtained under a decree in foreclosure against a man and his wife and the wife remains in possession claiming title in her own right, she should be made a defendant in ejectment and it should be found whether she was so brought into the foreclosure suit as to be bound by the decree therein.

Error to Oceana. Submitted Oct 8. Decided Jan. 19.

Ejectment. Defendant brings error. Reversed.

L. J. Rutherford for plaintiff in error.

F. J. Russell for defendanti n error.

Campbell, J. Curtis sued Sayles in ejectment and recovered judgment. Error is assigned on rulings on the trial and on the conclusions of law.

There are some interesting and complicated questions presented on the argument, but the defects in the facts found make it difficult to reach them.

Title is traced into two Indians, of two separate parcels of land. One of them is found to have conveyed as sole heir to the other, but there is no finding either that he was sole heir or how he became so.

Phebe Sayles, wife of Henry S. Sayles, was made a defendant in a chancery suit for the foreclosure of a mortgage, under the decree in which case Curtis asserts his title. It does not appear from the finding what title she had or claimed, but it does appear inferentially that she was in possession, and that demand of possession was made of her under the confirmation of sale. There is no finding that she was

brought in so as to be bound by the decree. If she was in possession, claiming title in her own right, she should have been made defendant in this suit. That matter, therefore, was not unimportant.

The whole finding leaves too much to be inferred. For the defects pointed out we think there was a mistrial, and a fuller finding would, perhaps, have made some questions now raised inapplicable.

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

The other Justices concurred.

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ALFRED F. WILCOX v. TOLEDO & ANN ARBOR R. R. Co.

Rehearing denied when the ground is not substantial—Variance.

Suit was brought in justice's court on a note purchased from the payee's assignee in bankruptcy. The defendant, on cross-examination of the plaintiff's witness, showed without objection that the payee was "thrown into bankruptcy," and that the note was purchased from his assignee. But plaintiff's introduction of the assignee's deed to the purchaser was objected to on the ground that the assignee's title was not proven. The deed, however, recited the grantor's authority by an order of sale from the bankrupt court. The plaintiff farther put in evidence, against objection, an order by the Register in Bankruptcy reciting the choice of the assignee, ordering a bond and requiring him to signify his acceptance, and the assignee testified that he had no doubt he had filed his bond and acceptance. *Held*, that the defendant had a right so to call out record evidence of the bankruptcy and the authority for the sale, or to waive it; that the term "thrown into bankruptcy" implied an adjudication; and that the evidence introduced by the plaintiff against objection was admissible.

A party insisting upon strict proof must do so consistently from the first; and if his own showing proves that his demand for something farther cannot be in the interest of justice, it should not be favored.

A defendant in justice's court moved for a nonsuit on the ground of variances between the declaration and the proofs in the matter of the assignment of the paper sued upon. *Held*, that an appellate court

would not regard other variances to which the justice's attention had not been called.

The Supreme Court, in reviewing the proceedings of a justice, will disregard mere informalities and technicalities, and will not disturb his judgments upon objections which he was given no opportunity to examine, or which were so blindly stated as not to attract his attention.

Motion for rehearing. Submitted Oct. 19. Denied Jan. 19.

Henry Z. Potter for the motion.

PER CURIAM. Plaintiff in error moves for a rehearing. The suit originated in a justice's court, where defendant in error sued on a promise by plaintiff in error to pay a certain sum of money to the Toledo, Ann Arbor & Northern R. R. Co. on certain conditions. The plaintiff's case was that the payee named in the paper had been thrown into bankruptcy, and the paper had come to the hands of the plaintiff by assignment.

To prove the plaintiff's case one Crane was called as a witness, who testified without objection that he purchased the paper of E. D Kinne, assignee in bankruptcy of the corporation to which it was given, at a bankrupt sale made by him. The defendant then took the witness for cross-examination and called out from him the following evidence: "Kinne was assignee of the bankrupt company; the company was thrown into bankruptcy on my petition in the Eastern District of Michigan about the 13th day of August, 1875. The corporation named I knew as a corporation doing business as such in this State prior to the time of its bankruptcy."

It thus appears that evidence that the payee named in the paper sued upon was thrown into bankruptcy on the petition of the witness Crane, that Kinne was its assignee and made sale as such, and that Crane became the purchaser of the paper, was put into the case by the concurring action of both parties to the suit, and without objection from either. Defendant had an undoubted right to demand record evidence of these facts, but he also had a right to waive it. *Burke v. Wilber* 42 Mich. 327.

Subsequently the deed from Kinne to Crane, given to carry into effect the sale, was offered and objected to on the ground that Kinne's title had not been shown. No objection was made to the form of the deed itself, nor was any particular defect in Kinne's title pointed out. The deed recited the authority of the grantor, by order of sale to him as assignee of the bankrupt company, made by the United States District Court for the Eastern District of Michigan, and it was received in evidence by the justice "on condition of further showing." Exactly what further showing was contemplated does not appear. The plaintiff gave further evidence, however, in an order made by Hovey K. Clarke, register in bankruptcy, dated June 9, 1874, reciting that the creditors of the bankrupt company had made choice of E. D. Kinne as assignee of the bankrupt estate, and ordering that he give bond in the sum of $50,000, appended to which was a notice to Kinne of his appointment and requiring him to signify his acceptance within five days, and an acceptance signed by him dated June 13, 1874. This evidence was objected to "for incompetency and irrelevancy," but it was admissible beyond question, we think, to show the facts recited, and it was followed by evidence from Kinne that he had no doubt he filed his bond in pursuance of the order, and also his acceptance, although he had no distinct recollection as to that matter.

Upon this state of facts the question is whether the justice should have rendered judgment for defendant for the want of evidence of an adjudication in bankruptcy, and for the want of proof of Kinne's authority to convey. We thought not when we had the case before and we think so still.

The fact that the corporation was "thrown into bankruptcy" on the petition of Crane was proved by defendant. The term of itself implies an adjudication. The fact that Kinne was assignee and acted as such was proved by both parties. Objections to the want of further evidence of his title were obviously merely technical, and when the appointment by the register was afterwards put in, nothing more could reasonably have been required. A party insisting upon strict proof must do so consistently from the first; and if his

own showing proves that his demand for something further cannot be in the interests of justice, it should not be favored. Such was the case here.

A further reason urged for a rehearing is that the court did not consider and pass upon the variances between the declaration and the proofs which were assigned as reasons for a nonsuit.

The answer to this is that the alleged variances were expressly restricted by defendant, in the motion for a nonsuit, to the matter of the assignment of the paper sued upon; and there is nothing in the record from which we could possibly infer that the justice ever had his attention called to questions which the plaintiff in error desires to raise on a rehearing. The uniform understanding in this court has been that in reviewing the proceedings of justices' courts it will disregard mere informalities and technicalities, and refuse to disturb judgments on objections which the justice was never given an opportunity to examine and pass upon, or which were so blindly stated that the point made in error failed to attract his attention. *Hinman v. Eakins* 26 Mich. 80; *Lake Superior Building Co. v. Thompson* 32 Mich. 293; *Zimmer v. Davis* 35 Mich. 39; *Bradshaw v. McLoughlin* 39 Mich. 480; *Thompson v. Ellsworth* 39 Mich. 719, and cases cited.

We think we said on the hearing all that the points actually made before the justice called for, and that a rehearing should be denied.

The Regents of the University of Michigan v. Preston B. Rose, Silas H. Douglas, Rice A. Beal et al.

Silas H. Douglas v. The Regents.

Accounting for deficit in public moneys—Agency—Forgery—Allowance of expenditures by public officers—Interest on public accounts—Acquiescence in decree—Printing record.

Books and similar exhibits need not be reproduced in the printed record of a case.

The Supreme Court declined to allow a chancery cause to go to hearing without printing the entire record, there being no appearance by counsel on one side with whom to agree, subject to the court's approval, as to how much ought to be printed.

Where a party to an accounting appeals from the decree, claiming that there is an error against him in an amount which he has himself previously reported as due to the other party, he has the burden of showing the error.

Where money had been paid out by an officer of the University of Michigan for the benefit of the University in cases in which the Regents could have expressly authorized its expenditure, it was *held* that they might ratify the act and direct repayment with interest at any rate not exceeding ten per cent., and that where they had made such payment with full knowledge of the facts, their action was final and could not be disturbed. And where there was no fraud or concealment in the presentation to them of the account for interest, it must be conclusively presumed that they acted with full knowledge, as it was their duty to do. But the allowance of interest would not imply a contract to allow it thereafter.

Interest cannot exceed seven per cent. in Michigan unless there is a written agreement for a higher rate.

The Regents of the University of Michigan appointed a person to assist the director of the chemical laboratory in receiving and keeping account of moneys paid in to that department, and they paid said assistant from the University funds, which embraced, with other resources, the income of the laboratory. *Held*, that even though the director may have had power to appoint and discharge the assistant, yet if it was not made a part of his duty to keep strict watch and save the University from loss through him, he could not be held accountable for moneys received by him and not paid over, as the assistant was not his agent but was in the employ of the University and answerable to the Regents.

A bill for an accounting, brought by the Regents of the University of Michigan against the director of the chemical laboratory and his assistant whose duty it was to pay over to the director the money which he received, though both were responsible to complainant, charged them with a deficit in their accounts, and it was stipulated that each was to be held accountable for so much money as came into his own hands. The stipulation fixed, also, the amount of the entire deficit. *Held*, that proof that the assistant had received money would not alone establish liability against his superior, as it would not tend to show that the superior had received the money from the subordinate; and the burden of proving that he had received it was upon the complainant, and, as between the defendants, it was on the subordinate.

On a bill for an accounting for a deficit the rules applicable to proof in civil cases must be observed, and the receipt of the money by the defendant may be shown by any competent testimony fairly tending to prove it, either alone or in connection with other circumstances.

Whether books carelessly kept by assistants who are not agents are admissible in evidence upon a bill for an accounting against their superior—*Q.*

In a suit for an accounting, defendant was charged with the receipt of money as shown by his signature upon the stubs in certain stub-books. He testified that the signature was not in his handwriting. *Held*, that this put the stubs in issue as would an affidavit denying the execution of an instrument sued on.

The acts, conduct and utterances of an accused party, if of the *res gestæ*, are competent evidence in a civil case as bearing on his culpability.

The Regents of the University of Michigan filed a bill against the director of the chemical laboratory and his assistant, an officer appointed by their authority, for an accounting for moneys received in that department and in which there was a deficit. The suit involved the question, as between the defendants, of the genuineness of the initial of the director, used in certain stub-books as a voucher to indicate that the assistant had accounted to him for moneys received. The director claimed that these initials were forged. So *held*, on appeal, upon comparison of the handwriting of both defendants, and especially of the director, which had changed somewhat, with that of the disputed vouchers; and in the light, also, of expert testimony and, particularly, of the conduct of the assistant in admitting delinquencies in his accounts of moneys received, when the deficit was first called to his attention, and in borrowing money and mortgaging his property to make them good, and giving security to meet whatever deficits might be discovered.

An effort to make a suspected person acknowledge a wrong already committed is not wrong if undue means, fraud, illegal compulsion or duress are not used.

Where a defendant in a suit for an accounting denies the genuineness of part of the vouchers produced against him, but does not designate those which are spurious though he has an opportunity to do so, they must all be regarded as *prima facie* valid in the absence of other evidence that they are not so.

Where a party to an accounting acquiesces in the disallowance of any of his claims and does not complain of it in the appellate court, it may be assumed that he is satisfied with the decree upon them and does not desire to have it reviewed. But the court will also assume that every claim made by the appellant is in issue, and will examine all the evidence for anything that will tend to show whether it ought to be allowed.

Appeal from Washtenaw. Submitted October 12 and 13, 1880. Decided January 19, 1881.

Motion for leave to proceed without printing the record. Submitted January 6, 1880. Denied January 8, 1880.

S. T. Douglass and *Ashley Pond* for the motion.

Byron M. Cutcheon, a Regent, as *amicus curiæ*.

MARSTON, C. J. A motion has been made by the appellants to dispense with the printing of the record, or a part thereof, in this case.

From statements of counsel, and a showing made, it appears that books and other similar exhibits constitute a considerable part of the record. Such exhibits we never require to be printed. How much of the other evidence should be, can only be determined on examination, or perhaps by counsel, subject to approval by this court.

It appears, from the statement of Mr. Cutcheon, that the Regents have at this time no authorized counsel to represent them, and the case is of such importance that it should not be heard at the present term under such circumstances. The case, therefore, must stand continued for the term.

Perhaps, when there is counsel on both sides, we may consent to take up the case with the understanding that we shall then order the printing of whatever testimony either party deems important.

In any event, there is a considerable portion of the record that should be printed before a hearing is entered upon.

Motion for leave to be heard before printing the record. Submitted April 20, 1880. Denied April 30, 1880.

S. T. Douglass for the motion.

MARSTON, C. J. In these cases, owing to the extraordinary and unprecedented course adopted by the complainant in the original cause, declining to render that aid and assistance which the researches and argument of counsel would give, and which has been universally recognized as proper and necessary in courts, especially those of last resort, we find the request to dispense with the printing of the record an embarrassing one. We do not know what questions are to be presented on the hearing, or the extent of the investigation that will be found necessary in the determination thereof.

We cannot, therefore, now say that the record should not be printed in the usual manner. That this may result in heavy and unnecessary expense upon the losing party, much of which might be avoided could we have the customary assistance of counsel, is very probable. It is, however, one of the consequences which we cannot avoid, when the case is thus thrown upon us, with no information on one side whether the full printing of the record is or not necessary. We must, as at present advised, assume that such printing is necessary, and act accordingly.

ACCOUNTING. Bill and cross-bill. Appeal taken by Douglass one, of the defendants in the original bill and complainant in the cross bill. Decree modified in appellant's favor.

Samuel T. Douglass, *Ashley Pond* and *E. D. Kinne* for appellant. Courts may use such methods in detecting forgery as are capable of being used by all persons of ordinary intelligence, though not experts in handwriting: *Moore v. United States* 91 U. S. 270; as to examination of writing of disputed genuineness, see "The Handwritings of Junius Professionally Investigated" and the review of that book in Littell's Living Age for June 10, 1871; accounts that have been examined, audited, reported upon by the proper committee, and adopted, are *settled accounts*: Story's Equity Jurisprudence §§ 523–6; Adams' Equity 227; *Philips v. Belden* 2 Edw. Ch. 13; *Lockwood v. Thorne* 11 N. Y. 171; *Dows v. Durfee* 10 Barb. 213; *Wiggins v. Burkham* 10 Wall. 129; and are not open to re-examination except on the ground of fraud or mistake: *Chappedlaine v. Dechenaux* 4 Cr. 306; after a body which can authorize expenditures has ratified them for a series of years and repaid them with interest, it cannot refuse to refuse to repay later expenditures on the ground that they had not authorized them: *Church v. Kidd* 3 Hun 269; *Lloyd v. Carrier* 2 Lans. 365; *Esterly v. Cole* 3 N. Y. 502; *Reid v. Rensselaer, etc. Glass Factory* 3 Cow. 393: 5 Cow. 587; *Carson v. Alexander* 34 Miss. 528; an agreement to pay ten per cent. interest may be implied from acts done though it is not expressly authorized except on agreement therefor in writing (Browne St. Fr. §§ 124, 346–7) as the purpose of the statute to prevent frauds is not thereby violated.

Marston, C. J. The original bill in this cause was filed for an accounting between defendants Douglas and Rose respecting moneys which had been received at the Chemical Laboratory of the University of Michigan, on account of the University, but not paid over or accounted for to the complainants, and for a decree against the defendants, or either of them, for such amount as should be found in their or his hands. The other defendants were joined as standing in the position of sureties for the defendant Rose, and responsible with him for any amount for which he should be found

chargeable. Answers were filed in the case by Douglas and Rose severally, each admitting the rights of complainants to an accounting, but each averring that the failure to account and pay over moneys received was chargeable to the other and not to himself. In the progress of the cause, a stipulation, which will be more fully referred to hereafter, was entered into by all parties, whereby it was agreed that there was a deficit in the accounting to the sum of $5671.87; that Douglas was liable for so much of this as had come to his hands and was not accounted for and paid over to the complainants, and Rose for so much as he had received and not accounted for and paid over to Douglas or to complainants; that an interlocutory decree for an accounting in open court should be entered in order to ascertain the respective liabilities of the parties; that this should not estop the complainants from calling on Douglas to account for any money received by him for complainants, otherwise than from Rose, but that after the accounting there should be a further accounting between complainants and Douglas as to any matters between them not involved in the accounting first to be taken. Under this stipulation the parties proceeded to take voluminous testimony in open court, and this was examined and reviewed by the circuit judge in the opinion rendered by him when disposing of the issue made on the original bill. In none of the testimony was it questioned that the moneys not accounted for to complainants had first been received by Rose, with the exception, perhaps, of a few small sums, but the controversy narrowed itself to this: Whether Rose had paid them over to Douglas, so that the responsibility for the deficiency was upon the latter, or whether, on the other hand, the deficiency was chargeable to Rose himself.

The summary of the facts by the circuit judge is so concise and accurate that I copy it here:

"The Laboratory is entrusted by the Regents to the supervision and general management of a director.

"This position was filled by Dr. Douglas from the establishment of the Laboratory to sometime in the spring of the present year. Chemicals and apparatus were purchased and

kept on hand for the use of students in the prosecution of their studies, and dispensed to them from time to time for that purpose, thus necessitating an account with each student. Dr. Rose entered the Laboratory April 3, 1866, as assistant, and was entrusted with the duty of keeping books of account with the students, and receiving money from them. At this time all agree that the system of Laboratory accounts was imperfect and unsatisfactory. There was a system of accounting between the director and the assistant. Money was received from the student by each indiscriminately. This method continued in use until the close of the fiscal or college year in June, 1866. The next fiscal year commenced in October, 1866. At this time some change and improvements in the system of accounts between the Laboratory and the students, and between the director and the assistant, was introduced at the suggestion of Dr. Rose, and with the concurrence of Dr. Douglas, which seems to have continued without any change during the period involved in this controversy. By this system, which is the former one modified and improved, a student applying for admission to the Laboratory makes a deposit to apply on chemicals, etc., to be supplied to him. This was required by the rules of the department, and was also practiced under the former system. The deposit required was $10, though sometimes in very exceptional cases it would be $5, $15 or $20. The money was paid directly to the assistant, for which he gave to the student a receipt, prepared or filled up from a book of blank vouchers with accompanying stubs, the entries upon the stubs indicating the number of the receipt, its date, the name of the student to whom issued and the amount of the deposit. Upon the back of the receipt was printed a blank certificate intended to be filled up with the full amount paid at the final settlement and signed by the student. These receipts, commonly called tickets, entitled the student holding them to a table for work in the Laboratory, when a vacancy occurred, in the order in which they were issued.

"If the student for want of a table, or for any other cause, did not enter upon a Laboratory course, the deposit money,

upon the return of the receipt, would be refunded to him by the assistant, and the receipt being returned to the director at the next succeeding settlement with him would be destroyed, and the corresponding stub marked 'cancelled' by a diagonal line upon it in black ink. If he did enter upon his course, an account was opened with him upon the Laboratory ledger, so called, in which he was credited with the amount of his deposit, and charged with all the chemicals supplied to him from time to time. If at any time the ledger indicated that the debtor side of the account was materially in excess of the credit side notice would sometimes be given to make a further deposit.

"If after entering upon the work the student should leave before the end of the course, whether before or after the deposit money was exhausted, his account was treated as forfeited, and so reported by the assistant to the director. This term 'forfeited accounts' seems to have been applied inaccurately to cases where the student left in debt to the Laboratory. Where an account is for any cause declared forfeited, all payments made subsequent to the first deposit are called subsequent payments on forfeited accounts. The payment need not have necessarily been made as I understand, after the report of the forfeiture. Upon the completion of a Laboratory course the accounts in the ordinary course of business would be settled, the balance either way paid, and the ledger balanced. The balance was, of course, quite uniformly—though not always—against the student, and it would be paid to the assistant, but in very exceptional cases the deposit would exceed the chemicals charged, and in that case the balance would be paid to the student. But, in any event, when an account was settled the deposit receipt, if possible, was produced by the student, the blank certificate on the back filled out with the full amount paid to the assistant, including the deposit, signed by the student and delivered to the assistant. Thus this voucher and the ledger would show the whole amount paid, and when paid. It often happened that the student had lost it, or for some reason, was unable to produce at the final settlement his

deposit ticket or receipt. In such cases, in the usual course of things, a duplicate would be made out and the student's certificate filled out and signed.

"Instances, however, are said to have occurred where accounts were settled and balanced upon the ledger, upon the student's promising to return the deposit ticket, with the certificate upon it, properly signed, without producing a duplicate voucher, but which he failed afterwards to do. This would give rise to a missing ticket, but it would be in the hands of the student and not be in the hands of either Dr. Rose or Dr. Douglas, a circumstance of possible consequence in explaining the absence of or loss of tickets.

"Douglas being the director, and Rose the assistant, money coming into the hands of the latter from the students, or otherwise, on account of the Laboratory, were from time to time paid over to the former, who reported annually to the Regents, usually in the month of June. It seems to have been the aim of the director and the assistant to settle and adjust their money affairs, growing out of the Laboratory, at least as far as practicable, about once a month, though sometimes a longer and sometimes a shorter period seems to have intervened according to the testimony of both. Upon the occasion of these periodical settlements, the method of accounting between them, so far as it can be serviceable to refer to it here, seems to have been this: The stub book of course would show the number of deposit receipts issued since the last preceding settlement, and the stubs the amount of money received from this source. Resort was therefore had to the stubs for the purpose of ascertaining the amount of deposit money received since the last settlement; and at the conclusion of the settlement, Douglas, to indicate that the [deposit] money had been passed over to him, would place his name or initials 'S. H. D.' or the single letter 'D.' upon each of the stubs since the last settlement, placing what is called a settlement mark—usually a cross or some other character—upon the last stub so initialled.

"The tickets or students' vouchers taken by the assistant since the last settlement, were produced to show the amount

received since that time, and the amount with which he should be charged on that account would be ascertained by adding the amounts upon the backs of the tickets and deducting the amount represented by the face, which would have been paid over at some former settlement. The tickets were then turned over to Dr. Douglas with the money, and to indicate the payment or to evidence the transaction, a red line was drawn diagonally across each stub, corresponding to the tickets turned over, and those vouchers, according to the regular course of business, would accompany the next annual report of the director to the Regents; thus the initial letter and the red line would receipt for all money received from the student and paid over to Douglas upon ledger accounts, which were represented by a stub and voucher. It often happened that the rule requiring an applicant for admission to deposit $10 was not adhered to; for various reasons students were allowed to enter without making a deposit, and in that case no deposit ticket or receipt would be issued. There would of course be no stub—hence the name 'stubless account.' However, upon the final settlement of this class of accounts, it seems to have been the habit of Dr. Rose, sometimes at least, to make up a deposit ticket and student's certificate as in other cases. In some instances this course was pursued, in others not; and when not, the account would become stubless after settlement, and in that case there would be of course no vouchers to hand over to Dr. Douglas and no stub to red line, indicating the payment of money to him. It may, however, be said here, that it is claimed on the part of Dr. Rose that this class of stubless accounts, and subsequent payments on forfeited accounts, were ascertained from the ledger and paid over at the last or final settlement in each year, which he styles an annual settlement.

"There are some material points of difference between Dr. Douglas and Dr. Rose respecting the course of business between them, especially in respect to the annual or last settlement of the year, which will be noticed hereafter. Enough has been said here to point out the different classes of delinquent accounts without misunderstanding. They are as follows:

First, missing tickets, which, according to the regular course of business, should have been returned by the student to Dr. Rose, by him to Dr. Douglas, and by the latter to the Regents, but which do not appear upon the reports of the latter to the Regents, and are not found with others in the steward's office, and upon the corresponding stubs of which are found the name of Douglas, or initials 'S. H. D.,' or the single letter 'D.' (an exceptional instance or two are found where the initials are wanting); *second*, missing tickets, with corresponding stubs red lined; *third*, stubless accounts, or accounts upon the ledger not represented by stub or voucher; *fourth*, forfeited accounts, or accounts for any cause reported as forfeited; and, *fifth*, subsequent payments on forfeited accounts.

"It will now be seen that if the names or initial letters upon the stubs, representing the delinquent deposit money, are genuine—if they were truly made by Dr. Douglas—they afford sufficient evidence that the money was paid by Dr. Rose to him, and it should in that case be charged to him in this accounting; if they are not genuine they do not afford such evidence, and the money should be charged to Dr. Rose. If the red lines upon the stubs representing delinquent accounts were made by Dr. Douglas, or Dr. Rose in his presence, or by his direction, then they afford satisfactory evidence that the money represented by them was paid to Douglas, and this class of delinquent money should be charged to him—otherwise to Rose. If the delinquent ledger accounts, not represented by stub or voucher, were settled for or paid over at the annual or final settlement, then they should be charged to Douglas—otherwise to Rose—as it is not claimed that they were paid except at the last or annual settlement in each year. Forfeited accounts are represented by stubs with initials indicating payment to Douglas. Subsequent payments on forfeited accounts were practically stubless accounts."

These were the main facts. In passing upon them the circuit judge reached the conclusion that the defendant Douglas was chargeable with some portion of the deficiency,

and the defendant Rose with another and larger portion. As regards the alleged forgery of the letter "D" or the initials "S. H. D." or the name "Douglas" on the stubs or vouchers, indicating that moneys had been paid over by Rose to Douglas, the judge was of opinion that the evidence did not justify the conclusion that the name and initials upon the stubs were otherwise than genuine, and all the stubs thus marked were left to stand as vouchers against Douglas. In other respects the conclusion of the circuit judge was favorable to Douglas, and his opinion, after reviewing in detail the evidence respecting the conduct of Rose when the delinquency was first discovered, concluded as follows: "On the whole, whatever doubt there would have been respecting the result, if the case were confined to evidence growing out of the books of account and the loose methods of accoun ing between Rose and Douglas, the subsequent talk and conduct of the former is every way so inconsistent with his present claim, except in respect to the questioned "D"s, and so confirmatory of the claim of Douglas respecting the stubless accounts and the red-lined stub accounts, that I cannot hesitate to say that the fair weight of evidence leads to the conclusion that stubless accounts were not paid over at the last or annual settlements, and that the red lines upon the stubs representing delinquent accounts, cannot be accepted as satisfactory evidence that the corresponding vouchers were turned over."

An interlocutory decree was thereupon entered referring the case to a commissioner to state the account with the following directions: *First*, that the delinquent deposit moneys, represented by stubs with initial letters or names, should be charged to Douglas; *second*, that delinquent accounts represented by red-lined stubs should be charged to Rose; *third*, that ledger accounts not represented by stubs or vouchers should be charged to Rose; *fourth*, that forfeited accounts represented by initialled stubs should be charged to Douglas, and subsequent payments on forfeited accounts, being practically stubless accounts, to Rose.

The accounting took place according to the directions of

the decree, and the result was that a decree was entered February 15, 1878, which adjudged that the defendant Douglas was liable for and should pay to complainants the sum of $1716 03, and the defendant Rose was liable for, and with his sureties should pay to complainants, the sum of $4647.55. It was also decreed that complainants should recover their costs of the defendants, but questions respecting them, and respecting costs between the defendants, were reserved.

From this decree defendant Douglas took an appeal. The complainants moved to dismiss on the ground that the case was not yet so far disposed of as to be appealable, and counsel for the appellant practically conceding the point, the appeal was dismissed.

On January 22d, 1878, defendant Douglas filed a cross-bill for an accounting between himself and the Regents in respect to other matters, and an issue was taken upon this and an accounting had. The matters embraced in this bill consisted in a balance shown to be due to Douglas in his last account rendered various errors which have been discovered in previous accounts, and interest on balances owing to him from time to time for moneys advanced. The Regents denied all liability to pay interest, and they claimed to offset against any amounts established in favor of Douglas all items of interest previously charged against them by Douglas in his accounts, and also a number of mistakes in his accounts which were in his favor. The accounting was had with the following result: The circuit judge credited Douglas with the amount of his final account and with such errors in other accounts as were thought to be established, and which operated against him, amounting in all to $2846.45. From this were deducted the amount of the previous decree, certain errors which had been discovered, which were in his favor, and the interest items previously allowed to him, making in all $2829.90, and leaving a balance due Douglas of $17.46, for which a decree was entered in his favor.

It is by appeal from this decree that the case is now before us.

The appellant Douglas claims that certain portions of this decree are erroneous, viz.: In crediting the Regents and charging him with the amount of $1716.03 "deficit deposit moneys" as determined by the decree of February 16, 1878, and interest thereon; in charging him and crediting the Regents with certain "so-called old accounts" amounting to $53.19 and interest thereon; in not allowing his claim for certain interest on certain advances made by him; and in disallowing his claim to be credited $390 for error in balance brought forward in his account rendered for 1870–1.

These questions I shall consider in the inverse order of the above statement.

Although there was no appearance in this court, except on behalf of the appellant, yet his counsel voluntarily furnished the Court, on the hearing, with printed copies of the briefs and argument of the principal counsel for the complainant Regents, and of the defendant Rose, and also of the opinion of the circuit judge upon the merits; and the Court was also furnished with a manuscript brief of counsel for the Regents, to all of which due and careful consideration has been given.

Taking up these several questions raised by the appeal, the first in order will be the one last above stated.

First. Appellant claims to be credited the sum of $390 for error in balance brought forward in his account rendered for 1870–1. I have carefully examined the evidence and the briefs referred to, in order to ascertain if a mistake had been made as claimed. The report made by defendant Douglas to the Regents for 1869–70 showed a balance in his hands belonging to the University of $61.49. The two last items of credits to the University upon this report are under date of June 29, 1870, viz.: June 29th, sundry persons, $836.22, and diplomas $19. His next report to the Regents credits the University, under date of July 1st, "By bal. $451.49." On turning to his book of accounts from which these reports were made I find the balance there stated under the same date $361.49; the other credit items correspond with his report. Turning back upon the same book to his account

for 1869 and up to June 29th, 1870, I find the total receipts footed up at $5685.87, and the expenditures at $5324.38; this makes the balance, as stated upon his books, $361.49. It is very clear, however, that a mistake was made in the footing-up of the receipts for 1869, as was pointed out during the argument by one of the members of the court. The correct footing-up is not $5685.87 but $5385.87, thus clearly showing a mistake of $300 to have been made in favor of the University. I have been unable to account for the difference between the amount or balance as shown upon his book and in his report. As already said, the book, as erroneously footed, showed a balance of $361.49, while his report gave the balance as $451.49; the mistake of $300 is clear, while there remains $90 unaccounted for. The evidence tends very strongly to show that this $90 was not received, yet the manner of keeping accounts was so loose and is so unsatisfactory that I am of opinion this $90 should be charged to the defendant Douglas. He having once reported the receipt thereof to the Regents, he must assume the burden of proving the mistake. This has been done to the amount of $300 and that amount should be credited to him.

Secondly. I now come to the question of interest. Defendant Douglas while director of the Laboratory, claiming to have made certain advances therefor, over and above the receipts therefrom in his hands, made monthly balances of his accounts and charged interest upon any balance found in his favor at the rate of ten per cent. per annum. In his annual accounts to the Regents the interest thus claimed and computed was charged. In some of the accounts this charge was more clearly and distinctly set forth than in others, it appearing in all as a charge of interest, but not in every instance showing how or upon what balance it was computed. The fact that such advances were made and that such balance in his favor in fact existed, is not disputed, except upon the theory of charging him with the entire receipts of the Laboratory. It was farther shown that there was no express authority given him by the Regents to make any advances, or if he did to charge interest thereon. These

accounts, when presented to the Board, were usually referred to the finance committee, by them examined, and reported back as being correct. There was no uniformity in the action taken by the Regents upon these reports; some were "accepted and the account and vouchers placed on file," others "accepted," "accepted and adopted," and "adopted." And this is true of all of the reports up to and including the report for 1871–2, except for the year 1866–7, which, although made and referred to the proper committee, the record of the Board fails to show any report made or action taken thereon. The report for that year is found on file, and formed the basis for the next year's report which was acted upon.

It has been claimed that the Regents, in auditing and allowing his accounts, did so in ignorance of the facts relating to the charges of interest, and that the Board had no authority to borrow money or to pay interest upon such advances. I do not deem it necessary to pass upon the question of the power of the Board of Regents to borrow money or to pay interest. I have no doubt but that where money has been paid out or expended for the use and benefit of the University, in cases where the Board could have expressly authorized such expenditures, they may ratify the act and direct payment thereof with interest at any rate not exceeding ten per cent. per annum; and where the Board with full knowledge of the facts has made such payment, such action will be final and cannot afterwards be disturbed.

Did then the Board of Regents pass upon these accounts with full knowledge of the facts? Whether as a matter of fact each member of the Board carefully examined these accounts for the purpose of ascertaining what was charged therein, and the reason therefor, is not of very much importance in the present inquiry. I shall not, therefore, consider the evidence tending to show such to have been the fact. In the presentation of these accounts, and the charges of interest therein, no fraud or concealment was attempted. The accounts upon their face showed certain interest items charged against the University. This was sufficient to put

the Regents upon inquiry, and in case they did not fully understand the charge as made, or the reason for making it, it became their duty, before acting farther thereon, to make full investigation and ascertain all the facts relating thereto. No one can doubt for a moment but that a proper investigation would have given them all the facts and circumstances pertaining to this question of interest. Such being the duty of the Board of Regents, this court cannot presume that it was either neglected or carelessly performed by that body. In the absence of fraud it must be conclusively presumed that the Board did know the facts relating to these charges and allowed them in the light thereof. What was said in *Detroit Advertiser etc., v. City of Detroit* 43 Mich. 116 is equally applicable in this connection and need not here be repeated, and the rule there laid down must be held decisive in the present case upon this question, so far as interest was allowed, which includes the amount in the report for 1871–2 and previous years.

The records of the Board do not show final action upon any report subsequent to that of 1871–2, consequently no allowance of interest thereafter. And I am of opinion, therefore, that interest after that time cannot be allowed in this case. If it could, clearly, under our statute, the rate could not exceed seven per cent. in the absence of a written agreement. Where charged and paid in the absence of such an agreement the person receiving such rate may retain it, but he cannot make that the basis for the recovery of the same rate upon implied contract. I am also of opinion that no implied contract can thus grow up under which interest can be recovered; that the rule applicable between individuals cannot here be followed, but rather the rule applicable between the State or municipalities and individuals must here govern. I have heretofore had occasion to examine the question whether interest could be claimed from the State upon an implied contract, and came to the conclusion that such was not the general rule, and I have seen no occasion to depart from or change the conclusion then arrived at. Report of Auditor General for 1874, ccxlv.

I am of opinion, therefore, that the interest charged in the report for 1872–3 and subsequently, cannot be allowed the defendant.

Thirdly. Old accounts amounting to $53 19. Before attempting to pass upon this and the remaining claim, it might be well to first ascertain the relations existing between the defendant Douglas and the University, and his legal liability to the University resulting therefrom.

As I have already given a full statement of the facts, a brief reference at this point will be sufficient. Defendant Douglas was at an early day appointed assistant professor and afterwards professor of chemistry. As such it was a part of his duty to purchase chemicals for the Laboratory, furnish them to students therein as necessary, collect the price thereof and account therefor to the Board of Regents. Our attention has not been called to, and I have been unable to find, the record of his appointment or the authority then or afterwards expressly conferred upon him. Evidence has been introduced as to what some members of the Board considered his duty, viz., to superintend the business of the Chemical Laboratory, receive and account for all moneys coming into the same; to act as its director, and to report to the Board the result of the management thereof, including all moneys coming into his hands, and all moneys paid out by him in connection therewith. As early as 1864 assistants were appointed, who, amongst other duties, took charge of the books, dispensed chemicals to the students, kept their accounts, collected from them and paid the same over to defendant Douglas.

In June, 1865, defendant Douglas made a report to the Regents in which the following appeared: "*The Dispensing of Chemicals and Apparatus and the Keeping of Accounts in the Laboratory.* An account is kept with each student in the Laboratory, who is made to pay for what he actually consumes; the labor attached to this branch is very great and requires the services of a good and correct accountant; thus, in transacting the business of the past year, there have been made in the books of the Laboratory upwards of

1800 entries of charges and credits, and in the hands of a careless and inefficient man large amounts may be lost to the University. Under all these circumstances I respectfully suggest to your honorable Board the appointment of an assistant of chemistry and lecturer on organic chemistry and metallurgy, at a salary of $1000, and that the remaining two assistants now authorized to be employed be paid, respectively $250 and $300; the expenses of the Laboratory would be thus increased $800; with this sum I think the services of one permanent and efficient assistant can be secured, and if the waste and loss consequent upon irresponsible and inefficient help is taken into account, it will prove little if any more expensive than the present arrangement." At the same session the committee to whom was referred the above reported the following, which was adopted: "*Resolved*, That an assistant professor of chemistry and lecturer on organic chemistry and metallurgy, at a salary of $1000, be employed, and that the remaining two assistants, now authorized to be employed, be paid respectively $250 and $300 per annum." The following was also adopted: "On motion of Regent Knight the appointment of an assistant professor in the Laboratory was referred to the executive committee and Professor Douglas." Under this authority Dr. Lewis was appointed to take charge of the books, dispense chemicals and keep accounts, and he held such position until the spring of 1866, when he resigned, and Dr. Preston B. Rose was then appointed.

I do not understand it to be claimed, or that, as a matter of fact, defendant Douglas, during or after 1864, kept the books of account with the students or dispensed any of the chemicals, or, with a very few exceptions, collected any moneys from the students. The books were kept, and all this work was done, by an assistant who accounted to defendant Douglas.

Under such a state of facts it is important to first determine whether defendant Douglas can be properly charged with and held liable for all moneys, which the books show to have been paid, or which were actually paid, to such assist-

ants, or only for the amount by them paid over to him. I have been unable to discover any principle or decision under which defendant Douglas can in this case be held liable for moneys not actually received by him. No such enlarged responsibility can result from his office or the class of duties he performed. The keeping of accounts and collection of moneys from the students could not, from the very nature of his position and the duties he had to perform, primarily fall upon him. He was not a mere accountant and collector. That duty necessarily must have been and was in fact entrusted to others—assistants who were appointed under authority from the Board of Regents, their salary fixed by them, and paid out of University funds. I make no distinction on this account, for there is none, because they may have been paid from Laboratory moneys and by the director; they were none the less University funds which otherwise it would have received. These assistants were not therefore the clerks, servants or agents of the defendant Douglas, for whose acts he would be chargeable, and the mere fact that he had power to employ or discharge them, would not make them such. They were in the employ of the University and were subject to be called to account by, and were responsible to, the Board of Regents for their acts and conduct.

If it was a part of the duties of the defendant Douglas to keep strict watch and account of their doings to prevent loss to the University, and he was guilty of such negligence in this respect as would render him responsible for the losses sustained in consequence thereof, the question might be different, but such is not the theory of the bill in this case.

It is not necessary, however, to rest the case upon this ground alone; as already intimated, the bill of complaint does not seek to charge him with any but the moneys that came into his hands. Farther than this, after the cause had been at issue, counsel representing all the parties, complainants and defendants, entered into a written stipulation, in which I find the following: "*1st.* All the said defendants who have appeared, consent and agree that said Douglas is liable to account to and pay over to said complainants so

much of the Laboratory deficit, so called, as came into his hands, and which has not been accounted for by him to the Regents, if any; and also, that said Rose is liable to account to, and pay over to, said complainants so much of said deficit as came into his hands and which he has not accounted for to said Douglas or to said Regents, if any. * * * * * *4th.* Nothing contained in the record of this cause, or the decree to be made therein, shall, at any time hereafter, be alleged or held to estop the complainants from calling on said defendant Douglas to account to them for any money which he may have received for their use, other than such as was received by him from or through said defendant Rose."

The authority to enter into this stipulation has not been and could not well be questioned, and it clearly fixes the liability of each to such amount "as came into his hands and which has not been accounted for by him." Whether therefore we look to the bill of complaint, the stipulation, or the legal liability resulting from undisputed facts, we can only charge defendant Douglas with the moneys received by him and not accounted for. It also follows from such a state of facts that there must be evidence, at least, tending to show moneys into Douglas' hands in order to justify the rendition of a decree against him. In stating this I do not overlook the second clause of the stipulation referred to which fixed the amount of the deficit, but left open the question what amount thereof should be charged to Rose and what amount to Douglas. This matter of division or apportionment was left to be settled by the court in the usual manner upon relevant and competent testimony in the case. It is not sufficient, therefore, in order to charge defendant Douglas, to show by the books kept by an assistant that a certain amount of money had been paid to the assistant, or, as a fact independent of the books, that such sums were paid to the assistant, as such evidence has no tendency to show that Douglas received it. Proof of these facts would necessarily be one of the steps in the case, but standing alone would fall short of establishing a liability against Douglas, or call upon him to account for what he has not been shown to have received.

The burthen of proof, in reference to these old accounts, is upon the complainants; and in reference to the deficit fixed by the stipulation, is upon defendant Rose, to show the money in Douglas' hands in order to charge him therewith. In seeking to establish such fact the rules applicable to the proof of facts in civil cases must be observed, and the fact may be shown by any competent testimony fairly tending, either alone or in connection with other circumstances, to establish it.

I have been wholly unable to find any satisfactory evidence that defendant Douglas received any of these old accounts charged to him in the decree. They are very old matters, running from 1860–1 to 1863–4, and the books kept at that time are principally relied upon to charge him. These books are not in his handwriting; the evidence shows that they were very carelessly kept; that the tickets then in use were relied upon in the settlement with the students, and that corrections made in the settlement did not necessarily appear upon the books, and that the entries therein are not correct. Under such circumstances I am of opinion that these old accounts should not be charged against the defendant Douglas. It may be very questionable whether the books, kept in such a manner, could be admitted in evidence as against this defendant, but as the proof stands, the question is hardly of sufficient importance to justify an extended discussion.

Fourth. I now come to perhaps the most difficult, certainly the most important, question raised by the appeal. The decree charges the defendant Douglas with certain deficit deposit moneys, paid in 1866–7 and following years up to 1873–4, amounting to $1275 and interest thereon. What has been said under the last subdivision, relating to the old accounts, as to the relation of the several parties, their respective liabilities and the burthen of proof, is equally applicable here and need not be repeated.

The principal evidence relied upon to charge defendant Douglas with the receipt of this deposit money is the stubs remaining in certain books, with the name, or initials, or initial D. thereon, of Douglas as a receipt or voucher that he

had received the amount mentioned in such stub. It is not disputed, but it is in fact conceded, that if all the vouchers for deposit money on the stub-books are genuine, the decree in this respect is correct and should not be changed. Defendant Douglas testified that the vouchers on stubs 37 and 44 to 85, inclusive, in stub-book 2, are not in his handwriting, and although testifying that there were others which he believed were not, these were the only stubs specifically pointed out by him. This, in my opinion, puts these stubs in issue, as would an affidavit denying the execution of an instrument sued upon. Twelve stub-books, running from 1866 to 1876, were put in evidence. On nearly all the stubs in these books I find defendant's vouchers, the great bulk of which are unquestioned. I do not, in this connection, refer to the red-line vouchers. Nearly one hundred orders drawn by the recorder upon the treasurer of the city of Ann Arbor, and countersigned by defendant Douglas as mayor, were put in evidence by the defendant Rose. There is also a large number of books and papers in evidence, containing the genuine handwriting of both the defendants Douglas and Rose.

I have made most careful examination and comparison of the writing and signatures of defendant Douglas with the disputed vouchers. I have also made a quite careful examination of defendant Rose's handwriting and signatures with the disputed vouchers. This last, however, was not as careful as the first for two reasons: *First*, if these disputed vouchers were the work of Rose, I would not expect them to be in his ordinary and natural handwriting but rather as an imitation of Douglas; and *secondly*, if I became satisfied they were not made by defendant Douglas, it would not, for the purpose of this case, become necessary to find by whom made, inasmuch as the case would then be merely this, that defendant Rose had received certain moneys for the payment over of which he had failed to produce vouchers. If I had confined my examination to defendant Douglas' signature on the city orders referred to, and a comparison thereof with the disputed vouchers, I should have no hesitation whatever in saying that the latter were not genuine. The city

orders, however, were all countersigned in 1871–'2 and '3—most of them in 1872—while these disputed stubs are dated September, 1867. An examination of the previous stubs in the same book, number 2, running from December, 1866, to the date of the disputed stubs, and of stub-book number 1, running from August 9, 1866, to December 10th of the same year, would not tend to weaken but strengthen such opinion. Thus far there can scarcely be said to be any resemblance whatever between the disputed papers and those shown or admitted to be genuine. No doubt, if all these I have mentioned, numbering about four hundred, should be taken and compared, resemblances might be pointed out between some which are disputed and some conceded to be genuine, but some resemblance would be expected on any theory of the case.

I encounter more difficulty when I come to the examination of other stub-books, for there is unquestionable evidence in the signatures and initials not disputed, that the handwriting of defendant Douglas underwent some changes in the period covered by them, which introduces an element of considerable embarrassment in the attempt to test these disputed papers.

In addition to the examination thus made we have the expert testimony, which cannot be overlooked but must receive such weight as in our judgment it is fairly entitled to. I may not be able to agree with the witness to the full extent of his theories, as in saying that certain initials or signatures were not and could not have been made by defendant Douglas, and yet there may be many things in his testimony that will aid us in arriving at a correct conclusion. Evidence as to the genuineness of handwriting given by a witness possessing the requisite experience and skill is admissible, and being so, must be considered, and given, in the light of all the evidence bearing thereon, just such weight as the court or jury may deem it reasonably entitled to. It cannot be rejected *in toto*, simply because expert testimony, in passing, unheeded, the actions of the respective parties. I do not now refer to opinions of witnesses based upon mere appearances, when parties are questioned touching matters of this

character; but to such acts, conduct and utterances as evidently were made deliberately and understandingly. Such acts and declarations have ever been considered competent evidence in civil cases, and are entitled to be weighed and considered in the light of the circumstances under which they were made.

Defendant Rose, when his attention was first called to the fact that the account submitted by him or return made to defendant Douglas was not complete, examined his books and admitted that the names submitted to him were not included; others were presented and like acknowledgments made. He then voluntarily offered to, and did, prepare a list of delinquent accounts for 1874–5, entered it in defendant Douglas' "long-book," and certified to its correctness; said he knew no better way than to find out how many were deficient, and pay them, and did borrow the money and paid them. Afterwards a deficit for previous years was discovered, and on his attention being called thereto, while denying that he was aware of any such deficit, yet he gave security to meet whatever might be found. A list of delinquent accounts for 1873–4 was made out, amounting to over eight hundred dollars, and on the 13th of November, 1875, he certified thereon that, so far as he knew, it was correct according to the examination of the books. He afterwards, on December 7, asked leave to make a supplementary statement thereto on the same paper, which not being permitted, a separate statement was made by him, but which does not explicitly question the correctness of his previous certificate. His admissions to President Angell and others all bear directly upon this question.

Much has been said, in the briefs of counsel referred to, as to the unfairness of the means resorted to for the purpose of procuring these admissions, papers and securities. I cannot agree with counsel in what they have said upon this subject. I certainly have heretofore gone as far as any court has in denouncing attempts to encourage men to commit crime in order to detect and punish them therefor, because of their previous supposed criminal conduct, and I have

no desire to depart from what I then said: *Saunders v. People* 38 Mich. 221. But in this matter, in all that was done no effort was made to have defendant Rose commit any wrong, but simply to acknowledge that he had omitted to make proper returns. This is a very common practice, and I certainly see no objections that can be urged against such a course, unless undue means are resorted to, which I think were not in this case, and I fully concur with the learned circuit judge in what he said in speaking of the trust deed given to secure the Regents against loss on account of delinquencies in former years: "Douglas was not present upon this occasion or connected with the transaction, and there certainly was nothing oppressive or over exacting in the conduct of the two Regents with whom the business was done, or that should excite timidity on the part of Rose." But perhaps the very strongest reasons that can be shown against the charge of undue influence to procure such written admission is the fact that the commissioner, in stating the account, found, and the court below approved his finding, that the list of delinquent accounts for 1874–5, entered and certified upon the "long-book" by Rose as correct, and the delinquent list for 1873–4, as certified to by him on November 13, 1875, already referred to, were in substance correct, and charged him therewith, and with the decree thus rendered he had rested satisfied, having taken no steps to obtain a review thereof.

I have given due consideration to the argument found in the briefs against these things, yet in view of the evidence of the men to whom these statements were made, I cannot come to the conclusion that any undue or improper advantage was sought or taken of defendant Rose, or that the circumstances would justify me in not giving due weight to such testimony. There was no illegal compulsion used, nor was he imposed upon or under duress. Nor have I overlooked the argument that the first D vouchers are denied, and also what is said in reference to the spelling of the word *Dougles* or *Dougled* on stub number 44. Whether this word was so spelled intentionally to furnish an argument against

the probability of one familiar with a name thus misspelling it under such circumstances, I pass, but in my opinion this name was not written by defendant Douglas. Nor have I overlooked the offers that were made by defendant Rose asking for investigation. Much may be said in favor of the apparent fairness of some of these propositions, and I have no desire to criticise them; they cannot overthrow or destroy the effect of the evidence in the case, and they can take but very little from its force and effect. There are still other facts and circumstances which might be considered and discussed at considerable length, yet it is deemed unnecessary in the present case.

In view of all the evidence I am of opinion it does not satisfactorily appear that the vouchers in stub book number 2 referred to were written by defendant Douglas, and he should not therefore be charged with the amounts represented thereby.

This still leaves a large number of delinquent deposit accounts charged to defendant Douglas. I have examined and considered with care the argument advanced by his counsel against the allowance of any of these accounts, and acknowledge its force. Bearing in mind, however, the admitted fact that for all genuine deposit stub vouchers unaccounted for he is responsible, and in view of the farther fact that although called as a witness and thus having full opportunity to point out all such vouchers as he did not believe were genuine, yet he did not deny any others except inferentially. If he had been incapacitated or disqualified as a witness, then no such denial could have been obtained, and the court must, from the other evidence in the case, have passed upon the question. But when a party is living, has been called as a witness, and does not specifically point out and designate those which he claims to be spurious, the court is quite justified in refusing to pay much heed to any elaborate argument by which it is sought to establish their falsity. In the absence of such a denial specifically pointing out those considered not valid, where, as in the present case, the great

bulk of them are not questioned, all must be considered *prima facie* valid.

For these reasons I am of opinion that all such delinquent deposit moneys must be charged to the defendant Douglas and that as to these the decree will not be disturbed.

I have thus carefully considered all of appellant's objections to the decree of the court below, except a question of costs. The appellant also insisted that the appeal brought up the whole case for review, and it was argued accordingly. Neither the Regents nor Rose or his sureties appealed, and neither of them appeared by counsel or otherwise in this court. This has been a source of great embarrassment to the court and has greatly increased our labor; and under such circumstances I think we have a right to assume that all parties, except Douglas, are satisfied with the decree as it stands. It is a long and well-settled rule that a decree appealed from by one party only, cannot be changed in the appellate court in favor of the party not appealing; and, as this rule is so well known and understood, it is expected that all parties will appeal who are dissatisfied with the conclusion of the circuit court, and desire to have the decree changed in their favor. The fact of dissatisfaction courts can only know by an appeal regularly taken according to the rules and practice of the court. Nevertheless, as we held in *Grant v. Merchants' etc. Bank* 35 Mich. 515, if in a case of accounting we find occasion to change the decree by allowing in favor of the appellant any items which were rejected in the court below, we will offset to these any other items claimed by the party not appealing which in our opinion were improperly rejected. But when a party acquiesces in the disallowance of any of his claims, and in this court neither by appeal nor otherwise complains of the disallowance, I think we have a right to assume that he is satisfied with the action upon it, and that he does not expect or desire us to examine into it. There may be reasons for his not desiring it which we could not know without their being explained to us, and it would be presumptuous on our part to treat the case in such a way, or to force the re-opening of matters which the parties con-

cerned chose to leave where they were left in the court below. We can give the appellant relief in so far as the decree may be found to err against him; but where no one else complains or appears, I shall follow the usual custom of courts and refuse to discuss such questions as in the case before us are mere abstractions, since the only possible motive in the discussion would be to express opinions on those parts of the decree below of which no one makes complaint.

The Court will assume, however, that any claim which is made by the appellant in this court, is in issue, and will look through all the evidence for any possible information which will show or tend to show that he is or is not entitled to have it allowed in his favor.

I am of opinion that the decree below should be modified in accordance with this opinion, and that appellant should recover costs in this court.

My brethren concurring, it is so ordered, and a decree will be entered in this court accordingly.

GRAVES, J., concurred.

COOLEY, J., concurring. In these cases it has seemed proper to me, in view of facts with which the public is familiar, that I should leave the examination of the record and the questions involved to be made by my associates without my presence or assistance. They have made their examination accordingly, and the result is embodied in the opinion of the Chief Justice just filed. I have examined that opinion and compared it with the record without finding occasion to disagree.

CAMPBELL, J., being disqualified by relationship to appellants' bail, did not sit in this case.

Edwin Wood and Simcoe Chapman v. Arthur S. Pierson.

Lost property—Finder's right to identification—Reward for its recovery.

It is a question of fact and not of law whether the finder of lost property has given fair and reasonable opportunity for its identification before restoring it and whether the claimant should have been given an opportunity to inspect it in order to decide whether it belonged to him. The jury's attention must be confined to the state of things preceding the beginning of suit.

In an action against the finder of lost property for its conversion by refusing to give it up, the fact that after suit was begun the finder learned that it really belonged to the claimant has no tendency to show that he had fair and reasonable evidence thereof before suit.

A right of action against the finder of property for which a reward has been offered is not defeated by neglect to tender the reward.

A finder of lost property has no lien upon it as finder after he knows to whom it belongs; but he has a lien upon it for whatever reward may be offered for its recovery.

A reward for lost property is not waived by insisting on its identification or any legal advantage connected with the finding.

Error to Bay. Submitted Oct. 14–15. Decided Jan. 19.

Replevin. Defendants bring error. Reversed.

Hatch & Cooley for plaintiff in error. The finder of lost property is entitled to it as against everybody but the loser (*McAvoy v. Medina* 11 Allen 548; *M'Laughlin v. Waite* 9 Cow. 670; *Bridges v. Hawkesworth* 7 E. L. & E. 424; *Mathews v. Harsell* 1 E. D. Smith 393; *Chase v. Corcoran* 106 Mass. 286); and may sue for its conversion by third persons: 2 Kent's Com. 356; *Hendricks v. Decker* 35 Barb. 298; *N. Y. etc. R. R. Co. v. Haws* 56 N. Y. 175; but where a reward has been offered for it replevin will not lie against the finder unless it has been paid or tendered: *Wentworth v. Day* 3 Met. 352; *Cummings v. Gann* 52 Penn. St. 484; *Wilson v. Guyton* 8 Gill 213; *Preston v. Neale* 12 Gray 222; *Auditor v. Ballard* 9 Bush 572.

Shepard & Lyon for defendants in error. The finder of lost property cannot claim a reward for its recovery if he does not comply with the conditions on which it is offered; *Clanton v. Young* 11 Rich. 546; nor if he did not know it had been offered: *Howland v. Lounds* 51 N. Y. 604; *Fitch v. Snedaker* 38 N. Y. 248; *Stamper v. Temple* 6 Humph. 113; *Marvin v. Treat* 37 Conn. 96; nor if he detains the property on grounds distinct from that of a lien for the reward: 1 Addison Torts 408; *Boardman v. Sill* 1 Camp. 410 *n*; *Hanna v. Phelps* 7 Ind. 21; *Dows v. Morewood* 10 Barb. 183; *Thatcher v. Harlan* 2 Houst. (Del.) 178; *Picquet v. M'Kay* 2 Blackf. 465; *Bean v. Bolton* 3 Phila. 87; *Holbrook v. Wight* 24 Wend. 169; *Everett v. Saltus* 15 Wend. 474; in which case the owner need not tender the reward before sueing the finder: *Lacy v. Wilson* 24 Mich. 479; *Hazard v. Loring* 10 Cush. 267; *Appleton v. Donaldson* 3 Penn. St. 381; *Ashburn v. Poulter* 35 Conn. 553.

GRAVES, J. Pierson sued in replevin and obtained judgment, and Wood and Chapman filed a bill of exceptions and brought error. The subject of the action was a breastpin found by Chapman and claimed by Pierson. Many of the facts are not disputed. Pierson lost at Bay City, July 18, 1878, a small diamond pin, which seems to have separated from the tongue in some unknown way. The circumstances of the loss and the manner in which the body of the pin and tongue became disunited are left unexplained. The metallic setting was a common pattern and the gem had no peculiarities to facilitate its identification by non-experts. Pierson caused a notice to be inserted in the *Tribune* newspaper published in the city, of this tenor:

"LOST.

"$25 REWARD—*Lost.*—A diamond pin. The finder will be paid the above reward by leaving the same at this office."

As will be observed the advertisement neither gave a description of the pin nor suggested who offered the reward.

Moreover, no means of any kind were provided for showing at the newspaper office the ownership or identity of the pin, or for connecting any pin which might be produced with the claim contained in the notice, nor was any money left with which to pay the reward, nor any provision whatever made for paying it there.

Chapman found a pin which was subsequently ascertained to be the one in question. His first impression was, when he picked it up, that it was a cheap trinket, but on second thought he decided to show it to a jeweler. Dirt was adhering to it, and attention was at once drawn to the fact that, although the tongue was wholly missing, the rivet was secure and firmly in its place. The query naturally arose as to how this condition of the pin and the absence of the tongue might be accounted for. But in order to find out whether it had any material value, Chapman took it immediately to Wood, the other defendant, he being a jeweler, and was by him told that the stone was a diamond, and that a diamond pin had been advertised in the *Tribune*.

On getting this information, Chapman went at once to the newspaper office and saw Mr. Shaw, the editor and manager, who showed him the advertisement and informed him who the author was. Mr. Shaw referred him for anything further to Mr. Pierson, and he at once carried the pin to Pierson's store and called for that gentleman. He was absent. Chapman was going from the city the next morning, and he told a clerk, Mr. Martin, that he had found a pin, and as he was going away, he would leave it at Mr. Wood's to be identified and returned to the owner. He then went to Wood's and there left it with instructions to give it to the person who should identify it and pay the reward, and to no one else. This was Friday evening, July 26th. The next morning he went from the city on business and only returned the Monday following at noon. During his absence Pierson called on Wood and asked to see the pin in order to identify it, and Wood declined and required him to identify it first. Pierson attempted to do so, but he failed to satisfy Wood, and in the judgment of another jeweler to whom both referred, and who had the

advantage of inspecting both the tongue and body of the pin and of comparing them, the physical appearances and indications were strongly against Pierson's claim.

In respect to what was said at these interviews there was want of harmony in the testimony. Pierson requested that another jeweler at Bay City who, he said, had formerly repaired the pin, and had a plaster cast of the stone and could identify it, might be permitted to see it. But Wood proposed that this gentleman should call with his mould and he, Wood, could then see for himself whether it fitted or not. The gentleman came but had no cast, and was unable to give a particular description, and Wood declined to show the pin to him. Pierson then proposed that the pin should be sent at his expense for the purpose of identification to Mr. Smith of Detroit, who, he said, had mounted it. This was declined and Wood suggested that Pierson should write to Smith for a description, an expedient he observed which would be attended with less risk, but this proposal was unacceptable to Pierson.

The testimony disagreed as to the incidents of the effort to get the question of identification settled through Mr. Smith, and in regard to what took place between Pierson and Chapman after the return of Chapman on the 29th. On Tuesday, the 30th of July, Pierson sued out the writ of replevin and went with the sheriff to Wood's store to get the pin. It was not produced and indeed was not then in the store, although the fact was not made known by Mr. Wood. It is unnecessary to recite the different versions of what took place. On the next morning, Wednesday the 31st, Mr. Chapman carried the pin to Detroit and satisfactorily ascertained at Mr. Smith's that it was the one advertised for by Mr. Pierson. He returned on Thursday, and on Friday, the day after, met the officer and handed the pin to him with the request to get the reward. Pierson refused to pay it, and on giving the usual replevin bond received the pin from the officer.

It has seemed proper to go into this detail on account of the singularities of the case. Yet it must not be assumed that

the outline given lends the exact coloring to the transaction which would be perceptible to a jury on hearing the whole testimony. At the first glance every one must admit that as to one feature of the case, at least, there can be no doubt. The facts are conclusive that the parties dispensed with the newspaper office as a place for doing what should be necessary in consequence of the reward. Pierson in the first place neglected preparations which were incumbent on him as a legal preliminary to holding Chapman to a compliance at that place, and Chapman did not insist on performance there. Both parties proceeded on the tacit understanding that whatever was to be done should be done elsewhere. So much is too clear to admit discussion and neither party is at liberty to claim any advantage on account of the omission to transact or perform at the printing office.

According to the common law the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear, whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his *status* as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in *Preston v. Neale* 12 Gray 222, and authorities are cited for it. Among them is the leading case of *Wentworth v. Day*, by Chief Justice Shaw, reported in 3 Metcalf 352, and which is approved and followed by the Supreme Court of Pennsylvania in *Cummings v. Gann*, 52 Penn. St. 484, adopted as correct by Story in his work on Bailments, §§ 121*a* and 621*a*. Parsons has given it his sanction by incorporating it in the text of his work on Contracts (vol. 3, p. 239, 6th ed.), and Edwards presents it as settled law in his treatise on Bailments, §§ 20, 68 (2d ed.).

Under this principle the admission is unavoidable that when Pierson claimed the pin, on the footing of his notice

and reward, of Chapman, the finder, who was holding it for the actual owner, it was, as between them, subject to a lien in Chapman's favor and against Pierson for the reward. According to the language of the books Chapman was entitled to *detain* the article from Pierson until the reward should be paid, and was under no legal obligation to relinquish possession to him, or to give it to another, or to allow anything to be done endangering his right or security. But there was a mutuality of rights. As claimant, Pierson was entitled to a reasonable time and to fair and reasonable opportunity in reference to the nature of the chattel, the existing state of things bearing on the transaction and the surrounding circumstances, and without impairing Chapman's right as contingent owner, nor his right of lien, nor interfering with his duty to the true ownership which might be subsequently asserted by another, to make such a showing as he could that the property was the same he had lost and advertised, and such evidence as would satisfy a fair and reasonable person of the fact.

It was not for Chapman to baffle investigation by any unfair action or inaction or give way to unfounded and unreasonable suspicion and then object that the evidence of identification was not sufficient. Nor was it for Pierson to demand anything which was not fair and just under the circumstances, and needful for investigation and consistent with Chapman's rights and duties, and then make its refusal a pretext for charging injustice, and an excuse for making costs; and in regard to these and similar matters it was for the jury to say what was the conduct of the parties; whether it was fair and reasonable or otherwise; whether either or both materially deviated from the proper course; whether the kind of reciprocity the occasion called for was shown or not, and whether Chapman was bound or not to be satisfied of the rectitude of Pierson's claim when the suit was begun.

Whether as between the parties and in view of all the considerations bearing on their rights and duties and on the conveniences and inconveniences of identification growing out of the nature of the property, and bearing on the chances for

imposition, and on the fact of Chapman's being liable to account to whoever should at last be found to be actual owner, it was reasonably and fairly due to Pierson to have a personal inspection to enable him to say that the pin was or was not his property, and if he thought it was, then to facilitate his proof, was not a matter of law. It depended on the peculiarities of the case, and was a question for the jury under instructions conforming to the principles here explained.

For the purpose of judging with what propriety the parties acted, and whether Chapman was guilty of legal fault, the transaction must be contemplated as it was on the 30th of July when the action commenced. It is necessary to keep in mind what time had then been taken and what had been done about identifying the pin, and what evidence Chapman had of the validity of Pierson's claim. That satisfactory evidence was procured afterwards by Chapman, must not be taken to show that he had fair and reasonable evidence before, or that his prior conduct was unjust. In considering this aspect of the controversy it is necessary to confine attention to the facts and appearances manifested up to the time the writ was taken out. The question was then pending and unsettled.

The contention touching the right of action in the absence of any tender of the reward is of no practical importance on this record. Whether in point of fact Chapman waived or abandoned the reward itself, would be a question for the jury under proper instructions. Inasmuch as it belonged to Pierson to identify the property and pay the reward too, it is not reasonable to contend that because Chapman insisted on the identification he therefore waived the reward. The exaction of the first or even a firm stand on every legal advantage concerning identification would not imply relinquishment of the other. Unless the reward itself was in fact waived, or there was such behavior on the part of Chapman respecting Pierson's reclamation as was tantamount to a denial of Pierson's right and a wrongful detention, it is not perceived that there was any ground for holding that the lien was forfeited.

In *Isaack v. Clark* 2 Bulstrode 306, Lord Coke states the

law in this wise: "When a man doth finde goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged, but this is not so, as appears by 12 E. IV. fol. 13, for he which findes goods is bound to answer him for them who hath the property; *and if he deliver them over to any one, unless it be unto the right owner*, he shall be *charged for them*, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, *one onely* hath then right unto them, and therefore he ought to keep them safely; if a man therefore which findes goods, if he be wise, he will then *search out the right owner* of them, and so deliver them unto him; if the owner comes unto him, and *demands them, and he answers him, that it is not known unto him whether he be the true Owner of the goods, or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him.*"

Lord Coke very clearly enforces the right and duty of the finder to be certain of the true owner before he makes delivery. As he is bound to hold for the true owner, and is liable in case of misdelivery, the law makes it his duty as well as his right, even when there is no reward, to "search out," or in other language, find the "right owner," or see to it that he submits to no other than the "right owner." Undoubtedly if Chapman's conduct was such that a jury would, under the circumstances of the case, feel satisfied that he was actually perverse and unreasonable, and pursued a course which was adapted to baffle fair investigation, instead of maintaining the attitude of a man whose duty it was, in the quaint terms of Lord Coke, to "search out the right owner," it would be just to regard him as having detained the property unlawfully.

The neglect to tender the reward, if it was still claimed, could not defeat the action. *Bancroft v. Peters* 4 Mich. 619.

The remedy of trover was originally given to enable the loser of goods to recover of the finder, and the principle has found recognition in one of the provisions of our action of replevin. Comp. L. § 6754. The statute expressly refers to

a case where one party is found to have a lien, and the other the general ownership, and the court is required to render such judgment as shall be just. The provision did not escape the attention of the court below. It was mentioned in the charge. The parties respectively ignored the statute concerning lost property and planted themselves on the common law, and hence there seems to be no occasion to notice the former.

The charge given by the learned judge was very elaborate. In some essential particulars it seems open to a construction not consistent with the views which are here explained. But it is not needful to specify the observations referred to.

It is enough to say now, that whatever may have been intended, the charge as we find it in the record must have been received by the jury as instructing them that the defendants were *bound* to submit the pin to the personal inspection of the plaintiff on his request, as a safe and proper expedient for the purpose of "searching out the right owner," and they could not have supposed that it was submitted to them to decide *according to their own judgment of the circumstances* whether the defendants ought or ought not to have allowed such inspection. The question was not for the bench but for the jury under suitable instructions.

The case has several features which demand a very strict adherence to the rule which restricts the province of the judge to the conveyance of such matters of law to the jury as the case calls for, and assigns to the jury the determination of all matters of fact. No doubt the unusual, if not unprecedented characteristics of the litigation, and the ordinary hurry of a trial, may explain all of the incidents which on careful review appear to be incapable of support.

The result reached is that the judgment must be reversed with costs and a new trial granted.

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

COOLEY J. did not sit in this case.

Calvin Goodspeed, impleaded with George W. Fales v. The Wiard Plow Company.

Contracts binding retiring partners—Orders for merchandise.

A retiring partner is bound by all previous contracts made within the line of the business; but after the dissolution of the partnership he is not bound by any new contract made by his former partner.

An order for goods does not amount to a contract binding the person who gives it until some act is done on the faith of it by the person to whom it is given, or until it is accepted; and if it is above $50 the acceptance, in Michigan, must be in writing.

Where goods are ordered by one member of a firm, and the order has not been accepted, nor the goods shipped until after notice of its dissolution, and the shipment varies from the terms of the order, the retiring partner will not be bound by it.

If the conditions of an order given by a firm are waived, after the dissolution of the partnership, by the remaining partner, it will not bind the retiring partner.

Error to Ingham. Submitted Nov. 10. Decided Nov. 19.

Assumpsit. Defendant Goodspeed brings error. Reversed.

M. V. & R. A. Montgomery for plaintiff in error.

Cowles & Cahill for defendant in error.

Campbell, J. Goodspeed and Fales prior to February 13, 1879, were partners in business, and on the 21st day of January preceding the dissolution, Fales, in the name of the firm, but in the absence of Goodspeed, and without his knowledge or authority, gave to an agent of the Wiard Plough Company an order in writing for a large number of articles connected with their business to be shipped on the first day of April thereafter. On the 13th of February the firm was dissolved, and on the same day the agent was informed of the dissolution. The price of the articles ordered was shown to be above $500. On the 15th of February a portion of the articles were shipped, and the remainder, some

earlier and some later than April. All came into the hands of Fales. There was no proof of any other acceptance of the order than the shipment, unless the agent at the time of receiving the order made some arrangement on the subject, which is not shown.

On a suit against Goodspeed and Fales the court held that the shipment of goods and their reception by Fales bound Goodspeed, and that the fact that the time of shipment was different from that named in the order made no difference.

We think this was erroneous, and that there was no ground of recovery. A retiring partner is bound by all previous contracts made within the line of the business, but after dissolution he is not bound by any new contract made by his copartner.

The order given by Fales made no contract until accepted, and until acceptance, could at any time be withdrawn. Inasmuch as the amount of goods exceeded fifty dollars, there could be no binding contract as against the Wiard Plough Company without either a writing or some act done on the faith of the order. Here there was no proof of acceptance of the order, in writing, if at all. The shipment of the goods was not made in accordance with the terms of the order, and was not made until the order had been rescinded by notice of the dissolution. Fales could not waive any of the conditions so as to bind Goodspeed, after the dissolution. The sale made was not the sale agreed upon if there was any agreement. The case is therefore doubly defective, in not showing any valid agreement at all, and in showing a departure from the agreement proposed. Either objection is fatal to a recovery.

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

The other Justices concurred.

Edward Sheldon v. Jeremiah Sullivan.

Malicious prosecution—Jurisdiction on appeal from a justice—General ad damnum clause.

The jurisdiction conferred upon the recorder of Corunna is that of a justice of the peace (Act 265 of 1869), and he therefore cannot entertain an action for malicious prosecution. Act 214 of 1875.

A general *ad damnum* clause at the end of a declaration in justice's court will apply to a count for assault and battery, especially if the other counts are invalid; and if there were any defect in making it general it would be within the statute of amendments.

An appeal by the defendant in a justice's court from a judgment in an action which the justice had no right to entertain, does not give the circuit court jurisdiction to render judgment for the plaintiff.

Error to Shiawassee. Submitted Jan. 4. Decided Jan. 19.

Case. Plaintiff brings error. Reversed.

A. R. McBride for plaintiff in error.

Hugh McCurdy for defendant in error. When a declaration contains dissimilar counts, each should conclude with an *ad damnum* clause: 1 Ch. Pl. 387–9: *Fuller v. Bowker* 11 Mich. 204.

Graves, J. In this action the plaintiff sued Sullivan before the recorder of Corunna, and in the first count alleged an assault and battery, and in the second, in substance and effect, a malicious prosecution. The recorder rendered judgment for Sheldon, and Sullivan appealed to the circuit court.

The cause being there brought to trial the circuit judge ruled that the first count of the declaration was fatally defective for the want of an *ad damnum* clause, and that no recovery was possible under the second count because no evidence had been given to show that the acts complained of were malicious, and the jury were required to find for the defendant.

It may be that the judge was mistaken in holding that there was no evidence of the malice which was averred in the second count. But if so the plaintiff was not injured by the ruling. The cause of action there set up was not suable before the recorder, and no authority was acquired by the circuit court, on the mere strength of the defendant's appeal, to give judgment for the plaintiff on a cause of action which the law refused to allow the recorder's court to entertain.

The power of that court to take cognizance of civil cases in general is the same as that extended to justices of the peace, and in reference to this proceeding the recorder's authority was subject to "the laws of this State applicable to justices of the peace elected in townships." Charter of Corunna, Act 265, 2 Sess. L. 1869, ch. 6, §§ 9, 16. Turning then to the law applicable to justices of the peace we find that jurisdiction of actions for malicious prosecution is expressly denied. Comp. L., § 5250, as amended in 1875, Pub. Acts 1875, p. 258. The point raised on the admission of the proceedings which were had in the alleged malicious prosecution becomes unimportant.

On the other part of the case we think an error was committed which necessitates a reversal. The count for assault and battery was sufficient, and evidence was given under it which the jury should have been allowed to consider. A general *ad damnum* was inserted at the end of the declaration, and this was regular. 1 Chitty, p. 435. It applied to the count for assault and battery, and in strictness could apply to no other, since the count for malicious prosecution was not lawfully in the case. Moreover had the supposed defect been real it would have been open to correction by amendment. Comp. L. § 5408.

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

The other Justices concurred.

EDWARD S. FRANKS ET AL. v. CLARK D. SMITH.

Jurisdiction on appeal from justice's courts.

The Circuit Court obtains no jurisdiction by an appeal from a justice's court, if taken after the statutory period of five days allowed for taking it

Error to Shiawassee. Submitted Jan. 4. Decided Jan. 19.

TROVER. Plaintiffs bring error. Reversed.

A. R. McBride for plaintiffs in error. A circuit court cannot entertain an appeal from a justice's judgment if not claimed until the sixth day thereafter: *Harrison v. Sager* 27 Mich. 476.

MARSTON, C. J. This case comes clearly within and is disposed of by *Dale v. Lavigne* 31 Mich. 149. The appeal was not taken within the time allowed by the statute, and the circuit court obtained no jurisdiction.

The judgment must be reversed with costs of both courts.

The other Justices concurred.

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IN RE ESTATE OF ASA B. BROWN.

Guardianship for incompetents.

Comp. L. § 4822 permits the relations or friends "of any person who, by reason of extreme old age or other cause, is mentally incompetent to have the charge" of his property, to apply to the judge of probate and have a guardian appointed for him. Section 4825 provides that when any person by excessive drinking so wastes his estate as to expose himself or his family to danger of want, or the county to expense for their support, the county superintendent of the poor, or a township poor director or justice of the peace may complain to the judge of probate and have a guardian appointed for him. *Held* (1),

that a petition setting forth that "said A. B. is incompetent to have the care, charge and management of his property. He is old and infirm"—is insufficient, as it does not necessarily allege mental incompetency; (2) that the additional allegation that he is so addicted to the excessive use of intoxicating drinks as to be liable to become the victim of designing persons, and that through intoxication and foolish speculation he has within fifteen years wasted more than half of a considerable estate, would be proper in a petition for the appointment of a guardian for a spendthrift as provided for in Comp. L. § 4825, but is surplusage in a petition based on mental incompetency.

Error to Kalamazoo. Submitted Jan. 4. Decided Jan. 19.

Appeal from an adjudication of incompetency. Petitioners bring error. Affirmed.

W. G. Howard, for the petitioners.

Dallas Boudeman, for the appellant.

COOLEY, J. There are two distinct and very dissimilar statutory provisions for the appointment of guardians for persons not minors who are found to be incompetent to manage their estates properly.

The first entitles the relations or friends "of any insane person, or of any person who, by reason of extreme old age or other cause, is mentally incompetent to have the charge and management of his property," to apply to the judge of probate and have a guardian appointed for him. Comp. L., § 4822.

The second is, that "when any person, by excessive drinking, or by gaming, idleness or debauchery of any kind, shall so spend, waste or lessen his estate, as to expose himself or his family to danger of want or suffering, or the county to charge or expense for the support of himself or his family, any superintendent of the poor of the county, or director of the poor, or justice of the peace of the township of which such spendthrift is an inhabitant, or in which he resides, may present a complaint to the judge of probate, setting forth the facts and circumstances of the case, and praying to have a guardian appointed for him." Comp. L., § 4825.

The petition in the present case was meant to comply with the first of these provisions. It sets forth that "said Asa B. Brown is incompetent to have the care, charge and management of his property. He is old and infirm." It then proceeds to allege that he is so addicted to the excessive use of intoxicating drinks as to be liable to become the victim of designing persons, and that through intoxication and foolish speculation he has within fifteen years wasted more than half of a considerable estate. These last allegations would have been proper in a petition filed under the second provision above recited, but are mere surplusage under the first.

Issue was taken upon the petition in the probate court, and a guardian was appointed. Appeal being then taken to the circuit court and the case called for hearing, the court, on objection from the respondent, refused to receive any evidence for the reason that the petition was believed to be fatally defective. The petitioners bring the case up on exceptions.

The ruling was correct. The incompetency set out in the petition is not necessarily mental incompetency. Age and infirmity are not inconsistent with vigor of intellect; and, therefore, the averment that respondent is old and infirm cannot stand as a substitute for a direct averment of mental incompetency. The other averments in the petition tend to prove the respondent to be a spendthrift; but a guardian for a spendthrift, as already stated, is not appointed under the statutory provision here invoked.

The defect in the petition is not formal, but goes to its very substance. The statute contemplates the existence of insanity or of mental infirmity that is equivalent in destroying mental competency. It is consistent with everything alleged that the mind may have been sound and vigorous.

The order must be affirmed, with costs.

The other Justices concurred.

The Toledo, Canada Southern & Detroit Railway Company v. Christopher Eder.

Railway companies—Fences.

Act 198 of 1873 gives damages against a railway company for cattle killed by reason of the company's negligence in not keeping up the fences along its track. *Held* that where the fences had been accidentally destroyed by fire after the track inspector had made his daily inspection, and the fact was not known until after the injury had been done, the company was not guilty of negligence.

Error to Monroe. Submitted Jan. 4. Decided Jan. 19.

Case. Defendant brings error. Reversed.

Frank H. Culver, for plaintiff in error, cited as analogous cases *Robinson v. Grand Trunk R'y* 32 Mich. 322; *Stephenson v. Grand Trunk Ry* 34 Mich. 323; and argued that the company had not unreasonably delayed to repair its fences: *Railroad Company v. Swearingen* 47 Ill. 206; a company is not required to keep a patrol night and day: *Chic. & N. W. Ry v. Barrie* 55 Ill. 226; *Ill. Cent. R. R. v. Dickerson* 27 Ill. 55, and is not liable until it has neglected to repair after notice: *Chic. & Alton R. R. v. Umphenour* 69 Ill., 198; *Aylesworth v. Railroad Company* 30 Ia. 459; *Hilliard v. Railway Company* 37 Ia. 442; *Davis v. Railroad Company* 40 Ia. 292; *McCormick v. Railroad Company* 41 Ia. 193; *McDowell v. R. Co.* 37 Barb. 195; Whart. Neg. §§ 888–890.

Ronan & Parker and *J. C. Shields* for defendant in error.

Graves, J. The railway track of the plaintiff in error crosses Eder's farm, and on July 5, 1879, a small piece of the fence built there by the company was accidentally destroyed by fire, and some of Eder's cattle wandered through the gap and were killed by a passing train. Eder brought this action against the company under the Act of 1873 (Laws 1873 p. 538), to recover for the injury, and under the rulings of the circuit judge the jury awarded damages.

There was evidence tending to show that the section foreman of the company, being the agent employed for that purpose, passed daily over the road to see that everything was in due condition, and that on the 5th of July, in discharging this duty, he passed the place in question about nine o'clock in the forenoon and saw that the fence was in good order; and that he did not discover the fire or know of it until the next morning. There was also evidence tending to show that the fire occurred about noon. In view of this evidence the counsel for the company requested an instruction that if the jury found that the fence was burned about noon on the 5th of July, and that the cattle were killed about six o'clock in the afternoon of the same day, the failure to repair the fence sooner than the next morning was not negligence on the part of the company. The judge refused the request, and after telling the jury that the company were entitled to reasonable time in which to restore the fence left it finally to them on the whole evidence to decide what would be reasonable diligence, and whether in fact there was or was not such diligence.

My brethren are of opinion that if the facts correspond with the hypothetical request it was a conclusion of law that the company were not guilty of the blame imputed by the declaration and that the instructions should have been given.

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

The other Justices concurred.

THE DETROIT FIRE AND MARINE INSURANCE CO. v. EMMA ASPINALL, ADMINISTRATRIX, ET AL.

Administrator's mortgage of estate to pay debts.

An administrator's mortgage given upon the estate to raise money to pay its debts, is invalid if the order allowing it and the proceedings thereon do not comply with Comp. L. § 4626, and specify the time

for which it may run, and the rate per cent. at which it shall be given; and the good faith of the parties will not save it. Whether the mortgagee could be subrogated to the rights of a prior mortgagee of the same property, for the payment of whose mortgage the administrator was allowed to raise money by giving another mortgage—Q.

Appeal from the Superior Court of Detroit. Submitted January 5. Decided January 19.

FORECLOSURE. Defendant appeals. Reversed; bill dismissed.

Moore, Canfield & Warner, for complainant, argued that as the mortgage was made and taken in good faith, it should be enforced as an equitable lien (*Howard v. Moore* 2 Mich. 234; *Blodgett v. Hitt* 29 Wis. 169; *Winslow v. Crowell* 32 Wis. 639; *Valle v. Fleming* 29 Mo. 152; *Love v. S. N. L. W. & M. Co.* 32 Cal. 639; *Beatty v. Clark* 20 Cal. 12; *Daggett v. Rankin* 31 Cal. 322; *Howard v. North* 5 Tex. 290; *Du Four v. Camfranc* 11 Mart. O. S. (La.) 615; *McLaughlin v. Daniel* 8 Dana 182; *Bentley v. Long* 1 Strobh. Eq. 43; *Cole v. Johnson* 53 Miss. 99; *Short v. Porter* 44 Miss. 533) and that the mortgagers having received the benefit of the loan, were estopped from disputing its validity: Sedgwick on Const. Law, 90.

Wilkinson, Post & Wilkinson for defendants, as to the effect of defective probate sales cited *Ryder v. Flanders* 30 Mich. 336; *Coon v. Fry* 6 Mich. 506; *Stewart v. Bailey* 23 Mich. 251; *Griffin v. Johnson* 37 Mich. 91; and contended that as the mortgage did not conform to law it created no lien: *Black v. Dressell* 20 Kan. 153; *Farhall v. Farhall* L. R. 7 Ch. App. 123; a court of equity cannot relieve against the defective execution of a statutory power where the requirements constitute the apparent policy of the statute: 1 Story Eq. Jur. § 96; *Bright v. Boyd* 1 Story 478; *Young v. Dowling* 15 Ill. 481; the question in this case is decided contrariwise in *Salmond v. Price* 13 Ohio 368, and *Bishop v. O'Connor* 69 Ill. 431.

MARSTON, C. J. The complainant company seeks to foreclose a mortgage given it upon real estate by the administratrix of Philip Aspinall deceased.

A license was granted by the probate court to the administratrix to mortgage certain property of the deceased, but "no time or rate per cent., upon the basis of which said mortgage should be executed, was specified in the license. No report was made by the administratrix to the probate court, of her action in mortgaging said property, and the probate court never passed upon the question of time and rate per cent. contained in said mortgage."

That the statute (2 Comp. L., § 4626)* was not complied with, and that this was fatal to the validity of the mortgage, as such, as decided in *Edwards v. Taliafero* 34 Mich. 15, must be considered as beyond question.

It is claimed, however, that certain equities exist in favor of the complainant, under which the mortgage may by the court be held effectual: among these, the good faith of the parties; the fact that a mortgage for nearly this amount upon real estate of the deceased, was from moneys received upon the mortgage in suit paid and discharged, should be considered.

We have carefully considered all the equities presented in favor of the complainant. If a non-compliance with the statute, § 4626, can thus be avoided, then in all cases where the parties act in good faith, and the money is used to pay and discharge debts of the deceased, it becomes a dead letter. But it is only for the purpose of paying debts against the

*(4626) SEC. 2. Such order [empowering an administrator to mortgage the estate for the payment of its debts] shall be obtained by petition to the proper judge of probate, * * and such order shall specify the amount to be secured by such mortgage or other security, the rate of interest to be given, and the length of time for which such mortgage or other security shall be given. * *

(4627) SEC. 3. * * said proceedings of the said * * administrator * * in mortgaging or otherwise pledging such estate, shall be reported to the judge of probate, and by him be subject to be confirmed or vacated, and new proceedings to be had, to the same extent and in the same manner, as near as may be, as is now provided by law in the case of the sale of real estate.

estate of the deceased that the judge of probate may empower an administrator to mortgage the estate. Such a construction as is contended for would make the statute in effect a nullity.

The mortgage taken up by the proceeds of the one in suit, was not upon the same property or any part of the property described in the mortgage in this case. Had this mortgage been given upon the same property, to take up a previous one, then it might become important to consider whether complainant could not to that extent be subrogated to the rights of the prior mortgagee. Under the facts in this case we are of opinion that no such question can arise, and that the complainant can obtain no relief in this case.

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

The other Justices concurred.

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HENRY D. WALLEN, JR. v. LEONARD ROSSMAN, SHERIFF.

Replevin for mortgaged chattels taken on attachment—Return.

A chattel mortgage, where possession is not given, is void as against the mortgager's creditors, if not put on file in the proper office, even though recorded elsewhere by mistake.

An offer to buy up a claim does not estop one from disputing its validity. So *held* where creditors negotiated for a chattel mortgage which was void as to them.

Where a chattel mortgage is void as against a creditor levying attachment, it is not material that the mortgagee had taken possession before one of the attachments was levied.

A mortgagee of chattels brought replevin against an attaching creditor, and sought to show that the demand in one of the attachment cases, which had passed into judgment, had been paid before judgment. *Held*, that if there was no showing of collusion between the attachment creditor and the debtor, this would be an attempt to re-try the question involved in the attachment suit.

Where the indorsement on a writ of attachment shows that it was not levied subject to a mortgage lien, it cannot be contradicted in an action of replevin brought by the mortgagee against the attaching creditor.

The question whether an officer has levied upon a complete title or only an encumbered interest is one of intent as to which the officer need make no statement beyond the indorsement on his writ, which is the evidence of his final action, whatever his intent may have been.

An officer who levies subject to a mortgage can afterwards change the levy.

Error to Montcalm. Submitted Jan. 5. Decided Jan. 19.

REPLEVIN. Plaintiff brings error. Affirmed.

Miller & Voorhees, for plaintiff in error. Omission to file a chattel mortgage is cured by subsequent delivery of possession, so far as regards those who have not acquired paramount rights before such delivery (*Morrow v. Reed*, 30 Wis., 81) if they might have ascertained the fact by inquiry: *Stephenson v. Clark*, 20 Vt., 624.

Smith & Sessions for defendant in error.

COOLEY, J. The plaintiff is mortgagee of chattels, and by reason, as he says, of erroneous information, put his mortgage on record in the wrong office. For the failure to place it in the proper office, the mortgage was void as against creditors: Comp. L., § 4706; *Fearey v. Cummings*, 41 Mich. 376; *Cooper v. Brock*, 41 Mich. 488. The defendant is sheriff of the county of Montcalm, and as such levied certain attachments upon the mortgaged property on behalf of the creditors of the mortgagor. The mortgagee brought replevin, and in the court below judgment passed against him.

We have looked through the record in vain for any circumstance which can distinguish this case from those above cited. There was evidence that the mortgagee had taken possession of the property before one of the attachments was levied; but this was not a material fact: *Fearey v. Cummings*, supra. Proof was also offered that the creditors had

negotiated for the mortgage, and thus recognized its validity. But an offer to buy up a claim does not estop one from disputing its validity. Parties in danger of falling into litigation often do this, with great propriety and prudence. The plaintiff also offered to show that the demand in one of the attachment cases, which had passed into judgment, was paid before judgment. There was no offer to show fraud or collusion between the attachment creditor and the debtor; and without this what was proposed would be merely an attempt to re-try the question involved in the attachment suit. He also sought to show that one of the attachments was levied subject to the mortgage; but the officer's endorsement of the levy showed the contrary, and it could not be contradicted in this way. The cases of *Nall v. Granger*, 8 Mich. 450, and *Winfield v. Adams*, 34 Mich. 437, which are referred to, are different. What was in issue in those cases was the act of the officer publicly performed; but when an officer levies on property, the question whether he levies as upon a complete title or only on some imperfect or encumbered interest, is a matter resting in intent, and respecting which he is under no necessity of making any public statement whatever, or any statement beyond what he enters on his writ. Moreover, if he should first make the levy subject to the mortgage, he would have a right to change it afterwards, and the endorsement on his writ is the evidence of his final action.

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

The other Justices concurred.

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Richard S. Freeman v. David Weeks et al.

Obstructing a ditch—Acquiescence in running a drain.

In an action for obstructing a ditch it is unimportant whether the ditch had been legally laid out, if the defendant had consented to it; it is also unimportant whether the parties originally agreed on the line of the ditch, if they acquiesced in what was done.

Where a ditch dug as a neighborhood drain has remained open as a water course for some years, it ought to be governed by the rules that apply to other water-courses.

Error to Macomb. Submitted Jan. 5. Decided Jan. 19.

CASE. Plaintiff brings error. Reversed.

Joseph Chubb and *Edgar Weeks* for plaintiff in error.

James B. Eldredge for defendants in error.

COOLEY, J. This suit is brought for obstructing a ditch, and causing the water usually flowing therein to set back upon plaintiff's land.

The evidence tends to show that the county drain commissioner laid out the ditch in 1871 across, among other lands, those of David Weeks; that Weeks objected and proposed to litigate; that finally some understanding was reached between the parties concerned which resulted in the ditch being suffered to be dug without objection, Weeks himself digging twenty rods of it, and that it has remained open from 1871 to the time of bringing suit. At some time not given in the bill of exceptions Weeks built a fence for a short distance over the ditch, and plaintiff claims that this was laid into or has settled into the ditch, and that thereby the water is caused to set back upon him. Weeks, on the other hand, claims that he did not assent to the ditch being cut where it was cut in some parts of the line, and he makes what apparently is a very strong showing that the fence does not obstruct the ditch, or if it does, does not set back water upon the plaintiff. The circuit judge directed a verdict for the defendants.

Importance seems to have been attached in the circuit court to the fact that it was not shown that the ditch was not legally laid out by the drain commissioner. This would be important if Weeks did not consent, but otherwise not. If by common consent the ditch was dug as a neighborhood drain, and has remained open as a water-course for a series of years, it ought to be governed by the same rules that apply

to other water-courses; and it is an unimportant circumstance that the parties did not originally agree as to the exact line of the ditch if they acquiesced in what was done. On the facts appearing we think, therefore, the plaintiff had a right to go to the jury on the facts.

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

The other Justices concurred.

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RICHARD FARMER AND JOHN DRISCOLL v. DAVID HUNTER.

Forcible detainer—Proof of defendant's rights.

Where suit is brought before a justice for a forcible detainer, and the complaint alleges the entry to have been peaceable, defendant can show that he entered under a *bona fide* claim of title and without collusion with the complainant's tenant.

A proceeding for forcible entry and detainer does not lie against one whose entry was peaceable and without collusion with a tenant.

Error to Midland. Submitted Jan. 7. Decided Jan. 19.

FORCIBLE ENTRY AND DETAINER. Defendant brings error. Reversed.

M. H. Stanford for plaintiff in error. An owner of premises, having obtained peaceable possession, may defend it: *Hoffman v. Harrington* 22 Mich. 52; *Newton v. Doyle* 38 Mich. 650.

Van Kleeck & Rice for defendant in error.

CAMPBELL, J. Hunter complained, before a justice of the peace, of Farmer and Driscoll of peaceably entering and forcibly detaining his premises. He prevailed both before the justice and on appeal, where the circuit judge refused to

allow the defendants to show a right to the land and directed a verdict for plaintiff.

On the trial plaintiff showed acts of force in keeping him out. He also undertook to show that the contest arose on occasion of his attempt to re-enter on a terminated lease. He seems to have claimed that respondents got in collusively by arrangement with his outgoing tenant.

But they introduced testimony to show that they entered under a *bona fide* claim of title and without any collusion whatever. Hunter could not under his complaint dispute the peaceable nature of their entry. If they entered peaceably and without collusion with Hunter's tenant, they were not in privity with him, and could not have their claims of right tried in this summary way. If they had title and entered in that way they had a right to continue in possession and Hunter had no claim against them, but would himself have been a trespasser by using force to dispossess them.

The court erred in directing a verdict on facts not admitted, but disputed on the main question involved.

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

The other Justices concurred.

MARY M. RICHARDSON v. CHARLES CODDINGTON.

Finding by jury—Impeaching undisputed mortgage.

The lessee of a farm made a settlement with his lessor in which he conveyed to him his undivided interest in certain personal property. The lessor immediately sold the personal property to the lessee's wife, giving her also a lease of the farm; and the husband gave him back a mortgage upon his own interest in the crops which under the first lease he and the lessor were to divide equally. Creditors of the husband levied upon the crops grown while the wife held the lease, and upon some of the personal property transferred to her, and she brought replevin against the sheriff, who claimed that the transfers of personal property were void as against creditors. But the validity

of the mortgage was not questioned, though in submitting the case to the jury it was left for that body to pass upon, and their verdict was for the defendant. *Held* error.

Error to St. Joseph. Submitted Jan. 7. Decided Jan. 19.

REPLEVIN. Plaintiff brings error. Reversed.

D. E. Thomas and *W. L. Stoughton* for plaintiff in error. Where there is no conflict of evidence on a point it is for the court and not the jury: *Wisner v. Davenport* 5 Mich. 501; *Fisher v. Thirkell* 21 Mich. 1.

Carpenter & Clark and *H. H. Riley* for defendant in error.

MARSTON, C. J. This case comes before us upon a very unsatisfactory record. The defendant levied upon certain property by virtue of an execution against James Richardson, the husband of the plaintiff, and recovered a judgment for the full amount of his lien. James Richardson had in 1876 leased a farm from James Johnson, under which one-half the stock and crops raised thereon belonged to Johnson. James Richardson on December 23, 1878, gave to James Johnson a chattel mortgage upon his, Richardson's half, to secure the payment of $593. December 23, 1878, Richardson and Johnson had a settlement. Richardson sold to Johnson his interest in the property, and at the same time Johnson leased the farm upon similar terms to Mrs. Richardson, the plaintiff, sold her the property, and took back a mortgage thereon for $593.20, due in one year. There was no change in the possession of the farm and James Richardson continued to cultivate it as before. Certain crops were grown thereon while Mrs. Richardson held the lease, and, although the date of the levy is not given, it was upon the crops thus raised, and upon some of the personal property conveyed to her by Johnson, that the levy was made.

Mrs. Richardson claimed that some of the property levied upon not only belonged to her but that her husband never had any interest therein, and the jury seems to have so

found. She also claimed that one undivided half of the other property levied upon was that of Johnson, in which her husband had no interest at any time, and that as to the undivided half which she acquired from her husband through Johnson the amount of the chattel mortgage should be deducted, and the defendant be entitled to a judgment for the balance only, if anything.

It is almost needless to add, after what has been said, that the sheriff claimed that the sale from James Richardson to Johnson and by the latter to Mrs. Richardson were fraudulent and void as to the creditors of James Richardson. Under the evidence and the verdict the jury must have found the mortgage given by James Richardson to Johnson not genuine, as such questions were submitted to the jury, although not a particle of evidence can be found, or even a claim made, questioning that instrument.

We need not go beyond this, at present. For this error the judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

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WILLIAM M. HOSIER, RELATOR v. HIGGINS TOWNSHIP BOARD.

Highway commissioners—Mandamus to enforce payment of bridge orders.

Highway commissioners have no authority to involve the township in debt, at their discretion, for building bridges.

Highway commissioners can only act when authorized; there is no general presumption that they can bind their township by obligations which they may see fit to issue, and if, in a proceeding to enforce such obligations, there is no finding of their authority to issue them, it must be assumed that none existed.

In mandamus proceedings to enforce the payment of money, as in any other, the claimant must make out his own case unless it is admitted

expressly or by implication; the burden is not on the respondent to show that the demand is illegal.

The Supreme Court has plenary jurisdiction in mandamus, and will grant relief where a case is made out in part, even if it fails in other respects.

Mandamus. Submitted Jan. 11. Decided Jan. 19.

George L. Alexander for relator. Highway commissioners have power to build bridges (Comp. L. §§ 1192, 1246; *Niles v. Martin* 4 Mich. 557); mandamus lies against a township to enforce payment of ascertained claims: *Marathon v. Oregon* 8 Mich. 372; *Dayton v. Rounds*, 27 Mich. 82; *Peterson v. Manistee*, 36 Mich. 8; *Detroit v. Michigan Paving Co.* id. 343.

Tarsney, Tennant & Weadock for respondent. Highway commissioners have no general authority to make contracts for bridges: *Conrad v. Smith* 32 Mich. 433; and if they do so the other contracting party cannot enforce payment from the township: *Taymouth v. Koehler* 35 Mich. 24; judgment cannot be given for part of a relator's claim and be for the respondent as to the rest: *Carpenter v. Beloit* 20 Wis. 79; *People v. Dutchess Supervisors* 1 Hill 50; *McSpedon v. Supervisors*, 18 How. Pr. 152; High Ext. Legal Rem. § 529; *Chance v. Temple* 1 Ia. 179; *Hartshorn v. Ellsworth* 60 Me. 276; *State v. Milwaukee* 22 Wis. 397; *People v. Brooks* 57 Ill. 142.

CAMPBELL, J. Relator asks a mandamus to compel the respondents to raise a tax to pay certain highway orders. One of them amounting to $100 and numbered 825 is not disputed. The rest were issued by the highway commissioners to pay for a bridge across the Au Sable river on the line of what is claimed to have been a highway. The answer of the respondents denied that there was any legal authority to build this bridge on the credit of the township, and on an issue framed upon this point no proof was apparently given, and no finding was had of any such authority, unless inherent in the office.

The statutes on this subject (Comp. L. § 1194) require the various highway commissioners to render to the town board at its annual meeting an account of the work of the preceding year, and certain items of collections and assessments, and also the improvements necessary to be made on roads and bridges, beyond what the labor assessed will do, and the town board is required to submit the same to the next annual town meeting, when a vote may be taken to raise not more than $250 in any one year. The board of supervisors may authorize townships to raise or borrow not more than $1000 for roads and bridges by vote of the electors. § 477. We have found no authority for highway commissioners of their own discretion to incur indebtedness for any such purpose. The amount of orders now in dispute for the building of the bridge in question is $375; and the record shows no right to issue them.

It is claimed that under the practice in mandamus cases the burden of showing illegality rests on the respondents. Mandamus proceedings to collect debts are not different from any other suits. The plaintiff must always make out his case unless admitted expressly or by implication. In this case his allegations were met by a defense denying his right. There is no general presumption that highway commissioners can bind their townships by such obligations as they choose to issue. They can only act when authorized. In the absence of any finding of authority we must assume none existed.

The mandamus as to these bridge orders must be denied. Under our present practice we have not been in the habit of denying relief where the relator fails in some part of his claim but makes out the rest. There is no good reason for distinguishing in this regard between mandamus proceedings and other actions where a complete cause of action is made out less than the whole claim. We have discarded the old rule, which seems to have prevailed under a different form of procedure, and which some of the earlier decisions of this court adopted. We do not deem it applicable under the constitutional provision which has given this court plenary juris-

diction in mandamus cases. Such remedies should be applied rationally.

The writ must be allowed for the valid order, but without costs.

The other Justices concurred.

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SHERMAN HINCKLEY IMPLEADED WITH EDWARD B. McCARD v. WILLIAM D. HARRIMAN, PROBATE JUDGE FOR WASHTENAW COUNTY.

Motion to dismiss writ of error—Guardian's liability—Payment by executor to guardian of devisee.

Where the prevailing party neglected to enter his judgment until after the return day of a writ of error which had been taken out, but to which return had not been made, a motion to dismiss a second writ sued out after judgment was entered, was denied.

An executor intrusted with the duty of keeping a legacy for a minor heir until she was of age, paid it over to her guardian while she was still a minor. *Held* that the payment did not discharge the executor, and that if the guardian did not pay the legacy to his ward when she became of age, the executor still remained liable.

Money devised to a ward to be paid to her when she comes of age, but improperly paid over to the guardian while the ward is still a minor, is not received by him as guardian, because he has no business with it; and he is not liable for it on his bond.

Error to Washtenaw. Submitted Jan. 12. Decided Jan. 19.

Motion to dismiss writ of error, Submitted June 8. Denied June 9.

Joslin & Whitman for the motion.

J. C. Knowlton against.

ASSUMPSIT on guardian's bond. Defendant Hinckley, impleaded as surety on the bond, brings error. Reversed.

Sawyer & Knowlton for plaintiff in error. An executor cannot transfer a duty imposed upon him by the will, to the general guardian of a devisee, so as to bind the guardian's sureties: *Livermore v. Bemis* 2 Allen 394; *Allen v. Crosland* 2 Rich. Eq. 68; *Swope v. Chambers* 2 Grat. 319; *Ballard v. Brummitt* 4 Strobh. Eq. 171; Schouler's Dom. Rel. § 491.

Joslin & Whitman for defendant in error.

Cooley, J. This suit was brought in the name of the judge of probate for the use of Ella A. Dodsworth, upon the bond of McCard, who was her guardian while she was a minor. The breach relied upon is the failure to pay over a certain sum of two hundred dollars, which the guardian received for his ward from the executors of the last will and testament of George B. Dennis deceased.

The will of Dennis under which this payment is claimed to have been made, gave to Ella A. Dodsworth, then McCard, the sum of two hundred dollars, and to other persons, also minors, other specified sums, but with provision that "the amount I bequeath [to them] is to be kept for them until they are of the age of twenty-one years." The legacies were charged upon real estate which was devised to one of the executors.

For some unexplained reason the executors, instead of waiting until Ella became of age, paid over the sum bequeathed to her, to her guardian. This they had no authority to do. It was in plain disregard of the testator's intent, which was that the legatee herself should receive the money when she came of age, and that it should not be for her use or be subject to contingencies before that time, but should remain secured by the real estate. The payment to the guardian was not, therefore, a payment which discharged the executors. Their duty was to pay to the legatee herself. If the guardian paid the money to her after she came of age, such payment would be a good payment by the executors, but if he withheld it, or even used it for the support or education of the ward, the executors would still remain liable. Paying over thus without authority they assumed all risks.

It follows that this suit cannot be maintained. The moneys were not received by McCard as guardian, because as guardian he had no business with them. The moneys in his hands were moneys belonging to the Dennis estate, and were held for the executors. It is the business of the executors to account to Mrs. Dodsworth.

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

The other Justices concurred.

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GEORGE A. CHASE ADMINISTRATOR FOR ALPHEUS COON v. JONATHAN WELSH, JAMES WELSH AND SARAH F. BELKNAP.

Deed void as against creditors—Tender.

Where a debtor, in anticipation of proceedings against him, made a deed to his brother, the evident purpose of which was to hamper the title, and for which a very small part of the consideration was paid, the deed was held to be invalid as against creditors.

A mortgagee of land against which attachment proceedings have been started, is not without notice where his counsel, before advancing the money secured by the mortgage, recognized the attachment as a lien to be got rid of in order to clear the title, and caused money to be tendered for that purpose.

A tender to satisfy a claim in litigation is not good if made in the street, without any computation or means of computation that would not require delay, and on the idea that the claim is in judgment when no judgment has been entered, and when no costs have been or could regularly have been taxed.

A mere offer to pay whatever shall be ascertained to be necessary to discharge a litigated demand, without taken any steps to find out, beyond preparing a receipt in blank purporting to discharge the judgment when, in fact, none has been entered, is no proper tender of payment.

The effect of a tender made during suit or before judgment must always depend more or less on the views of the court and rarely affects anything but the liability for costs. It cannot discharge the debt until paid.

Whether tender of an amount in litigation can discharge an attachment—Q. And if it could, it would not make valid a transfer of the property attached, if void as against the creditor, or prevent assailing it on execution, except as to intervening *bona fide* purchasers or encumbrancers.

Appeal from Wayne. Submitted Jan. 12. Decided Jan. 19.

BILL to set aside deed. Dismissed below. Complainant appeals. Reversed; decree entered.

David Fox and *Alfred Russell* for complainant. One who knowingly takes a mortgage, fraudulent as to creditors, is not entitled to relief: *Smith v. Ayer* 101 U. S. 320; a tender must be unconditional: *Potts v. Plaisted* 30 Mich. 149.

Ward v. Palmer for defendants. An unqualified offer of the amount due on a claim in litigation is a sufficient answer to a suit to foreclose a mortgage given for the debt: *Eslow v. Mitchell* 26 Mich. 500; *Moynahan v. Moore* 9 Mich. 9; *Van Husan v. Kanouse* 13 Mich. 303; *Collar v. Harrison* 30 Mich. 66.

CAMPBELL, J. This is a cause wherein the bill was filed in aid of an execution levy. Jonathan Welsh is the execution debtor, James Welsh, his brother and grantee, and Sarah F. Belknap a mortgagee from James. The facts are not complicated. Jonathan Welsh in anticipation of proceedings against him by complainant at law, is charged to have conveyed lot 1 in block 8 of private claim 609 in Detroit, on the 15th of December, 1874, to his brother James, for a nominal consideration of $2000. The debt for which complainant prosecutes was for moneys belonging to the children of Alpheus Coon, of whom James was guardian, but these funds had got into the hands of Jonathan. Some delays were incurred in getting matters into shape for suit, and it was during this period that the deed was made which is claimed to have been fraudulent. In February, 1875, complainant brought suit in attachment and this lot was attached.

In July, 1875, a verdict was obtained, but for some reason judgment was not rendered until January, 1876, after which executions were issued, and the land levied on. James claims to have paid down $100, and given mortgages for $1900 in all, partly on this property and partly on other property of his own. On the 15th of September, 1875, the brothers made arrangements to borrow of Mrs. Belknap, through her agent Mr. Ward of Detroit, $2000 of which a sufficient amount was to be paid to extinguish complainant's claim and discharge the attachment, of which Mr. Ward had got knowledge and which was to be got rid of so as to clear the title. By the same arrangement the mortgages from James were to be discharged also. An attempt was made by a clerk of Mr. Ward accompanying Jonathan to tender the amount due complainant to Mr. Prentis his attorney. Before furnishing the money Mr. Ward got a mortgage for $2000 on lot 1 and some other property, and discharges of James Welsh's mortgages. Prentis did not accept the tender. Ward then concluded not to let Welsh have more than $1200, and paid this over the same day, and endorsed down the mortgage to Mrs. Belknap to that sum. No money was paid into court, and payment of the complainant's debt was refused, and Ward seems to have supposed the tender cleared the title. The court below dismissed the bill, probably on this ground.

There can be no doubt of the invalidity of the deed to James, as against creditors. He does not pretend to have paid more than $100 previous to the discharge of his mortgages, and it is doubtful whether he paid that. The brothers were both mixed up in the affairs of this trust fund, and it is plain that the purpose of the deed was to hamper the title. Mrs. Belknap's counsel recognized the attachment as a lien which must be got rid of to clear the title, and required the money to be tendered for that purpose. Mrs. Belknap, therefore, was not a mortgagee without notice.

We do not think the tender amounted to anything. Even if we assume the effect of a tender at that time would have been what the parties appear to have supposed, it was not

made in such manner and circumstances as to sustain it. It was made in the street, when no costs had been taxed or could be taxed regularly, without any computation or means of computation that would not have required delay, and upon the idea that the claim was in judgment, when no judgment had been entered.

No sum of money whatever was tendered, and no tender in the proper sense made at all. There was no more than a proposition or offer to pay what might be ascertained as the proper sum, but the parties tendering had not informed themselves and took no steps to do so beyond preparing a receipt in blank to be filled up when the supposed judgment and interest should be figured up. This receipt purported to discharge the judgment. Prentis refused to sign it. There is some conflict as to what reason he gave, but inasmuch as no sum of money whatever was produced or offered, all that it could have amounted to at best was a manifestation of readiness to make payment when the proper amount was figured up. This was no tender of payment. But if it had been, inasmuch as the tender was not kept good, it could not have availed in this case. It was not made on a judgment, which is a finality, but during the pendency of the suit, when it had not been judicially determined that the verdict should stand as the basis of a judgment. The effect of a tender during suit or before judgment must always depend more or less on the views of the court, and rarely affects more than the liability for costs. It cannot discharge the debt until paid. The law has provided other ways of dissolving or releasing attachments, and we are not aware of any rule which would make a tender have that operation. And if it did, that would not make the transfer valid or prevent assailing it on execution except as to intervening *bona fide* purchasers or encumbrancers; and no one in this suit holds that position.

The complainant is entitled to a decree holding the deed to James and the mortgage to Mrs. Belknap void as against the

execution levy, and ordering the proper steps to make this relief effectual.

The decree dismissing the bill must be reversed with costs of both courts and a proper decree entered in accordance with these views.

The other Justices concurred.

THOMAS FLETCHER v. HENRY J. BRADFORD.

Declarations in justice's courts—Conclusiveness of findings of fact.

Recovery can be had under the common counts upon an agreement to pay for services in forwarding the sale of one's land.

Declarations in justices' courts are to be liberally construed.

Plaintiff has a right to have the evidence submitted to the jury on his theory of the case.

Error to Wayne. Submitted Jan. 12. Decided Jan. 19.

ASSUMPSIT. Defendant brings error. Affirmed.

Albert J. Chapman for plaintiff in error.

Thomas C. Prosser, Ervin Palmer and George Gartner for defendant in error.

MARSTON, C. J. Bradford brought suit in justice's court, declaring therein upon a special contract whereby the defendant agreed to pay him one hundred dollars for services done and performed in forwarding the sale of certain lands of the defendant, which defendant had agreed to pay when the lands were sold, and alleging that the lands had been sold. He declared also upon all the common counts. The plaintiff recovered judgment in the justice's court, and also on appeal in the circuit. The case comes here on writ of error.

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It is claimed that the declaration is insufficient. We cannot concur in this view. Declarations in justice's courts are liberally construed. We do not find, however, any fatal defect in the special count, and even if such was the case, we know of no good reason why he should not recover on the common counts.

It is also claimed that the plaintiff could not recover unless he proved that he had sold the land for $2400, while in fact the land was sold not by him but by the defendant for $1000. The evidence given by the defendant may have tended to prove such a contract, but the evidence given on the part of the plaintiff was very different, and he had a right to have the case submitted to the jury upon his theory of the case. The charge of the court was as favorable to the defendant below as the case would permit. As the court instructed the jury, if the plaintiff was employed by the defendant to sell the land, and did sell it; he would be entitled to recover the agreed consideration, but if he did not make or aid in negotiating the sale made he could not recover in the action.

The judgment must be affirmed with costs.

The other Justices concurred.

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RICHARD WALDRON v. MARION L. WALDRON ET AL.

Construction of wills—Oral evidence—Allowance of counsel fees.

A woman devised to her husband the undivided half of certain descriptions of land, referred to as "containing 240 acres," and she made the devise subject to a right reserved by her grantor to occupy one-half of the dwelling house thereon. She devised the other undivided half to her children. The descriptions were according to the government subdivisions, but embraced only 140 acres, which was only a part of 240 acres actually granted to her in one compact body, and no other disposition was made of the rest of this grant. The dwelling house was not upon the 140 acres devised. *Held*, that the testator's evident intent was to devise the entire 240 acres.

Oral evidence is not admissible to explain a testator's intent except so far as it brings before the court such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed.

The allowance of counsel fees, in proceedings to obtain the construction of a will, is for the probate court.

Appeal from Jackson. Submitted Jan. 12. Decided Jan. 19.

BILL for construction of will. Complainant appeals.

Austin Blair for complainant. In constructing wills all intendments are made to prevent partial intestacy: *Toms v. Williams* 41 Mich. 565; *Tewksbury v. French* 44 Mich. 100; the presumption is that the testator intended to dispose of all the property, 1 Jarm. Wills 1; Redf. Wills Ch. 9; but his intention must be learned by a construction of the will in view of the circumstances existing at the time (*Brown v. Thorndike* 15 Pick. 400); and parol evidence may be given to prove the surroundings though not to alter the expressions of the will, 1 Jarm. Wills 342; 1 Greenl. Ev. § 289; *Doe v. Roe* 1 Wend. 541; *Pritchard v. Hicks*, 1 Paige 271; *Zimmerman v. Zimmerman* 2 Cai. 146; *Jackson v. White* 8 Johns. 58.

G. H. Wolcott and *J. A. Parkinson* for defendants. A will must show, by its own terms, that the testator meant to include omitted descriptions of property before it can be construed as covering such; the question is not only what he meant but what he said: 1 Redf. Wills 433; *Griscom v. Evens* 40 N. J. L. 402; *Dunham v. Averill* 45 Conn. 67; *Tucker v. Seaman's Aid Society* 7 Met. 188; *Gwillim v. Gwillim* 5 B. & Ad. 122; *Beaumont v. Field* 2 Chit. Pr. Cas. 275; specific descriptions are restrictive and not to be rejected: *Fitzpatrick v. Fitzpatrick* 36 Ia. 674; *Winkley v. Kaim* 32 N. H. 268; *Crombie v. Cooper* 22 Grant's Ch. (U. C.) 267; descriptions by statements of quantity are unreliable and never permitted to control natural landmarks: *Bishop v. Morgan* 82 Ill. 351; *Woods v. Woods* 2 Jones Eq. (N. C.)

420; *Coleman v. Eberly* 66 Penn. St. 197; *Kurtz v. Hibner* 55 Ill. 514; the presentation against partial intestacy does not prevent requiring a will to fairly include disputed property (*Jameson's Appeal* 1 Mich. 99), and the natural heirs are entitled to all fair intendments, besides: 1 Redf. Wills 435; *Franc's Estate* 75 Penn. St. 220; *Bender v. Dietrick* 7 W. & S. 284; *Cowles v. Cowles* 53 Penn. St. 175.

Cooley, J. The bill of complaint is filed in this case to procure an authoritative construction of the will of Emma A. Waldron, late of the township of Sandstone, in the county of Jackson. The testator was the wife of complainant, and the mother of defendants. The provisions of the will upon which the controversy arises relate to the testator's farm, and are as follows:

"*First.* I give and devise to my husband, Richard Waldron, the equal undivided one-half part of the east one-half of the southeast quarter of the northeast quarter of section No. seven. Also, the west half of the southwest quarter of the northwest quarter of sec. No. eight, all in township two south, of range No. two west, in the county of Jackson, state of Michigan, containing two hundred and forty acres, more or less, subject however to the right of William Berrien to occupy one-half of the dwelling-house on premises as reserved in his deed conveying said lands to me, to have and to hold to the said Richard Waldron, and to his heirs and assigns forever the premises above described.

"*Second.* I give and devise to my children, William Berrien Waldron and Marion Louise Waldron, the remaining undivided one-half part of the above described premises, to have and to hold the same to them and to their heirs and assigns forever, subject to the limitations hereinafter set forth."

It is apparent from these provisions that there is some error in the description of the lands which are the subject of the devise. The quantity is specified as two hundred and forty acres; but the particular descriptions which are given include one hundred and forty acres only. To solve the ambiguity the parties have introduced evidence from which it appears that the testator owned a farm of two hundred and forty acres lying together in one compact body on sections

seven and eight in township two south, of range two west, in the county of Jackson; that this was purchased by her of William Berrien and that in the conveyance to her Berrien reserved the right to occupy one-half the dwelling-house on the premises. It also appears that the particulars given in the will, in describing the land according to the government subdivisions, are applicable to a portion of these lands.

The question then is whether the devise to complainant is limited to the undivided half of the one hundred and forty acres particularly described according to the government subdivisions, or will embrace the undivided half of the two hundred and forty acres which the testator owned and occupied. It is conceded that one or the other is the true construction.

We agree with counsel for defendants that oral evidence cannot be received to explain the intent, except as it may bring before the court such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed. The evidence of the scrivener as to the statements of the testator made to him preliminary to the drafting of the will must therefore be rejected. To act upon these would be to frame a new will for the testator, based upon an intent which we should reach upon parol evidence, but which she had failed to express in legal form.

But we think the testator has sufficiently described in the will the whole farm of two hundred and forty acres, and devised to the complainant the undivided half thereof. She names the sections, township, county and State in which it is situated; she specifies the quantity; she makes it subject "to the right of William Berrien to occupy one-half of the dwelling-house on the premises, as reserved in his deed conveying said lands to" her, and all these particulars coincide with the land she owned and occupied, and embrace the whole of it. If there was nothing more in the description the case, we think, would be clear. But the remaining portion of the description raised an ambiguity, for it particularly specifies government subdivisions which include one hundred and forty acres only. But if this portion stood alone

there would still be an ambiguity, for the house, the use of a part of which is reserved to Berrien, is not upon the one hundred and forty acres, and the reservation is therefore idle and meaningless if the devise is thus restricted. Moreover it is evident the testator intended the use of the house, so far as not reserved to Berrien, should pass to her husband, and this intent is defeated if the devise is limited to the smaller quantity.

If the devise was meant to be restricted to one hundred and forty acres, the testator committed two mistakes: *First*, in specifying the quantity; and *second*, in supposing that her dwelling-house was upon the land described, when it was not. Both these are unlikely mistakes, but the latter especially so, for it seems incredible that the testator should not have known the location of her dwelling-house. If the intent was that the devise should be of an undivided half of the whole two hundred and forty acres, there is a mistake in describing the lands according to the government subdivisions; but nothing is more common than such an error. The accidental substitution of one small word for another—such as an *of* for an *and*—often introduces incalculable mischief in such descriptions.

It is plain from what has been said that the particulars the testator gives in her will cannot all be satisfied unless the whole two hundred and forty acres are held to be devised, and that the devisee cannot otherwise have any use of the dwelling-house. The inference that such was the intent seems, therefore, irresistible. Moreover in that case the testator will not have died intestate as to any of her lands; and as nothing in other parts of the will indicates an expectation that she would do so, this is a circumstance of some importance. On the other hand the description which is given by government subdivisions is only incorrect in that it fails to embrace all the lands; it is correct so far as it goes and therefore is harmless.

Many cases supposed to resemble this were cited by counsel on the argument, but we do not specially rely upon any of them. We decide the case upon its special facts, and on

familiar legal principles. We have been requested by counsel to make proper allowance for services in this case; but in *Toms v. Williams* 41 Mich. 552, we held this to be the proper business of the probate court. We have no doubt that court will do what is just in the premises.

A decree will be entered in accordance with the views above expressed.

The other Justices concurred.

FREMONT WINFIELD v. WILFRED C. DODGE.

Sunday bargains are void and not open to ratification.

A Sunday horse trade is void and cannot be ratified on week day; and if possession is given the horse can be reclaimed unless a new contract is made with mutual assent.

Error to Jackson. Submitted Jan. 12. Decided Jan. 19.

REPLEVIN. Plaintiff brings error. Reversed.

Hewlett Bros. and *Austin Blair* for plaintiff in error. A Sunday contract is void and cannot be ratified: *Tucker v. Mowrey* 12 Mich. 378; it does not change title: *Blakeman v. Blakeman* 39 Conn. 320; *Hearst v. Pujol* 44 Cal. 230; *Hardignee v. Mitchum* 51 Ala. 151; *Pitcher v. Hennessey* 48 N. Y. 415; Story's Eq. Jur. 120, 121.

Thomas A. Wilson for defendant in error. A contract of sale or exchange made on Sunday is void, but the parties may, by acts and assent, make a new contract on a week day respecting the same subject matter: *Bradley v. Rea* 103 Mass. 188; 1 Addison on Contracts 428; *Tucker v. Mowrey* 12 Mich. 378; a promise to pay, made in consideration of the retention of the property, is good: *Dodson v. Harris* 10 Ala. 566.

GRAVES, J. The parties traded horses on Sunday. The exchange was even and there was immediate delivery. The plaintiff became dissatisfied and, wishing to trade back, went the next morning to the defendant's place and made several offers of money to induce him to do so, but he refused. After some bantering however the defendant gave the plaintiff five dollars and a tobacco pipe, for the purpose, as explained at the time, of averting ill feeling. The plaintiff then returned home, but wishing, on further consideration, to undo what had been done, he again called on the defendant and peremptorily insisted on trading back, and he offered to restore the money he had received and someting more than the value of the pipe. The defendant refused to listen to any overture.

The plaintiff then brought replevin before a justice and obtained judgment and the defendant appealed. The circuit judge, on the close of the evidence, took the case from the jury and ordered a verdict for the defendant. This ruling went on the theory that the transaction on Monday amounted to a new contract by which the title became established in defendant, and that no room for any other view existed.

We think this was error. The case made by the evidence was not necessarily of the character assumed. The transaction on Sunday passed no title. As a trade it was void, and the evidence of what took place on Monday was not conclusive that there was anything more than an attempt to ratify and validate the Sunday negotiation; and of course a ratification of that trade was impossible; unless there was a new contract the plaintiff was entitled to reclaim his horse against the void negotiation. No new contract could be made without a mutual assent of the parties, and unless the plaintiff intended to make one the title was not affected by the occurrences subsequent to the transaction on Sunday, and whether there was such new contract was a question for the jury on the whole evidence under proper instructions.

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

The other Justices concurred.

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William Hyler v. Henry Nolan.

Absolute transfers may be shown to be by way of security.

Parol evidence is admissible to explain the true consideration for a contract and apply the instrument to the subject matter.

One who has given a written assignment, absolute in form, of a particular payment described in a mortgage, and has also given the accompanying note, can nevertheless show by parol that the transfer was not unqualified but was made as security for repayment of money borrowed from the transferee.

The finding of a trial judge, sitting without a jury, is conclusive as to the witness's credibility and the effect of his evidence.

Case made from Kent. Submitted Jan. 13. Decided Jan. 19.

Assumpsit. Plaintiff had judgment below. Affirmed.

John A. Fairfield for plaintiff.

B. F. Lockwood for defendant.

Graves, J. This record presents the single question of law whether it was competent for the plaintiff to give parol evidence that his written assignment to the defendant, absolute in form, of a particular payment described in a mortgage, together with the accompanying note, was in fact made as security for a sum of money borrowed by the plaintiff of the defendant, and not as an unqualified transfer. The circuit judge allowed the evidence and the defendant excepted. The ruling was correct.

The purpose of the evidence was to explain the true consideration between the parties to the contract, and apply the instrument to the subject-matter, and this was entirely proper. *Colman v. Post* 10 Mich. 422; *Kimball v. Myers* 21 Mich. 276; *Bowker v. Johnson* 17 Mich. 42.

The question of credibility and the effect of the evidence was for the circuit judge who found the facts, and his determination is conclusive.

The judgment is affirmed with costs.

The other Justices concurred.

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ELIZABETH J. PETTIFORD v. MINA ZOELLNER.

Collateral questions—Regularity of divorce proceedings—Affidavits for orders of publication, and of publication of notice.

Where the record of a case is questioned collaterally, only such objections can be noticed as affect the jurisdiction to dispose of it.

Where a wife, suing for a divorce, swears positively that her husband does not reside in this State but in a specified foreign locality, it is enough to support an order of publication.

A divorce granted upon an order of publication, issued by a circuit court commissioner on an affidavit based upon information and belief, was sustained in a collateral proceeding involving the validity of a later marriage and the consequent right to property.

It seems that the affidavit for an order of publication in divorce is sufficient if it tends to establish a foundation for the order, and if the officer to whom it is presented finds enough in it to satisfy his judgment; and his decision cannot be set aside, in a collateral proceeding, for defects in the proofs submitted to him therefor.

Affidavits of the publication of orders for defendant's appearance in a divorce proceeding are sufficient to give jurisdiction if they state positively the fact of publication, and if the affiant swears that he is employed in the office of the newspaper in which the order was published and knows well the facts stated in the affidavit. It is unimportant that he does not describe himself as clerk, if it appears that he is entrusted with the duty of making affidavits of publication.

Proceedings after a decree of divorce do not touch the right to adjudicate and cannot be reviewed in a collateral proceeding.

Case made after judgment from Wayne. Submitted January 6. Decided January 26.

EJECTMENT. Plaintiffs brings error. Affirmed.

Latham & Case for plaintiff. The validity of a judgment or decree may be questioned directly or collaterally by parties or strangers if the record does not show jurisdiction: *Greenvault v. F. & M. Bank* 2 Doug. (Mich.) 505; *Wilson v. Arnold* 5 Mich. 98; *Baugh v. Baugh* 37 Mich. 62; *Gillett v. Needham* id. 143; *Forbes v. Hyde* 31 Cal. 348; *Bloom v. Burdick* 1 Hill 139; *Morris v. Hogle* 37 Ill. 152; *Elliott v. Peirsol* 1 Pet. 340; *Howard v. Thornton* 50 Mo. 291; *Thatcher v. Powell* 6 Wh. 128; *People v. Board of Police* 6 Abb. Pr. 162; an order for appearance against a non-resident defendant in divorce cannot be obtained without an affidavit: Comp. L. § 5116; 1 Barb. Ch. Pr. 92; if it is, subsequent proceedings are void: *Platt v. Stewart* 10 Mich. 260; *Parish v. Parish* 32 Ga. 653; *Towsley v. McDonald* 32 Barb. 607; *Shields v. Miller* 9 Kan. 390; an affidavit on information and belief is insufficient: *Morgan v. Eureka Co.* 9 Nev. 360; *Warren v. Tiffany* 9 Abb. Pr. 66; *Smith v. Luce* 14 Wend. 237; *Evertson v. Thomas* 5 How. Pr. 45; an order of publication that does not comply with statutory provisions cannot give jurisdiction: *Freeman v. Freeman* 1 Mich. 480; *Marshall v. Marshall* 2 Greene (Ia.) 241; *Boyland v. Boyland* 18 Ill. 551; and the affidavit in proof of publication must show that the affiant is the printer, foreman or printer's clerk: Comp. L. § 5927; *Perrien v. Fetters* 35 Mich. 236; *Gray v. Larrimore* 2 Abb. (U. S.) 551; *Steinbach v. Leese* 27 Cal. 295; *Hill v. Hoover* 5 Wis. 354.

Adam E. Bloom and *George Gartner* for defendant. A judge or commissioner, in making an order for appearance based upon an affidavit, passes on the facts, and his decision cannot be impeached collaterally: *Pennoyer v. Neff* 95 U. S. 721; *Porter v. Purdy* 29 N. Y. 106; *Morton v. Crane* 39 Mich. 526; *Dexter v. Cranston* 41 Mich. 452; *Shawhan v. Loffer* 24 Ia. 226; *Goudy v. Hall* 30 Ill. 116; Bigelow on Estoppel 130–1, n; where there is evidence of jurisdiction, and the only question is as to its sufficiency, the proceedings can be set aside in a direct proceeding alone: *Cooper v. Sunderland* 3 Ia. 114; *Morrow v. Weed* 4 Ia. 77; *Long v.*

Burnett 13 Ia. 28; *Pursley v. Hayes* 22 Ia. 11; *Hungerford v. Cushing* 8 Wis. 324; *Bridgeport Bank v. Eldredge* 28 Conn. 556; *Kipp v. Fullerton* 4 Minn. 366; *Galena etc. R. R. v. Pound* 22 Ill. 400; an affidavit of publication is sufficient if it merely recites that affiant is a printer in the office in which it is published: *Brown v. Phillips* 40 Mich. 269; or if it is made by the editor: *Sharp v. Daugney* 33 Cal. 513.

GRAVES, J. The plaintiff brought ejectment for certain premises situated in Detroit and in the occupation of defendant, and the circuit judge sitting without a jury found in favor of the latter. A review is asked by the plaintiff on a case.

The premises were formerly owned by one Julius Zoellner, who died seized and in possession, and without any will, on the 12th of May, 1880. At that time the defendant was residing with him as his wife, and she now claims to be his lawful widow, and in that character asserts a right to hold possession for a full year from Zoellner's death, under the statute. Comp. L. § 4291.

On the 8th of June, 1857, the decedent married one Margaretha Schnurr at Toledo, and lived with her as his wife until November, 1871. The plaintiff and two others are children of that marriage and decedent's sole heirs, and she sues in that character.

The defendant on the 10th of June, 1865, became the wife of one Anthony Bittner. In April, 1874, and while the former wife of the one and the former husband of the other were living, the decedent and the defendant went through a regular ceremony of marriage, and cohabited together thereafter, and until Zoellner's death, as husband and wife. September 26, 1872, the Wayne circuit court in chancery granted a divorce in decedent's favor against the said Margaretha Schnurr on the alleged grounds of cruelty and habitual drunkenness, and on the 20th of January, 1873, the same court allowed a decree of divorce in defendant's favor against the said Bittner on the alleged ground of desertion.

The result of the ejectment depends on the question

whether the defendant is or is not the lawful widow of decedent, the plaintiff's father, and this in turn depends on the effect due on this inquiry to the divorce proceedings. The plaintiff's counsel points out a large number of defects in each of the divorce cases, which, he contends, go far enough to overthrow the decree. It is very plain that many serious irregularities were committed, and which upon a direct proceeding, it may be, would have necessitated a reversal. But the records are now brought in question collaterally, and no objection can be noticed which does not go to the jurisdiction. If the court acquired the right to adjudicate, the proceedings and decisions are not open to revision in this way. The question which sometimes occurs, whether a court which has obtained jurisdiction has not gone on and exceeded it, is not involved.

If in either of the divorce cases the decree is void the plaintiff is entitled to recover. On the other hand, however irregular or erroneous the proceedings, if the court had jurisdictional power the defendant cannot be disturbed. In each case the defendant was proceeded against on publication and not on service of subpœna or appearance, and whether the court obtained jurisdiction to hold cognizance of the merits depends on the practice which was pursued in respect to those proceedings. If that practice, though irregular and imperfect, was not void, it is sufficient for the present inquiry. The decree cannot be disregarded.

The objections brought against the later proceedings are not tenable in this collateral litigation. None of them touch the right to adjudicate.

In the case instituted by defendant she swore positively that her husband did not reside in this State but in Breslau in the province of Schlesien in Europe. This was certainly sufficient to be passed on, and the circuit judge acted on it, and made it the ground of a three-months' order. Here was no error. In the other case the decedent made affidavit that Margaretha Zoellner, the defendant, was not a resident of the State of Michigan, as he was informed and believed, but that her residence was in the city of Toledo, in the State of

Ohio, and a circuit court commissioner made a two-months' order. It is contended that this affidavit presents no facts which could give the officer jurisdiction to make the order, the deponent merely testifying to information and belief and not even giving the sources of his information. That this affidavit is not what it ought to have been may be fully admitted; but when it is claimed that the order of publication and the subsequent decree of the court are void for this reason, the court may well hesitate before acceding to a construction so far-reaching and so destructive.

It is the view of some of the judges that affidavits equally defective have been much in use as the foundation for orders of publication, from the organization of the State government to the present time, and that whilst some solicitors have made their own papers more satisfactory and some judges have tried to maintain a better practice, the fact is indubitable that such affidavits have always been, and still are, largely made use of; that the titles to numerous estates, the validity of many marriages, the legitimacy of children and the peace of many families are dependent on the practice; that if orders made on such showings should be held void the most serious and painful consequences would necessarily ensue, and that the considerations of this nature which present themselves are too vast to be put aside to accommodate any notions not based on provisions which are actually imperative; that, coming to the proceeding in question, the statute does not assume to explain what shall amount to proof, but simply provides that proof of the fact shall be made by affidavit; the officer is to find enough in the affidavit to satisfy his judgment, enough to amount to proof to his mind, and if the contents of the affidavit tend to make out what is required as the basis for the order, it contains sufficient to afford his judgment the materials on which to exercise itself, and his decision cannot be held void for defect in the proof offered to him; that considering the long and inveterate practice mentioned, and the very brief and general terms of the provision, the proceeding ought not to be held null for the want of further and more satisfactory matter in the affidavit.

Another member of the court is of opinion that whatever may be the rule in ordinary cases the strict one contended for is not fairly applicable to an affidavit of the husband concerning the residence of his wife; that he may fairly be supposed to have as full and exact knowledge on that subject as any one to whom he could properly refer, and that in cases where there is no cause for suspicion it ought not to be intended that his disclosure is misleading, or that anything more positive or definite is practicable.

The further objection is made that the proof given of the publication of the orders was defective. In both cases the showing was by affidavit and the affidavits were substantially alike. The fact of publication was stated positively and the affiant swore that he was employed in the office of the newspaper and knew well the facts stated. My brethren think this was sufficient and that the omission of the affiant to describe himself as clerk by a literal statement to that effect is unimportant. Being employed in the office and entrusted with the duty of swearing to affidavits of publication, as it seems was the case, it would be reasonable, as they view it, to infer that his duty was clerical and his position that of clerk.

In these observations it is not intended to refer to any other than cases where the proof is made in the course of regular suits at law or in equity. No opinion is expressed as to the mode of proof in special or extraordinary proceedings. *Perrien v. Fetters* 35 Mich. 233, and *Gillett v. Needham* 37 Mich. 143, are not in point on the question considered.

We think this disposes of all the objections entitled to consideration. But in saying this we do not overlook the industry and ability shown by counsel scanning the proceedings and in laying bare the dangerous errors and imperfections of certain practice.

The result is that the judgment must be affirmed with costs.

The other Justices concurred.

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J. SILL STOWELL AND J. DORR STOWELL v. EMORY A. STOWELL.

Promissory note in aid of railroad construction.

A promissory note, payable to the treasurer of the Chicago and Canada Southern Railway Company, was made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of passenger and freight depot" at Dundee; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond Dundee, so as to form a through line. *Held*, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated.

Error to Monroe. Submitted Jan. 6. Decided Jan. 26.

ASSUMPSIT. Plaintiffs bring error. Reversed.

Grosvenor & Landon for plaintiffs in error. A contract, if its language is plain, must be carried into effect according to its manifest meaning: *N. A. Ins. Co. v. Throop* 22 Mich. 146; *Strohecker v. Farmer's Bank* 6 Penn. St. 41; *Benjamin v. McConnell* 4 Gilm. 536; *Railroad v. Trimble* 10 Wall. 367; *Collender v. Dinsmore* 55 N. Y. 200; *Huntington v. Dinsmore* 4 Hun. 66; and where the consideration is expressed no other can be proved: 1 Pars. Cont. 430; *Johnson v. Sutherland* 39 Mich. 580.

C. A. & J. A. Stacy, *E. D. Kinne* and *S. C. Randall* for defendant in error.

GRAVES, J. The plaintiffs brought this action on an instrument of the following tenor:

"$50. DUNDEE, MICH., March 5, 1872.

"In consideration of the construction of the Chicago & Canada Southern Railway through or within one-half mile

of the village of Dundee in the county of Monroe, State of Michigan, within three years of this date and the building of passenger and freight depot at Dundee, Mich., I promise to pay to the treasurer of said railway company or bearer, the sum of fifty dollars in thirty days after said road and depot are constructed as aforesaid.

"EMORY A. STOWELL."

The suit was commenced before a justice of the peace and was appealed to the circuit court and under the rulings of the judge a recovery was denied.

The only question which calls for remark arises on the meaning of the contract, and for the purpose of its solution a resort to extrinsic matters resting in parol is not required and should not be allowed. The view taken of the case will be explained briefly. My own opinion may be thus stated: in specifying the Chicago & Canada Southern Railway and in referring to the construction of its road, the parties contemplated not only the identical corporation so named, but also the very road from one point to another as it stood described in the charter. It was regarded as a single and entire work to extend from one fixed and known point to another and hence the writing made no provision for applying the arrangement to anything less or anything different. The locality of these points was not expressed in writing, but it was assumed to be understood. The reference to the corporation and the circumstances connecting the agreement with the charter would authorize a recourse to the latter, when necessary, to show where the road was to begin and where it was to end, and thus afford the contract all needed aid on the subject.

The effect was to render the charter description as completely a part of the instrument in suit as it would have been in case the parties had actually inserted it. According to this theory, which seems to me to be the true one, it would, in my view of it, follow that the things to be performed as preliminary to any right to the $50 were—*first*, the construction within three years of the Chicago & Canada Southern Railway from one charter point to the other; and *second*,

its construction between the *termini* in such manner as that it should pass through Dundee or within half a mile and be there provided with a passenger and freight depot. But this construction of the agreement was not complied with. The charter contemplated that the road to be built should extend from the east line of Monguagon, in Wayne county in this State, to the city of Chicago, and it has been built no further west than Fayette in the state of Ohio, a distance of about seventy miles. It is not denied that in building this section the agreement has been so far observed. The road runs past Dundee and a passenger and freight depot is put up there. It is also true that by connecting with other roads a through line to Chicago is established.

Still, as I regard the contract, the maker of it bargained for something more. His promise required that the whole line should be built, and not merely a section of it, and the claim would not be unreasonable that a distinct and independant road made by the company for the whole distance would promise greater local advantage and a more valuable return for contributions than a short road operated in connection with roads of other companies to complete the line. This opinion agrees with that of the circuit judge.

But my brethren hold that this conclusion is erroneous. In their judgment the case is plainly governed by *Swartwout v. Mich. Air Line R. R. Co.* 24 Mich. 389. They are satisfied that the contract itself, when read in connection with the chartered powers and purposes of the corporation, and with a proper regard for those considerations of practical importance which manifestly actuated the parties, fairly imports that the promise was made to afford aid in constructing the road, and contemplated that the money should be payable in case of the completion as agreed of that part of the line which has been built, and that a construction which would defer the right to call for payment until the whole line should be actually built by the company, or would deny the right to payment in case of failure to construct the road the entire distance to Chicago within three years, would defeat

the intent of the parties and disappoint the manifest object which was meant to be carried out.

As a consequence of this construction the judgment must be reversed with costs and a new trial granted.

The other Justices concurred.

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

Adverse possession as between tenants in common—Election among defendants claiming from different sources of title.

A claim of adverse possession by one tenant in common, as against another, must be clear and unambiguous because the mere possession in a tenant in common would be rightful and would not imply an adverse holding, and the tenant is presumed to hold in recognition of the rights of his co-tenant unless his acts and declarations are clearly inconsistent with such presumption.

Adverse possession must be clear and distinct, and plainly proven, to establish title.

The lessee of one tenant in common told the son of the other, while the father was living, that he (the lessee) had more right on the premises than he (the son) had. *Held*, that this had no tendency to prove that the tenant in common under whom he occupied the premises held adversely to the other.

Comp. L. § 6230, in requiring that a plaintiff in ejectment against several defendants claiming under different sources of title shall elect against which he will proceed, does not apply where the action is against one claimant and those in possession under him and where the same defense is common to all.

Error to Wayne. Submitted Jan. 11. Decided Jan. 26.

EJECTMENT. Defendant brings error. Affirmed.

F. A. Baker and *Ashley Pond* for plaintiff in error. Where a claimant of property has not been in possession or control for thirty years, and another has been in actual possession, the fact tends to show that the latter's possession is

adverse: *Dubois v. Campau* 28 Mich. 304; possession to the exclusion of another is adverse within the meaning of the statute of limitations: *Campau v. Dubois* 39 Mich. 274.

H. L. Baker and *G. V. N. Lothrop* for defendant in error. Actions of ejectment brought by the same party against several defendants for the same premises ought to be consolidated where the defense is substantially the same: *Jackson v. Stiles* 5 Cow. 282; *Jackson v. Schauber* 4 Cow. 78; *Jackson v. Woods* 5 Johns. 279; a single action is maintainable for several parcels; Adams' Ejectment 221, 229; *Huggins v. Ketchum* 4 Dev. & Bat. 421.

MARSTON, C. J. This case has been twice before this court previous to the present term. In the present case it is claimed the plaintiffs below were barred by the statute of limitations.

We held in this case when here before (44 Mich. 31), that as between tenants in common, a claim of adverse possession by one should not be of doubtful character, but clear and unambiguous. The reason of this is that the possession itself is rightful, and does not imply adverse possession as would that of a stranger, so that the presumption of possession in recognition of the rights of co-tenants must be overcome by acts and declarations clearly inconsistent therewith brought home to the co-tenants. It was also held in the same case that clearness and distinctness were requisite to acquire title by adverse possession in any case, or as was said in *Yelverton v. Steele* 40 Mich. 541, it must be made out by clear and cogent proof.

There are many loose expressions testified to in this case, but of so ambiguous a character that they cannot fairly be said to bring this case within the rule referred to. Perhaps one of the strongest statements which can be claimed tended to show adverse possession, and indeed the one upon which most reliance was placed upon the argument, is found in the testimony of Phillis Chauvin, who testified "that when Dennis wanted her husband to pay rent he would not do it,

and claimed he had a right to stay there; that none of the children of Barnabas Campau ever came there to see about it at all, but when Jacques Campau, a son of Joseph, was alive, he use to come there and raise awful rows with her husband, and witness at one time thought they were going to fight; that her husband told Jacques Campau *that he had more right to stay there than he had.*" The husband of the witness died March 1, 1862. Joseph Campau died in 1863, so that at the time of this conversation referred to Jacques Campau's father, Joseph, was alive, and Jacques had no interest in the premises, and in truth the husband of the witness "had more right to stay there than he (Jacques) had." This, therefore, has not the slightest tendency to prove an adverse holding, and from what has been said the other evidence relied upon was not, we think, sufficient to entitle it to be made the basis of a verdict and judgment.

It is next objected that the court erred in allowing plaintiffs to proceed for all the property described in their declaration, and in not requiring them to elect whether they would proceed for separate parcels. Our statute does not require an election in cases where all the titles, possessions or claims are derived from the same source. 2 Comp. L. § 6230. Without undertaking to definitely fix the meaning and limits of this section, we are of opinion that in this case no election was necessary. The action in effect was one against a claimant and those in possession under him. The same defense was common and applicable to all. No one relied upon matters in which the others did not and could not have any interest.

The judgment must be affirmed with costs and the record remanded.

The other Justices concurred.

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JULIA BIGLEY v. ABRAM SOUVEY.

Revocability of testamentary grant—Passage of title.

An instrument purporting to convey land but providing that it shall remain the grantor's property during his life-time and go to the grantee on his death, is a mere devise, revocable at will, and passes no title; and the grantor's promise to pay the grantee to reconvey the land is without any consideration.

Error to Superior Court of Detroit. Submitted January 12. Decided January 26

Stewart v Bailey 40 N.Y. 50

ASSUMPSIT. Plaintiff brings error. Affirmed

J. W. Donovan and *C. M. Burton* for plaintiff in error.

Stewart & Galloway for defendant in error.

COOLEY, J. Defendant executed and delivered to plaintiff a deed of his homestead, but upon the express condition that "the conveyance of land herein named shall be and continue the property of the first party during his life-time, and the remainder to said second party immediately at the death of said first party. But in the event of the death of the second party before the said first party, then the estate herein shall go to said first party as before."

This instrument was purely voluntary. The homestead was worth less than $1500. Plaintiff claims that defendant afterwards agreed to give her $2000, if she would reconvey, and she did so. He paid a small sum but refused to give more, and this suit is brought on the promise.

The superior court held the promise to be without consideration; and we agree in this. The instrument given by defendant was a deed in form, but was testamentary in its nature, and passed no title whatever. If defendant survived the plaintiff, it was to be inoperative; if she survived him, it was to take effect at his death. It was therefore a disposition of property to take effect at his death, she sur-

viving him, and was a devise and nothing else. He might revoke it at will, and her reconveyance had nothing upon which it could operate.

The judgment must be affirmed with costs.

The other Justices concurred

SYLVESTER B. SMITH AND THOMAS J. TOBEY v. CHARLES H. VAN BLARCOM AND JOHN R. VAN BLARCOM.

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Power of indefinite extension destroys negotiability

A clause attached to a promissory note and providing that the payee or his assigns may indefinitely extend the time of payment, destroys its negotiability and makes it a simple contract.

Where a promissory note has a clause appended giving the payee the power to extend the time of payment indefinitely, the note and the clause must be construed together.

In an action between the original parties to a note the circumstances of its issue are open to explanation.

A proviso in a promissory note is not void unless it is illegal or nugatory; and if innocent it does not make the note illegal though it may destroy its negotiability.

Error to Branch. Submitted Jan. 12–13. Decided Jan. 26.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Richard A. Watts and *Charles Upson* for plaintiff in error. Where a clause in a promissory note makes the time when it will fall due dependent on the will of the holder, it must be presumed that the time will come: *Seacord v. Burling* 5 Den. 445; *Clayton v. Gosling* 5 B. & C. 363; such a clause is mere surplusage: *Henschel v. Mahler* 3 Hill 132; *Bullock v. Taylor* 39 Mich. 137; *Myer v. Hart* 40 Mich. 517; power in the holder of a note to extend the time of payment does not destroy its negotiability: *Hodges v. Shuler* 22 N.Y. 114; *Hosstatter v. Wilson* 36 Barb. 307; *Heard v. Dubuque*

County Bank 8 Neb. 10; *Capron v. Capron* 44 Vt. 410; 1 Dan. Neg. Inst. §§ 35–40; *Newton Wagon Co. v. Dier* 4 N. W. R. (Neb.) 995; *Goshen Turnpike Co. v. Hurtin* 9 Johns. 217; *White v. Smith* 77 Ill. 351; *Stillwell v. Craig* 58 Mo. 24; *Cate v. Patterson* 25 Mich 191; *Tripp v. Curtenius* 36 Mich. 494; *Dutchess Cotton Mfy. v. Davis* 14 Johns. 239; *Protection Ins. Co. v. Bill* 31 Conn. 534.

John W. Turner and *Loveridge & Barlow* for defendants in error. A promissory note with a clause appended to it giving the payee power to entend the time of payment indefinitely, must be read together: *Barnard v. Cushing* 4 Met. 230; an instrument is not a promissory note if the date at which it is payable cannot be made certain: *Brooks v. Hargreaves* 21 Mich. 254; a note must be payable unconditionally to be negotiable: 1 Dan. Neg. Inst. 34; *Hubbard v. Mosely* 11 Gray 170; *Amer. Exch. Bk. v. Blanchard* 7 Allen 333; it must be payable at a time certain: *Fralick v. Norton* 2 Mich. 130; *Mattison v. Marks* 31 Mich. 421; if its language is ambiguous, parol evidence of the circumstances under which it was made may be given to aid in construing it: *Facey v. Otis* 11 Mich. 213.

CAMPBELL, J. The only question in this case is whether the note in suit is negotiable so as to protect holders without notice.

It is a joint and several note signed by the two Van Blarcoms, payable to the order of one of them, Charles H. Van Blarcom, for $300, payable in the body of the note at 3 months with interest at 10 per cent. Appended to it was this clause: "The makers and endorsers of this note expressly agree that the payee, or his assigns, may extend the time of payment thereof indefinitely, as he or they may see fit."

The court below held that this destroyed the negotiability, because it rendered the time of payment uncertain.

Plaintiffs in error claim that this clause is void, and that the note should stand without it. But it cannot be held void unless it is either illegal or nugatory as meaning nothing.

Parties may make such innocent bargains as they choose, and the effect will not be to destroy the legality of the instrument, although it may destroy its negotiability.

By the terms of this note, which must be read subject to the condition, it was not payable absolutely three months after date, or at any other one time. The time of payment could be postponed not merely once but as often as either Charles H. Van Blarcom or his assigns might think it desirable. There is nothing on the face of the note whereby any one can tell either directly or by reference to any particular event, at what period this paper will become absolutely payable. We cannot conceive how this can be treated as not payable on a contingency.

It would not be easy to harmonize all the cases on this subject, and we shall not attempt to do so. If any of them maintain that the time of payment may be indefinitely shifted at the will of any of the parties, we cannot accept the doctrine. Public policy would not be furthered, and honesty would not be subserved by encouraging the negotiation of paper which is so palpably uncertain on its face that no good business man can look at it without seeing that it must have originated in peculiar dealings which would probably, if known, qualify its obligation.

As between the original parties to this note the circumstances of its issue can be explained, and when explained it appears that this was only one of various contemporaneous written contracts which must be read together. When so read the condition in question is shown to have had a reasonable and important purpose, and to have been limited by the other writing. The negotiation of the note was a fraud on the makers, if their claims are true, and nothing but the supposed negotiable quality of the note could deprive them of their defense. We think the condition in question reduced the paper to a simple contract and destroyed its quality as a negotiable note.

The judgment must be affirmed with costs.

The other Justices concurred.

Henry Harrington v. George Gies.

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Contract of service—Furnishing wife's services—Variance.

A man bringing suit in his own name, put in evidence a contract under which he and his wife were to work for defendant. *Held*, that there was no material variance.

A man can contract to furnish his own services and those of his wife, and if his wife makes no separate claim, can sue for them. And if the wife gives evidence in support of his demand, upon the trial, it is a sufficient ratification of his contract, if necessary to ratify it.

A servant suing his employer upon a contract of service which the latter has prevented him from fulfilling by discharging him without cause before the expiration of the time for which he was hired, should meanwhile seek employment in his neighborhood, and if he fails to get it and does work for himself, its value cannot be deducted from the amount of his claim.

Error to Macomb. Submitted Jan. 13. Decided Jan. 26.

Assumpsit. Defendant brings error. Affirmed.

William S. Thomas and *Henry M. Cheever* for plaintiff in error. Where a man and his wife make a contract the right of action for a breach is joint: *Berger v. Jacobs* 21 Mich. 215; *Tillman v. Shackleton* 15 Mich. 447; *Campbell v. White* 22 Mich. 178; *De Vries v. Conklin* 27 Mich. 255; *Rankin v. West* 25 Mich. 195; a servant who sues his employer for breach of the contract of service by discharging him, must reduce the damages by seeking other employment (*King v. Steiren* 44 Penn. St. 99; *Hoyt v. Wildfire* 3 Johns. 518; *Ward v. Ames* 9 Johns. 138; *Emerson v. Howland* 1 Mason 51; *Armfield v. Nash* 31 Miss. 361) and that for which he will receive compensation: *Hunt v. Crane* 33 Miss. 669; *Danley v. Williams* 16 Wis. 581; *Gordon v. Brewster* 7 Wis. 355.

E. Weeks and *Crocker & Hutchins* for defendant in error.

MARSTON, C. J. Gies sued Harrington in *assumpsit*, declaring specially. Upon the trial he gave evidence tending to prove that in April, 1878, he entered into an agreement with Harrington, by which he, Gies and his wife, should work for defendant one year, upon his farm, taking care of the farm-house, boarding men, and also to give defendant the use of a cow owned by the plaintiff. Defendant was to furnish all needed supplies for the house and pay plaintiff $180. It was farther claimed by plaintiff that at the expiration of six months from the time they commenced work the defendant, without good and sufficient cause, discharged them.

The principal objections urged in this court are, that there was a variance between the declaration and proofs, and that the husband could not sue in his own name and recover for the services of his wife.

We find no material variance between the declaration and the proofs. All that was alleged was proved, or at least evidence given tending to prove it. In reference to the second objection, the wife does not seem to have made any separate claim. The husband had a right to enter into a contract to work himself and to furnish labor of any other person, whether his wife or not, and if he performed on his part, we see no reason why he should not be permitted to recover. His wife made no claim against the defendant, but appeared as a witness on the trial in corroboration and support of her husband's claim, thus ratifying his agreement if any ratification was necessary.

The court fairly and clearly submitted to the jury the question whether defendant was justified in discharging the plaintiff and also whether plaintiff made reasonable effort to obtain other employment.

The plaintiff after leaving defendant's employ and within the year performed some services upon his own land, and this the defendant sought to inquire into and have the value thereof deducted from the plaintiff's claim. If the plaintiff made an effort to obtain employment in the vicinity where he resided and failed, he was under no obligation to remain

idle, and if he performed some labor for himself he could not be charged with the value thereof.

The judgment must be affirmed with costs.

The other Justices concurred.

GEORGE A. HECHT AND GEORGE ITTNER, IMPLEADED WITH THOMAS MEARNS v. ARMINA FERRIS AND WILLIAM FERRIS.

Action for rent on appeal bond in proceedings for recovery of land—Assignment of lease—Evidence in bar.

In an action for rent based on the condition of the appeal bond in proceedings for the recovery of the land, it was *held*, that proof of the writ of restitution was proper if it was served, and immaterial if complainant got possession without it.

Sureties on an appeal bond, being sued alone, did not plead the non-joinder of their principal, in abatement, but the court set aside a default for the non-joinder and allowed an amendment. On a new summons the principal was defaulted, but the sureties pleaded the general issue to the amended declaration, and went to trial, without legally objecting to it. *Held*, that on error they could not raise any question about the propriety of the new pleading.

An action for rent was brought on the condition of the appeal bond in proceedings to recover the land from the tenant. In bar of recovery proof was offered of an execution sale of the property against one of the lessors in favor of one of the sureties, and of a judgment in favor of the same surety in summary proceedings against the same lessor and the lessee for the possession of the same premises. But the lessee had enjoyed the premises for a certain period and neither he nor his lessor had been ousted. *Held*, that the proof was properly ruled out.

In an action for rent against the sureties on an appeal bond bringing up proceedings for the recovery of the premises leased by a man and his wife, an order payable out of the rent, signed by the man but not by his wife, and drawn upon the tenant, was held inadmissible where there was no assignment of the lease by both lessors.

One of two lessors, even if the other be his wife, cannot assign the lease.

An action for rent must be brought in the names of the lessors if the lease has not been assigned.

A tenant who has accepted his lease from several lessors jointly cannot inquire into their individual interests so long as he remains in possession undisturbed.

Error to Bay. Submitted Jan. 13. Decided Jan. 26.

DEBT on bond. Defendants bring error. Affirmed.

A. C. Maxwell for plaintiffs in error.

McDonell & Mann for defendants in error.

CAMPBELL, J. This is an action for rent under the condition of an appeal bond in proceedings for the recovery of land, removed from a commissioner into the circuit court for Bay county.

On the 26th of February, 1876, a lease was made by defendants in error, who are husband and wife, of a hotel and furniture to Mearns for a year from March 1st at $1000 a year in monthly instalments. He remained in possession till August 26th, and absconded. In May, 1878, proceedings were begun to remove him for non-payment of rent, and judgment of restitution given which was appealed, and the bond in suit executed. In the appellate court judgment of restitution was given in September, and the writ served and restitution made in January, 1879. There was no proof of any different possession by any other person, but Ferris and wife are said to have got in on the 26th of August. Some objection was made to proof of the writ of restitution, but it was proper if served, and immaterial if the parties had got in without it.

Suit was brought on the appeal bond against the sureties alone. They did not plead in abatement the non-joinder of Mearns, but after default the circuit court set it aside for the non-joinder but allowed an amendment, and a new summons was issued to reach him and he was defaulted. The other defendants pleaded the general issue to the amended declaration, and went to trial on it. They cannot now raise any question about the propriety of the new pleading, to which it does not appear they ever objected in any legal way below.

On the trial a recovery was had for rent up to August 26th, 1878, from May 2, which was the time during which it was unpaid. The defendants sought to prove two transactions in bar of it, which were an execution sale against William Ferris in favor of George A. Hecht, one of the plaintiffs in error, wherein the deed was dated March 8th, 1878; and summary proceedings against Mearns and William Ferris on which judgment in favor of Hecht was rendered, August 9, 1878, but no writ of restitution ever issued. Both of these were properly ruled out, inasmuch as Mearns enjoyed the premises till August, 1878, and neither he nor Ferris was ousted.

An order on Mearns for $450 payable out of the future rents to Hecht and accepted by him, dated April 25th, and signed by Ferris, and not by his wife, was also ruled out, and we think properly. There was no assignment of the lease, or of any more than a part of the rent, and Ferris alone could not make an assignment. No suit for rent, where the lease is not assigned, can be brought in the name of any but the lessors. They may be responsible to some one else for what they recover, if they have made any charge upon it, but they must sue for it themselves. The lease being accepted from the two jointly as lessors, the tenant could not inquire into their individual interests, so long as he remained in possession undisturbed; and no such inquiry is open in this action for rent, during his occupancy.

Objection was made against recovering rent as far back as May. But the bond sued on secured by its terms all rent due or to become due from Mearns, and this rent was all due.

No exception was taken to the charge or in any other way, whereby the objection was presented that the rent should be apportioned on account of the furniture, and therefore we need not inquire whether the lessee of a furnished house, under such a bond as this, can claim a reduction for the furniture when his rent is all in default.

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

The other Justices concurred.

45 379
111 396

GEORGE W. JONES ET AL v. LAFAYETTE W. SCHALL ET AL.

Receivership.

A receiver cannot be appointed as a preliminary to filing a bill and beginning suit, and without any notice to parties interested in the property placed in his hands.

Appeal from Cass. Submitted Jan. 13. Decided Jan. 26.

BILL to set aside mortgages claimed to be fraudulent. Defendants appeal. Reversed.

Howell & Carr and *L. A. Tabor* for complainants

R. R. Pealer for defendants appellant.

MARSTON, C. J. The complainants on the 15th of November, 1879, filed their bill of complaint in the circuit court for the county of Cass in chancery, alleging therein that each had on the 11th day of October, 1879, recovered judgments against the defendants, Lafayette W. and Peter Schall, for certain specified sums; that each of said causes had been commenced by attachment and levies made thereunder upon certain personal property of said defendants, which is particularly described. It was also alleged that executions had been issued upon said judgments and said property levied upon by virtue thereof, but it was conceded on the argument that no such levy had or has been made. It is farther alleged that Lafayette W. Schall executed and delivered a chattel mortgage on said personal property, March 7, 1879, to his wife; also a similar mortgage on said property, May 8, 1879, and that Peter Schall had given to his wife and one Precilla McEntefer, March 7, 1879, a chattel mortgage on said property; also one dated May 8, 1879; also a mortgage by Lafayette to his brother Elias.

It is alleged that all these instruments, except the last, were given for the express purpose of cheating and defraud-

ing complainants and to hinder and delay them in collection of their respective claims. Certain other facts were alleged, and, amongst them, that a forced sale of such property subject to such encumbrances, would not realize any sum to apply on their claims, and they prayed for the appointment of a receiver to take charge of such property.

On the 13th day of November a receiver was appointed "to take immediate charge of all the personal property of the said defendants Lafayette W. Schall and Peter Schall, except such as is exempt from execution by law, and to sell and dispose of the same for cash to the best possible advantage, in any mode or manner that may seem to him to be most advantageous to all the parties concerned, and after the sale of such property to bring the moneys arising therefrom into this court, and deposit the same with the register of this court, to be held by him until it shall be determined by this court by regular decree, as to whom the same rightfully belongs." Possession was taken, a sale made and the money deposited as thus ordered, and a part of it has since been distributed by a final decree in the case.

This appointment of a receiver, even if one could have been appointed at any stage of the case, was absolutely void, as the bill had not been filed and no suit commenced at the time. *Merchants' & Manufacturers' Nat. Bank v. Circuit Judge* 43 Mich. 292. These proceedings were intended and operated as a substitute for an execution at law, and there was no equity stated in the bill. No levy was made on the property by virtue of the execution, and the court upon an *ex parte* application, upon the ground apparently that some of the mortgages were fraudulent in whole or in part, ordered possession to be taken of the property and the receiver to sell it in any mode or manner that to him might seem most advantageous. This is a most dangerous power to give to any man. The law has pointed out a way in which personal property may be seized and sold upon execution, and requires notice of such sale to be given, and the sale to be public. This, it is supposed, would afford some protection to owners or parties interested therein, but all such means

of protection were thrown aside in this case. Had the ordinary method been pursued, the mortgagees could have taken steps to protect their interests, and have an opportunity at least to be heard before condemnation, and could have had the question submitted to a jury. This right also was denied them. Their securities were in effect declared fraudulent, the property upon which they relied for protection ordered sold, and they then graciously permitted to come into a court of chancery and be heard in defense of their claims. As was said in *Arnold v. Bright* 41 Mich. 210: "The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it." And subsequent cases in this court have very emphatically condemned the practice of resorting to these extraordinary remedies. There are other objections to the proceedings in this case but they need not be considered.

The decree must be reversed and the bill dismissed as to the appellants with costs of both courts, and the record will be remanded to the court below in order that the parties interested may take such further action as they may deem necessary and proper.

The other Justices concurred.

45	381
80	660
45	381
105	505

W. Durfee Pettibone v. Adam Maclem.

Declaration—Application of judge's charge—Special questions—Costs.

An objection to a declaration for not being full enough should be taken before going on with the trial.

Where the issue is distinctly set forth in the pleadings, and the evidence conforms to it, and the record does not show that the plaintiff took any ground inconsistent with the proofs, it is not to be assumed that the jury applied the language of the charge so as to make it cover anything foreign to the issue.

A general verdict need not be excluded for the failure of the jury to answer special questions that are of no legal consequence.

Costs are discretionary in cases determined in the circuit court on appeal from a justice, and their allowance will not be reviewed.

Error to Macomb. Submitted Jan. 13 and 14. Decided Jan. 26.

CASE. Defendant brings error. Affirmed.

James B. Eldredge for plaintiff in error.

Crocker & Hutchins for defendant in error.

GRAVES, J. This is a companion case to *Pettibone v. Smith* reported in 37 Mich. 579, and the outline there given will suffice for this occasion. The action was brought for the same interference with the same water-course and the jury found a verdict in Maclem's favor for $5. Although the exceptions are very numerous we think it needless to use many words. The law applicable has been pretty fully explained in former cases. *Dumont v. Kellogg* 29 Mich. 423; *Hall v. Ionia* 38 Mich. 493. *Pettibone v. Smith*, supra, has also a direct bearing.

There is no valid objection to the declaration. If it was not supposed to be full enough the objection should have been taken before entering upon the trial.

Maclem's contention was in substance that Pettibone had obstructed and diverted the stream in such manner, and to such extent, that the water thereby became so much wasted by frost, absorption and evaporation as to cause him material injury and damage. The point is now made that the circuit judge in charging the jury made no allowance for the diminution of the water consequent on the reasonable use of the stream by Pettibone for watering his stock and for other domestic purposes; but gave the case to the jury in terms broad enough to permit them to hold Pettibone responsible for diminution of water however caused. We think this is not a just view and that the jury did not receive the charge

in that sense or so apply it. The controversy as shaped by the pleadings and followed up by the whole evidence distinctly excluded all liability of Pettibone on account of having used the water for stock or for his household or for any like purpose, and the record contains no sign of any position by the plaintiff inconsistent with the course of proof. Now it is no more than reasonable to assume that the jury did not step aside and apply the language of the charge to something wholly foreign to the issue. The case contains no evidence that they did so and the fair conclusion is that they applied it correctly and were not misled.

We do not find it necessary to discuss the twenty-one requests for instructions. The actual dispute was fully covered by the charge and the jury were not misdirected. The defendant objected to the reception of the general verdict because the jury had not answered each of twenty-seven special questions. We think the court committed no error in refusing to allow the objection. Nearly all the questions were answered, and those which were not were of no legal consequence. It is not needful to add further reasons.

The case originated before a justice of the peace and the recovery was for $100. As this was reduced to $5 the claim is made that the court below erred in allowing costs to the plaintiff. The defendant, it is said, should have had costs. The allowance of costs in the appellate court was discretionary and we cannot review it. *Hewitt v. Ingham Circuit Judge* 44 Mich. 153.

We have examined the exceptions as to the admission and rejection of evidence and do not find any which call for discussion.

The judgment should be affirmed with costs.

The other Justices concurred.

Michael Peltier v. John Babillion.

Promissory note payable to estate.

A note made payable to the "order of J. V. Mehling estate," and indorsed by the sole legatee who was also executrix, was *held* valid and payable to the proper representative of the estate.

In an action on the common counts by the indorsee of a note made payable to a specified estate and indorsed by the sole legatee and executrix, its negotiability is unimportant, because, if negotiable, it is indorsed by one who is presumed to hold the title to the estate, and if not, the assignee, under Michigan statutes, can sue on it in his own name.

Error to Macomb. Submitted Jan. 14. Decided Jan. 26.

Assumpsit. Defendant brings error. Affirmed.

Crocker & Hutchins for plaintiff in error.

Edgar Weeks for defendant in error. Promissory notes have been held good when made payable to M. K. "or heirs:" *Knight v. Jones* 21 Mich. 161; to "St. Bt. Juda and owners:" *Moore v. Anderson* 8 Ind. 18; to "the estate of E., deceased:" *M'Kinney v. Harter* 7 Blackf. 385; to the "administrator of A.'s estate:" *Moody v. Threlkeld* 13 Ga. 55; *Adams v. King* 16 Ill. 169; to "R. C., guardian of E. N:" *Bingham v. Calvert* 13 Ark. 399; to "the heirs of A." who was still living: *Bacon v. Fitch* 1 Root 181; to "the trustees acting under the will of A.:" *Megginson v. Harper* 2 C. & M. 322.

Campbell, J. Babillion sued Peltier in the circuit court for the county of Macomb, on the common counts, and appended a notice that the plaintiff would give in evidence, under the money counts, a promissory note, a copy of which was appended. This note was in the usual form, for $370 and interest at 8 per cent., dated October 7, 1878, and payable one day after date to the "order of J. V. Mehling estate," at store 28 and 30, Michigan Grand avenue, Detroit. This was

indorsed by Sophia Mehling, sole legatee of John V. Mehling. It appears that she is also executrix. The circuit court gave judgment on it.

The only question presented by the argument for plaintiff in error, and therefore the only one we need notice, is that this instrument contains no payee, and is not a negotiable promissory note.

Inasmuch as the declaration contains no special count, the negotiable quality of the paper, if valid, does not seem to us important. If not negotiable the assignee can, under our statute, sue in his own name. If negotiable, it is not claimed that Mrs. Mehling, being both executrix and sole legatee, does not hold the title of the estate.

We think that this note was a valid instrument, and payable to the proper representative of the estate. Such was the manifest intent of the parties, and there is no legal reason that we can discover to the contrary. There is no uncertainty about the intent, and there has been no change in the representative.

The judgment must be affirmed with costs.

The other Justices concurred.

PETER NICKODEMUS v. JACOB NICKODEMUS.

Absolute transfer of property by debtor.

A man made an absolute conveyance of his property to his brother in order to avoid the payment of certain paper upon which, he claimed, his liability had been fraudulently obtained. He was also otherwise indebted. In a suit by creditors to set aside the conveyance as fraudulent as against them, it was proven by the brothers to have been *bona fide*. The grantor afterwards filed a bill against his brother for an accounting and for leave to redeem, claiming that it had been further agreed between them that the defendant, after paying complainant's debts out of the proceeds and profits of the property, should reconvey. *Held*, on the evidence, that the bill was rightly dismissed.

Appeal from Saginaw. Submitted January 14. Decided January 26.

BILL for accounting and reconveyance. Dismissal affirmed.

Tarsney & Weadock for complainant.

John McArthur, *William H. Sweet* and *George A. Flanders* for defendant. Fraudulent conveyances, while void as to creditors, are valid as between the parties: Story's Eq. Jur. §§ 353-5, 371; 4 Bac. Ab. 412; *Bolt v. Rogers* 3 Paige 157; *Nellis v. Clark* 20 Wend. 24: 4 Hill. 424; *Osborne v. Moss* 7 Johns. 161; *Noble v. Noble* 26 Ark. 317; *Jones v. Rahilly* 16 Minn. 320; *Blount v. Costen* 47 Ga. 534; *Moseley v. Moseley* 15 N. Y. 335; *Stephens v. Heirs of Harrow* 26 Ia. 458; *Stewart v. Ackley* 52 Barb. 283; *Sweet v. Tinslar* id. 271; *Dunbar v. McFall* 9 Humph. 505; *Tremper v. Barton* 18 Ohio 418; *Malin v. Garsney* 16 Johns. 189; *St. John v. Benedict* 6 Johns. Ch. 111; *Gage v. Gage* 36 Mich. 229; but see *Clemens v. Clemens* 28 Wis. 637; courts will not allow debtors to transfer property to pay just debts and avoid those that are unjust: *Brady v. Briscoe* 2 J. J. Marsh. 213; *Stewart v. Iglehart* 7 G. & J. 132; *Ward v. Trotter* 3 T. B. Mon. 2; where it is claimed that one who holds title under an absolute conveyance holds it in trust, the trust must be satisfactorily established: *Shepard v. Pratt* 32 Ia. 296; parol evidence to supplement the written evidence is inadmissible: *Cook v. Barr* 44 N. Y. 156; where property is conveyed by an ordinary deed, without any condition or declaration of trust, and which declares the uses to be for the grantee's benefit, no resulting trust can arise in the grantor's favor under any parol agreement contravening the deed: *Brown v. Bronson* 35 Mich. 415.

MARSTON, C. J. The complainant and defendant are brothers, and, prior to 1869, they owned certain real estate in common and were engaged in keeping a saloon in East Saginaw. The complainant had become indebted as an indorser, and was also liable on certain paper which he claims was fraudulently obtained, and to avoid payment of this last, he made an absolute conveyance of certain real and personal property to the defendant, and a written agreement was at

the same time executed, under which the grantee was to pay certain debts against the complainant in consideration of the conveyances made. The complainant now claims that there was a farther agreement made between the defendant and himself, that he, the complainant, should retain his interest in the saloon; that the defendant out of the profits and proceeds of the property was to pay the debts of the complainant, except the notes fraudulently obtained, and that upon payment thereof, the defendant should then reconvey to complainant his interest in the property. The bill was filed in this case for an accounting and for leave to redeem. It is almost needless to say that the defendant claims that the conveyance to him was absolute; that he was not to reconvey when the debts were paid, and that complainant had no interest in the business carried on by him. The case was heard upon pleadings and proofs and the bill dismissed.

All the writings introduced in evidence sustain the defendant's theory. The oral evidence introduced on the part of the complainant, standing alone, is not of that clear and satisfactory character which would justify a court in granting the relief prayed for.

After the conveyance was made certain creditors of the complainant levied upon the property and then filed a bill in chancery to have the conveyance set aside as fraudulent as against creditors. The complainant put in an answer, and was examined as a witness in that case, and also the defendant. The transaction was then by them proven to the satisfaction of the creditors to have been *bona fide*, and the proceedings were abandoned. No pretence was then made by this complainant that he had any interest in the property, or that it was at any time or under any circumstances to be reconveyed to him. If valid then, it has not changed since

We need not discuss the questions raised at length.

The decree must be affirmed with costs.

CAMPBELL and GRAVES, JJ. concurred: COOLEY, J. did not sit in this case.

Albert W. Bates v. Nancy Phinney.

Liability for rent—Construction of agreement.

A three years' lease of farm lands began in March, 1877, and the rent was to be paid annually, October 15. September 2, 1878, the parties terminated the lease, but it was agreed that the tenant might keep possession until he could harvest his crops; that he was to pay no rent from that date; and that this stipulation was not to affect the rent to become due in October. *Held*, that this did not bind him to pay the rent for the whole year, but only until September 2, the date of the stipulation.

Rent is the consideration for occupancy, and there is no consideration for its payment when the enjoyment of the rented premises ceases.

An action for use and occupation will not lie where no actual use exists or is bargained for.

Error to Hillsdale. Submitted Jan. 14. Decided Jan. 26.

Assumpsit. Defendant brings error. Reversed.

Shepard & Fowle for plaintiff in error.

George A. Knickerbocker and *Charles W. Pratt* for defendant in error.

Campbell, J. This was an action for half a year's rent, claimed to be due from Bates under a lease from Ellen Lucas, mother and assignor of Mrs. Phinney.

In March, 1877, Bates took a written lease of a tract of 30 acres in Woodbridge, Hillsdale county, for three years—which would be until March, 1880. He paid $5 an acre for the wheat then in the ground, and $2.50 per acre for a lot called the southeast lot, and for the west lot he was to put up a fence. For the second and third years he was to pay $2.50 an acre for the land under cultivation. The rent was to be paid each year on October 15.

In 1878 there was some difficulty and litigation about matters which do not appear in the record; but which do not seem to have grown directly out of the lease. On the 2d of

September, 1878, a stipulation was made between Bates and Mrs. Lucas, whereby he agreed to discontinue his suit, and it was further agreed that he should give up immediate possession to Mrs. Lucas to enable her to put in fall crops, retaining the house and land on which his then growing crops stood for forty days, to enable him to harvest them; but it being in that immediate connection declared that Bates was "*to pay no rent from this date.*" After some further recitals it concluded as follows: "This stipulation being in full settlement of the matter in difference in this suit, but not to affect the rent to become due in October, by said Bates to said Ellen Lucas."

The only question of importance is whether under this stipulation Bates was to pay rent for the whole year ending March, 1879, or for the half-year ending about the date of the stipulation. The court below held that his payment to the latter date left him still indebted for the remaining half-year when he was out of possession.

We think this was erroneous. October was only the time fixed by the lease at the middle of the year to pay the year's rent. It is quite likely the chief value of the use of the land was in its cultivation. But the lease does not contain anything which indicates that the occupation from October to March was regarded as of no account. There was a house and other conveniences as well as land. And in stipulating for the occupancy of the house and premises for forty days after September 2, 1878, if the whole rent was to be paid in October for the year's occupancy till March, in spite of the surrender, it would have been absurd to speak of Bates being required to pay no rent from September, when in fact he was to pay for six months longer.

Rent is the consideration for occupancy, and there was no consideration for payment when enjoyment was to cease. We think taking the whole document together it merely meant that the surrender and termination of the lease before the rent-day arrived, should not exempt Bates from paying in October the rent due for the half-year's occupancy. There is nothing to support any larger promise, and the theory of

the action for use and occupation will not apply to a case where no actual use existed or was even bargained for.

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

MARSTON, C. J. and GRAVES, J. concurred.

COOLEY, J. did not sit in this case.

JOHN BUTLER v. HENRY C. HOGADONE, PHEBE J. HOGADONE ET AL.

Foreclosure—Bona fide purchase—Statute of limitations.

A man gave a mortgage, in which his wife united, upon certain lands, which he held under a certificate of part payment from the State. He afterwards assigned his rights under this certificate to his brother, who, in turn, assigned his interest to the wife. On foreclosure the wife claimed that, as the brother had no notice of the mortgage, he was a *bona fide* purchaser and she was entitled to the same protection as he. But as it did not satisfactorily appear that actual payment had been made on the assignment, the defense was overruled.

Foreclosure of a mortgage dated in 1855 was not barred in 1878 where there was proof of payments made as late as 1866 by the mortgager as agent for his wife, who held the mortgaged interest under an assignment from a *mesne* purchaser.

Appeal from Kent. Submitted Jan. 14. Decided Jan. 26.

FORECLOSURE. Defendant Phebe J. Hogadone appeals. Affirmed

Simonds & Fletcher for complainant.

White & Dodge and *White & Howell* for defendant appellant.

MARSTON, C. J. The complainant on the 27th day of February, 1878, filed the bill of complaint set forth in the record to foreclose a mortgage dated February 21st, 1855,

given by defendants Henry C. and Phebe J. Hogadone his wife, to George Kendall, and by the latter assigned to complainant. A note of even date accompanied the mortgage. The lands described in the mortgage were known as Salt Spring lands, purchased from the State at four dollars per acre, one-quarter of which was paid in cash and a certificate issued to the purchaser Henry C. Hogadone. No patent has as yet been issued and no farther payment of the principal made.

March 2d, 1859, Henry C. Hogadone assigned all his rights under said certificate, to his brother Edwin D. The consideration recited in this certificate is $500, and on the twenty-sixth day of the same month, Edwin D. assigned his interest to Phebe J. A like consideration is recited in this assignment.

It is now claimed that Edwin D. was a *bona fide* purchaser, having no notice of said mortgage, and that Phebe J., claiming through a *bona fide* purchaser, is entitled to the same protection that would have been afforded to him. The recitals in the assignment have no tendency to show actual payment, and Henry C. and Phebe J., the only witnesses testifying upon the subject, utterly fail to show any payment made. It is true they say this consideration was paid, but how it was paid, or any of the particulars, they fail to state. We have no doubt whatever but that the whole transaction was a mere cover and sham.

It was also urged by the defendant that the cause of action was barred by the statute of limitations. A number of payments are indorsed on the note, the last dated in March, 1866, and signed by Henry C. Hogadone, the maker of the note. Besides this, proof that such payments were made was given, and that Henry C. in making them was acting under authority from his wife, so that the case was taken out of the statute, and the remedy under the mortgage not barred.

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

CAMPBELL and GRAVES, JJ. concurred.

COOLEY, J. did not sit in this case.

James G. Bunt administrator v. Isaac Jones.

Claim by a husband against his wife's estate.

A husband assigned to his wife a judgment recovered by him, but after her death he filed a claim against her estate for the money received on it as for money received to his use. It did not appear that she had received it on any trust in his favor, or that she owed him anything. *Held*, that in respect to this transaction the husband and wife were one in law unless he gave her the money or paid it to her on a part or concurrent consideration. If they were one, an *assumpit* could not arise between them; if the money were given or paid to her it was hers unconditionally and there was nothing to support an *assumpsit* from the wife to the husband.

Error to Hillsdale. Submitted Jan. 14. Decided Jan. 26.

Appeal from allowance by commissioners on an estate. The administrator brings error. Reversed.

George A. Knickerbocker for plaintiff in error.

Shepard & Fowle and *E. L. Koon* for defendant in error.

Graves, J. The defendant in error, having obtained judgment against a railroad company for several hundred dollars, made an assignment of it to his wife, who received the money, and after her death he preferred a claim against her estate therefor as money received to his use. The commissioners allowed the claim and the administrator appealed. On the trial in the circuit court the claimant put these papers in evidence:

"Hillsdale, Mich., May 12, A. D. 1873.

"Received of A. Dickerman seven hundred and six dollars and twenty-one cents in full for money due me upon judgment of Isaac Jones against the Detroit, Hillsdale & Indiana Railroad Company. Sarah Jones."

"I acknowledge satisfaction of the above amount, and ratify the action of my wife having heretofore sold and assigned said judgment to her. Isaac Jones."

The money here specified is the same sought to be recovered. In addition to the evidence supplied by the papers the claimant was allowed to show that on two or three occasions his wife said that the money was assigned to her because he would waste it in drink, and she could take better care of it than he could. On the part of the administrator it was shown among other things that she expressly denied that he had any interest, and told him she owed him nothing.

The circuit judge refused to direct a finding for the plaintiff in error, and submitted the case on the assumption that a verdict might be given for the claimant on the theory that the money was received and held by Mrs. Jones on a trust in his favor, and the jury allowed him $191.44. We cannot assent to this view of the case.

The husband and wife in respect to this transaction were in law one person, unless the money was a gift, or was a payment made to her on account of a present or prior consideration. If the relation was that first mentioned it was not possible for an *assumpsit* to arise from one to the other. *Jenne v. Marble* 37 Mich. 319. If it was a case of gift, or a case of payment made on a concurrent or antecedent consideration, then there was nothing to give rise to an *assumpsit* from the wife to the husband. The money belonged to her unconditionally. The transaction must have borne one of these characters and there was no basis for implying a cause of action on any theory of trusts.

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

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

COOLEY, J. did not sit in this case.

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ANDRUS EVELAND v. SAMUEL M. STEPHENSON ET AL.

Equity pleadings—Bill must be signed—Effect of demurrer—Bill of review or for rehearing.

A bill in equity, if not signed in person or with the responsible signature of counsel, appended by himself or by some authorized representative, may be stricken from the files. A printed signature is not good.

An objection to the sufficiency of a pleading only admits the facts stated for the temporary purpose of the pending suit.

Any bill whose main purpose is to obtain a new hearing of a controversy already decided, either on questions of law or on the same or additional testimony, is a bill of review or in the nature of a bill of review, even though it involves matters of supplement or revivor or other additional elements.

E. filed a bill to assure his title to land recovered from him by H. in a previous suit; he asked also that the former decree be declared void or that a rehearing be allowed on the grounds that false testimony had been given in the previous suit,—that after the decree both parties had agreed to a settlement, but that H. had repudiated the bargain when it was too late for E. to appeal,—and that there was newly discovered evidence. *Held*, that this was merely a bill for a rehearing, and that not being sworn to, it could not stand as a petition for a rehearing under Chancery Rule 81.

A bill to enforce an agreement involving an interest in land is demurrable if it appears that the agreement is void under the statute of frauds; and even if it does not appear, the defect is involved in the case. But the defense may be lost by not insisting on it.

A bill in equity is not necessary to reach a reversion of land in which another person has held a life estate which has run out.

Appeal from Menominee. Submitted January 14. Decided January 26.

BILL to vacate decree or for rehearing. The bill was stricken from the files in the lower court. Complainant appeals.

Thos. B. Rice, *L. F. Frisby* and *E. P. Smith* for complainant. A bill in chancery lies to set aside a decree for fraud: Willard's Eq. Jur. 160; Adams' Equity 416, 419–20;

Lube's Eq. Pl. 177; 1 Story's Eq. Jur. § 252; Kerr on Fraud 293; see *Huebschman v. Baker* 7 Wis. 542; *Jilsun v. Stebbins* 41 Wis. 235; *Loomer v. Wheelwright* 3 Sandf. Ch. 135; *Monell v. Lawrence* 12 Johns. 521; *Reigal v. Wood* 1 Johns. Ch. 402; *Campau v. Van Dyke* 15 Mich. 371; *Stowell v. Eldred* 26 Wis. 504; *Blakesley v. Johnson* 13 Wis. 530; *Merritt v. Baldwin* 6 Wis. 439; *Barber v. Rukeyser* 39 Wis. 590.

B. J. Brown and *H. O. Fairchild* for defendants. A bill to impeach a decree for fraud is essentially a bill of review or in that nature: *Mussel v. Morgan* 3 Br. Ch. 74; *Exp. Smith* 34 Ala. 455; *Frost v. Myrick* 1 Barb. 362; *Edmondson v. Moseby's heirs* 4 J. J. Marsh. 497; *Hollingsworth v. M'Donald* 2 Har. & J. 230; *Singleton v. Singleton* 8 B. Mon. 340; relief may be given on the ground of fraud when it consists in something unknown to the opposite party at the time the decreee was procured: 1 Story's Eq. Jur. § 252*a*; *Patch v. Ward* L. R. 3 Ch. App. 203; *Ross v. Wood* 70 N. Y. 8; or where the fraud affects the merits, in which case, if the decree is reversed, the party is entitled to a rehearing; newly discovered evidence may be considered on a motion for rehearing: *Sheldon v. Hawes* 15 Mich. 519; *Maynard v. Pereault* 30 Mich. 160; an original bill to impeach a decree for fraud cannot be joined to a bill of review: *Berdanatti v. Sexton* 2 Tenn. Ch. 704; *Hart v. McKeen* Walk. Ch. 417; on a bill of review the cause must be tried on the original record and pleadings: *Perry v. Goodwin* 6 Mass. 498; *Swett v. Sullivan* 7 Mass. 342; *Hart v. Johnson* id. 471; an order, if correct, will not be reversed for being founded on a mistaken theory: *Wellover v. Soule* 30 Mich. 481; *Ormsby v. Barr* 22 Mich. 80; *Witherbee v. Supervisors* 70 N. Y. 228.

Campbell, J. The bill in this cause, having been filed in the circuit court for the county of Menominee, was dismissed on motion, as being in fact a bill for the purpose of reviving the decree in another suit decided in 1865, and as not having been authorized by leave of the court, or by other prerequisites which must be complied with before such a bill can be filed. Appeal is brought from the order of dismissal.

The bill, in addition to the points insisted on before the circuit judge, is neither signed nor verified. The only signatures found upon it are printed and not written. No bill can be regularly filed without being signed in person or by counsel. Under our practice every attorney is *ex officio* a counsellor, but unless a bill is actually signed by him in some capacity, by the responsible signature of himself or some authorized representative, it is irregular, and may be stricken from the files. 1 Hoffm. Ch. Pr. 97, and notes. The court below did not act upon this objection, and for other reasons we merely point it out as a matter of some importance.

All of the questions passed on by the circuit judge depend upon whether the bill is purely an original bill to set aside a decree for fraud, and not one involving the elements of one of the various forms of bills of review.

Before going further it is proper to refer very briefly to a ground taken by the appellant, whose counsel seems to think that by introducing one of the grounds of motion the rest were practically overruled, and grounds of relief so far admitted as to preclude any dismissal as equivalent to a decree on demurrer. The ground referred to by counsel was this: "*Fourth*, The bill of complaint herein is in form and substance a bill of review, or a bill in the nature of a bill of review, and states no case to entitle it to be treated as a bill to set aside or impeach a decree on the grounds of fraud."

We do not appreciate the force of this suggestion. It has never been supposed, and we are not prepared to hold, that a bad ground in a motion can hurt good grounds, or that an objection to the sufficiency of a pleading is for any but the temporary purpose of the particular hearing an admission that all it avers is true. The nature of the present controversy illustrates this very well. The rules do not allow a certain class of bills to be filed without leave. If so filed the practice has always authorized their summary removal from the files. How this can be done without inquiring into the nature and sufficiency of their allegations, it is difficult to imagine.

The complainant claims that this is a bill to set aside a

decree for fraud, and no more. The defense claims that its purpose is to obtain a new disposal of a controversy once decided.

We need not discuss the technical niceties in regard to the various kinds of bills of review, and bills in the nature of a bill of review. Any bill, the main purpose of which is to obtain a new hearing of a controversy already decided, either on questions of law or on the same or further testimony, belongs to one of these classes, although it may involve matters of supplement or revivor, or other additional elements. *Perry v. Phelips* 17 Ves. 174; *Bainbridge v. Baddeley* 2 Ph. 705. And as it is elementary law that a decree once granted is binding until set aside, the latter case, which is merely one out of very many, indicates that if the old decree could have been pleaded in bar to the new bill, if not referred to in it, the bill must of necessity be a bill of review, or in the nature of a bill of review.

The bill in the present cause recites at length a former cause where the bill was filed by one Jonathan C. Hall against complainant in this cause, to enforce an agreement whereby Hall was to have an interest in certain property entered in the land office at the Sault de Ste. Marie in the name of complainant and one Quimby, which had been put in complainant's name. Complainant now claims that this agreement, or as he claims it to have been, a resulting trust, was, if made, void under the statute of frauds.

It need not be remarked that if any such defect appeared on the face of the bill it might have been demurred to, and if not appearing, it was nevertheless involved in the case, so that Hall could not have recovered without either proof or some waiver of proof of a statutory right. It is also quite possible to lose such a defense by not insisting on it or bringing it before the court.

The bill thus shows that on the issues framed the case went to a hearing and decree, upon an answer putting everything in issue properly, and on all the evidence which diligence was able to obtain, and that the testimony of Hall and Quimby was all that Hall introduced that was material.

The decree gave Hall the land he asked for. Complainant now claims that this decree is bad and void for want of power in the court to give such relief, and also that it conveyed to Hall merely a life estate which has run out. It need not be suggested that if it really bore this remarkable construction—which it does not—there would be no occasion for this or any other bill to get the reversion.

Complainant avers that before the hearing, he was informed by his counsel that there was no possibility of his being defeated, or of Hall's getting a decree. This is one of the reasons he gives for not proceeding sooner to provide for emergencies; and that after the decree he took certain steps to consult with Mr. Cotton, a lawyer of another State, as to what had better be done, and that meanwhile he had an interview with Hall in which a certain division of lands was suggested, on which complainant desired to consult Mr. Cotton. That he afterwards, on Cotton's advice, accepted the proposition in writing, and Hall verbally assented and said he need take no further steps, but subsequently, and when too late to appeal, repudiated the bargain.

The remainder of the bill is devoted to excuses for delay, and contains statements of the discovery of various matters indicating that Hall and Quimby had sworn falsely, and also that Hall had by a general assignment negatived any right to sue for the land.

There are no other important averments, except as to changes in titles.

The bill asks relief on the merits to assure his title to the land, and that the decree may be declared void, or if not, that a rehearing may be had.

It appears, then, that the merits of the old controversy are the only matters involved in the present bill. The frauds complained of are false testimony alleged to have been given in that case, and the prevention of the appeal by putting complainant off his guard.

Reduced to its real meaning, this is nothing more nor less than an application to rehear a controversy on newly-discovered evidence, giving as an excuse for delay various good or

bad reasons why the application was not made sooner. The delay in appealing had no bearing on the question of falsehood in the evidence or newly-discovered evidence, and only bore on the propriety of a technical bill of review on the old record. But a rehearing on old or new testimony, or both, is the only thing involved in this bill. And had any other matter been mixed up with it, that could not have deprived the cause of this character.

As nothing appears under oath, it would be impossible to give this bill the quality of a petition, so that it might stand as an application under the rules. It is not of such a character that we should be disposed to give it any favor beyond what its technical shape requires.

It was properly dismissed. The order must be affirmed with costs.

MARSTON, C. J. and GRAVES, J. concurred.

COOLEY, J., did not sit in this case.

KAIRAIAZIEK HOLDEN v. DEWITT C. RANNEY.

Attachment—Return of service.

A constable's return to a writ of attachment, reciting that he had "personally attempted to serve the within attachment on the defendant by reading the same and offering a copy to him at the house of Daniel Dean, but he ran away. I could not deliver a copy to him," is not valid as a return of personal service; it does not show that the officer was actually in the presence or hearing of the defendant or that the defendant knew that he had a writ against him, or that his flight had any connection with the suit.

Error to Barry. Submitted Jan. 19. Decided Jan. 26.

REPLEVIN. Plaintiff brings error. Reversed.

C. G. Holbrook for plaintiff in error.

E. W. Hewitt, James Clarke, John Carveth and *L. E. Knappen* for defendant in error. A return of service of a writ of attachment is sufficient if it shows that the officer did all he could to effect service without committing an assault and battery and failed because of defendant's refusal to listen to the writ or receive a copy: *Slaght v. Robbins* 13 N. J. L. 340; *Story v. Ware* 35 Miss. 399; *Fuller v. Kenney* 32 Me. 334; *Orendorff v. Stanberry* 20 Ill. 89; *Davison v. Baker* 24 How. 39; *Bell v. Vincent* 7 D. & R. 233.

Cooley, J. Mrs. Holden, the plaintiff, has replevied in this suit certain wheat grown by one Fisher, and mortgaged to her October 30, 1878. The defendant claims the same wheat under an attachment levied October 28, 1878. The first question presented by the record is whether this attachment has any validity; if not, the defendant makes out no defense whatever.

The attachment was issued October 28 and might have been served on any day not later than November 1. On October 31 the constable made return to it as follows:

"By virtue of the within attachment, I, D. C. Ranney, on the 28th day of Oct., A. D. 1878, seized the goods and chattels of the defendant, mentioned in the inventory, of which the annexed is a copy, and on the same day I served on the defendant a copy of the within attachment and of the said inventory, duly certified by me, by posting a copy on the door of defendant's house, and on the 31st day of October, A. D. 1878, I personally attempted to serve the within attachment on the defendant by reading the same and offering a copy to him at the house of Daniel Dean, but he run away. I could not deliver a copy to him.

D. C. Ranney, *Constable.*"

Dated October 31st, 1878.

The inventory attached described the wheat now in question as the sole property seized.

The justice treated this return as a return of personal service, and on the return day of the writ proceeded to hear and give judgment in the case, Fisher not appearing. Execution was taken upon the judgment and placed in the hands

of the defendant as constable, and he made levy upon the wheat by virtue thereof.

If it had appeared in the case that the constable, in the presence and hearing of Fisher, had attempted to make service of the attachment and inventory upon him, and that Fisher had run away in order to prevent such service being made, we might possibly agree with the justice that the very attempt sufficiently accomplished the purpose of the statutory regulations respecting service. It would then have been evident that Fisher was aware of the officer's business with him, and the court might justly go a great way in preventing Fisher taking advantage of his own wrong.

But it did not appear from the officer's return that he was ever in the presence or hearing of Fisher, or that Fisher was aware he had any writ against him, or that Fisher's running away had anything to do with the institution of the attachment suit. It is perfectly consistent with all that appears that Fisher's running off may have been wholly blameless, or if not, that he may have fled from some other writ, real or suspected, or from anything else rather than the writ now in question. The mere act of running could not prove both that Fisher knew of this writ and also that he ran because of it. It would be a most violent assumption for any court or officer thus to hold.

The justice having proceeded to judgment without authority of law, his judgment was void. The defendant having thus failed in his defense, the judgment in his favor must be reversed with costs, and a new trial ordered.

The other Justices concurred.

JACOB ESTEY v. QUINCY A. SMITH.

Trepass for cutting and carrying away wheat—Evidence under general issue—Defendant's intent.

Where trespass for cutting and carrying away wheat is brought by an assignee of the party injured thereby, a plea to the general issue puts every part of the declaration in issue and denies not only the taking but the plaintiff's ownership at the time of the alleged trespass.

A tenant who had sown a crop which would not ripen until after the expiration of his lease, gave a chattel mortgage on it to indemnify a surety upon the bond in a replevin suit brought by him against his landlord. The surety, however, verbally assigned his interest in the mortgage to S. on condition that S. should protect him. The landlord had judgment in the replevin suit and also in his action on the bond, which latter was paid in the tenant's behalf by E. to whom the tenant afterwards assigned his right to the wheat. The landlord, however, had previously sold it to S. who had cut and removed it, for which E. sued him in trespass. *Held*, that under the plea of the general issue S. could show the transfer to him of the mortgage interest held by the surety on the replevin bond, and could introduce the mortgage itself; the evidence bore on the tenant's title to the wheat or the fact of his possession and on the question whether he had not abandoned it to the landlord.

The mere intent of a defendant in trespass is not material if his conduct was not actionable.

Error to Ingham. Submitted Jan. 19. Decided Jan. 26.

TRESPASS. Plaintiff brings error. Affirmed.

M. V. & R. A. Montgomery for plaintiff in error.

M. M. Atwood and *Q. A. Smith* for defendant in error.

GRAVES, J. A reference to a few facts will be sufficient to dispose of this case. Lewis H. Harmon made a parol lease of certain premises to one William Nestle for one year from January, 1876, and in the course of the fall Nestle sowed several acres to wheat. In the winter following and after the expiration of the year, Nestle removed from the premises

and Harmon took possession. In January, 1877, Nestle executed a chattel mortgage on the wheat to one Lamb, to indemnify him for being surety in a replevin bond given in a case brought by Nestle against Harmon. The replevin suit was decided against Nestle, and Harmon sued on the bond, and having recovered judgment the plaintiff [Estey] satisfied it. Harmon gave defendant [Smith] a bill of sale of the wheat and the latter cut it and applied it to his own use. About a year later and in August, 1879, Nestle assigned his right to Estey and he sued Smith in trespass for the cutting and carrying away of the wheat. The defendant pleaded the statutory general issue, and under the rulings of the circuit judge, the jury returned a verdict for the defendant.

In the course of his defense Smith gave evidence that Lamb agreed with him before harvest that he should have the benefit and protection of his mortgage on condition of seeing Lamb kept harmless on the bond, and that with such agreement and understanding Lamb turned over his interest in the mortgage by verbal agreement to defendant. Having made this proof Smith offered the mortgage in evidence. The plaintiff's counsel objected that it was inadmissible under the pleadings, but the court admitted it. It is now urged that this was matter of justification or excuse and was hence incompetent under the general issue in the absence of a special notice.

We think the tendency of the proof was more radical than the objection assumes. The gist of the declaration is that it was Nestle's wheat that was taken and carried away and the plea puts every part of it in issue. It not only involves a denial of the taking, but a denial of the taking of wheat belonging to Nestle, and hence a denial of the ownership of Nestle at the time of the alleged trespass is in issue. Such is the rule at common law where the action is brought by the party supposed to have been injured. Stephens' Plead. 174; 6 Robinson's Pr. 649; *Bartholomew v. Ireland* Andr. 108: *Dodd v. Kyffin* 7 Term 350; *Argent v. Durrant* 8 Term 403; *Whittington v. Boxall* 5 Ad. & El. (N. S.) 143; *Kav-*

anagh v. Gudge 7 Man. & Gr. 320. And there is no reason for an exception where the suit is by an assignee.

The proof in question we think bore on Nestle's title to the wheat and somewhat also on the fact of his possession. Moreover it tended to throw some light on the controverted question whether Nestle did not abandon the wheat to Harmon.

A charge was requested that if the defendant intended, when he took possession of the wheat, to go on and dispose of it in defiance of the mortgage and in defiance of its provisions and in defiance of any rights which the mortgagor had in the property and without any regard then to the mortgage or its conditions, the verdict must be for the plaintiff. The refusal of this request was not error. It purposed to make the case turn on the way in which the defendant's thoughts were occupied, and independently of the consideration of ownership. If his conduct was not in itself actionable, it could not be made so by any particular mental attitude towards the property. The unexpressed operations of his mind did not amount to a trespass.

Nothing further is urged against the judgment and it must be affirmed with costs.

The other Justices concurred.

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JOHN L. POOL v. CARLOS D. HORTON ET AL.

Foreclosure of mortgage subject to interests of strangers—Grantee's consent to substitution of mortgage—Non-appearance of persons wrongly impleaded—Costs as to non-appellant.

Where a mortgage is made subject to a life estate already vested in a third person, or where a third person had an undivided interest in the property before the mortgage is given, a foreclosure bill should be dismissed as to him.

Where a purchase-money mortgage contains a stipulation that it shall be "null and void" unless a certain other mortgage, already given by

the vendor upon the same property, shall be discharged, the provision is for the benefit of the vendees who give the purchase-money mortgage, and if they do not insist upon it, the mortgagee in the prior mortgage cannot.

The mortgagers of property deeded it, and afterwards gave a new mortgage in place of the former one for the purpose of correcting an error of description. The consent of the grantees to the execution of the later mortgage was attached thereto in writing, but was signed by only one, the name of the other being added "by his attorney in fact." *Held*, that the giving of consent by the one who signed was equivalent to uniting in the mortgage, and bound his interest and that of any one claiming under him to the extent to which his interest was encumbered by this consent; but that the other's interest was not bound, as the deed antedated the later mortgage to the execution of which it did not sufficiently appear that he had assented

Where complainant's own showing proves that a person impleaded as defendant is not a proper party, he will be relieved from liability even though he did not appeal and defend.

Costs are not awarded to a party who does not appeal from a decree even where it is modified in his favor.

Appeal from St. Clair. Submitted Jan. 20. Decided Jan. 26.

FORECLOSURE. Defendants appeal. Decree modified

Brown & Farrand for complainant.

A. E. Chadwick and *O'Brien J. Atkinson* for defendants.

COOLEY, J. On the 18th day of January, 1875, Carlos D. Horton, in order to secure the payment of promissory notes amounting in all to $2950, gave a mortgage to Herbert W. Pool upon lands in the city of Port Huron described as follows: The undivided one-half of the undivided one-quarter of lots number one, two and three, east of Commercial street, and eleven, twelve, thirteen and fourteen south of Quay street, all of Thorn's plat, and the undivided half of lot five, in block one hundred, and of a part of lot five, of block one hundred and six, both of White's plat, being the so-called homestead on Water street. The mortgage contained a provision that it was "subject to the life use and interest in said property of Rebecca Horton, mother of Carlos D. Horton,

and in no event to be foreclosed until the termination of such life estate."

On the fifteenth day of October following, Rebecca Horton, Carlos D. Horton and Ettie M. Beard, the first having her life estate as above, and the last being owner of an undivided one-eighth subject to said life estate, and having been such owner previous to the giving of the mortgage to Pool, joined in a deed to William B. Hibbard and John Hibbard of lands in Port Huron aforesaid described as follows: The undivided one-fourth of lots ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, south of Quay street, and lot one, east side of Commercial street, on Thorn's plat. On January 10th following, the Hibbards gave back to the grantors what seems to have been intended as a purchase-money mortgage for $2800, but with the following stipulation contained therein:

"It is also agreed by Carlos D. Horton, one of said second parties, that he will pay off and obtain a release of a certain mortgage this day executed to one Herbert W. Pool upon the interest of him, said Carlos D. Horton, in the above-described lots, for the sum of two thousand nine hundred and fifty dollars, it being further agreed that this mortgage is to be null and void unless the Pool mortgage is discharged to the extent of the notes herewith given, on or before the maturing of notes collateral hereto." A further clause was as follows: "This mortgage being given for a part of the purchase money on premises described, and in place of one dated October 15, 1875, and to correct a mistake therein."

The mortgage mentioned in the above stipulation was given, as there indicated, on the tenth day of January, 1876, by Carlos D. Horton to Herbert W. Pool, to secure the same debt specified in the first mortgage above described, and the premises are described therein as follows: The undivided one-half of the undivided one-quarter of lot number one east of Commercial street, and lots number ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen south of Quay street, all of Thorn's plat; the undivided one-half of lot number five of block one hundred and a part of

lot number five of block one hundred and six of White's plat, being the Horton homestead on Water street, all in the city of Port Huron—"this mortgage being given to take the place of one for a like sum between said parties, dated January 18, 1875, in which there was an erroneous description." The mortgage was payable in five annual payments of $590 each, the first to be made January 18, 1876. Annexed to it was the following:

"We hereby consent to and authorize the execution of the within and attached mortgage, the same being for the correction of an error in one bearing date January 18, 1875.

JOHN HIBBARD [L. S.]
W. B. HIBBARD [L. S.]
By his attorney in fact."

The execution of this consent was acknowledged by John Hibbard, but neither proved nor acknowledged as to W B Hibbard. The mortgage—with, we suppose, this attached paper also—was recorded January 11, 1876. The deed to the Hibbards and the mortgage from the Hibbards to Carlos D. Horton, Rebecca Horton and Ettie M. Beard had been previously recorded. The mortgage by Carlos D. Horton to Herbert W. Pool, given January 18, 1875, was discharged when that of January 10, 1876, was executed.

This suit is instituted to foreclose the mortgage of January 10, 1876, from Carlos D. Horton to Herbert W. Pool of whom complainant is assignee. The bill is in the main an ordinary foreclosure bill, but it sets forth that the mortgage it seeks to foreclose was given in the place of a former mortgage, in which the premises intended to be mortgaged were incorrectly described; it mentions the conveyance of Carlos D. Horton to the Hibbards, and avers that said Carlos D. Horton thereby "conveyed said lots described as being in Thorn's plat" to said Hibbards, but is silent about his mother and Ettie M. Beard having conveyed anything thereby, and not in that connection mentioning them except as a copy of the deed is attached; it avers further that in order that said mortgage might have priority of the conveyance to the Hibbards, and be a lien on the lots previously conveyed

to them, the Hibbards consented in writing to the giving of the same upon said lots, and thereby made complainant's mortgage "an equitable mortgage, and gave the mortgagee therein named and his heirs and assigns, an equitable lien upon all the property therein described;" it refers to the mortgage of the Hibbards to Carlos D. Horton, Rebecca Horton and Ettie M. Beard, and prays that it may be taken as a part of the bill of complaint, and without any further special allegations whatsoever, it makes the First National Bank of Port Huron, Samuel H. Crowl, Albert H. Harmon, John Hibbard, William B. Hibbard, Rebecca Horton and Ettie M. Beard defendants, as having or claiming rights or interests in the mortgaged premises, or in some part or parts thereof, as subsequent purchasers or incumbrancers or otherwise.

Crowl, Harmon and William B. Hibbard made no defence. The others all appeared and made defence by solicitors. In addition to the facts above recited, and which were undisputed, it appeared that the mortgage given by the Hibbards to Carlos and Rebecca Horton and Ettie M. Beard had been foreclosed and the premises mortgaged thereby bid in by the mortgagees. Also that the First National Bank of Port Huron was mortgagee of the Hibbards of lots ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen south of Quay street, and of lots one, two and three east of Commercial street, together with other lots, by mortgage dated February 10, 1876, and duly recorded the same day The bill was filed February 13, 1879.

The usual decree of foreclosure and sale was made against all the defendants April 27, 1880. It seems obvious from the facts above recited that the decree is erroneous in several particulars.

1. The interests of Rebecca Horton and Ettie M. Beard were not subject to this mortgage, but were paramount, and the bill as to them should have been dismissed. Their original titles antedated both the Pool mortgages. Their mortgage from the Hibbards antedated the mortgage the bill was filed to foreclose and was duly recorded. Complain-

ant relies upon a provision therein making it "null and void" unless the Pool mortgage was discharged, but this was a provision for the benefit of the Hibbards themselves, and for some reason they appear not to have relied upon it when their mortgage was foreclosed. There may have been good reasons for this with which no one else was concerned.

2. The interests of William B. Hibbard and of the First National Bank of Port Huron, so far as it was derived from him, were not subject to this mortgage. His deed preceded this mortgage, and it does not appear that he ever assented to the mortgage being given. William B. Hibbard, it is true, did not appear and defend, but this is immaterial as complainant's own showing establishes the fact that he was not a proper party to the suit.

3. The giving of consent by John Hibbard in the manner he did we think was equivalent in legal effect to uniting in the mortgage, and his interest is therefore bound. The bank is also bound to the extent that the interest mortgaged by him to the bank had been previously encumbered by this consent. In other respects the decree appears to be unobjectionable.

The conclusion is that the decree must be reversed as to the defendants Rebecca Horton and Ettie M. Beard, and the bill dismissed with costs of both courts. It must be modified as to the First National Bank of Port Huron by striking out the name of William B. Hibbard as a party and by providing for the protection of such interest as the bank derives through him. The bank not having appealed will recover no costs of this court, and no costs will be awarded either for or against it in the court below. As to Carlos D. Horton the decree will be affirmed with costs.

The other Justices concurred.

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HENRIETTA DEMILL ET AL v. JAMES MOFFAT.

Ejectment—Instructions to the jury—Costs on mistrial.

A trial judge should never take a case from the jury on the evidence unless it is very clear; and when he does so, he should specify the particular ground or grounds of his ruling.

A trial judge has a right to direct the jury's attention to any essential point in the case which he thinks the plaintiff has given no evidence fairly tending to prove; and he may advise them to render verdict accordingly.

A trial judge should advise the jury as to the bearing of the evidence upon any point in the case which may in any view be controlling.

The Supreme Court reviews judgments in law cases upon questions of law only. It has no authority to review a case at law upon the facts and decide from the record whether the plaintiff has made out such a case as would entitle him to go to the jury, and if he has, whether the defendant has met it by so unquestionable a defense as to leave the jury no discretion to do anything but give him a verdict.

An action of ejectment involved the questions of title by inheritance in the plaintiffs, or of title by conveyance, tax-deed and absolute possession in the defendant. The trial judge charged the jury simply that defendant was entitled to their verdict, and did not specify on what grounds. *Held* that judgment should be reversed and a new trial ordered as for mistrial.

Adverse possession is a defense resting wholly upon facts.

Title by deed is a question of fact.

Costs are not awarded where the result in the trial court is in the nature of mistrial.

Error to St. Clair. Submitted Jan. 20. Decided Jan. 26.

EJECTMENT. Plaintiffs bring error. Reversed.

Whipple & Voorheis for plaintiffs in error.

Brown & Farrand and *O'Brien J. Atkinson* for defendant in error.

COOLEY, J. This is an action of ejectment. The plaintiffs claim title to the land in dispute as heirs at law of one Thorn. The defendant claims through a deed which he alleges was

given by Thorn in his life-time to one Hamilton. He also claims by tax-title and by adverse possession for twenty years. Elaborate testimony was taken in the court below, at the conclusion of which the defendant would seem to have insisted that the plaintiffs had not proved their heirship, and also that by reason of a failure to suggest of record in due form the death of a plaintiff, the surviving plaintiffs were not in position to take judgment. In this state of the case, after argument by counsel, the circuit judge addressed the jury as follows: "Gentlemen of the jury: I have this to say to you; only this and nothing more. The defendant is entitled to your verdict." The jury returned a verdict accordingly, and the whole case is now brought before us on exception to the charge.

This Court reviews the judgments of the circuit court in law cases on questions of law only. What question of law is involved in this charge of the circuit judge? Was he of opinion that the plaintiffs had given no evidence tending to the proof of their heirship? If he had said that, we could have reviewed the evidence on that point, and should probably have had no difficulty in pointing out his error. Did he think adverse possession was satisfactorily made out? If so, as that is a defense resting wholly upon facts, it is plain he should have taken the opinion of the jury, unless the facts were unmistakable in their import and were undisputed. Did he think the defendants had proved title out of Thorn through the alleged deed to Hamilton? This again was a question of fact, and the existence of the fact was denied and vigorously contested. But we need not proceed from point to point in the case and endeavor to surmise on what ground the plaintiffs were turned out of court. The circuit judge has given us no light on that point, and the record can afford none.

What we are asked to do in this case is to examine an elaborate record in order to ascertain whether the plaintiffs made out such a case as entitled them to go with it to the jury, and if so, whether the defendant met it by any defense that was so entirely unquestionable as to leave to the jury no

discretion to do otherwise than give him a verdict. In other words we are invited to review this case upon all the facts. It is sufficient for us to say in reply that the law has given us no such authority.

What the circuit judge should have done in this case, was to submit the evidence to the jury under proper instructions. If in his opinion the plaintiffs had given no evidence fairly tending to prove any essential point in their case, it was his privilege to direct the attention of the jury to that point, and advise them to render verdict accordingly. It was also his right and his duty to advise the jury upon the bearing of the evidence upon adverse possession, upon the alleged deed of Thorn to Hamilton, upon the tax-title, and upon any other point in the case arising upon the facts that might in any view be controlling. The jury would thereby be enabled to discharge their duty intelligently, and if a dissatisfied party shall then bring the case up for review, we shall have no difficulty in addressing our attention to the questions—and the only questions—that under the Constitution and laws we are at liberty to pass upon. It must be a very clear case indeed that will justify the judge in taking the case from the jury on the evidence, and he should never do so without specifying the particular ground or grounds which appear to him to justify it.

The judgment must be reversed and a new trial ordered. But as the result in the suit below was in the nature of a mistrial, no costs will be awarded.

The other Justices concurred.

HENRIETTA DEMILL ET AL v. JOHN W. THOMPSON JR.

Error to St. Clair. Submitted Jan. 11. Decided Jan. 26.

EJECTMENT. Plaintiffs bring error. Reversed.

Whipple & Voorheis for plaintiffs in error.

Brown & Farrand for defendant in error.

GRAVES, J. This case stands on the same ground as *Demill v. Moffat*, supra, and the same order will be entered in it.

The other Justices concurred.

THE FIRST NATIONAL BANK OF PORT HURON v. HARVEY MELLEN ET AL, INTERVENING CLAIMANTS.

Garnishment—Garnishee's liability to actual creditor—Vacation of judgment rendered on false disclosure—Attorney fee—Costs on dismissal of writ of error—Error does not lie on collateral order.

A garnishee disclosed an indebtedness in favor of the principal defendants, and judgment was rendered against him, but it afterward appeared that the debt was due to other persons on whose motion the judgment was vacated. The affidavit in garnishment was made to stand as a declaration, and the real creditors were permitted to assume the defense. The garnishee, however, had paid over to the plaintiff the amount of the judgment against him before the judgment had been vacated, and an order was made that the plaintiff pay back to the real creditors the amount so received less an attorney fee paid to the garnishee's attorney. *Held*, that this order was not a judgment and would not support a writ of error, and that there was no suit pending between the plaintiff and the actual creditors in which a judgment could be entered, but the order was collateral to the suit in garnishment.

Costs are not granted on dismissal of a writ of error where no motion was made for its dismissal.

A judgment against a garnishee defendant does not bind his actual creditors where his indebtedness was to them and not to the principal defendant. And there is no need of a motion to vacate such a judgment unless, perhaps, where the debt was itself a judgment and proceedings to collect it had been stayed.

A judgment against a garnishee, rendered upon a false disclosure, may be vacated in the discretion of the court, and if the garnishee has already made payment it will not protect him against the claim of his actual creditor. The plaintiff, also, will hold the money paid, as to the creditor's use, and the latter is entitled to have it refunded to him on demand.

One who has obtained a judgment against a garnishee upon a false disclosure must refund the money paid thereon to the garnishee's actual

creditor upon the latter's demand after the judgment is vacated. And the plaintiff cannot retain the amount of the attorney fee paid to the garnishee's attorney.

Error to St. Clair. Submitted Jan. 21. Decided Jan. 26.

GARNISHMENT. Plaintiff brings error. Judgment ordered.

Elliott G. Stevenson and *O'Brien J. Atkinson* for plaintiff in error.

Chadwick & Cline for defendant in error.

COOLEY, J. In the year 1878 the plaintiff in error having a judgment in circuit court against John E. Kitton and Brooks W. Gossage, garnished Samuel H. Woodruff as a debtor of Gossage upon a justice's judgment; and on his disclosure took judgment for some $80. In February following John N. and Harvey Mellen applied on affidavits to have this judgment vacated, and made a showing under oath that the indebtedness of Woodruff was due, not to Gossage, but to themselves. The circuit court heard their motion and granted it, and at the same time directed the affidavit for garnishment to stand as a declaration and that an issue be made thereon. Issue was made by the Mellens accordingly, in the garnishee suit, and was tried by the court, who found that the Mellens were the real creditors. But it appeared in the case that before the judgment was vacated Woodruff had made payment to the plaintiff; and thereupon the circuit judge entered the following order:

"*The First National Bank of Port Huron v. John E. Kitton and Brooks W. Gossage*, Defendants. And *Samuel H. Woodruff*, Garnishee Defendant, and *John N. Mellen* and *Harvey Mellen*, Intervening Claimants.

"This cause as to the right of the said claimants in and to the indebtedness disclosed by said garnishee came on to be heard, and the court having heard the proofs and allegations of the parties and the arguments of counsel, it appearing that the check upon which was rendered the judgment stayed by said garnishee defendant, was in fact the property of the said claimants, that the said Brooks W. Gossage had no right,

title, claim or interest in or to the same, and said garnishee defendant has paid over to the said plaintiff (the First National Bank of Port Huron) the said amount mentioned in his disclosure, viz.: $83.31 less the sum of ten dollars ($10) paid to the attorney of said garnishee defendant: Therefore it is adjudged and determined that said claimants do recover of and from the said the First National Bank of Port Huron the sum of 75 and 31–100 dollars without costs, and that the said claimants have execution thereof."

Treating this order as a judgment in favor of the Mellens, the plaintiff brought error.

I. This order is no judgment. There was no suit pending between the plaintiff and the Mellens in which a judgment could be entered. The suit pending was the garnishee suit, the defense of which the Mellens had been permitted to take upon themselves, and this order was collateral to that suit. Error, therefore, would not lie upon it, and the writ will be dismissed, but without costs, no motion for dismissal having been made.

This disposes of this record, and we might leave the case here, but it may be advisable to save further litigation over this small sum of money by calling attention to a few obvious facts and principles.

II. The judgment against Woodruff did not bind the Mellens, who were no parties to the proceeding, and they would have been under no necessity for moving to vacate it had it not appeared—as it did—that the court had made an order staying all proceedings for the collection of the original justice's judgment. Perhaps even that stay was unauthorized, but it was proper to move to get rid of it.

III. The circuit court in the exercise of its discretion had the right to vacate the judgment against Woodruff, and when it did so, the fact that Woodruff had made payment to the plaintiff could not protect him against the claim of the Mellens. The money paid would be held by the plaintiff for Woodruff's use, and he would be entitled to have it refunded to him on demand.

IV. It seems scarcely necessary to say that the plaintiff had no right, legal or equitable, to retain from another man's

money an attorney fee which it had paid in an unsuccessful attempt to get more from him.

Woodruff is entitled to judgment in the garnishee suit, and to have back from the plaintiff the whole amount he paid, and the Mellens are left at liberty to collect their judgment of Woodruff.

MARSTON, C. J. and GRAVES, J. concurred.

JOSEPH P. LEROUX AND MAX SCHOTT, RELATORS v. JUDGE OF THE CIRCUIT COURT FOR BAY COUNTY.

Mandamus—Preliminary application to respondent.

Mandamus to set aside an order of removal to a federal court was denied without looking into the merits where the record did not show that any application had been made to the respondent to vacate the order.

Mandamus. Submitted Jan. 26. Denied Jan. 27.

A. McDonell and *Griffin & Dickinson* for relators.

Wisner & Speed for respondent.

COOLEY, J. This is an application for a *mandamus* to respondent, requiring him to set aside an order whereby he transferred to the federal court a certain cause to which relators are parties. No application appears to have been made to the circuit judge himself, and for this reason we deny the application without looking into the merits. We must assume, if the application has merits, the circuit judge would voluntarily have recognized them.

The other Justices concurred.

Elise Fournier v. Anna M. Chisholm and Wencenslas Fournier.

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Enforcement of chattel mortgage for moneys invested in homestead.

A wife has no equity to interpose her homestead right against a chattel mortgage which she has not signed, where it is given for moneys advanced for the purpose of establishing the homestead.

Appeal from Alpena. Submitted and decided Jan. 27.

Bill to set aside a chattel mortgage. Dismissal affirmed.

Holmes & Carpenter for complainant.

Kelley & Clayberg for defendant Chisholm.

Cooley, J. This is a bill to protect alleged rights of complainant to a certain building which she occupies with defendant Fournier, who is her husband, as a homestead. The building is upon land owned by a third party, and defendant Chisholm has a mortgage upon it given by the husband for the benefit of one Dekiese. This mortgage, not having been signed by complainant, she claims is void as to her.

It satisfactorily appears that the mortgage was given for moneys advanced by Dekiese from time to time for the very purpose of enabling the husband to build this house, and that it was only by means of these advances that the house was built. Complainant in effect admits this, though she also claims to have put a good deal of money into the house herself. On this subject her evidence is unsatisfactory. We think she has no equity to claim homestead rights as against this mortgage. Some interlocutory orders of the circuit court are complained of, but they were discretionary.

Decree affirmed with costs.

The other Justices concurred.

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AMBROSE L. SOULE v. FLAVIUS J. HOUGH.

Constructive possession—Sufficiency of foreclosure by publication.

Getting into the back kitchen of an occupied house through an open door when no one is in the room, and boarding up the rest of the house on failing to secure an entrance thereto does not establish such a constructive possession of the premises as will justify committing assault and battery upon the occupants if they attempt to remove obstructions.

A house is an entirety so long as it is occupied as such by a tenant, and the possession, by an adverse party, of a single room cannot be held a possession of the building to the exclusion of the tenant.

Due diligence in making service of a chancery subpœna upon a defendant who cannot be found is not exercised unless the effort to serve it is continued so long as service can lawfully be made.

A foreclosure is invalid that is based on an order of publication made upon complainant's affidavit that defendants could not be found, the subpœna having been returned before the return day.

The proof of defendant's absence and of diligence in seeking to obtain service on him upon which to base an order of publication in foreclosure should rest on the applicant's own knowledge.

Error to Ottawa. Submitted Oct. 6. Decided Jan. 28.

TRESPASS. Plaintiff brings error. Reversed.

Akeley & Farr and *Norris & Uhl* for plaintiff in error.

Lowing & Cross for defendant in error.

CAMPBELL, J. Soule sued Hough for trespass, including an assault on his person, and the use of force in attempting to expel plaintiff and his family from their dwelling, and various acts of annoyance connected with the conduct in question.

Plaintiff was in possession under a party claiming title, and who actually owned it with a right of possession, unless cut off by foreclosure proceedings.

The testimony tended to show, and there is nothing contradicting it, that Hough, having got into the outer kitchen

of Soule's house through an open door, when no one was in the room, maintained possession of that, and attempted by force to get into the other part of the house, and failing in this, boarded up the premises and used violence and threatened to kill Soule if he attempted to remove the obstructions.

The court in effect charged the jury that the entry into the kitchen gave Hough such possession as justified him, if having title, in boarding up the rest of the house, so as to keep it from being habitable, and that the assault and battery, if committed in an attempt in a reasonable and moderate manner to keep plaintiff from knocking off the boards was not actionable.

The doctrine that a party may make entry and hold possession of a part of premises, and thereby get constructive possession of the rest, so as to turn the tenant out if he can do it peaceably, though with some force, cannot be applicable to such a case as this. The house, so long as occupied by a tenant, is an entirety, and the wholesome rule of law which forbids forcible entry would be of very little use, if by getting a foothold in a single room or outbuilding, an intruder, with or without title, could be held to be in possession of the principal structure to the exclusion of the family in actual occupancy. Under the general rules of law the possession of the principal covers the incident, and possession of the incident does not control but is subordinate. A dwelling is too important a refuge to be destroyed by any such indirection. The case is in its main features not unlike though much worse than *Seitz v. Miles* 16 Mich. 456; and the testimony indicates a great outrage. The jury could not under the charge have regarded the chief elements of damage.

The foreclosure proceedings, which, although pertinent, could not if regular have justified defendant's conduct, are claimed to have been invalid for any such purpose, or for any purpose. They were begun on the 16th of June, 1859, by James P. Scott against Lucy Piquette, Francis Piquette, and George Redfield, in the circuit court for the county of Ottawa. Lucy Piquette was owner of the land mortgaged. The decree was made by default against

her and her husband on publication, and not on service of process. The sale was made and report filed in August, 1860. No order of confirmation appears in the record, but it is recited as an order entered in the common-rule book in January, 1880, after this suit was brought, and only a few days before trial. We shall make no remark upon this, as possibly it is an error, and the case will not require it.

On the 16th of June, 1859, a subpœna was issued returnable on the 29th. On the 25th of June, which was less than ten days from its issue, and when it could not have been made legally returnable (Rule 9), the sheriff of Ottawa county made return on oath that he had served the writ on Redfield, but was unable to find the other defendants, and was informed and believed they did not reside in this State.

On June 30, 1859, complainant made an affidavit before a justice of the peace, setting out "that Lucy Piquette and Francis Piquette are residents of this State; that subpœna for their appearance has been issued in the above entitled cause, returnable on the 29th day of June instant, and that the same could not be served on the said Lucy Piquette and Francis Piquette by reason of their absence from the State of Michigan." On this, an order of publication was made by a circuit court commissioner.

The statute which is relied on to sustain this proceeding is section 5116 of the Compiled Laws, which authorizes such an order "when the defendant is a resident of this State, upon proof by affidavit that the process for his appearance has been duly issued, and that the same could not be served by reason of his absence from or concealment within this State, or by reason of his continued absence from his place of residence."

The statute is very clear that the cause for issuing the order of publication must be made out by *proof*, and this must come from some one who testifies on his own responsibility. And, according to the well-recognized rules of procedure, the process must be issued and diligent efforts made to serve it during its entire time allowed for service, and there must be a responsible showing why it was not served.

In this case the process was returned four days before its return-day, and the officer makes no showing of diligence before this, and no one makes any showing of diligence at all afterwards. There is a conflict of fact between the return and affidavit as to the cause of *non-service.* It was not possible that the complainant, who had no part in the service, could swear of his own knowledge to any diligence, and in the case of residents of the State, the issue and return of process is imperative, and here there was no lawful return of not found. It is not due diligence to make no effort to serve a writ so long as service can be lawfully made.

The rule of diligence in cases where the disability must be extended to the whole State and not a county was referred to in *Merrill v. Montgomery* 25 Mich. 73. The statute was never designed to encourage getting constructive service on a merely temporary absence, and the affidavit should leave nothing ambiguous as to the diligence used to find the parties. As a matter of fact there can usually be no difficulty generally in finding residents within a reasonable time; and the court ought to have a sufficiently responsible showing to guide it in determining whether a case is fully made out. The English statute, which was intended chiefly, if not entirely, to reach residents who were absent, was construed in *Burton v. Maloon*, Barnardiston p. 401, as requiring a positive showing, and the New York court of chancery in *Evarts v. Becker* 8 Paige 506, is to the same effect.

We think the present showing cannot be upheld on any ground as sufficient.

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

GRAVES, J. and MARSTON, C. J. concurred.

COOLEY, J., dissenting. An accidental circumstance having deprived me of the opportunity to explain my views when this case was decided, I should not deem it important to do so afterwards were it not that I think a very serious error has been committed which will not merely be injurious in this case, but will be destructive of many titles.

The suit was in trespass, and the main purpose in instituting it probably was to determine the title to certain lands. Hough claimed to be in possession claiming a right to occupy under an insurance company whose title was traced through a chancery foreclosure in a suit in which James P. Scott was complainant and Lucy Piquette, Francis Piquette and George Redfield were defendants. Lucy Piquette was mortgagor, and she and Francis Piquette were proceeded against as non-residents. The majority of the Court has determined that these proceedings were fatally defective, because the Piquettes were never properly brought in.

The proceedings were twenty years old when the suit was brought, and we are not informed that the validity of the foreclosure was ever questioned before. The fact is not important except as it brings forcibly before us the danger of over-nicety in criticising judicial proceedings; because they may be questioned after sixty years as well as after twenty, unless actual and continued possession has perfected a title under the statute of limitations. And if I am correct in my opinion that the proceedings were in conformity to the law, the error is emphasized and made more mischievous by the lapse of time.

I do not understand that any defect is pointed out except that the subpœna which was issued for service on the Piquettes was returned not served before the return-day had arrived. This appears to me a wholly unimportant fact. The statute makes no requirement upon the subject except that there shall be proof by affidavit that the process issued could not be served by reason of the absence of the defendant from the State. The officer's return does not necessarily show this, nor is it necessarily shown by his affidavit. Indeed, it is not essential that the writ be placed in the hands of an officer at all; any one may serve it, if service is practicable, and any one may show the impracticability of making service when such is the fact. I cannot think it possible that it was ever intended jurisdiction of a case should depend upon a circumstance so entirely unimportant as that a subpœna which could not be served was left in the register's office before its

return-day, instead of being kept in the office of the sheriff or of the party.

The proof by the affidavit of the complainant that the subpœna could not be served on defendants by reason of their absence from the State, is full and complete, and is made after the return-day of process was passed. As the averment is made in positive terms, we must take it as made on personal knowledge of the facts. We have no right to infer that the affiant did not know the facts as fully as the officer; but even if we could, it would be unimportant, for it was for the court which acted upon the proof and made the order for publication, to decide upon its sufficiency; no one can deny that the affidavit was "proof," so that a case was made calling for judicial action. If so, the order of publication cannot be held void without disregarding the authorities. *Brittain v. Kinnaird* 1 B. & B. 432; *Basten v. Carew* 3 B. & C. 649; *Sheldon v. Wright* 5 N. Y. 497; *Porter v. Purdy* 29 N. Y. 106; *Sitzman v. Pacquette* 13 Wis. 291; *Florentine v. Barton* 2 Wall. 211. We need not go for the principle further than to *Facey v. Fuller* 13 Mich. 527 and *Wall v. Trumbull* 16 Mich. 228, which fully cover it. But the case of *Pettiford v. Zoellner*, *ante*, p. 358, decided with the principal case, seems to me authority more than ample for my views; for it was there held that an affidavit based on information and belief, without disclosing the source of the information, was sufficient. But surely an oath to hearsay cannot be "proof" and an oath to actual knowledge not proof, especially when the source of the hearsay is not given so as to impose upon the party making the affidavit some feeling of responsibility to the criminal laws. There could be no doubt, I think, which "proof" a careful judge would consider most trustworthy.

But the real jurisdictional fact in these cases is the fact which, when shown by proof, authorizes the court to make the order of publication. *Pennoyer v. Neff* 95 U. S. 714. There is little danger, therefore, of any wrong being done by an order of publication being made unadvisedly. If a party is proceeded against as a non-resident when in fact he

has a domicile within the State, he is entitled as of right to have the proceedings set aside at any time, unless interests have been acquired by *bona fide* purchasers (*Jermain v. Langdon* 8 Paige 41), and possibly the case should be likened to that of administration upon the estate of a living person; in which case the proceedings are void though the proof as to the death may appear to have been complete and ample. *Moore v. Smith* 11 Rich. 569; *Jochumsen v. Savings Bank* 3 Allen 87; *Melia v. Simmons* 45 Wis. 334; *D'Arusmont v. Jones* (Tenn.) 11 Cent. Law Jour. 253; contra, *Roderigas v. Savings Institution* 63 N. Y. 460. But there has been no averment in this case that the jurisdictional fact did not exist; all that is claimed is, that it was not sufficiently shown. The parties proceeded against under the order for publication never appealed, and never applied to set aside the proceedings on the ground either of defective showing, or that the fact affirmed did not exist. Suppose they had appeared after decree but before sale, and moved to vacate proceedings on the sole ground that the affidavit was defective and without denying its truth; what possible equity could they have had for relief upon this ground? And what standing can others have upon equities which they fail to show?

Comment on any other branch of the case is unnecessary in view of the opinion on file.

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JOHN N. GOTT v. SOPHRONIA BRIGHAM.

Challenge to the array.

A challenge to the array in the Superior Bourt of Detroit was properly overruled where interposed on the grounds (1) that the judge was not present when the names of the jurors were deposited in the jury box and those of former jurors removed; (2) that he did not determine the number to be drawn for the term, but that twenty-four were drawn and he was not present at the drawing; (3) that they were drawn by the sheriff and the minute was kept by the clerk; (4) that the affidavit accompanying the list of 300 jurors filed in the clerk's office did not

show in detail the proceedings taken to select the list, but only alleged that as affiant verily believed it was done in accordance with the statute. So *held* by equal division of the court.

Error to Superior Court of Detroit. Submitted November 9 and 10, 1880. Decided January 28, 1881.

Assumpsit. Defendant brings error. Affirmed.

Beakes & Cutcheon for plaintiff in error cited in support of the challenge: *Clare v. State* 30 Md. 164; *State v. DaRocha* 20 La. Ann. 356; *Convers v. G. R. & I. R. R.* 18 Mich. 459; *Gladden v. State* 13 Fla. 626; *Stokes v. State* 24 Miss. 621; *Mitchell v. Likens* 3 Blackf. 258; *United States v. Woodruff* 4 McL. 105; 1 Bish. Cr. Pro. § 749; *State v. Rollins* 22 N. H. 528; *O'Connell v. Queen* 11 Cl. & Fin. 155, 362; *People v. M'Kay* 18 Johns. 212; *People v. Williams* 24 Mich. 161; *Gardner v. Turner* 9 Johns. 260.

Don M. Dickinson for defendant in error urged that rules for drawing jurors were directory only: *State v. Haywood* 73 N. C. 437; *Mowry v. Starbuck* 4 Cal. 274; *Ferris v. People* 35 N. Y. 125; *Friery v. People* 54 Barb. 319; *Com. v. Lippard* 6 S. & R. 395; *Pringle v. Huse* 1 Cow. 432 n.; a challenge to the array is never made but for favor or partiality: Proffat on Jury Trials, § 154; *Cole v. Perry* 6 Cow. 584; *People v. Ransom* 7 Wend. 417; *State v. Pitts* 58 Mo. 556; *State v. Breen* 59 Mo. 413; *State v. Carney* 20 Ia. 82; *Page v. Inhabitants* 7 Met. 326.

Graves, J. Mrs. Brigham brought *assumpsit* in the Superior Court of the city of Detroit and was allowed to recover, and the defendant Gott now asks a review on writ of error and bill of exceptions. A great many questions are propounded in the record, but the subject of contention which occupies the foreground overshadows the others and must be first considered. If error is there found the other points will not be examined. If any of them again arise it will be under circumstances in all probability necessitating a

mode of treatment not appropriate now. Moreover it is not to be assumed that they will recur at all.

The trial was on the 26th of February, 1880, and on the appearance of the proper number of persons to form a jury the plaintiff in error challenged the array. The challenge was in writing, and it specified four distinct grounds as follows:

1. That on the 2d day of December, 1879, a list of three hundred persons to serve as jurors in said court was filed in the office of the clerk of this court in pursuance of sec. 19 of the act establishing this court as amended, and that the judge of this court did not attend and was not present with the clerk when the ballots containing the names of the persons so selected to serve as jurors were deposited in the jury-box, or when those that remained of the preceding list (if any) or any of them, were taken out and destroyed.

2. That the judge of this court did not direct or determine the number of jurors to be drawn to serve as jurors at this term of court, but that twenty-four names were drawn without any direction or determination by the judge of this court as to the number he deemed necessary, and the judge was not present when said jurors were drawn out of the box.

3. That said jurors for this term of court were drawn from the jury-box by Walter H. Coots, the sheriff of the county, and not by the clerk of this court, and that the minute of such drawing was kept by the clerk and not by the judge or sheriff, or other attending officer.

4. That the affidavit filed with the said list of 300 jurors does not show the proceedings taken to select said list in detail, or what was actually done in the premises, but only alleges that said list was selected in accordance with the statute in such cases made and provided, as the affiant verily believes, and said list and affidavit on file are referred to and made a part hereof." See Pub. Act 97 of 1879; Detroit Charter 1857; Laws 1857, pp. 115, 116, 117.

There is some confusion in the record as to exactly what was subsequently done in this proceeding. An entry appears in one place to the effect that to the first and fourth grounds a demurrer was interposed in which the defendant joined, and that issue on the fact was taken on the second and third grounds.

In another part of the record a pleading is found in which the plaintiff demurs to the first ground and tenders issue of

fact on the other three, and this is succeeded by a piece of pleading by which defendant joins in the demurrer to the first ground and accepts the tender of issue of fact on the others.

It seems that in a preceding case between other parties, and before another judge, a similar question arose, and that the judge ruled against the challenge, and that as part of the proceeding in that case the judge found the facts on the second and third grounds. In the present case the judge explained that he should follow the other, and it was stipulated that the evidence, rulings and proceedings in that case on the same question, should be adopted in this. According to this arrangement the parties have introduced the finding made in the other case on the second and third grounds as findings on the same ground in this. There is no specific finding on the fourth ground. But it sufficiently appears that the challenge was overruled. The first ground was disposed of on demurrer, there being no issue of fact raised on it.

The second and third grounds were decided on the construction the judge placed on the facts, and the fourth ground was decided as though there had been a demurrer. The issue of fact on this ground was really immaterial. The objection was that the affidavit which was made a part of the challenge was not in compliance with the statute. Whether it was or not was apparent on its face and there was no fact in dispute. At the common law the whole execution of the jury process was committed to the sheriff and there could be no miscarriage at this stage except by his indifference or default. A personal charge against him was therefore the ancient ground of challenge, and if the challenge was successful the result was that another officer was charged with the duty of summoning a new jury.

By the legislative provisions applicable to the court below the sheriff is superseded in the old functions, and different machinery is provided for the due array of juries, and for the purpose of challenge it is proper to consider as within its influence all the agencies which are required to take part.

The fundamental idea is to secure a legal tribunal, and the change made in the way of evolving it out of the constituents existing in society has not foreclosed the right of parties to insist upon its being constituted in substantial conformity with the laws as established. They may not see fit to complain even in the case of gross errors, and if they fail to object seasonably and regularly, they must be deemed to have waived the defects. But if they object in proper time and in due form, and show that a substantial deviation from the law has taken place; that positive provisions enacted to secure and guard the right of trial by jury and maintain the purity of that mode of trial, have been violated or disregarded, there is no warrant in our jurisprudence for treating the deviations as harmless irregularities.

A party so objecting and so substantiating his objection stands on valuable legal rights and is entitled to have the array quashed. The law has prescribed its own methods for the constitution of the tribunal, and has carefully defined what means shall be provided to negative the existence of any error in relation thereto prejudical to the parties; and it is not fair reasoning to say that such methods may be set aside and that a party reasonably and regularly objecting may be silenced by an answer that it appears from extrinsic sources that he was not injured. The effect of such a doctrine would be to license courts to suspend the laws, if in their opinion, no one would be injured thereby as matter of fact. It is needless to dwell long upon the challenge. The second ground was properly overruled. Twenty-four jurors were drawn. An order would have been necessary for a greater number, but no order whatever was made. In the absence of any new direction it was proper to assume as the facts were that the judge deemed twenty-four to be necessary.

The affidavit mentioned in the fourth ground was not defective for want of detail. The statute does not require it to specify the various proceedings. In so far, this ground of challenge was not valid.

But the next point was well taken. The affiant merely swore to his belief. The statute takes notice that he must

have actual knowledge of the facts, and it requires a positive oath. A statement on belief can afford no such security for exact and honest compliance with the statute as the Legislature intended.

As to the third ground. The finding of facts states that on the occasion of the drawing, the clerk and sheriff only attended; that the sheriff shook the box and drew out the names of the same twenty-four persons who were summoned; that as he drew out each slip he opened it and read the name on it, then put it down near the desk where he could read it, and the clerk entered the name on the minute of the drawing; that the names on the slips and the minute were compared by the sheriff's reading off the names from the slips, and the clerk's checking them on the minute; that the minute was then signed by the clerk and sheriff; and that this manner of drawing the jury was in accordance with the practice which has always prevailed in the Recorder's Court and in the Superior Court.

The Legislature have seen fit to provide expressly that the clerk, and no one else, shall handle the box and draw therefrom in the presence of the officer or officers attending, and that one of the attending officers shall keep a minute of such drawing. The law has apportioned the duties with extreme care. The list and box are under the sworn custody of the clerk. His oath of office applies to the duty of drawing and the oaths of the others apply to the duties assigned to them. If they exchange duties their respective oaths do not accompany the exchange. If the sheriff assumes to draw the jurors he does not make himself the sworn clerk of the court, and if the clerk undertakes to keep the minutes of the drawing, he does not become judge or sheriff for the time being. If their duties are lawfully interchangeable, why may not the sheriff swear the witnesses and jurors, and the clerk serve executions?

It is a part of our daily experience that the only reason which can be urged for holding ineffectual a service by one official which if done by another would be effectual is that the law has so arranged and apportioned duties, and unless

this reason is maintained we shall not be long in lapsing into legal chaos.

The fact in the first ground of challenge was admitted by the demurrer for the purpose of the question. When the occasion came for the clerk to convert the grand list into slips, and to clear the box of old ones, and place the new ones therein, the judge was not in attendance. That responsible duty was left to the clerk alone, and without a witness. The law is very exact in requiring at least two to be present at every stage in the process down to the issue of the *venire*. It has not been content to leave any part to the sole fidelity of one however eminent or apparently trustworthy, and it has provided positively that on the occasion of replenishing the box the judge shall be present. No one else is required to attend with the clerk. On examining the statute no one can fail being struck with the exceeding care manifested to guard the jury process against all chance of mistake and fraud, and even against all suspicion of error. The present officers may be safely trusted. But the same rule must apply to their proceedings which would be applicable to the doings of suspected agents.

In this case the jury objected to was not a jury provided in accordance with law. The defects were cause of principal challenge and were substantial. The regulations referred to and which were in some respects evaded and in others only partially followed, belong to the safeguards devised by the wisdom of the Legislature to ensure good juries and to keep the administration of justice pure and preserve confidence in the judicial tribunals. The defendant waived nothing. He made his challenge promptly and in due form. Was it due to law and justice to disregard his objection? If so, to what extent must deviations from the statutes regulating jury process be carried to justify exception?

It seems to me the irregularities pointed out are insurmountable and that the case ought to go down to another jury.

But the members of the court, whilst agreeing in opinion that the record contains no other grounds for a reversal, are

equally divided upon the questions raised by the challenge, and therefore the judgment must stand affirmed.

The other Justices concurred.

Alanson Sheley v. City of Detroit.

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Legislative policy—Apportionment of paving tax.

The Legislature, when acting within the sphere of its powers in making laws, passes finally upon all questions of policy and of equity.

Local assessments may be apportioned according to frontage under legislation which permits that method to be followed.

The Legislature has power to impose the burden of repaving, as well as of paving streets, upon the abutting owners.

Appeal from Wayne. Submitted Jan. 13. Decided Jan. 28.

Injunction to restrain sale for taxes. Dismissal affirmed.

Theodore Romeyn for complainant. Assessments by frontage, when arbitrarily made, are invalid: *Clapp v. Hartford* 35 Conn. 166; repairing streets is a municipal duty: *Hammett v. Philadelphia* 65 Penn St. 146; *Sutton's Heirs v. Louisville* 5 Dana 28.

City Counselor *F. A. Baker* for defendant. The power to compel the owners of abutting property to pave a street ordinarily extends to repaving: 2 Dill. Mun. Corp. § 619; *Gurnee v. Chicago* 40 Ill. 165; *McCormack v. Patchin* 53 Mo. 33; *Municipality v. Dubois* 10 La. Ann. 57; *Lafayette v. Fowler* 34 Ind. 140; Cooley on Taxation 422; *Willard v. Presbury* 14 Wall. 676; *Bradley v. McAtee* 7 Bush 667; *Broadway Church v. McAtee* 8 Bush 508.

Cooley, J. This is a bill to restrain the collection of a pavement tax. Complainant is owner of a lot on Woodward avenue, in the city of Detroit, which has been paved and

repaved several times, sometimes at the expense of abutting owners and sometimes not, according as the law in force at the time provided. Complainant avers that he has paid two assessments for repaving which were levied on the owners of abutting property. In 1879 the common council passed resolutions for repairing and repaving a section of this avenue, including that portion upon which complainant's lot abutted, at the expense of the lots fronting thereon, and took steps for the purpose which resulted in an assessment upon complainant of $171.02. The whole expense of the repaving was assessed upon the abutting lots in proportion to the street front. The new pavement was to be of cedar blocks, and an old pavement of cobble stone, which complainant avers was not worn out, had to be removed for the purpose. It is insisted by complainant that an assessment according to frontage is not an assessment in proportion to benefits received, and is unjust and unwarranted by legal principles. No question is made of the sufficiency of the legislation under which the common council assumed to act to authorize the action taken, if the legislation is itself constitutional, but it is denied that it is so. The learned counsel for the complainant states the question at issue to be: The right of the Legislature to authorize municipal authorities to require the owners of property on streets in the city to continue, at their own expense, to repave them, whenever ordered by the common council, and to do so in reference to the extent of frontage, or, in other words, of territory upon the street, with no reference at all as to values.

The questions, then, are questions of legislative power. Whether this method of apportioning the cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The Legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the Legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to

values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority. We must then address our attention to that point, and to that exclusively.

Now it has been several times decided in this State that it was competent under legislation permitting it, to apportion local assessments according to frontage. The leading case of *Williams v. Mayor* 2 Mich. 560 was not disturbed by *Woodbridge v. Detroit* 8 Mich. 274, and was expressly approved in *Motz v. Detroit* 18 Mich. 495, after most thorough argument and careful and deliberate examination. The case of *Jones v. Board of Water Commissioners* 34 Mich. 273, to which complainant calls attention, is foreign to this controversy. It was expressly held in that case that water rates were in no sense taxes, and they were held not apportionable by frontage on that very ground. *Thomas v. Gain* 35 Mich. 155 has quite as little relevancy. There was an attempt in that case to apportion a sewer tax in manifest disregard of any principle of justice or equity, and the Court rejected it for that reason, and as having no lawful principle to sustain it. In that very case *Williams v. Mayor* was recognized, and it was said (p. 161) that "the idea that underlies statutes for this purpose is, that the benefit to the abutting lots is generally in proportion to the length of their respective fronts, and that as a rule this principle of apportionment is more just than any other." It would be strange indeed if we could hold an apportionment to be void for its injustice when it had been prescribed by law for the very reason that justice and equity require it.

We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets, though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessments and to direct an apportionment of the cost by frontage, should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the

law of taxation have collected the cases, and have recognized the principle as settled, and if the question were new in this State, we might think it important to refer to what they say. But the question is not new; it was settled for us thirty years ago.

It is urged, however, that even conceding it to be admissible to charge the owners of abutting lots with the cost of the first pavement of the street, the special exaction should stop there, and all repaving should be by general levy. But the learned counsel for complainant does not undertake to explain to us how it can be that the legislature can have power to order the first improvement at the expense of adjoining owners, and still not have power to order any subsequent pavement on the like basis. The argument to that effect appears to assume that a pavement once laid is an improvement which is to last for ages, like some substantial structure of granite or marble; and that the adjacent proprietors having incurred the expense of making it, the comparatively insignificant cost of keeping it in condition for use from year to year ought properly and justly to be taken upon the shoulders of the community. But no assumption can be more unfounded. A pavement is but a temporary improvement of the street. It may last for five years, or ten, or twenty, but at the end of some short period the street will need a new one, and the question who shall be at the cost of it is the same as before and rests upon the same equities. It can never be said of any street that it is permanently paved. It is paved for the time being only; and the pavement will wear out or become unsuitable, just as a sewer will decay or become inadequate to the needs it was intended to meet.

If there is any soundness in the theory on which the bill is filed, it must be found in this: that when the adjacent owners have once made the street a substantial thoroughfare at their own expense, a principle of constitutional justice requires that the city should afterwards maintain it as a substantial thoroughfare. But any such principle rests upon such a basis of uncertainty that it would not only be difficult of application, but lead to the most absurd results. When

shall it be said that the duty of the property holder in making the thoroughfare is fully performed? Is it when the street is planked? Or when it is laid with cobble stone? Or when it is experimented upon with concrete or with green pine blocks? Or only when dry cedar blocks are laid, or perhaps blocks of granite? Does legislative power depend upon the uncertain opinions of witnesses as to the substantial nature or permanency of some particular street improvement? And if it can be exercised but once for all time, as to any particular parcel of land, shall the power a generation hence depend upon the uncertain recollection of old inhabitants as to the nature of the first improvements, and how the cost was borne, or perhaps upon the care with which city records are made up and kept?

Examine the case in whatever light we will, the supposed principle rests upon a fallacy. All street improvements are ordered in view of existing needs, and are, therefore, of one kind at one time and another at another time, as the needs are supposed to require. To-day in an incipient city they are cheap, imperfect and temporary; but ten years hence, if the city fulfils its promise, they may be expensive and constructed with greater regard to durability. The equity that the lot owners shall pay for the cheap, temporary improvement is no greater than that they or their successors in ownership shall pay for that which is more expensive, but which answers the local needs more perfectly and makes their lots more valuable. It will be no less fifty or a hundred years hence, though the improvement may have been renewed many times in the interval. It rested in the first place on the undoubted fact that all these local improvements, while they are public benefits in a general sense, have a special and peculiar value to the lots fronting upon them, and tend to increase their value in a degree bearing some proportion to the cost of the work. Let the improvements go to decay and the value of the lots will deteriorate; let them be renewed, and the price immediately comes up again. Leave a business street without a pavement, and business will be driven from it. These are facts of common observation, but they need no experience to

prove them; they are what our reason would teach us to expect. There is ample ground, therefore, upon which the legislature may act when they decide that in their opinion considerations of equity require the cost of paving to be imposed upon the owners of abutting lots. We do not hold that they decide right, for that is not our concern; we only decide that they have the power and the discretion to do what they have done.

The decree must be affirmed with costs.

MARSTON, C. J. and GRAVES, J. concurred.

CAMPBELL, J. While I am not satisfied that the legal objections to the charter and ordinance regulations have not some force, I am, nevertheless, of opinion that on this record complainant has not made out a case for relief.

We cannot assume, under the pleadings, that the improvement was not one which the city could make, and charge to a district for assessment. We cannot in this case have any certainty that complainant has been seriously, if at all, overburdened beyond what his assessment would have been if made in another way. The proceedings are regular, and unless he shows some distinct and tangible grievance of a serious character, he makes out no cause for equitable interference.

I concur in affirming the decree.

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MAURICE COLLINS v. LUTHER BEECHER AND MARQUETTE & PACIFIC ROLLING MILL COMPANY.

Bill of particulars—Variance from evidence—Amendments.

Where a bill of particulars gives the dates of charges, a due-bill of a later date and for a less amount than the aggregate of items, should not be rejected for variance if it tends to prove an indebtedness existing at its date.

Single items of evidence cannot be rejected for failing to establish the whole case, but must be received if they contribute to that end; and their sufficiency in connection with the other evidence will be determined on a review of the whole when the case is closed.

Where evidence is objected to solely for a formal variance from the bill of particulars, it is better to permit an amendment of the bill than reject the evidence, unless there is reason to believe the defendant will be prejudiced.

Error to Marquette. Submitted Jan. 14. Decided Jan. 28.

ASSUMPSIT. Plaintiff brings error. Reversed.

F. O. Clark for plaintiff in error.

J. P. Whittemore for defendant in error.

COOLEY, J. Collins sued the Marquette & Pacific Rolling Mill Company to recover compensation for labor performed for the company in the year 1877. Beecher was made a joint defendant, as being a stockholder. A bill of particulars being called for by Beecher, was given as follows:

The Marquette & Pacific Rolling Mill Company, Dr.

To *Maurice Collins:*

To	25½	days'	work	in May, 1877, at	$2.00	per day,	$51.00
"	16¾	"	"	June, "	"	"	33.50
"	23¼	"	"	July, "	"	"	46.50
"	27	"	"	Aug. "	"	"	54.00
"	24	"	"	Sept. "	"	"	48.00
"	20	"	"	Oct. "	"	"	40.00
							$273.00

The above work performed as common miner in the Rolling Mill Mine.

On the trial the plaintiff gave evidence tending to show that he was employed to labor for the Rolling Mill Co. in 1877; that W. W. Wheaton was treasurer and general manager of the company in that year, and James Bale superintendent under him, and that Bale, under Wheaton's direction, gave to the laborers time or due bills when they left respec-

tively. He then offered in evidence the following paper, having first proved the signature to it:

"No. 4099. NEGAUNEE, November 7th, 1877.
Due Maurice Collins for labor from the Rolling Mill Mine on pay day, one hundred thirty-seven dollars ($137).
W. W. WHEATON, Treasurer.
By JAMES BALE, Supt."

This was objected to because it varied from the bill of particulars, and the objection was sustained. No other reason was assigned.

The variance from the bill of particulars must consist in this: that the paper rejected did not specify the months in which the labor was performed. But this, we think, was altogether too technical. The paper tended to prove an indebtedness for labor existing at its date, and was admissible on that ground even though, standing alone, it might not have gone far enough to make out the plaintiff's case. No single item of evidence can be rejected upon the sole ground that it falls short of making a case; if it contributes to that end it must be received, and its sufficiency in connection with the other evidence must be determined on a review of the whole when the case is closed. Moreover, when the sole objection is that the evidence offered varies from the bill of particulars, if the variance is merely formal, it is better to permit an amendment of the particulars than to reject the evidence, because the amendment will generally be in furtherance of justice, unless there is reason to believe the defendant will be prejudiced thereby.

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

The other Justices concurred.

EDWIN A. WETMORE AND WILLIAM L. WETMORE v. MARTIN PATTISON.

Measure of damages—Construction of agreement.

The measure of damages for failure to fulfill a contract to furnish saw-logs cannot be fixed by the loss occasioned to the other party from his own consequent failure to supply lumber therefrom under a contract subsequently made with other persons, the first contract not having been made on the strength of the second.

Damages for non-performance of a contract of supply are such as result directly from the default and may be supposed to have been in contemplation of the parties, but are not such as would be measured only by the possibilities of whatever scheme may have been based on the contract by the party to whom performance was due.

In a contract by which one party was to furnish saw-logs to the other, the latter agreed that the former should not pay more than a fixed amount stumpage on certain lands. *Held* that this implied that the parties contemplated that the logs were to be obtained from those lands, and that the party who assumed to fix the price of the stumpage claimed the right to dispose of it and thereby assured to the other party the right to cut on those lands.

Where a special agreement by one of the parties to a contract is obscure it may properly be interpreted most strongly against the party making it.

Error to Marquette. Submitted Jan. 14. Decided Jan. 28.

ASSUMPSIT. Plaintiffs bring error. Affirmed.

F. O. Clark for plaintiffs in error. Damages for breach of contract are such as naturally result therefrom: *Clark v. Moore* 3 Mich. 60; Sedgwick on Damages (5th ed.) 260: 2 Greenl. Ev. § 261; or such as will compensate the party wronged for his injury: *Allison v. Chandler* 11 Mich. 542; and cover loss of profits that would have been realized if the breach had not happened: *Burrell v. N. Y. etc. Salt. Co.* 14 Mich. 39; *Hopkins v. Sanford* 38 Mich. 613: 41 Mich. 243.

Egbert J. Mapes for defendant in error.

GRAVES, J. On the 17th of May, 1878, the parties entered into a written contract by which Pattison for certain considerations therein stated agreed to furnish certain saw-logs to the plaintiffs. He furnished a part of the number but failed to supply the whole. It was part of the agreement of the plaintiffs that Pattison should not pay over fifty cents a thousand for towing, nor more than one dollar per thousand feet stumpage on any land owned by Lac la Belle Company, or the Marquette Lumber Company, or William L. Wetmore and Bay Furnace Company.

The plaintiffs brought this action to recover damages of Pattison for his failure to fulfil the contract, and he claimed as matter of defense that it was the intent of their stipulation in the contract that he should be allowed to get the logs on the lands mentioned at one dollar per thousand for the stumpage, and should not be compelled to pay more than fifty cents per thousand for their towage, and that the plaintiffs failed to secure to him the right to get the logs on said lands, and the owners forbade and expelled him. For this he claimed damage by way of recoupment, and under the charge of the court the jury found in his favor to the amount of $5.

Several days subsequent to the contract between the plaintiffs and defendant the former made an agreement with a car company at Michigan City, to furnish them with the lumber expected to be sawed out of these logs. As a consequence of defendant's failure to perform, the plaintiffs were unable to keep their agreement with the car company, and they insist that their loss thus occasioned was a proper measure of damages.

This is not a correct view. The logs were not contracted for on the strength of the lumber agreement. The latter had no existence when the former was entered into. The plaintiffs after having made their contract with the defendant were at liberty, no doubt, to embark in such enterprises as they thought proper on the strength of it. It was a question

of business prudence how far it would be wise or safe to rely on the agreement with defendant. But they were not empowered to enter into such scheme or arrangement as they might choose, in reliance on his contract, and make him responsible in the event of his failure for whatever losses might happen through such secondary operations. To hold otherwise would be to visit the failure of performance with an amount of liability not dependent on the contract, but on the conjectural possibilities of any scheme built upon the contract by the party to whom performance is due. The damages for which one may be held liable in a contract of this nature, are such as flow directly from his own default, and which it is reasonable to suppose were within the contemplation of the parties on their entering into the contract.

It is said that the provision in the contract respecting the cost of towage and stumpage went no further than to secure Pattison against higher rates for any logs which he might be able to get on the lands referred to and did not involve any agreement that he should be privileged to obtain the logs there, and that consequently the judge erred in permitting him to recoup damages for having been stopped from cutting on such lands.

The language is very obscure but, on the whole, the construction claimed seems too narrow. The implication is unavoidable that the parties contemplated that the logs were to be obtained there, and that in contracting they proceeded under the expectation that they would be. Unless this was the understanding we cannot account for the pains taken to insert this stipulation, nor for the peculiar form given to it. The plaintiffs appear to have assumed to have power to fix the price of the stumpage, and this naturally presupposes, in the absence of any explanation otherwise, that they claimed the right to dispose of it, and it is not going far to say that the intent was to assure permission to the defendant to cut on these lands. This portion of the contract is the agreement of the plaintiffs and its obscurity justifies an interpretation most strongly against them.

We are not satisfied that there is any error in the judgment, and it must be affirmed with costs.

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

COOLEY J. did not sit in this case.

TOWNSHIP OF COMINS v. TOWNSHIP OF HARRISVILLE.

Organization of townships—Collection of taxes.

A township is not completely organized for the assessment, levy and collection of taxes until the election of its proper officers; and until then the township from which it is set off may levy and collect the taxes.

Assumpsit on the common counts will not lie at the suit of a township to recover from the township from which it has been set off the amount of school and township taxes collected by the latter under an assessment made upon the territory of the former before its township organization was perfected.

Case made after judgment from Alcona. Submitted January 18. Decided January 28.

ASSUMPSIT. Defendant had judgment. Affirmed.

James M. Goodell for plaintiff. A township becomes a body corporate and politic as soon as it is organized and before election of its officers: *Carleton v. People* 10 Mich. 250; *Rice v. Ruddiman*, id. 125; taxes for township and school purposes belong to the township in which they were levied; *Clare County v. Auditor General* 41 Mich. 182; an action for money had and received is the only proceeding by which to liquidate a demand against a municipal corporation for money wrongfully held: *Midland School Districts* 40 Mich. 551; *Moore v. Mandlebaum* 8 Mich. 448.

R. Z. Roberts for defendant. The proper proceeding to recover money belonging to one township but in the treasury

of another is by mandamus: *Marathon v. Oregon* 8 Mich. 372; *People v. Porter* 18 Mich. 101; *Dayton v. Rounds* 27 Mich. 82.

MARSTON, C. J. The facts as found by the circuit judge appear in the margin.*

The law of this State relating to the assessment, levy and collection of taxes, does not regard certain designated territory as a township until the proper officers necessary to conduct its affairs have been elected. The officers of the new township not having been elected until July, there was not such a perfected organization as would enable that township to assess the township and school taxes for that year. Under such circumstances, in my opinion the township of Harrisville had a right to levy and collect the taxes in question.

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* The facts found are as follows: From the year 1869 until the twenty-second day of March, A. D. 1877, the county of Oscoda was attached to the county of Alcona, for judicial and municipal purposes, and up to the last-named date the township of Harrisville lawfully and legally exercised municipal jurisdiction over the territory comprising the said county of Oscoda.

That on the last-named date the legislature passed an act (No. 263, Sess. Laws 1877), organizing the county of Oscoda into a township, called by said act the township of Comins, said act taking immediate effect.

In the year 1877 the supervisor of the township of Harrisville made an assessment roll, embracing, with other territory, all the territory in the county of Oscoda. The total amount of taxes spread upon the whole roll was $28,293.24, of which there was assessed for township taxes $809 76; for school taxes $4164.65. Included in the two last-named items was the sum of $469.39 for township tax and $1702.01 for school tax, which two last-named items were assessed upon the territory comprised in the county of Oscoda. Said two last-named items were collected by the treasurer of the township of Harrisville. The interest on said two last-named items to day of trial is $341.95.

The township of Comins elected officers of the township in the month of July, 1877. This was the first election of township officers in the township of Comins.

In the year 1879 the township of Comins, by its duly-constituted agent, made a demand on the township board of the township of Harrisville for the payment to the township of Comins of both of said items of township and school tax, and interest thereon, stated above to have been collected from the county of Oscoda.

Upon the foregoing facts found it is concluded that if the said tax was legally assessed, then the money arising from the assessment belongs to the defendant; if the assessment of said tax was without legal power or authority, and therefore void, then the money so collected belongs to the tax-payers who paid it.

In this case, as a conclusion of law, we say that the defendant is entitled to judgment.

Dated May 5, 1880. J. B. TUTTLE, Circuit Judge.

But whether it did or not, the present action will not lie to recover the moneys so collected. If it did have, this is not the proper remedy; if it did not, its action cannot be ratified by the town of Comins, and an action maintained for the money.

In either view the judgment below was correct and must be affirmed with costs.

COOLEY and GRAVES, JJ. concurred.

CAMPBELL, J. I concur in the result.

D. M. OSBORNE & Co. v. JOHN VAN HOUTEN.

Guaranty on contract of agency—Alteration of agreement.

A guarantor upon a contract of agency cannot be held if after signing a draft of the agreement to be submitted to the principal, the latter so alters it as to enlarge the agent's liability, as by requiring him to become responsible for more property or less salable property than at first contemplated.

Error to Eaton. Submitted Jan. 18. Decided Jan. 28.

ASSUMPSIT. Plaintiff brings error. Affirmed.

D. P. Sagendorph for plaintiff in error

Foote & Scott for defendant in error.

GRAVES, J. For the purpose of completing an arrangement with one John Dilley, jr., to act as agent for the plaintiff corporation in vending its farm implements, one of its agents, Mr. Maltby, reduced the understanding to writing in the form of an agreement between the company and Dilley, and the latter signed it, and Maltby as agent signed the name of the company. At this stage of the transaction the defend-

ant, by a written undertaking indorsed thereon, agreed to guaranty Dilley's performance.

This suit was brought on that guaranty and the circuit judge directed a verdict for the defendant.

The writing signed by Dilley contained a provision that it should not be in force until approved and countersigned by the plaintiff's manager, Mr. Moffet; and Maltby, subsequent to the guaranty, sent the paper forward for his approval and countersign. He withheld his approval from it as it then was, and in the shape it bore when the defendant became surety, and proceeded to introduce certain changes. Having made such alterations as he thought proper, he approved and countersigned it in its new form and sent it back. The declaration counted on it as thus altered and amended by the plaintiff's manager, and laid the undertaking of defendant as a guaranty of Dilley's performance thereof. According to the writing between Dilley and the company before the alteration, and as it stood at the time the defendant became surety, the company was to supply Dilley with new machines and there was no provision for his taking any others. But amongst the changes, introduced by Moffet, there was one binding Dilley to take certain old machines in the hands of a former agent and which had been left over from the previous season.

The chief question is whether this alteration was material; because if it was, there are two reasons at least against disturbing the judgment—*First*, the contract proved is not the same as the contract alleged; *second*, the alterations of the principal agreement not having been consented to, nor ratified by defendant, operated to release him, even though Dilley, the principal, may have assented.

That the alteration referred to was material is considered clear. If we read the guaranty as though it contained the principal writing in the form it bore before it was changed, and again read it as though it embraced the document as altered, we cannot fail to see that the obligation imported by the terms is not the same in both. By the alteration the arrangement is made to apply to a new subject-matter and

the consideration secured to the company for its own undertaking is changed and increased. As the paper was first framed the defendant could not be held for anything done by Dilley respecting the old machines, because the arrangement as written did not extend to them. But the meaning of the addition made by Moffet is to include them and as a consequence to enlarge the liability of the defendant. The case appears so plain on principles which are familiar that we do not deem it needful to enlarge upon it or to cite authorities.

The judgment must be affirmed with costs.

The other Justices concurred.

JOSEPH E. FENN v. DAVID KINSEY.

Railroad lands—Unlawful grants—Void legislation.

Act 132 of 1877, confirming the transfer, by the Governor and Board of Control of Railroads to the Port Huron & Lake Michigan Railroad Company, of lands granted by Congress to the State in aid of the construction of railroads, and at first assigned to the Detroit & Milwaukee Railway Company, was void as impairing the contract obligation arising from the conditions of the grant, whereby the lands were to revert to the General Government if the roads to which the State assigned them were not completed within a specified time.

Void legislation should be treated as absolutely void until the Legislature after obtaining authority to do so, re-enacts it.

Where an act of a state legislature would impair a contract obligation existing between the State and the General Government, it is void and cannot be given effect by a subsequent release from the contract obligation.

Error to Kent. Submitted Jan. 18. Decided Jan. 28.

EJECTMENT. Plaintiff brings error. Affirmed.

Drury & Maher and *R. W. Boynton* for plaintiff in error. The concurrence of grantor and grantee is necessary

to pass title: 3 Washb. R. P. 261; *Armitage v. Widoe* 36 Mich. 124; *Wilsey v. Dennis* 44 Barb. 259; *Fonda v. Sage* 46 Barb. 123; *Foster v. Beardsley* 47 Barb. 513; *Young v. Guilbeau* 3 Wal. 636; the presumption of the acceptance of a grant attaches only where the grant imposes no conditions that may be to the disadvantage of the grantee: 1 Phil. Ev. (5th Am. ed.) 609; and if the grantee refuses to accept on the conditions attached, title will not pass: *Bullitt v. Taylor* 34 Miss. 708; the ratification by the legislature of the transfer of railroad lands made by the Governor and Board of Control related back to the time when the action was had, and its legal effect is the same as if previous authority had been conferred: *Scott v. Detroit Young Men's Society* 1 Doug. (Mich.) 119; *Edwards v. Chandler* 14 Mich. 471; *People v. Supervisors* 20 Mich. 95; *Hankins v. Baker* 46 N. Y. 666; 1 Wait's Actions 234; Story on Agency § 242; a grant by one to whom lands have been conveyed in trust, gives the grantee the legal title and right of action which the grantor had possessed, even though the transfer was a breach of trust: 3 Wait's Actions 18; Tyler on Ejectment 192; Hill on Trustees 274; Tiffany & Bullard on Trustees 811; Perry on Trusts §§ 328, 602; *Canoy v. Troutman* 7 Ired. 155; *Reece v. Allen* 5 Gilm. 241; *Taylor v. King* 6 Munf. 358; *Gillespie v. Smith* 29 Ill. 481; *Graham v. Anderson* 42 Ill. 577.

Taggart & Wolcott for defendant in error. The Act of Congress of July 3, 1856, vested the lands granted in aid of railroads in the State of Michigan: *Johnson v. Ballou* 28 Mich. 379; act 126 of 1857, governed their sale thereafter, but if its terms were substantially complied with, the State had no authority to grant to other parties or interfere with the title: *Langdeau v. Hanes* 21 Wall. 521; *Courtright v. Cedar Rapids and Missouri R. R.* 35 Ia. 399; *M. K. & T. Ry v. K. P. Ry.* 97 U. S. 491; *Railroad v. Fremont County* 9 Wal. 94; *Lessieur v. Price* 12 How. 59; *Rutherford v. Greene* 2 Wh. 196; *L. L. & G. R. R. v. United States* 92 U. S. 733; this act required no assurances of title

and certificates as to acts done would only be regarded as evidence of title previously passed to the grantee: *Busch v. Donohue* 31 Mich. 481; *Sutherland v Governor* 29 Mich. 322; *Dart v. Hercules* 34 Ill. 395; *C. R. & M. R. R. v. Carroll Co.* 41 Ia. 155; *Alison v. Halface* 11 Ia. 450; *Kissell v. St. Louis* 18 How. 19; *Cooper v. Roberts* 18 How. 173; *Minnesota Min. Co. v. Nat. Min. Co.* 11 Mich. 186; *Ballou v. O'Brien* 20 Mich. 304; vested rights can ordinarily be determined by forfeiture only on judicial determination of the facts: Cooley Const. Lim. 351–362; *People v. Bank of Pontiac* 12 Mich. 537; *Trombley v. Humphrey* 23 Mich. 471; but this does not apply to a legislative grant containing conditions of forfeiture, but a legislative claim of ownership is enough: *Farnsworth v. Minnesota & Pacific R. R.* 92 U. S. 49; but the power of the State to transfer title was limited to a particular purpose and the law governing it is binding until repealed: *Schulenberg v. Harriman* 21 Wal. 59.

Campbell, J. Fenn sued Kinsey in ejectment to recover certain lands in Kent county, which under the congressional land grant of 1856, and the State law of 1857, had been set apart, by the proper selection, as appropriated to the aid of a railroad from Owosso to Grand Haven. The plaintiff claimed title under conveyance from William R. Bowes, who claimed under grant from the Port Huron & Lake Michigan Railway Company, to which company the land had been granted by the Board of Control and the Governor acting in pursuance of their grant, in 1873. We held this action of the Board of Control and of the Governor to be unlawful and void, in *Bowes v. Haywood* 35 Mich. 241; and had the title stood without further action, there could be no doubt of the plaintiff's failure to prove any right.

But it is now claimed that this title, which was void in its creation, was afterwards made good by confirmation. We must, therefore, look at the various steps in this assumed title to see where the law has left it. The lands became subject in 1857 to appropriation by the Board of Control to such

proper party as should be competent to build a railroad from Owosso to Grand Haven, by reason of the failure of the Detroit & Milwaukee Railway Company to accept the act of 1857. The Board of Control, in August, 1857, transferred the grant and privileges to certain gentlemen as trustees, who never took any steps to carry out the work, and who subsequently released all their claims to the State.

Nothing further was done until 1871, when the Board of Control resolved that if it could lawfully be done, it would be proper to transfer the grant to the Port Huron & Lake Michigan Company. In 1873 a further resolution was passed declaring in substance that this company was engaged in building a road which, with its connections, would form a continued line from Grand Haven to Flint and thence to Port Huron, and releasing the grant to this company, subject to the obligation to sell the lands to actual settlers in occupancy, at a dollar and a quarter an acre. On May 30, 1873, the Governor made a patent purporting to be issued under this resolution, and to convey to the company the interest of the State in these lands.

At this time this company had neither built nor intended to build any road west of Owosso, and had actually built nothing west of Flint, but had built sixty miles between Flint and Port Huron, Whether this had been certified by the Governor to the Secretary of the Interior does not appear and is not important, because that certificate would only cover lands belonging to the line east of Flint. It does not appear that Congress had ever been asked or had ever consented to extend the time for building a road from Flint or Owosso to Grand Haven, and the time had long run out for doing so.

Immediately thereafter the company made a deed whereby they conveyed the lands to William R. Bowes, his "successors and assigns," as trustees under a contemporaneous declaration of trust which is not put in evidence, to secure the faithful sale and disposition of the lands according to the conditions of the trust. This deed, which was made by William L. Bancroft and Edgar White, who claimed to have been authorized by the directors, was afterwards confirmed by a

vote of directors, but not by the stockholders. Bowes conveyed to plaintiff by warranty deed in 1878.

In 1877 the Legislature passed an act to ratify and confirm the acts of the Governor and Board of Control, giving the conveyance effect from its date. Laws 1877, p. 121. On the 3d of March, 1879, Congress released to the State of Michigan the reversionary interest of the United States. 17 U. S. St. at L. 490.

The court below held, under various rulings at law, that plaintiff had no title established by the facts found.

At the time when the act of 1877 was passed it is beyond question that the State was bound by the terms of the congressional grant, which were formally accepted by the law of 1857, to dispose of none of these lands except for the specific purposes named in the act of Congress. As the United States reserved a right to all lands not legally disposed of under the trust, and under the grant the State itself had no power to divert them, the act of 1877 was in direct violation of that clause of the Constitution of the United States which declares that no State shall pass any law violating the obligation of contracts.

To hold that such a law operated by way of estoppel would be in effect to destroy the weight of the constitutional prohibition. The only proper way to construe void legislation, is to treat it as absolutely void until the legislative power, after obtaining authority to do so, sees fit to re-enact it. Congress did not attempt to bind the State to carry out its illegal action, and could not have done so. Any State Legislature, after 1877, had a right to treat that legislation as if it had never been passed, and a mere release from the obligations of the original contract by Congress could not operate to ratify the illegal action of the State Legislature. It is for the State itself, now that it has plenary power, to act as if there had been nothing done before.

As the illegality of all of these transactions was manifest on the face of the proceedings, it does not occur to us that either the Railway Company or Bowes was in a position to deal with the lands in such a way that mutual estoppels would

arise so as to vest him with any trust in the lands. Whatever right his grantees may have against his estate, if he undertook to convey in his own name and by personal warranty, no such right can be traced back through Bowes and the Railway Company to bind the State. As we do not know what the trust was, we need not consider it further.

The judgment below is correct, and must be affirmed with costs.

MARSTON, C. J. and GRAVES, J. concurred.

COOLEY, J. did not sit in this case.

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GRAND RAPIDS & INDIANA R. R. CO. v. ALEXANDER CAMERON.

Railroad companies—Side fencing—Injuries to cattle—Modification of requests to charge.

The statutory liability of a railway company for injuries to cattle resulting from its neglect to put up and maintain side-fencing is not affected by the contributory negligence of the owner of the cattle. Act 198 of 1873.

Where a charge, considered as a whole, cures an apparent error committed by the court in modifying a request for an instruction, the judgment will not be reversed for such error.

Error to Kalamazoo. Submitted Jan. 18. Decided Jan. 28.

CASE. Defendant brings error. Affirmed.

D. Darwin Hughes, Jr. for plaintiff in error. Contributory negligence is a defense to an action for injury resulting from neglect of a railroad company to obey the statutory requirement to maintain side-fencing: *Curry v. Railroad* 43 Wis. 665; *Jones v. Railroad* 42 Wis. 306; *Lawrence v. Railway* id. 322; *Hance v. Railroad* 26 N. Y. 428; *Towne v. Railroad* 124 Mass. 101; *Eames v. Railroad* 98 Mass. 560;

Trow v. Vt. Cent. R. R. 24 Vt. 487; *Ross v. R. R.* 6 Allen 87; *Chic. & Alton R. R. v. Fears* 53 Ill. 115; *Peoria etc. Railroad v. Champ* 75 Ill. 577.

Oscar T. Tuthill for defendant in error. The liability of a railroad company under a statute giving damages for injuries resulting from its neglect to maintain side-fencing is absolute: 1 Redf. Railways 466–490; *Robinson v. Grand Trunk Ry* 32 Mich. 322; *C. C. C. & I. R. R. Co. v. Brown* 45 Ind. 90; *Gilman v. R. R. Co.* 60 Me. 235; *Chic. & Alton R. R. v. Umphenour* 69 Ill. 198; *Poler v. N. Y. C. R.R.* 16 N. Y. 476; *Williams v. New Alb. R. R.* 5 Ind. 111; *Tol. & Wabash R. R. v. Cohen* 44 Ind. 444; *McKinney v. O. & M. R. R.* 22 Ind. 99; *Norris v. Androscoggin R. R.* 39 Me. 273; *Corwin v. N. Y. & E. R. R.* 13 N. Y. 42; *Brown v. Milwaukee Ry* 21 Wis. 39; *Laude v. Chic. R. R.* 33 Wis. 640; *Rogers v. Newburyport R. R.* 1 Allen 16; *Ind. & C. R. R. v. Townsend* 10 Ind. 38; *Jeffersonville Ry v. Applegate* id. 49.

Marston, C. J. In *Flint & Pere Marquette Ry Co. v. Lull* 28 Mich. 510, it was held that the liability of the company under the statute for injuries to cattle, by reason of the company's fences not being put up and maintained, was not affected by the contributory negligence of the owner of the cattle. This disposes of several of the errors assigned in this court. It may be that the modification of the defendant's sixth request, if standing alone, could not be sustained, but when we examine the entire charge as given, we are of opinion that the error, if any, was cured. The charge on the whole was even more favorable in some respects than the law would warrant.

The judgment must be affirmed with costs.

Campbell and Graves, JJ. concurred.

Cooley, J. did not sit in this case.

Robert Cook v. The Detroit & Milwaukee Railroad Company and James H. Muir.

Receiver for insolvent corporation—Demurrer in equity.

A receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation and pending the decision on a demurrer whereby the right to file the bill is put in issue.

A demurrer to a bill admits the complainant's case for the purpose of that issue only, and not for the purpose of establishing a right to relief which the proofs might not sustain if defendant should be allowed to answer after his demurrer is overruled.

Comp. L. § 6565 in providing for the sequestration of corporate property and for the appointment of a receiver does not contemplate that an appointment shall precede an adjudication or the adjudication a hearing on notice.

Appeal from Wayne. Submitted Jan. 19. Decided Jan. 28.

Judgment creditor's bill. Defendant appeals. Reversed.

Alfred Russell for complainant.

Theodore Romeyn for defendant.

Cooley, J. This is a judgment creditor's bill. James H. Muir is made defendant as having in his possession the books and papers of the company as its secretary. The bill alleges a judgment in favor of complainant, and the return of execution thereon *nulla bona*, and the allegations of the bill are supposed by complainant to be sufficient for a bill under chapter 206 of the Compiled Laws of 1871 which makes provisions for the winding up in chancery of insolvent corporations on the petition of creditors.

The defendants demurred to the bill, and while the demurrers were undisposed of, the court, on an *ex parte* application, made an order whereby it "ordered, adjudged and decreed, that the stock, property, things in action and effects of the said Detroit & Milwaukee Railroad Company be and the same are hereby sequestered;" that Henry F. Brownson

be appointed receiver thereof; "that the said receiver shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed upon receivers in and by chapter 206 of Comp. Laws of 1871, touching proceedings against corporations in chancery; that the directors, clerks, attorneys and other agents and servants of the said company, and each and every of them, disclose and deliver over to the said receiver on demand, all the moneys, property and effects of the said company in their possession or within their power or under their control, or in the possesion, within the power, or under the control of any or either of them, or in which the said company have any interest, including all real property and the title deeds thereof, and all books, papers and memoranda, and all evidence of or security for any debts or claims due, owing or belonging to the said company, or in which the said company have any interest; and that the said Detroit & Milwaukee Railroad Company and James H. Muir, secretary of the said company, forthwith assign, transfer and deliver possession of all the said stock-ledgers, books of account, papers and writings of every description, and property, personal and real, belonging to the said Detroit & Milwaukee Railroad Company, to the said receiver, within five days after demand by him and service by him of a certified copy of this order upon C. C. Trowbridge, president of the said corporation, and upon the said James H. Muir, secretary thereof."

From this order the defendants appeal.

The circuit judge seems to have assumed that there could be no answer to the *prima facie* case made by the complainant's bill, and that the appointment of a receiver was a matter of course. He therefore not only appointed one without giving defendants an opportunity to be heard, but he decreed a sequestration of the Railroad Company's property. And this was done while an issue which involved the right to file the bill was pending and not disposed of. Surely this was erroneous. The judge could not know in that stage of the case that complainant had any equities whatever.

It is said that the demurrer admitted complainant's case. But this was so for the purposes of that issue only. If the demurrers had been overruled, the defendants would have been given leave to answer, and the Court is not at liberty to assume, without hearing them, that they could not disprove complainant's case. The statute (Comp. L. § 6565) says that the court "may sequestrate the stock, property, things in action, and effects of such corporation, and may appoint a receiver of the same;" but it does not intend that the condemnation shall precede an adjudication, or the adjudication precede a hearing.

The order appealed from must be reversed with costs and the record remanded.

The other Justices concurred.

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ALONZO VOSBURGH ET AL v. GEORGE T. LAY.

Attorney fee on foreclosure of mortgage.

An attorney fee paid under protest on redeeming from a statutory foreclosure may be recovered back.

Redemption from a statutory foreclosure cannot be conditioned on the payment of any allowances in the nature of fees beyond what are authorized by statute.

A stipulation in a mortgage fixing in advance a gross allowance for the attorney's fee in the event of foreclosure at law is against public policy and cannot be enforced.

Error to Allegan. Submitted Jan. 18. Decided Jan. 28.

ASSUMPSIT. Plaintiffs bring error. Reversed.

Pope & Hart for plaintiffs in error.

Padgham & Padgham for defendant in error.

GRAVES, J. The plaintiffs were owners of the equity of redemption of certain premises on which the defendant fore-

closed a mortgage by proceedings under the statute. The mortgage provided that an attorney fee of $50 should be allowed in case of proceedings taken to foreclose.

The defendant bid in the premises and the attorney fee of $50 was included in the sum bid. The mortgage debt carried interest at ten per cent. The sheriff executed the deed, and indorsed the time when it would become operative, and on the last day of the time given for redeeming, the plaintiffs offered the defendant, for the purpose of effecting redemption, the full amount for which the premises were sold, together with the costs of sale and interest thereon at ten per cent. less the attorney fee of $50 and interest thereon. They also offered to pay $25 as an attorney fee by way of compromise, if the defendant would accept it and allow redemption. The defendant refused to accept less than the entire amount bid and interest thereon at ten per cent. The plaintiffs then informed defendant that they would pay the attorney fee to the register of deeds under protest, and then sue him, the said defendant, to recover it back. They accordingly deposited the attorney fee and interest on it in one package and the residue in another package with the register of deeds for the purpose of redeeming from the mortgage sale, and they accompanied such deposit with a written protest that the attorney fee and interest thereon were paid to effect redemption, and were claimed to be an illegal exaction. The defendant took the money from the register and received with it said protest. The plaintiffs thereupon brought this suit to recover back the amount of the attorney fee and interest, and the circuit judge after finding the facts entered judgment for defendant.

The case is governed by the principles laid down in *Myer v. Hart* 40 Mich. 517, and recognized in *Parks v. Allen* 42 Mich. 482. No court is vested with authority to draw a line and decide that the fee specified in one mortgage is proper and its payment compulsory, and that the fee contained in another is excessive and its payment voidable. Neither is there any criterion in law for apportioning the sum expressed to the service rendered, and if the payment of $50 can be

made imperative by expressing it in the mortgage as a fee for future service under the power of sale, however slight, it would follow that payment of $500 could also be made imperative on the some principle and in the same way.

As the law now stands it cannot be regarded as authorizing as a condition precedent to redemption any other exaction in the way of fees or compensation than such as the statute specifies, and stipulations in advance for gross allowances are not consistent with public policy. In respect to all proceedings of this nature, and which are exceptional and peculiar, all allowances which partake of the character of fees are dependent on legislation. *Booth v. McQueen* 1 Doug. (Mich.) 41.

The judgment must be reversed and one entered here in favor of plaintiffs for fifty-five dollars and costs of both courts.

The other Justices concurred.

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HARRIET PRATT v. GEORGE S. HOUGHTALING.

Jurisdiction to license administrator's sale.

Creditors of a decedent's estate are not cut off from enforcing their claims so long as no commissioners are appointed upon the estate and no time or place appointed for the allowance of claims.

Where a widow, after being made executrix, remarries and an administrator *de bonis non* is appointed, the interim between her disqualification and the new appointment may be added to the four years and six months allowed by law for the payment of claims against the estate.

A probate court does not lose jurisdiction to license the sale of real estate for the payment of debts if the order is made within the period to which the time may properly be extended, even if the extension is not actually made.

It seems that a probate license to sell real estate for the payment of debts will not necessarily be held invalid for having been granted after the period allowed therefor by statute, when inquired into collaterally, as in an action of ejectment against the purchaser.

Case made after judgment from Cass. Submitted January 19. Decided January 28.

EJECTMENT. Defendant had judgment. Affirmed.

Howell & Carr for plaintiff. Claims cannot be presented against an estate after the statutory period allowed therefor: *People v. Probate Judge* 16 Mich. 204; *Godfrey's Estate* 4 Mich. 308; and the probate court loses jurisdiction to license a sale for their payment if the statutory time has passed and he has not extended the time: Freeman on Judgments § 121; *People v. Sanchez* 24 Cal. 17; *People v. Bradwell* 2 Cow. 445; *Wight v. Wallbaum* 39 Ill. 554; *Orman v. Riley* 16 Cal. 186; *Northrop v. People* 37 N. Y. 203.

Harsen D. Smith for defendant. A probate license to sell real estate cannot be attacked collaterally for having been made after the expiration of the time within which the statute requires the estate to be settled: *Cooper v. Robinson* 2 Cush. 190; *Allen, petitioner*, 15 Mass. 58; *Richmond, petitioner*, 2 Pick. 567; *Hudson v. Hulbert* 15 Pick. 423; *Palmer v. Palmer* 13 Gray 326; unless granted after the estate is actually closed: *Howard v. Moore* 2 Mich. 226; *Coon v. Fry* 6 Mich. 506; *Woods v. Monroe* 17 Mich. 238; *Osman v. Traphagen* 23 Mich. 80; *Griffin v. Johnson* 37 Mich. 87; *Larzelere v. Starkweather* 38 Mich. 100; *Dexter v. Cranston* 41 Mich. 448; *Church v. Holcomb* ante p. 29.

MARSTON, C. J. This was an action of ejectment, brought by one of the children and heirs-at-law of Rulof D. Crego, deceased, to recover her interest in lands of which he died seized. The defendant claims title under an administrator's sale made in 1861, and also to be a *bona fide* purchaser.

The plaintiff claims that no debts were ever proven against the estate; that the real estate of the deceased could only be sold to pay debts; and that at the time license was granted to sell the real estate the probate court had lost all jurisdiction in the premises by lapse of time.

Crego died August 29, 1856. No commissioners were appointed to allow claims. Eliza Crego, executrix,* November 16, 1857, petitioned the probate court for license to sell certain real estate, alleging therein the existence of debts amounting to $500. License was granted February 1st, 1858, to Joseph Jones, administrator *de bonis non*, the executrix having married, and a sale made March 26, 1859, which was afterwards vacated and set aside by the probate court. May 7, 1861, Joseph Jones, administrator, filed a petition for license to sell the real estate, alleging therein debts to the amount of $500, which was heard June 18th, 1861, license granted and a sale made thereunder August 3d, 1861, which was confirmed August 15th, 1861.

If the probate court had jurisdiction to hear the petition filed May 7th, 1861, and grant a license thereunder, then under section 4596, 2 Comp. Laws, the defendant is protected.

No commissioners were appointed for the allowance of claims, nor did the judge of probate appoint any time or place for the allowance of claims by himself; and until some provision was thus made to give creditors an opportunity to present their claims, we cannot say they were cut off, under the facts and circumstances of the present case.

That debts existed against the estate, and were informally recognized as valid and subsisting by the probate court, cannot be controverted. The probate court, under the statute, could have allowed the original executrix four years to dispose of the estate and pay the debts, and an administrator *de bonis non* having been appointed, six months' additional time could have been given him, besides the time between the date of his appointment and the time the executrix was first incapacitated from acting. The time which could thus have been allowed would extend to August, 1861, and in this case the petition and license under which the sale was made, were previous to that time. The case had not therefore passed beyond the jurisdiction of the probate court, and although it does not appear that the time for thus settling

* The executrix was appointed Nov. 7, 1856.

the estate had been extended, yet this is not necessary. A failure to so extend would not deprive the court of jurisdiction.

Even then if the sale could thus be inquired into in a case like the present, still it does appear that the court was acting within the limits of its jurisdiction, and action thereunder was valid. Where an estate has not been formally closed, we do not wish to be understood as holding or intimating that a license granted after the time fixed by the statute would be necessarily void, in a case like the present, when inquired into collaterally.

The judgment must be affirmed with costs and the record remanded.

The other Justices concurred.

William E. Rogers v. The Port Huron & Lake Michigan Railroad Company and Harston G. Barnum.

Railroad land-grants—Passage of title.

Congress, by an Act passed June 3, 1856, granted certain lands to the State of Michigan to be used solely in aid of the construction of railroads. The State, by Act 126 of 1857, set them apart for the benefit of certain designated roads on condition that the beneficiaries should accept them subject to the terms of the Act. *Held*, in a case in which the acceptance was qualified, that the company acquired no title, and that a bill would not lie to quiet a title to the lands obtained by a levy of execution against the beneficiary intended by the Statute.

Common law rules cannot override statutes.

The State, while acting under the Constitution, can impose its own conditions on its own grants.

Railroad companies which accepted the congressional grant of public lands under the provisions of Act 126 of 1857, acquired rights which could not be destroyed except by their own neglect.

Appeal from Muskegon. Submitted January 19. Decided January 28.

BILL to quiet title. Dismissal affirmed.

E. R. Hutchins, *Benton Hanchett* and *G. R. Lyon* for complainant.

R. W. Boynton for defendant Barnum.

CAMPBELL, J. Complainant filed his bill to quiet title to certain lands claimed under an execution sale under a judgment rendered against the Detroit & Milwaukee Railway Company. A tax title is also set up, but it is not important, because if the lands were not at the time the tax was assessed the property of the Detroit & Milwaukee Railway Company they were not taxable. No dispute is made by counsel concerning the regularity of the execution sale, and therefore, for present purposes, it may be assumed to be valid, although, for the reason mentioned, we have not examined into it.

If the property belonged to the railway company, it was because it devolved upon the corporation under act No. 126 of the Laws of 1857 (Laws 1857, p. 346) disposing of the congressional land grant to Michigan in aid of railroads. The facts, therefore, require to be referred to somewhat specially.

The Detroit & Milwaukee Railway Company was a chartered corporation, and not organized under general laws. Its railway extended from Detroit through Owosso, and was to terminate at Grand Haven. It was, at the time of the state law of 1857, finished some distance west of Owosso, and it was in 1858 or 1859 completed to Grand Haven. It was under mortgages by the foreclosure of which the road and appurtenances passed in 1860 to another company.

In 1856, Congress passed a law whereby there was granted to the State of Michigan, conditionally, the right to appropriate alternate sections within a certain distance from the lines of certain railroads projected between given points, with a right to select other lands within a broader range to make up deficiencies caused by private rights or government appropriations. Among the roads to be built were men-

tioned roads from Grand Haven and Pere Marquette to Flint, and thence to Port Huron. U. S. Laws 1855–6, pp. 19, 20.

The Act of Congress in giving this privilege to the State made the lands subject to disposal by the legislature "for the purpose aforesaid, and no other." These purposes were that the lands should "be exclusively applied to the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever."

The law further enacted that the lands "shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding 120 sections, for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of the State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed 120 sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of said roads may be sold; and so from time to time until said roads are completed; and if any of said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States."

Instead of selling the lands and using the proceeds, the State adopted the policy of allotting the lines to companies, and letting them have the lands as they earned them. In 1857 the statute first referred to was passed to take immediate effect from February 14th, and the principal questions in the case depend on the effect of this law, and action under it.

It will be perceived that the lands were so appropriated by Congress, that each twenty miles of road had set apart for it lands lying opposite to it so far as not already sold, and that in disposing of the lands they could not be sold except in portions of twenty miles in boundary. But the State could sell such a tract not exceeding 120 sections in the outset, but

thereafter was confined to such sales as twenty miles lengths of road were completed and certified by the Governor to the Secretary of the Interior. Provision was thus made whereby the United States authorities were to have constant knowledge of the progress of the work, and of the lands that remained and belonged to the government at the end of ten years, when the surplus was released from the appropriation.

The State law of 1857 (Laws 1857 p. 346) undertook to dispose of the land grants—as already suggested—not by selling the lands directly and building roads, but by setting them apart for the benefit of several railroads already projected or in process of construction. In doing this the original statute reserved from appropriation until the completion of the roads, a portion which the State itself could have used. While the Act of Congress contemplated that the State might act directly, yet the State Constitution stood in the way, and limited the power of the State in a manner which required attention in applying all of this legislation. By section 9 of article 14 of the Constitution it is ordained that "the State shall not be a party to or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property." The result of this restriction and of the Act of Congress, is that in dealing with this fund, the State—although having very broad discretionary powers—was nevertheless acting in some respects, as a trustee, and this trust relation is important in construing the action in dispute on this record.

The State by the act referred to accepted the congressional grant, and all the restrictions and the terms and conditions contained in the Act of Congress. It then proceeded to vest "fully and completely" in various railroad companies "so much of the aforesaid lands, franchises, rights, powers and privileges, as are or may be granted and conferred, in pursuance of said Act of Congress, to aid in the construction of" such of the roads as covered specified lines provided for in the grant. The lines from Grand Haven to Flint and from Flint to Port Huron, were divided at Owosso, the Detroit &

Milwaukee Railway Company taking the western division, and the Port Huron & Milwaukee Railway Company the eastern. The section making this apportionment contained at its close this important clause: "All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions and obligations imposed upon them by this act, as hereinafter provided."

Most of these conditions are unimportant in determining the present cause, and may be passed over briefly. Those of more immediate moment will be referred to separately.

To provide for the completion of the work directions were given concerning the quality of the structures, the use of them in accordance with the conditions of the grant, the preparation of maps to fix the line of selection, and various specific restrictions belonging chiefly to State policy. Some of these as well as others became important, especially in connection with the fact that while the Detroit & Milwaukee Railway Company, and some others, were chartered companies, not subject to legislative discretion, most of the companies were organized under general laws, which could be changed without the consent of the companies.

By section 5 it was provided that "each and every one of said railroad companies is required, by a vote of a majority of the directors thereof, to accept the lands, franchises, rights, powers and privileges hereinbefore conferred, which acceptance shall be embodied in a written instrument, signed by the president, and attested by the secretary and corporate seal of said company; and in such acceptance, each of said companies shall severally assent and agree to the provisions and requirements of this act, which acceptance shall be filed in the office of the Secretary of State of Michigan, within sixty days after the passage of this act."

By section 8 a board of control was provided for, "whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this act provided, and to do any and all other acts necessary and proper respecting the construction and building of said railroads, which shall be prescribed by law." No subse-

quent legislation concerning this board is relevant here except the extension of its existence, which was at first limited, and the legislation of 1863 and 1865, which in continuing the board expressly ratified and confirmed all its official action theretofore had under the act of 1857. Laws 1863 p. 283; Laws 1865 p. 669.

Section 7 authorized each railroad company after the completion of twenty continuous miles, and after the Governor had certified to the Secretary of the Interior such completion, "then and not before" to sell sixty sections of land included in any continuous twenty miles, and so on until its entire completion and the acceptance of the same by the board of control herein provided, when and not before, it might sell the remainder.

Section 11 is as follows: "Should either of said railroad companies fail to accept said lands on the terms of this act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line of road or any part thereof, in the time and manner required, in such case said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said board of control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act."

Section 12 declares that "All of said railroad companies shall at all times and in all matters, be subject to the laws of this State, and to such rules and regulations as may from time to time be enacted and provided by the Legislature of the State of Michigan, in regard to the management and disposition of the said lands, not inconsistent with the provisions of this act, and the Act of Congress making said grant of land to this State, and they shall be entitled to all the immunities and privileges conferred by said laws: *Provided*, that nothing herein contained shall be so construed as to relinquish the right of the State to any specific tax imposed upon any railroad company within this State."

At this time the Detroit & Milwaukee Railway Company

was subject to a tax of one per cent. on its capital stock paid in, in lieu of all other taxes.

By section 20, a tax was levied of one per cent. on the cost of each road and of its equipments and appurtenances, and provision was made for an additional tax of not more than two per cent. on gross earnings, but the Detroit & Milwaukee and Port Huron & Milwaukee Railway Companies were to be allowed a diminution of the two per cent. tax in proportion to their diminished share of lands as compared with other companies. This was because these roads ran through a part of the State containing a smaller amount of unsold lands.

The Detroit & Milwaukee Railway Company on the 11th of April 1857, and within the 60 days specified, filed a document adopted by the directors and signed by the president and secretary under the corporate seal, accepting all of the act of 1857 except section 12, which was declared to be in contravention of its charter, and section 20, which provided for taxation. Against these there was also a protest, and distinct refusal of assent.

On the 26th of August, 1857, the Board of Control declared by resolution that the company had not in accordance with the statute accepted the grant and agreed to the provisions of the act, and had filed no such acceptance in the office of the Secretary of State; and thereupon declared the lands forfeited to, and revested in the State.

The directors of the company never thereafter made any other resolution of acceptance, and the company never applied to the Governor or the Board to accept their road as built in accordance with the act, and no certificate was ever filed on behalf of the corporation by the Governor with the Secretary of the Interior to that effect. There was never any corporate action thereafter asserting or claiming any rights under the grant.

The only claim by complainants that is supposed to make a difference is under certain amendatory acts of the legislature passed in 1859 and 1863, and the further claim that by the act of 1857 a title was vested in the railroad companies

in the shape of fee-simple only, forfeitable on condition subsequent, and that such forfeiture could only be declared judicially.

The law of 1859 contained two sections. The first purported to amend section 7 of the act of 1857, by changing "sixty" to "one hundred and twenty" as the number of sections to be earned by each twenty miles of road. The second section limited taxation to 1 per cent. on capital stock paid in.

There was nothing in this amendment which was designed to change any other part of the act of 1857. It did not repeal the section which required an assent to be filed in 60 days by the companies named in the act, and could only apply to companies that had, or should, become subject to its provisions. If designed—as it may have been in fact, although no court can so declare as matter of law—to conciliate particular companies, it could only do so as an inducement to future conduct, and not as a retrospective removal of disabilities. The Board of Control might perhaps find it easier to secure the building of some of the designated roads. But the Legislature could not and did not attempt to reach any company without a lawful acceptance by its directors and officers.

It is also to be noticed that this statute of 1859 did not change section 12 of the statute of 1857 which the Detroit & Milwaukee Railway Company had made their principal ground of refusal, as bringing the chartered rights of the company further under legislative control than they were willing to place them.

The law of 1863 (Laws 1863, p. 284) provided that such of the railroad companies mentioned in the act of 1857 as had finished twenty miles of road should have the full time allowed by the acts of Congress to finish their lines, and all forfeitures incurred by such companies under the laws of this State were thereby waived. Special provision was made for some particular roads.

The original act had declared forfeitures unless twenty miles should be finished in each year, and unless the whole

roads should be finished in seven years. Roads in the Upper Peninsula, and some particular roads, were made subject to special provisions. The Act of Congress gave ten years for completing the road, and made no provision for less than the whole, except that land was only earned in twenty-mile sections.

It is quite plain that the object of the act of 1863 was merely to aid such companies as had accepted the conditions of the act of 1857, but had delayed finishing their roads.

So far as the claim is concerned that these companies without acceptance obtained titles in fee, we think it has no legal basis. We have held and we have no doubt that such companies as accepted the statute, obtained thereby rights which could not be destroyed except by their own neglect. *Johnson v. Ballou* 28 Mich. 379; *Att'y Genl. v. Lake Superior Ship Canal Co.*32 Mich. 233.

But the title of the State was itself subject to some conditions before a complete and absolute right could exist in any of these lands except the first 120 sections, and the State never transferred to any of the railroad companies the right to any lands not to be earned by building their roads. Under the Act of Congress the State could not sell any of these lands until the Governor had certified to the Secretary of the Interior that the appropriate twenty miles had been completed. While, therefore, the State could, as we have held in the cases cited, make such disposition in such manner as it saw fit of the lands granted, it could only be for the purposes and on the conditions prescribed by Congress. These conditions are all distinctly embodied in the statute of 1857. Not only did the State, as it was bound to do, impose these conditions, but it refused to allow any company to take the lands at all without a distinct and express act of acceptance.

This acceptance was the only act whereby any of these companies was brought into contract relations with the State at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions.

There is no occasion to discuss the other questions raised

on a different theory. It is enough for our present purposes to say that common-law rules cannot override statutes, and that the State, while acting within the Constitution, can impose its own conditions on its own grants.

We think no title vested in the Railway Company, and that the bill was properly dismissed.

The decree must be affirmed with costs.

MARSTON, C. J. and GRAVES, J. concurred.

COOLEY, J. did not sit in this case.

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HENRY B. ATWOOD ET AL. v. MARTHA E. BEARSS.

Record of execution sale as notice to subsequent purchaser.

Putting the sheriff's certificate of a sale on execution upon record is constructive notice to subsequent purchasers: Act 123 of 1875.

One who bids in lands under an execution therefor becomes a "purchaser" within the meaning of the registry laws even though he does not yet receive the sheriff's deed; and if he records his certificate of sale he is entitled to protection against subsequent purchasers until he can receive his deed.

Abandonment of a sale on execution because of an error in the notice therefor does not necessarily invalidate a subsequent sale or notice if it does not appear that the execution debtor has been prejudiced.

The issue of two executions at once upon the same judgment to the sheriffs of different counties is irregular; but in an action of ejectment for premises sold under one of them, the other not being returned, the sale will not necessarily be held void, nor will the officer's omission to return a want of personal property be fatal thereto, especially if there is no showing that there was any.

A sheriff serving an execution is not bound to search for personal property beyond his own bailiwick.

The amount for which property has been sold may be put in evidence as tending to show its value.

Where an execution purchaser of land has recorded the certificate of sale in advance of any conveyance from the debtor to other persons, he is

presumed, until the contrary appears, to be entitled to recover in an action of ejectment against the latter, who have the burden of proving themselves to be or to derive title from *bona fide* purchasers.

Error to Tuscola. Submitted Jan. 19–20. Decided Jan. 28.

EJECTMENT. Defendant brings error. Affirmed.

Atwood & Markham for plaintiffs in error. The value of property may be shown by evidence of its market value: Greenl. Ev. § 440*a*; Sedgw. on Damages 335 *n*; *Brady v. Brady* 8 Allen 101; *Sission v. Cleveland etc. R. R.* 14 Mich. 489; two executions cannot legally be issued at the same time: *State v. Stout* 6 Halst. 362; *Hammond v. Mather* 2 Cow. 456; *Elliott v. Elmore* 16 Ohio 27; filing the certificate of sheriff's sale is not necessary to its validity: *Jackson v. Page* 4 Wend. 585; *Jackson v. Young* 5 Cow. 269; nor is a sale invalidated by an irregularity in the notice in stating the year of sale: *Addison v. Knowles* 38 Mich. 316.

Tarsney & Wendock for defendant in error.

MARSTON, C. J. The plaintiff below brought ejectment to recover the possession of certain real estate, claiming title thereto under an execution sale against Mary L. Waldron. The plaintiff farther undertook to show that the defendants were in possession under sundry mesne conveyances from Mrs. Waldron, and that they were not, nor were any of the parties through whom they claimed, *bona fide* purchasers.

It appeared that Mrs. Waldron conveyed the premises to her daughter, Mary J. Gale, September 23d, 1876, and that this deed was recorded July 16, 1877. Mrs. Gale conveyed to Martha E. Orr July 31, 1877, and Mrs. Gale, being then a minor, after becoming of age, and on April 25, 1878, again conveyed to Mrs. Orr. These deeds were recorded May 17, 1878.

The judgment under which plaintiff claimed was rendered November 17, 1876. Execution issued thereon November 24 and a levy made the same day; sale made thereunder

June 1, 1877, and the sheriff's certificate thereof, dated June 4, 1877, was recorded the same day, in accordance with the provisions of Act 123, Pub. Acts 1875, p. 154.

It will thus be seen that this certificate was recorded previous to the purchase by Mrs. Orr, and it therefore becomes important to ascertain whether such record was constructive notice of Mrs. Bearss' rights acquired under the execution sale.

In *Columbia Bank v. Jacobs* 10 Mich. 349, it was held that an attaching creditor was not a purchaser within the meaning of the registry laws, and that filing a copy of the attachment, with a description of the real estate levied on, in the office of the register of deeds, would not be constructive notice to subsequent purchasers. This was followed and applied under somewhat different circumstances in *Millar v. Babcock* 25 Mich. 138 and *Campau v. Barnard* id. 381.

When this case was submitted I was quite strongly of opinion that the same construction must be given the act of 1875, because it does not in express terms declare that such record of the sheriff's certificate shall be constructive notice, while it does point out and declare the purposes for which it may be used. A more careful examination however satisfies me that such record must be considered and held to be constructive notice.

The statute relating to deeds and conveyances and the recording thereof, does not in explicit terms, declare that the record of such conveyances shall be constructive notice to subsequent purchasers, but such has ever been held to be the legal effect and operation thereof. The statute does declare that conveyances not recorded shall be void as to subsequent purchasers, etc., in good faith. The argument advanced against the record of the sheriff's certificates being constructive notice is, that the general laws relating to the recording of conveyances can not be held applicable to a statute subsequently passed unless so declared, and that the recording of the certificate should be given no greater or other force than the filing thereof under the old law would have, except as otherwise provided in the amendment.

If the Legislature had originally in specific terms, declared that the record should be constructive notice, or in subsequent legislation providing for the recording of instruments, had so declared, and we found the omission in the act of 1875 for the first time, the argument advanced would be very strong.

Perhaps this has been done in the section relating to the record of defective instruments, § 4253; but that such has not generally been considered necessary an examination of §§ 4254–4265, inclusive, will show; and yet I think few if any would claim that the record in these sections provided for or authorized, would not be constructive notice. The act of 1875 is in the same general language and in my opinion should have the same force and effect.

The terms "purchaser" and "conveyance" are broadly defined in §§ 4236, 4237, and certainly a party who has purchased at an execution sale, is entitled to protection between the date of the sale and the time when he can receive and record his sheriff's deed. He has something more than a mere lien upon the land: he has in effect, by a satisfaction of the execution to the extent of his bid, if the execution creditor purchases, paid for the land, and if a stranger has actually paid for it, and in either event, as he cannot obtain possession, is entitled to the protection which the registry laws aim to give parties. In my opinion they then become purchasers within the meaning of our laws, even although they have not received a deed of the premises. I do not understand the case of *Columbia Bank v. Jacobs* as holding that the person bidding off the property at an execution sale would not be a purchaser, until he had received a sheriff's deed, although so stated in *Millar v. Babcock*, even if such questions were material in either case.

I am therefore of opinion that the record of the sheriff's certificate was constructive notice of the interest which Mrs. Bearss acquired as a purchaser at the sheriff's sale, and that Mrs. Orr was bound thereby.

While the above was considered the most important ques-

tion in the case, yet a number of others were raised, which may be noticed very briefly.

It appears that the property had been advertised by the sheriff, sold and bid in by the plaintiff in the execution, but owing to an error in the notice this sale was abandoned. The error was in the date of the time fixed for the sale. The sale was made in March, 1877, but in the published notice of the sale, the time advertised for the sale to take place was March, 1876. It may be that the mistake was not fatal, but it was abandoned and there is nothing in the case tending to show that the execution debtor was prejudiced in this, or that the subsequent sale could be held void in consequence thereof.

It also appeared that two executions issued the same day, one directed to the sheriff of Tuscola county, and what was called an *alias* to the sheriff of Huron county. The lands in question are situate in Tuscola and were sold under the execution issued to the sheriff of that county. No return has been made by the sheriff of Huron. It is claimed that two executions could not legally be issued at the same time under act 105, Sess. Laws 1847, p. 172,* and that if effect could be given to either, it must be to the one sent to Huron, as the execution debtor had personal property in that county, and farther that the return made by the sheriff of Tuscola does not show that the debtor had no personal property upon which he could levy, and that unless such was the fact he could not levy on the real estate. The issuing of two

*Revised Statutes of 1846, ch. 106, sec. 10 is as follows: Executions, whether against the body, or against the property of any party, may be issued at the same time, to sheriffs of different counties, but no execution against the body of any party shall issue, while there is an execution against his property not returned, nor shall an execution against the property of any party be issued, while there is an execution against his body unreturned, unless by order of the court.

Act 105 of 1847 "to amend the Revised Statutes of 1846" provides in sec. 13, p. 172, "that chapter one hundred and six, section ten, be so amended that but one execution shall issue at the same time."

No attempt is made in the compilation of 1857 (§ 4448) or of 1871 (§ 6084) to incorporate the amendment with the original statute; it is introduced in a foot note to the section, which remains as originally worded, except that in the Compiled Laws of 1857, the words *at the same time* are italicized also.

executions, while irregular, would not render the sale made, when attacked in this case, void; neither would the omission of the officer to set forth in his return a want of personal property be fatal. It may very fairly be presumed that the officer performed his duty, and without saying what the effect would be should the contrary appear on the trial, it is sufficient, for the present case, that no attempt was made to show that the execution debtor did have any goods and chattels in Tuscola county, and the officer was not bound to make search beyond his bailiwick. This renders immaterial the objections taken to the testimony of Sengra and others as to the property in Huron county or value of the same, although proof of what the property actually sold for would be competent as tending to show the value thereof.

Several questions were raised as to defendant's want of notice of facts tending to show the conveyance from Mrs. Waldron to her daughter, Mrs. Gale, was fraudulent. The plaintiff having succeeded in recording the sheriff's certificate prior to the record of any of the conveyances from Mrs. Waldron or her grantees, she is presumed to be entitled to recover until the contrary appears, and the burthen of proof would be upon the defendants to show that they were *bona fide* purchasers, or that they derived title from a *bona fide* purchaser. *Godfroy v. Disbrow* Walk. Ch. 260; *Shotwell v. Harrison* 22 Mich. 410. The defendants evidently proceeded upon the theory that the burthen was upon the plaintiff to prove that they were not. We shall not therefore enter upon a discussion of the questions raised upon this branch of the case, as they also had constructive notice of the record of the sheriff's certificate and upon a new trial the questions are likely to assume a different aspect.

We discover no error in the record. The judgment must be affirmed with costs, and the record remanded for further proceedings under the statute.

The other Justices concurred.

MARGARET J. ELLISON v. SOLOMON KITTRIDGE.

ANNIE T. HOWELL v. SOLOMON KITTRIDGE.

Bills to clear title—Disclaimer and release of defendant's claim.

Comp. L. § 5072 provides that in proceedings to remove a cloud from title, if complainant shall establish his own title defendant shall release all claim and pay costs, unless in answering he *has disclaimed all title* AND *given a release* to complainant, in which case the costs are discretionary. *Held* (1) that there was no discretion in a case where defendant, while disclaiming all title of the nature set forth in the bill, set up an independent title which was disproved; (2) nor where while disclaiming he had not tendered a release.

Appeals from St. Clair. Submitted January 20. Decided January 28.

BILLS to clear title. Defendant appeals. Affirmed.

William T. Mitchell for complainant. Comp. L. § 5072 covers every kind of claim imperiling or damaging the value of complainant's premises: *Head v. Fordyce* 17 Cal. 149; *Grover v. Fox* 36 Mich. 460; *Haddon v. Hemingway* 39 Mich. 618.

W. F. Atkinson & Vance for defendant.

GRAVES, J. The complainant filed this bill under the statute to compel defendant to release a claim alleged to be set up by him to certain premises in her ownership and possession. Comp. L. § 5072. In the course of his answer he denied having made any claim and stated that as far as the mortgage specified in the bill was concerned he had always been willing to release all claim under it on request, and that he made no claim to any of the land on the strength of the mortgage, or the foreclosure thereof or the sheriff's deed. He nevertheless admitted that he had refused to quit-claim his interest for the reason that he held an independent title. The court below granted the relief author-

ized by the statute and allowed costs to complainant. Her right to the land as against defendant appears on this record to be unquestionable, and there is nothing to dispute about except costs, and when the terms of the statute are applied to the attitude of the parties and the circumstances of the case there is small chance for controversy on that question.

The statute says: "If the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands and give a release to the complainant, in which case costs shall be awarded as the court may deem just."

The statements of non-claim in this answer are not a disclaimer of all title, and were not so intended. On the contrary there is a distinct assertion of title adverse to that of complainant, and the proofs are all against him. The complainant has a perfect case under the statute, and the conditions are wanting to invest the court with any discretion on the question of costs.

The decree should be affirmed with costs.

The other Justices concurred.

GRAVES, J. The only difference between this case and *Ellison v. Kittridge* is that in this a disclaimer of title appears in the answer. The defendant neither gave nor tendered a release; but on the contrary he took a contentious position and adhered to it. That he gave lawful occasion for complainant to file the bill appears conclusively. He obtained a satisfied mortgage on this and other lands and including premises which had been quit-claimed to himself, and went through the form of a statutory foreclosure, followed by a deed in his favor from the sheriff. There was no record evidence that the mortgage had been paid, and his proceedings created an apparent right to complainant's land. He claims the foreclosure was a proper expedient to fortify or clear up the title to his parcel and that of complainant and others,

and he insisted on his foreclosure as against complainant and the others unless they would pay him what he regarded as a proper proportion of his alleged expense.

The provision in § 5072 for giving the court discretion in decreeing costs supposes the defendant to have gone far enough to justify complainant in filing the bill, and, consequently, far enough to make it just, in the event of his disclaiming title, to require him to take the further step and accompany his disclaimer with a release of all title to the complainant.

The disclaimer and release are the statutory preliminaries to the right to apply discretion to the question of costs, and before the defendant can ask favor under this clause of the statute he must perform these preliminaries, and if any expense is involved he must bear it. No difference is made in this respect between the cost of disclaimer and the cost of release. What the court may do concerning these items when it comes to exercise its discretion is another question. Having given ground for the bill the law offers the defendant opportunity to apply for favor on the terms of disclaiming and releasing. The complainant is not put to terms, and is under no duty or obligation to tender or pay for a release. The defendant is the only one to be benefited, and he must do what is necessary to permit the court to entertain an appeal to its discretion. No part of that burden belongs to the complainant. In the present case no release has been offered by the defendant, and his disclaimer alone is not sufficient to warrant stepping from the imperative provision to the discretionary one.

The decree must be affirmed with costs.

The other Justices concurred.

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Solomon Kittridge v. Barney Miller.

Jurisdiction by value—Replevin for fox-skin.

Replevin for a fox-skin worth a dollar and a half will not lie in the circuit court.

Error to St. Clair. Submitted Jan. 20. Decided Jan. 28.

Replevin. Plaintiff brings error. Affirmed.

W. F. Atkinson for plaintiff in error.

Whipple & Voorheis for defendant in error.

Campbell, J. Kittridge sued Miller in replevin for the skin of a fox, which he claimed because the animal was first started and wounded by him, and chased to earth by his dog, and finally caught by the dog and killed by his help. As there is no evidence whatever tending to show that Miller had or claimed any interest in, or control over, the skin, there was no ground for an action of replevin, and we shall not discuss the respective interests of the several men and dogs that killed the fox.

This case, which involved only one dollar and a half, was brought in the circuit court, and not before a justice. While the former may have jurisdiction it certainly ought not to have it, and probably was not intended to have it. Such a case should not have been brought there, and is evidently a matter of bad feeling and not of serious grievance. Neither the public nor the parties should have been put to the expense of such a litigation.

The judgment must be affirmed with costs.

Marston, C. J. and Graves, J. concurred.

Marston, C. J. While I concur in the result arrived at by Mr. Justice Campbell in this case, yet I am also of opinion that the circuit court had no jurisdiction of the case because of the amount involved therein.

The whole theory and policy of our legislation has been against the commencement of such petty cases in the circuit

court. There are sections in the general replevin act, chapter 213, 2 Comp Laws, p. 1883, which seem to contemplate that suits may be commenced in the circuit where the value of the property is under one hundred dollars. See § 6735. This does not however in my opinion contemplate that actions clearly within the jurisdiction of a justice, may be commenced in the circuit. The true object and meaning thereof is, that where the plaintiff, his agent or attorney, in good faith commences his action in the circuit, believing the property to be of the value of one hundred dollars or upwards, the fact that the appraisers, court or jury may find it to be of less value, would not deprive the court of its jurisdiction. In this case the amount involved was but a dollar and a half, and no one could have supposed the property was of much greater value, and I cannot believe it was the design to commence such an action in a court where the costs would so far outweigh the value of the property, and I cannot permit such a case to pass unnoticed.

NAHUM E. THOMAS, RELATOR v. BOARD OF SUPERVISORS OF ST. CLAIR COUNTY.

Salaries—Implied assent—Receipt with protest.

A probate judge's silent acceptance of his salary as reduced by the Board of Supervisors from the amount previously allowed him, is an implied assent to their fixing it at the lower rate, and precludes him from claiming more.

A protest is ineffective unless made to the body having power to act upon the subject matter. If a salaried officer protests that the amount of salary allowed him is less than he is entitled to, it is of no effect to make the protest to the functionary entrusted with the mere duty of paying him if the latter has no part in fixing the salary, and is under no obligation to report the protest to the body which fixes it.

Mandamus. Submitted Jan. 20. Decided Jan. 28.

H. W. Stevens for relator. Assent is not implied unless there is some obligation on the party against whom the implication is raised: *Hosmer v. Wilson* 7 Mich. 301; *Ward v. Warner* 8 Mich. 520; *Strong v. Saunders* 15 Mich. 345; the mere fact that a claimant has received less than he was entitled to, does not amount to a waiver of his rights: *Miller v. Auditors* 41 Mich. 4.

E. G. Stevenson and *O'B. G. Atkinson* for respondent.

MARSTON, C. J. The relator was judge of probate of St. Clair county, and he claims the board of supervisors reduced his salary, and asks for a mandamus to compel the board to pay him according to the amount as first fixed. The board answered, and an issue of fact was formed and certain questions sent to the circuit court for a determination and answer. The circuit judge certifies as appears in the margin herewith.*

It is now claimed that an implied assent is not binding on the relator and that the facts show he made protest to the county treasurer against receiving the reduced salary in full payment.

We have no doubt but that an implied assent is sufficient, and that from the very nature of the case nothing farther

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*As to the three several matters or questions submitted, I find—

First. That the said relator did assent (not expressly but impliedly) to the fixing of his salary in the fall of 1878, for the year 1879, but did not assent to the fixing it in the fall of 1879 for the year 1880. This implied assent was in ignorance of the law as afterwards declared by the Supreme Court in *Douvielle v. Manistee* 40 Mich. 585; and up to the announcement of the decision in April, 1879, the relator, as well as the board, understood that the board had full power and authority to fix the salary of the judge of probate from year to year.

Sscond. So far as the relator did assent, as above found, he assented that the salary should be fixed at such sum as "to the board should be just and reasonable."

Third. For the first quarter of the year 1879, the relator did accept, impliedly, full payment at the rate fixed by the board in the fall of 1878, but ever since the first quarter he has insisted upon his right to $1500 per year and since that has not accepted the payments made as a full payment, but only on account of salary.

My conclusion is that for the year 1879 the relator is not entitled to pay beyond the amount fixed by the board in the fall of 1878, which amount has been paid, and that for the year 1880 he is entitled to the amount he claims.

Port Huron, December 20, 1880. E. W. HARRIS, Circuit Judge.

could be expected. Until the decision of this court in *Douvielle v. Manistee* 40 Mich. 585, there was almost, if not quite, universal acquiescence in the power of the board of supervisors to fix the salary of the judge of probate from time to time, so that no one thought of making any protest, but accepted the salary as fixed, and under such circumstances, the silent acceptance of the salary must be considered as an assent thereto, and binding upon them. We are also of opinion that a protest entered with the county treasurer cannot be deemed of any force or effect. That officer had no power to fix the salary or take any action with reference thereto, nor was it even a part of his duty to report such protests to the board. The protest, to have any effect, must have been made to the body having power to act in the premises.

Under the finding of the court the relator should receive at the rate of $1500 for the year 1880, and a writ will issue to that effect, but without costs.

The other Justices concurred.

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EDWARD BAUGHMAN v. ELIJAH G. GOULD.

Sale—Misrepresentation of quantity—Recoupment.

The right of a purchaser of land, in an action against him for the purchase price, to recoup the excess in price due to the vendor's misrepresentation of the extent of the property, is the same whether the misrepresentation be willful or innocent.

Where the vendor of land, by misrepresenting its extent induces the purchaser to incur a liability for land which the vendor is unable to convey, the effect of the transaction, in the contemplation of the law, is a fraud upon the purchaser, even though both parties acted in good faith.

A purchaser's right on being sued by the vendor, to recoup damages for the latter's misrepresentation in a sale including both real and personal property, is not affected by the fact that the misrepresentation

referred to only one class of property, if the transaction was an entirety, and the consideration was not apportioned.

Error to VanBuren. Submitted Jan. 20. Decided Jan. 28.

Assumpsit. Defendant brings error. Reversed.

Richards & Mills for plaintiff in error.

E. R. Annable for defendant in error.

Graves, J. Gould sold Baughman certain merchandise together with a small parcel of land for $1000. The lot was surrounded by a fence and there was a dwelling-house, a well and considerable ornamental shrubbery. It was represented by Gould that the lot included all the territory enclosed, and this representation was made by him and received by Baughman in perfect good faith. Both supposed it to be true, and Baughman in assenting to the purchase and in agreeing to terms relied upon it. The purchase of the goods and of the real estate was an entire transaction, although the price of $650 was assigned to the latter. When the parties adjusted the general consideration there was a balance of $157.40 still to be provided for, and Baughman gave his note for it. It was subsequently ascertained that the representation made by Gould was incorrect and that part of the land within the enclosure belonged to another; that a small portion of the house was beyond the line and that the well and part of the shrubbery were wholly so.

Under these circumstances Gould brought this action upon the note, and Baughman claimed to recover damages for the misrepresentation made relative to the premises. But under the judge's rulings the jury found in Gould's favor and refused to allow anything on account of the misrepresentation.

Two points arise upon the charge: *First*, the circuit judge instructed the jury that there could be no recoupment unless Gould knew his representation was false or, at least, had means of knowledge that it was so superior to any possessed

by Baughman; *second*, that in case the note was given in part payment for goods and land together it would not be competent to allow damages for the misrepresentation concerning the land.

We are not able to assent to either of these propositions. For the purpose of recoupment it is quite immaterial whether, as a question of morals, Gould was or was not at fault. The right to recoup was not dependent on it. There being in fact a misrepresentation, though made innocently, its deceptive influence was as effective, and the consequences to Baughman as serious in respect to actual damage as though it had proceeded from a vicious purpose. The result was a fraud on Baughman, in contemplation of law, and it entitled him to contend in Gould's action for the purchase money that the damage should be thrown on the latter. *Converse v. Blumrich* 14 Mich. 108; *Steinbach v. Hill* 25 Mich. 78; *Webster v. Bailey* 31 Mich. 36; *Starkweather v. Benjamin* 32 Mich. 305.

The circumstance that the misrepresentation was confined to the real estate whilst the consideration of the note included some part of the purchase price of both merchandise and realty is of no importance. There was but one trade and the consideration from Baughman was not apportioned. The object of the suit is to enforce performance of Baughman's share of the trade, and the claim of recoupment is founded on actionable conduct on the part of Gould in his share of it. The case seems to be within well-settled rules, and there is no occasion to cite authorities.

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

The other Justices concurred.

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EDWARD WIEMAN, JR., BY NEXT FRIEND v. JOHN P. MABEE ET AL.

Libel—Bad moral character—privileged communication.

A communication, representing that a certain person was of bad moral character, and wholly unfit to teach and have the care of a district school, was made to a township superintendent, by persons interested in a particular school within his jurisdiction, for the sole purpose of preventing the issue to the person so charged, of a license to teach the school. *Held*, that it was a privileged communication, and abundantly justified by proof that he was a habitual blasphemer and profane person, and an open violator of the Sabbath.

A charge of bad moral character, if made generally, is not fully justified by proof of profanity and Sabbath-breaking.

A person is responsible for such meaning of his language as is most natural, and is actually by his own fault, accepted under the particular circumstances. But there is no responsibility for any other meaning than that which is shown to have been intended and actually understood.

An action for libel will not lie on a communication relating to personal character, if made in good faith and for an honest purpose by persons concerned, and to the proper person. Nor will it lie when such a communication is untrue, if it is not maliciously made.

Error to Macomb. Submitted Jan. 20. Decided Jan. 28.

CASE FOR LIBEL. Plaintiff brings error. Affirmed.

Irving D. Hanscom and *A. B. Maynard* for plaintiff in error.

James B. Eldredge for defendant in error.

CAMPBELL, J. Plaintiff sued defendants for libel in publishing of him that he was a man of bad moral character, and wholly unfit to teach and have the care of a district school. This charge was made in an affidavit made by some of the defendants, and a petition of others directed to the superintendent of schools of the township of Lenox, in Macomb county, and the papers were intended to prevent the licensing of Wieman as a teacher in the district where

the signers lived. The declaration, in addition to general damages, averred that the plaintiff was thereby deprived of getting such license.

The defense rested on the privileged character of the publication, and also averred, by way of justification, that Wieman was a habitual blasphemer and profane person, and an open violator of the Sabbath by hunting, sports and in other ways.

On the trial there was no testimony tending to prove that these papers were got up for any purpose or used for any purpose except to be laid before the superintendent of schools to prevent his granting a license to Wieman. It also appeared that the papers were drawn by counsel as expressing properly the result of the charges of the parties, which were detailed to him in full, and related mainly to the bad language and Sabbath-breaking acts of plaintiff, and that they were informed the papers were shaped as they should be for that purpose. It appeared further that in laying the papers before the superintendent they explained to him fully that their objections were the same before referred to and no other, and were accompanied with manifestations of an entire absence of personal ill will.

There was evidence of his general good character in other repects. There was also evidence of his habitual use of profane and bad language before his scholars as well as elsewhere, and of such open and conspicuous Sabbath-breaking as offended his neighbors. There was some dispute concerning one or two acts, but none upon the general result.

The court below held the communication was privileged unless both false and expressly malicious. It was also held that a man who habitually violated his duty by profanity and Sabbath-breaking, was of bad moral character.

If this had been a libel published generally, and without reference to any particular purpose, it is very probable that its meaning might be regarded as covering a kind of conduct different from that proved against plaintiff here, and that, by reason of the difference, a justification might not be complete that went no further. Language does not always and

in all places convey the same impression, and a person is liable for the meaning that is most natural and is actually, by his own fault, fairly accepted under the circumstances.

But, on the other hand, where the meaning intended to be conveyed, and actually understood, is shown, there can be no responsibility incurred for any other. In the present case the writings were understood by the superintendent precisely as they were meant to be. It was his duty by law to give no license to any one unless such as "he shall deem qualified in respect to moral character, learning, and ability to instruct and govern a school." Laws 1875, p. 36. We do not think any superintendent would need vindication for being dissatisfied with the moral character of a teacher who has the faults complained of by these parties who opposed the licensing of plaintiff. A superintendent who should subject young children to such influences, would be very censurable.

In the present case the communication was fully privileged. It was made by persons interested in the school, to the person qualified to receive and act on the petition, for an honest purpose, and with an honest belief in the justice of their action. In such cases no action can be maintained even if the complaint is untrue, if not maliciously made. *Foster v. Scripps* 39 Mich. 376, *Dickeson v. Hilliard* L. R. 9 Exch. 79; *Harrison v. Bush* 5 El. & Bl. 344.

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

The other Justices concurred.

William Preston v. The People.

Autrefois convict—Sufficiency of plea in justice's court.

A plea of former conviction, in a justice's court, need not be in writing.

A justice enters what he understands to be the substance of a plea in his docket, and if none but a plainly untenable objection has been taken to it, a court of review will presume that it was otherwise sufficient.

Where the prosecution, in a criminal proceeding before a justice, does not demur or otherwise object to a special plea, for either form or substance, the justice should not reject it on grounds which the prosecution seems disposed to waive.

A plea of former conviction to a charge of assault and battery is not legally inconsistent with a showing that the conviction was under a village by-law for disorderly conduct.

Error to Wexford. Submitted Jan. 21. Decided Jan. 28.

ASSAULT AND BATTERY. Respondent brings error. Reversed and prisoner discharged.

Sawyer & Bishop for plaintiff in error.

Attorney-General *Jacob J. Van Riper* for the people. Plea of former conviction before a justice must conform to the rules in a court of record and set forth the former warrant and conviction, aver defendant's identity and that of the offense, and if the former judgment was by a justice, must state his jurisdiction, etc.: *Com. v. Goddard* 13 Mass. 457; Tiff. Cr. L. 401; *Briggs v. Milburn* 40 Mich. 512.

COOLEY, J. Plaintiff in error was arrested and brought before a justice of the peace on a charge of assault and battery. On the charge being read to him he pleaded orally not guilty and a former conviction in bar. The justice disregarded the plea of a former conviction because it was not in writing and sworn to, and proceeded to try, convict and sentence the party on the issue presented by the other plea. This conviction has been affirmed in the circuit court.

It is not claimed by the Attorney-General that the justice was right in holding the special plea in bar to be of no force because not in writing, but it is urged that the plea itself was a nullity because of want of substance. It specified no prosecution, no court, no time or place, but merely in general terms set up a former conviction. But in answer to this it is sufficient to say that in case of an oral plea the justice merely enters what he deems to be its substance on the docket; and when no objection is taken to it but one that is manifestly untenable, we must suppose it was in other respects sufficient.

Besides, it does not appear that the prosecution objected to the special plea, either for form or substance, by demurrer or otherwise; and the justice should not have volunteered an objection which the prosecution, apparently, were disposed to waive.

It is said, however, that it sufficiently appears from the record that the supposed former conviction was a conviction of disorderly conduct under a village by-law; and that such a conviction could constitute no bar. It is true there is an affidavit appearing in the record in which plaintiff in error affirms that he has been so convicted of disorderly conduct, and that the cause for which he was convicted "is and was the same identical transaction and cause" for which he was then under arrest; but this is not legally inconsistent with his plea. He may have been convicted under the general statute and under village ordinance also.

The judgment must be reversed, and the plaintiff in error discharged from his recognizance.

The other Justices concurred.

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JOHN A. LAMB v. THOMAS STORY.

Negotiability—Evidence explaining indorsement.

The negotiability of a promissory note, made payable "on or before two years from date," is destroyed by a memorandum attached thereto providing that if paid within one year there shall be no interest.

In an action between original parties upon an instrument that is not negotiable, it is competent for the defendant to show the circumstances under which he had indorsed it to the plaintiff, if the evidence does not vary any positive legal agreement made by him.

Where a vendor of a chattel takes a note for the purchase price, in which he reserves the right to retake the chattel on default and retain what has been paid or collect the note, his assignment of the note by indorsement does not of itself assign this right, and in an action brought against him on the note by the indorsee, he can show all the facts connected with the indorsement to fix and determine its character and extent.

Error to St. Clair. Submitted Jan. 21. Decided Jan. 28.

Assumpsit. Defendant brings error. Reversed.

Wright & McCall and *A. E. Chadwick* for plaintiff in error. A memorandum attacted to a note and altering its terms is material: *Wait v. Pomeroy* 20 Mich. 425.

Elliott E. Stevenson and *O'Brien J. Atkinson*, for defendant in error, claimed that the instrument in suit was a promissory note: *Beardslee v. Horton* 3 Mich. 560; *Smith v. Kendall* 9 Mich. 241; *Wright v. Irwin* 33 Mich. 33; *Knight v. Jones* 21 Mich. 161; *Fairchild v. O. C. & R. R. Co.* 15 N. Y. 337; *Cota v. Buck* 7 Met. 588; *Hodges v. Shuler* 22 N. Y. 114; *Preston v. Whitney* 23 Mich. 264; *Newton Wagon Co. v. Dier* — Neb. —; *Stewart v. First Nat. Bank* 40 Mich. 348; if a note is so drawn as to show how much will be due at maturity, it is certain enough: *Houghton v. Morrison* 29 Ill. 244; *Nickerson v. Sheldon* 33 Ill. 372.

Marston, C. J. An instrument, a copy of which appears herewith,* was by Lamb traded off to Story for a horse.

*$150.00. Columbus, July 18th, 1877.

On or before two years after date, we promise to pay to John A. Lamb or order the sum of one hundred and fifty dollars value received, with ten per cent. interest and current rate of exchange or express charges. This note is given for the purchase of the instrument mentioned below, which instrument is to remain the property of John A. Lamb, until the note is paid in full. It being optional with John A. Lamb upon default of payment to take possession of said instrument or to collect the note by process of law. And in case he shall take such instrument said John A. Lamb shall not be liable to refund any moneys heretofore paid by the purchaser thereof. And said instrument shall not be removed from the township of Columbus without the consent of the said John A. Lamb.

DANIEL HICKEY.
SARAH HICKEY.

Style 16, No. 52704 organ.

Payable at Wales, Michigan.
P. O. Address, Memphis, Michigan.

If this note is paid within one year no interest to be paid.

[Endorsed on back]

August 2d. 1877.
Received on the within note $25.
Pay to Thomas Story.
JOHN A. LAMB.

Some sixteen days after the exchange and delivery of this instrument to Story, he requested Lamb to endorse it, and there is some dispute between the parties as to what then took place, as well as to the original agreement, under which Lamb claimed he had refused to endorse or to make himself in any way liable thereon, and he also claimed that he endorsed the same simply to enable Story to sue and collect the same in his own name.

It is now claimed that this instrument was not a negotiable promissory note, and that under the evidence the requests as to Lamb's liability in case the jury found he endorsed it solely to enable Story to collect, should have been given.

We are of opinion that the instrument sued upon cannot be considered a negotiable promissory note. While it is made payable on or before two years with ten per cent. interest, and is thus far definite and certain, yet the subsequent clause, that if paid within one year it shall not draw interest, destroys the element of certainty which otherwise would exist. No person until after the expiration of the first year, could with absolute certainty determine or ascertain the amount that would be paid in discharge thereof. The memorandum at the foot of this instrument is inconsistent with the promise made in the body, and in this respect it will be found to differ very materially from other cases decided in this court, and cited by defendant in error.

We are also of opinion that it was competent for Lamb to show the circumstances under which he placed his name on the back of this instrument. This not being a negotiable instrument, and the action being between the original parties, Lamb and Story, the facts could be shown, as they would not in our opinion vary or change any positive legal written agreement made by him. The position taken by him is not inconsistent with the endorsement made by him. This instrument [the note] is peculiar. It was given for the purchase price of an instrument [an organ], which had been and was to remain the property of Lamb, and he had authority to retake possession of the instrument and retain what had been paid thereon, or collect the so-called note at his option. This

right he did not in terms assign to Story, and this was not the case of a mere security accompanying a money obligation which would pass with an assignment or transfer of the latter. We are not called upon to say what Lamb's rights and power might be under such an instrument, but we have no doubt that he might show under such an endorsement all the facts in connection therewith, to fix and determine the character and extent thereof.

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

The other Justices concurred.

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WALTER H. HAWKINS v. JOSIAH H. SANDERS.

Nuisance.

A wooden awning over a side walk in front of a store is not *per se* a public nuisance.

Appeal from Washtenaw. Submitted Jan. 25. Decided January 28.

INJUNCTION. Bill dismissed. Affirmed.

Joslin & Whitman for complainant. Roofing a public highway interferes with the easement of the public even though it may not impede travel: *Garland v. Towne* 55 N. H. 55; *Rex v. Lord Grosvenor* 2 Stark. 511; *Reg. v. Betts* 16 Q. B. 1022; *Rex v. Russell* 6 East 427; *Davis v. Mayor* 14 N. Y. 524; *Grove v. Fort Wayne* 45 Ind. 429.

Albert Crane for defendant. A grantor who has not reserved the right has no implied right of light across the front of the premises granted: *Myers v. Gemmel* (1851) 10 Barb. 537; *White v. Bass* (1862) 7 H. & N. 722; *Potts v. Smith* (1868) L. R. 6 Eq. 311; *Mullen v. Stricker* (1869) 19

Ohio St. 135; *Keats v. Hugo* (1874) 115 Mass. 204; *Jenks v. Williams* (1874) id. 217; *Keiper v. Klein* (1875) 51 Ind. 316; *Wheeldon v. Burrows* (1878) 12 Ch. Div. 31; *Rennyson's Appeal* (1880) — Penn. St. —: 9 Rep. 826; nor has he an implied right of prospect which will entitle him to interfere with an awning in front: *Aldred's Case* (1611) 9 Co. 58; *Knowles v. Richardson* (1669) 1 Mod. 55; *Attorney General v. Doughty* (1752) 2 Ves. Sr. 453; *Fishmonger's Co. v. East India Co.* (1752) 1 Dick. 163; *Wells v. Ody* (1836) 7 C. & P. 410; *Squire v. Campbell* (1836) 1 Myl. & C. 459; *Harwood v. Tompkins* (1854) 24 N. J. L. 425; *Butt v. Imp. Gas Co.* (1866) L. R. 2 Ch. 158; an awning does not interfere with the use of a street for the purpose of a street, and is not a nuisance: *Clark v. Lake St. Clair Ice Co.* (1872) 24 Mich. 508; *People v. Carpenter* (1849) 1 Mich. 273.

CAMPBELL, J. Hawkins who owns a hotel building in Ypsilanti, filed his bill to restrain defendant, who owns a neighboring store building, from maintaining a wooden awning in front of his premises. The complainant's theory seems to be that this is a public nuisance, which injuriously affects him specially.

The awning is, so far as we can see, no more of a nuisance than it would have been if made of any other material, and it was not, as shown from the evidence, such a structure as any court would regard as a public injury or grievance. It was such as was used habitually in other parts of Ypsilanti as well as elsewhere, and was recognized by the city ordinances as not objectionable. It was therefore no more than a lawful use of defendant's own property.

The special grievance complained of is simply that it obstructs the view of the sidewalk and a portion of the street. The testimony does not indicate that there was any very well-founded objection in fact to the awning, and there is no legal objection to it.

The bill was properly dismissed.

The other Justices concurred.

ALEX. BENGLEY AND JOHN DELORMIER v. CHAS. M. WHEELER, JAMES H. KING AND THE BESSEMER IRON CO. 45 493 122 645

Equity pleadings—Bill to compel assignment of lease—Parties.

Two of the three directors of a corporation allowed a mining lease thereto to be forfeited, and then took another for their own benefit. Two of the stockholders filed a bill against the two directors and the corporation to compel the directors to assign the lease to the corporation. *Held*, on demurrer that the remaining stockholders should have been brought in as complainants and the lessor as a joint defendant.

Where a bill is filed by stockholders to compel the assignment to the corporation of a lease which had never belonged to it, all the stockholders should be made complainants because the corporation may elect to waive its right to the lease as well as to demand it, and the election cannot be made unless all the stockholders are joined.

Where a bill is filed by stockholders for the benefit of the corporation the bill should state any reasons that exist for omitting to join all the stockholders as complainants in the bill.

A bill to compel lessees to assign their lease should bring in the lessor as joint defendant as it is to be presumed that the landlord is interested in being heard as to who shall be his tenant.

Appeal from Marquette. Submitted January 26. Decided January 28.

BILL to compel assignment of lease. Dismissed below without prejudice. Affirmed.

Dan H. Ball and *Ashley Pond* for complainants.

W. P. Healy for defendants Wheeler and King, argued that the remaining stockholders should be joined as complainants: *Titus v. Minnesota Mining Co.* 8 Mich. 183; *Westcott v. Minnesota Mining Co.* 23 Mich. 145; and the lessor as defendant; Story's Eq. Pl. §§ 72, 73, 76, and 138: *Mallow v. Hinde* 12 Wh. 196.

COOLEY, J. The bill in this case is filed by two large stockholders in The Bessemer Iron Company against the

company and two of the three directors, Charles M. Wheeler and James H. King, the principal purpose of which appears to be to compel Wheeler and King to assign to the company a lease which they had obtained in their own names from the Teal Lake Iron Mining Co., of certain lands for mining purposes. The equity set up in the bill as entitling the Bessemer Iron Company to this lease is found in the fact that that company had itself had a prior lease of the same lands for the same purposes, which the defendants Wheeler and King had suffered to be forfeited in violation of their duty as officers of the company and with the dishonest purpose—which they had carried out—of obtaining one in their own names and for their exclusive benefit. Neither of the leases is set out in the bill, but it is stated that they differed in this respect, that the royalty upon the ore mined was fifty cents per ton under the first lease and but forty cents per ton under the second lease. In the view we take of the case it does not become important to give further particulars of the bill.

The defendants demurred, assigning for cause the non-joinder of proper parties and the want of equity. The court sustained the demurrer upon the ground that the Teal Lake Iron Mining Co., and also the remaing stockholders of the Bessemer Iron Company were necessary parties, but gave complainants leave to amend. This permission not being embraced, the bill was dismissed, but without prejudice.

I. It was certainly proper that all the stockholders of the Bessemer Iron Co. should be made parties. The bill charged the officers with dishonest management, and sought to take advantage, for the benefit of the corporation, of a contract they had made in their own names. But upon the facts stated in the bill, this contract was not, and never had been, the property of the corporation; and if the corporation had the right to elect to demand an assignment, it had also the right to decline. The election in such a case could not be made by a portion of the stockholders only, but must be a corporate act. It could not therefore have been made in this suit. There may be reasons sometimes to excuse

failure to bring in all the stockholders; but when they exist they should be stated. None are given in this bill.

II. The Teal Lake Iron Mining Co. should have been made a party. If the prayer of the bill should be granted, the company would be given a tenant which it has not consented to accept. As already stated, the terms of its lease are not given, and it may contain provisions which would preclude its assignment to the Bessemer Iron Co. It may contain other provisions which would require attention for the protection of the lessor's interest in any transfer, and we cannot assume without having the lease before us, that the lessees have the right to make an assignment regardless of the lessor's will, and that no legal interest of the lessor will be affected thereby. The presumption is that the landlord is interested in being heard when the question is who is to be his tenant. And the presumption is especially strong in this case, for the Teal Lake Company is charged in the bill with having connived with Wheeler and King to deprive the Bessemer Company of its lease in order that a new one might be given to these parties. If such connivance existed the Teal Lake Company must have had some inducement; and as the royalty was actually reduced, it is reasonable to infer that the new lease must have been more advantageous to the lessor than the old in some other particular. Men do not plan and carry out dishonest schemes with the end in view to reduce their returns from their property with no compensation therefor.

The decree must be affirmed with costs.

The other Justices concurred.

Alfred E. Underhill et al v. Muskegon Booming Co.

Costs for vexatious litigation.

Where costs for vexatious litigation are not applied for, the affirmance of judgment against a plaintiff who has made out no case, will not necessarily give more than ordinary costs.

Error to Muskegon. Submitted Jan. 26. Decided Jan. 28.

Assumpsit. Plaintiffs bring error. Affirmed.

Stephenson & McLaughlin for plaintiffs in error.

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

Campbell, J. This case in no respects differs from what it was when formerly before us. *Underhill v. Muskegon Booming Co.* 40 Mich. 660; *Muskegon Booming Co. v. Underhill* 43 Mich. 629. The plaintiff made out no case whatever, and judgment was properly rendered against him. The attempt in this way to protract litigation is a grievance to the defendant, but as no application is made for more than ordinary costs the judgment is affirmed with costs.

The other Justices concurred.

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James D. Turnbull, relator v. Board of Education of Alpena Township.

Municipal corporations—Payment of school district debts after other districts have been made up from its territory.

Where a school-district has been subdivided and other districts set off, the debts of the original district cannot be parcelled out among all by a proceeding in the courts so as to give creditors a remedy against any but the original debtors: *Maltz v. Board of Education* 41 Mich. 547.

A municipal corporation remains liable upon a debt which it has created, notwithstanding a subsequent change in its corporate limits. If contribution is required from territory set off from it, the corporation must obtain it, and not the creditors, unless otherwise provided.

Mandamus lies to compel a school-district to pay orders issued by it, even though the district has since been subdivided, where statutory provision for distributing the original liability has not been carried out.

It is suggested that statutes passed to enable the debt of a municipal corporation to be distributed on the subdivision of the corporation, should provide that a failure to assign its share to each subdivision at the time appointed by the statute, shall not impair the right to do so afterward, and that full provision should be made for that purpose; if this is not done further legislation may be required.

Interest upon orders issued by a school-district is denied on granting a mandamus to compel their payment if no authority has been given to impose it.

Costs on granting a mandamus to compel the payment of orders issued by a school-district were denied where the case involved new questions.

Mandamus. Submitted Jan. 27. Granted Jan. 28.

J. C. Shields for relator.

J. D. Holmes for respondent.

CAMPBELL, J. Relator asks for a mandamus to compel respondent to provide for the payment of certain orders issued by Union School-District No. 1 in the township of Alpena, for various lawful purposes, before the division of that district took effect.

Originally, and when these orders were issued, that district embraced the townships of Alpena, Wilson and Long Rapids. In 1877 various statutes were passed which were identical in all important respects so far as this proceeding is concerned, whereby it was provided that the territory in Wilson and Long Rapids should be set off so that each of those townships should be made a separate school-district. Acts 356, 358 and 362, Loc. Acts 1877, pp. 486, 491, 500.

The language in each of the statutes relating to Wilson and Long Rapids, was that "the territory embraced within the township [of Wilson and 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 politic," etc.

The statutes then proceed to give corporate powers, and provide in the usual manner for all matters relating to the corporate welfare. The complete organization was to take place in April, 1878, on the 3d Monday in April. By section 7 of each act it was provided that each of the corporations thus set off should provide for and pay to Union District number one of Alpena a proportion of the indebtedness of the old district in accordance with the assessed valuation of property on the equalized assessment roll for 1877, and be entitled to credits in proportion to their share of the unexpended funds or taxes belonging to the old district on the 3d Monday of April, 1878, to be determined according to the same standard of the assessment roll of 1877. All school property was to belong to the district in which it was situated, but the division of such property was to be allowed according to the same basis as the debts and credits.

Union School-district number one in Alpena was made liable for all the debts and liabilities of the whole district as before existing, and was entitled to receive from the new districts payment of their respective shares as determined in the manner already pointed out.

In order to adjust these amounts the various acts in identical terms required the official representatives of all three of the districts to meet in April, 1878, on Tuesday after the 3d Monday of April at the township clerk's office in Alpena and make a final adjustment of all matters on the basis prescribed. All the papers, books and records of the district were to remain with respondent, the name being changed to "The Public Schools of the Township of Alpena." The only objection regularly presented on the record is that the present respondent cannot be held for this indebtedness because it has not been provided with means from the other districts to pay their share. The return avers that the assignment provided for by the acts of 1877 was never made.

We do not think this makes any difference. The respondents are in law the same corporation as the old and larger district. The only effect of these acts was to detach certain lands from the district, but not to change its corporate identity. We have already disposed of this question in *Maltz v. Board of Education of Wilson Township* 41 Mich. 547, in which we held that the debts could not be parcelled out in a proceeding in the courts, so as to give creditors a remedy against any but the present respondents. A debt once existing must remain a debt against the corporation that created it, and its obligation is not destroyed by a change in corporate limits. If contribution is required, it must be obtained by the corporation and not by its creditors, unless otherwise provided by law.

It is unfortunate that the various boards did not perform their statutory duty, and adjust these matters on the equitable basis provided by the laws under which they organized. It was distinctly enjoined on them as their first duty after organizing.

As it is now, it is desirable if not absolutely necessary that further legislation be had for accomplishing this result. These adjustments cannot be made satisfactorily by any of the ordinary judicial machinery, and should be arranged by the local authorities. The basis of their action is so well defined that they can hardly go astray when they have once ascertained the items of property and accounts to be compared. Some of the difficulties attending this subject were referred to in *Brewer v. Palmer* 13 Mich. 104, where the identity of the district had been entirely destroyed.

We venture to suggest that while it is wise to prescribe times for such action, the statutes should also provide that a failure at the appointed time shall not defeat or impair the right to have it attended to afterward; and that full provision should be made of means for that purpose.

The relator is entitled to a mandamus as prayed to provide for payment of the amount of his orders. We do not discover any authority to impose interest, and that is denied. The case is a new one in some of its features, and we impose no costs.

COOLEY and GRAVES, JJ. concurred.

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APRIL TERM 1881.

WILLIAM A. MOORE v. DAVID BARNHEISEL, JOHN ATKINSON ET AL.

Interpleader.

Interpleading cannot be ordered unless the claims threatening complainant negative each other; if one can be legally enforced without implying the other's invalidity there is nothing to be settled by interpleader.

The attorney for several creditors having obtained from the debtor an assignment of certain policies of insurance then payable to him, thereupon executed a paper reciting that he was to pay, from the proceeds, the claims held by him and pay over the residue to the attorneys for certain other creditors. Before this was done he was garnished by still other creditors, but the attorneys to whom he was to pay the residue insisted that their claim thereto could not be affected by the garnishment. *Held*, that he could maintain a bill of interpleader against them and the other creditors to determine which was entitled to the fund.

Appeal from Superior Court of Detroit. Submitted January 5 and 6. Decided April 13.

BILL of interpleader. Defendant Atkinson appeals. Affirmed.

Moore, Canfield & Warner for complainant. One who holds a fund in which he has no interest can maintain a bill of interpleader against rival complainants for it when he is uncertain to which it is due: Adams' Eq. § 203: 1 Barb. Ch. Pr. 117; and where he is under no independent liability: *Lindsey v. Barron* 6 C. B. 291; *Pipp v. Reynolds* 20 Mich. 88; *Turner v. McCarty* 22 Mich. 265; and it does

not matter how the claims are made: *Langston v. Boylston* 2 Ves. jr. 101; see *School Dist. v. Weston* 31 Mich. 97; *Westervelt v. Ackerman* 3 N. J. Ch. 325; *Atkinson v. Manks* 1 Cow. 691; *Bleeker v. Graham* 2 Edw. Ch. 650; *Angell v. Hadden* 15 Ves. 246; *Dungey v. Angove* 2 Ves. jr. 310.

John Atkinson for defendants Atkinson. One who has expressly promised to pay a fund to a specified party cannot compel him to interplead for it with other claimants for it: Story's Eq. Jur. §§ 291–3; *Siggers v. Evans* 85 E. C. L. 367.

GRAVES, J. This case comes up by appeal by the defendants Atkinson against a decree requiring the defendants to interplead. The objection to the decree calls for a short statement of facts and the explanation in defendants' brief is very nearly all that is necessary. Charles A. McIntosh had insurance on the steamer Bertschy for $5000. The steamer had been lost. Complainant's law firm held for collection against McIntosh claims in favor of the Bay City Iron Company, the Brewster Coal Company, Bay City Dry Dock & Ship-yard Company and Lewis C. Hansheer. Complainant was likewise empowered to act for Mrs. Peck who was entitled to part of the insurance as mortgagee. His firm had garnished the insurance companies to compel the application on these claims of sufficient of the insurance money to pay them.

The defendants Atkinson set up claims against McIntosh to an amount exceeding the residue of the insurance fund, and on the 8th of October, 1879, McIntosh and Mr. James J. Atkinson met complainant, and thereupon McIntosh assigned the policies to complainant and as part of the same transaction complainant then and there executed and delivered to Mr. Atkinson the following paper:

"DETROIT, MICH., October 8, 1879.

"The policies in the Phœnix Insurance Company, the St. Paul Fire & Marine and the Manhattan Fire, on the str. 'Bertschy,' amounting to $5000, and payable to C. A. McIntosh, have this day been assigned by him to me.

I am to pay, from the proceeds of said policies, the claims of the Bay City Iron Co., the Brewster Coal Co., Bay City Dry Dock and Ship-yard Co., and Louis C. Hansheer, and the costs upon the same, if I find said claims to be correct.

I am also to pay Susan E. Peck the amount due upon her mortgage, agreed upon as $2326.66, to Sept. 29, 1879.

Balance I am to pay to Atkinson & Atkinson.

WM. A. MOORE."

Some thirty days later and before complainant had collected any insurance he was garnished in the admiralty on claims against McIntosh in favor of the other defendants. But before making disclosure he collected the insurance and paid the specific claims in the writing of the 8th of October. On answering the garnishee proceedings in the admiralty he explained the facts and disclosed that the "balance," being $1560.60, remained in his hands and was claimed by the defendants Atkinson. The libelants in said garnishee proceedings claim and insist that said balance is still the money of said McIntosh and subject to be arrested under their garnishment and appropriated to their demands against him. The defendants Atkinson requested complainant to pay said balance to them, and on his refusal they brought their action against him therefor. They claim and insist that they cannot be affected in any way by the garnishment in the admiralty or by the result of it; that whatever may be there required of complainant they are entitled to recover the amount of him as due to them under said paper; that he having expressly promised to pay them the sum in question, he is not in a position to compel them to interplead with the other defendants who have interposed claims on another basis.

The point raised is one of no little difficulty. The principle on which the objection proceeds is expounded with great clearness in *Crawshay v. Thornton* 2 Myl. & C. 1, and was applied in *Sherman v. Partridge* 4 Duer 646, and in *Sprague v. Soule* 35 Mich. 35. There is no doubt of the rule that interpleading cannot be rightly ordered unless the respective claims threatening complainant are such as to

antagonize and negative each other. Where the claim of one party may be legally enforced without implying invalidity of the other, there can be no issuable point for decision by interpleader. But much consideration has led to the opinion that the case is not subject to this objection. It is expedient to bear in mind that we have now no concern whatever with the final question of right on the part of the defendants Atkinson. The inquiry at present is only the preliminary one in regard to the fitness of the controversy for an interpleader to determine that final question. The objection turns on the proper view of the transaction of October 8th. At that time McIntosh assigned his policies to complainant, and directed what should be done with the proceeds. The assignment and provision for the fund were parts of one transaction. The form given to it is of no material importance. The court is bound to penetrate to the substance, and ascertain the real merits.

The disposition of the residue in question was defined and ordered by McIntosh, the assignor. The direction made was his direction. The complainant merely acceded and agreed to it. The defendants Atkinson assented. The object of McIntosh was to appropriate that part of the fund to the purpose of the defendants Atkinson, and confer on them the right of property as against all others, and the complainant so far concurred as to agree to the direction given by McIntosh to the fund. The transaction did not contemplate any absolute liability of complainant independent of his lawful power over the property, and it was not imagined that in case of its turning out that McIntosh had given a better right to some one else the complainant should yet be liable to the defendants Atkinson.

The right was to spring from McIntosh and pass through complainant, and it was not intended that any loss or diversion of it without any fault of complainant, should be made his loss. He was not to be held responsible for any fault or failure of title, nor be liable to pay damages on account of the detention of the fund by McIntosh's outside creditors.

Now the real claim advanced by the defendants, who have

sought to sequester the fund, is that the transaction of the 8th of October was not as against them a valid appropriation of the property, and the defendants Atkinson insist that it was. The true issue is hence upon the effect of the transaction referred to, and a decision in favor of either side must necessarily amount to a negative of the right on the other. The case is therefore a proper one for interpleader. *Oppenheim v. Wolf* 3 Sandf. Ch. 571.

The decree must be affirmed with costs, and the cause remanded for further proceedings.

The other Justices concurred.

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CHARLES F. BURTON, RECEIVER v. WILLIAM SCHILDBACH ET AL.

Accounting for loans made by a void corporation.

A corporation organized under a void law cannot enforce a mortgage made to it; but if not organized for an unlawful purpose a receiver for it can demand in equity an accounting for the debt purporting to be secured thereby. Such accounting should be with interest after allowing all payments made upon the loan.

The Supreme Court may permit a bill of foreclosure, filed to enforce void securities, to be so amended, after the hearing, as to ask for an accounting for the debt.

A borrower, after making payments to a receiver appointed for his creditor in proceedings to which he was not a party, cannot afterwards, in proceedings against himself for the enforcement of his debt, question the validity of the appointment.

Appeal from the Superior Court of Detroit. Submitted January 7. Decided April 13.

FORECLOSURE. Bill dismissed without prejudice. Reversed.

Charles F. Burton and *Alfred Russell* for complainant. An association can recover against an individual member on

a specific contract between them (*Townsend v. Goewey* 19 Wend. 424; *Cross v. Jackson* 5 Hill 478) especially where a mortgage has been given: *Galway v. Fullerton* 17 N. J. Eq. 389; *Baring v. Lyman* 1 Story 423; *Gridley v. Dole* 4 Comst. 492; *Jemison v. Walsh* 30 Ind. 167; and whatever the association can do its receiver can do also: *Brouwer v. Hill* 1 Sandf. 629.

Romeyn & Romeyn for defendant. A receiver appointed without jurisdiction cannot control the assets: *Port Huron & Gratiot Ry v. Jones* 33 Mich. 303; *Port Huron & Gratiot Ry v. St. Clair Circ. Judge* 31 Mich. 456; *Kimball v. Goodburn* 32 Mich. 10.

Cooley, J. The Legislature of 1869 passed an act to authorize the incorporation of Building and Savings Associations, which is published as chapter 93 of the Compiled Laws of 1871. Several associations were formed under and in supposed conformity with its provisions; and among them the "Detroit Building & Savings Association No. 4," of which the defendant William Schildbach became a member. The articles of association provided for a capital stock of $250,000, divided into 2000 shares, of which no member could hold more than twenty. The shares were to be had on paying an initiation fee of ten cents, and twenty-five cents a week thereafter. The purpose of the association was declared to be to make loans to members and enable them to procure houses and places of business. Each share was to entitle the holder to a loan of $125, for which he was to give real estate security. Loans were obtained as follows: At each regular weekly meeting, whenever there were more than $125 on hand, the money was to be sold in loans of $125, and the shareholder who bid the highest premium was to receive it. Each shareholder receiving such a loan was to pay a weekly interest of fifteen cents, and also the weekly dues of twenty-five cents until the dissolution of the corporation. This dissolution was to take place as soon as every shareholder should have received on each share the sum of $125, including the premiums bid as aforesaid, and all mortgages given were then

to be discharged or returned to their respective makers. These articles, together with the constitution and by-laws of the association, are given in full in 30 Mich. 514 *et seq.*

William Schildbach became the owner of twenty shares in the association, and in May, 1873, was awarded a loan thereon of $125 on each share. The premium bid for this appears to have been $178.50, and a bond and mortgage were given as security, which bear date June 10, 1873. The conditions of the bond are as follows:

"The conditions of this obligation are such that, whereas, the said William Schildbach is a member of said association and the owner of twenty shares of its stock, on which stock he, the said William Schildbach, on the 19th day of May, 1873, made a loan of the sum of twenty-five hundred dollars, pursuant to the provisions of the constitution and by-laws of the said association, on which sum of twenty-five hundred dollars he agrees to pay to said association interest, to wit, the sum of three dollars weekly in advance from the date hereof, on or before the Monday of each and every week during the existence of said association, and in like manner, at the same time and for the same period, to pay a weekly assessment of fifty [twenty-five] cents on each and every share of stock owned by him, and on which he has taken a loan as aforesaid, and also to pay all fines that may be legally assessed against him under and by virtue of said constitution and by-laws, or any amendments that may be made thereto; also, to keep the buildings on the premises mortgaged—to secure the conditions of this obligation—insured, during the existence of said association, against loss and damage by fire, to the acceptance of the directors of said association, in the sum of at least one thousand dollars for the benefit of said association, and pay all taxes and assessments which may be levied upon said mortgaged premises during the existence of said association, including all taxes that may be assessed on the loan or money hereby secured, and to comply with all and singular the conditions of the constitution and by-laws so far as they are binding upon him.

"Now THEREFORE, if the said William Schildbach shall promptly pay to said association said weekly dues or assessments, as aforesaid, and the interest upon the sum loaned, as aforesaid, amounting to the sum of eight (8) dollars, on or before the Monday of each and every week during the existence of said association, as aforesaid, and shall pay all fines

that may be legally assessed against him, as aforesaid, shall insure and keep insured said mortgaged premises, as aforesaid, shall pay the taxes which may be legally levied upon them, and upon the sum loaned during the life of said association, and shall comply with all and singular the conditions of said constitution and by-laws, so far as they are binding upon him, then this obligation shall be void, otherwise be and remain in full force and virtue.

"PROVIDED, That in case said William Schildbach shall be in default in paying said sum of money, or any part thereof, as aforesaid, for a period of sixty days after the same becomes due, then the whole sum of money loaned, as aforesaid, shall become immediately due and collectible, with the interest in this bond specified. This bond is given as collateral security of a certain mortgage, bearing even date herewith, and executed by the undersigned and wife."

The mortgage was conditioned for the performance of the condition of this bond.

Schildbach made the weekly payments on the bond and mortgage until December 7, 1874, and after that date made payments as follows: $50 May 6, 1875; $25 July 15, 1875, and $25 September 30, 1875. He made no payments after the date last named. The last three payments were made to Michael Martz, receiver as hereinafter mentioned.

Sometime in the year 1874 one Andrew Mok, who was also a member of the association and had given to it a similar bond and mortgage, filed his bill in the Superior Court of Detroit to have the weekly payments which he had made upon the mortgage, except so far as should be necessary to satisfy the accruing interest at the lawful rate, declared to be payments on the principal sum named in the bond and mortgage, and to have those securities decreed to be satisfied and discharged when the principal sum should be thus paid up. The Superior Court made a decree in accordance with the prayer of the bill, and the defendant appealed to this court. In this court the discussions of counsel were directed mainly to the question whether the act under which the association was organized was constitutionally sufficient for the purpose, and this court was of opinion that it was not. The reasons for the opinion are given in the reported case. *Mok v. Detroit*

Building & Savings Association 30 Mich. 511. The defect in the act was found to be, that it was not complete and sufficient in itself to permit of incorporations under it, and that it undertook to accomplish the purpose by reference to an indirect and blind amendment of a previous statute, whereas the Constitution requires that all amendments of statutes shall present the provisions in full as amended.

The result of this decision was that the association of persons who previously supposed they had been organized into a corporation were left unorganized, and those of their number who had previously acted as officers, had securities or intended securities in their hands made to the supposed corporation, but which now as legal securities had become worthless. Probably they had moneys and other property in their hands also, and they may have contracted debts in the name of the supposed corporation which still remained unsatisfied; but on these points we have no information. It is not probable that all the members had obtained loans, and those who had not, must have had equities which the others ought to recognize whether legally compellable to do so or not. It would be highly inequitable that the money borrowed should be retained, and the securities at the same time repudiated.

In this position of affairs, and on the 29th day of March, 1875, one Peter Geller, who was a borrower from the association of the sum of $2500 less the premium bid for the same, filed his bill in the Superior Court of Detroit against the association, its officers and all the original associated members "and other associates whose names are unknown to complainant, and whom he prays may be brought in when discovered in such manner as the court may direct;" the purpose and prayer of which was that a receiver of the property, effects and credits of the association might be appointed, and an account be taken of all assets and debts, and the assets be applied in the payment of the debts equally, and the surplus, if any, divided among the shareholders. Schildbach was not brought in or in any way made a party to this bill, but the defendants actually named appeared by counsel, and the

court on the 3d day of April, 1875, appointed Michael Martz receiver in accordance with the prayer of the bill. To this receiver Schildbach made payments to the amount of $100, as before stated. Afterwards the present complainant became receiver as successor to Martz.

The bill in the case now before us was filed to foreclose the mortgage which Schildbach and his wife gave as is above shown. It sets forth the giving of the bond and mortgage; alleges that at the time of the filing of the bill the sum of $634.38 was due, and prays for the usual decree of foreclosure and sale.

The defendants William Schildbach and wife made answer, in which they insist on the invalidity of the organization and supposed incorporation of the association; deny that either Martz or the complainant was ever legally appointed receiver, or could have been appointed receiver so far as the rights and equities of William Schildbach were concerned in a suit to which he was not a party; deny that the bond and mortgage had legal existence, but aver that Martz as pretended receiver collected a large amount of money, to a ratable portion of which the defendant William Schildbach is equitably entitled, and his share of which would more than satisfy what is claimed to be due from him on the bond and mortgage. Replication was filed to the answer and testimony taken, and on the hearing the bill was dismissed, but without prejudice to any other or further remedy. The complainant has appealed.

Neither party on the argument in this court has called in question the decision in *Mok v. Building etc., Association*, but the complainant insists that relief may be given him notwithstanding that case. It therefore becomes necessary to see what that case actually decides, and important also, to determine whether decisions heretofore made in the State upon cases more or less analogous have any important bearing.

In *Mok's Case* nothing was directly decided except that the enactment under which the association was formed had no validity. Nevertheless, as the defendant in that case was

insisting upon Mok's mortgage as a valid security for the full amount according to its terms, the court must have rendered a different decree if it had sustained this claim. On the other hand the judgment of this court must have been the same that was actually rendered if the court had reached the conclusion that the mortgage was a valid security, but that all the weekly payments made must be applied as payment. This was what Mok claimed, and this was what the Superior Court decreed in his case. And this complainant, as we understand it, is satisfied with this conclusion, and makes no objection to its being applied in this case.

The obvious difficulty in giving any remedy springs from the fact that these promises to pay had no payee. The bond and mortgage purported to be given to a certain corporation, when there was no such corporation in existence. They were, therefore, as securities, merely null and void. If this point required authority, it is to be found in *Green, receiver v. Graves* 1 Doug. (Mich.) 351, in which a receiver of a bank organized under the General Banking Law of 1837 was held incompetent to enforce at law the notes given to the bank while it was engaged in transacting business under that unconstitutional law. In the subsequent case of *Hurlbut v. Britain* 2 Doug. (Mich.) 191, the further ruling was made that a mortgage given to such a bank could not be foreclosed in equity. There seems to be no escape from these decisions: they meet the point squarely, and hold that securities given to what purports to be, but is not, a corporation, are of no validity whatever.

There is a difference, however, between the cases in Douglas and this case, which may not be wholly unimportant. The business of banking, when carried on by institutions, associations or persons not lawfully authorized, was at that time forbidden and illegal. Everything done under the General Banking Law was therefore illegal, and no equities could have arisen in favor of any of the participants in the unlawful conduct. But there is no illegality in loaning money, or in associating for the purpose, and it is possible, therefore, for equities to arise in favor of the parties to such a transaction,

when it proves not to have been conducted in strict conformity to the law. The vice of intentional disregard of the law does not taint it.

But what relief can be given if not upon the securities? In *State v. How* 1 Mich. 512, Chancellor Manning held that shareholders in a bank organized under the unconstitutional General Banking Law could not be made liable as partners upon the obligations the bank had issued. But importance was there attached—and justly, as we think—to the fact that the issue of any such obligations was forbidden by law and illegal. If it had not been illegal, possibly it might have been held that those who assumed to carry on banking business in the name of an association not empowered to do so, were personally responsible as joint promissors to those who had trusted them. *Medill v. Collier* 16 Ohio St. 599.

When persons in good faith proceed to organize what they intend shall be a corporation, contemplating a lawful business, and the organization proves ineffectual, but the money jointly contributed by the members associated finds its way into the hands of one of their number, or of some third person, it ought not to be in the power of such person to retain what he has thus received, and to refuse to account to those who were equitably entitled. There is an injustice in such conduct which equity ought to be able to correct. If the money has been obtained in good faith, in the mistaken belief that a corporation existed, it ought not to be retained when the mistake is discovered, and the corporators, who cannot sue at law, ought to be at liberty to come into equity for an accounting. We know of no principle of equity that would be violated by giving such redress; and on the other hand there is ground for the argument that it would be entirely competent for the Legislature retrospectively to affirm and validate the promise to repay, so that a suit at law in the name of the association might be brought upon it. *Lewis v. McElvain* 16 Ohio 347; *Savings Bank v. Allen* 28 Conn. 97; *Parmelee v. Lawrence* 48 Ill. 331; *Danville v. Pace* 25 Grat. 1; *Thompson v. Morgan* 6 Minn. 292. But that point is not before us, and is not decided.

One difficulty in this case, which is very serious, is that it was not contemplated the loans to this association should ever be repaid. Weekly payments were to be made until every member had had a loan corresponding to the number of his shares, and the corporation was then to be dissolved and the securities cancelled. The nominal purpose of the organization was to enable members, by a small weekly payment, to obtain a considerable sum of money; and the securities were only to be enforced against them in case the weekly payments were not kept up. The weakness of the system lay in the fact that the weekly payments must pay the expenses of management; and *Mok's Case* is evidence that these were found very burdensome. But if a borrower is disposed to abide by his contract, it cannot be in the power of the court, or even of the Legislature, to make a new contract for him. He does all that can be required of him if he abides by its terms. The difficulty here is that by the association ceasing to do business, it has become altogether impossible that the terms of the contract shall be kept by either party. Schildbach was to continue to keep up his weekly payments until sufficient had been realized to make proportionate loans to all the members, and was then to be released from all obligation. But as soon as it became impossible to make further loans, there was nothing to limit the time that Schildbach should continue to pay, if he were disposed to perform his contract according to its terms. From that time any remedy that should be open, either to him or to the associates against him must be, to some extent at least, independent of the contract.

The position, then, of these associates is this: They have all put moneys—some more and some less—into a common fund. Some of them have received from this common fund considerable sums of money, and others probably nothing, though equally entitled. Equity requires that there should be an adjustment between all the parties on a fair accounting, and that those who have received moneys on an understanding with their associates which cannot possibly be carried into effect, should return them for the purposes of a fair division. And the return should be with interest after allow-

ing all payments heretofore made. But no decree can be made against any one of the associates based upon the securities, for these are wholly void in law. The decree can take notice of the money loaned only, and can establish no lien on land where the parties have created none.

It has been already stated that the bill in this case is a bill of foreclosure. It is not properly framed, therefore, to entitle the complainant to such relief as is available. It shows no debts owing by the association, and it fails to show that as between Schildbach and the other associates he has not returned all that can equitably be required of him. But the bill may be easily amended in these particulars, and no good reason is apparent why an amendment should not be allowed now, if the complainant elects to make it, instead of beginning *de novo*.

It is objected that the receiver was not legally appointed because Schildbach was not made a party to Geller's bill. But Schildbach has recognized the receivership by his subsequent payments, and he should not be heard to question the appointment in this collateral way.

The decree appealed from must be reversed and an order entered in this court in accordance with the views above expressed. The complainant in entering the order will elect whether he will dismiss his bill or amend, and the matter of costs will be then determined.

The other Justices concurred.

HENRY M. CAMPBELL ADM'R. v. JOSEPH KUHN.

Administrator cannot recover consideration for deed to insane decedent.

A deed left unconditionally with a third person for the use of a grantee who is not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered, and conveys title even although the grantee be of unsound mind.

Transactions that are neither void nor necessarily binding must stand until they are regularly assailed by some one whose position or interests warrant him in assailing them.

An administrator cannot waive a conveyance made to his decedent, either directly or indirectly; and if it is not avoided by the heirs who have the title by descent, he cannot sue the grantor to recover the consideration as if the transaction had been void. And if any of the heirs have reconveyed their interest to the grantor, the administrator is not concerned with the fairness of the latter's dealings towards them, but it is for the heirs to seek redress on their own complaint.

Whether an attempt to recover the consideration paid by a decedent for a conveyance of land does not demand a resort to equity where all persons interested may be made parties and all rights and liabilities safely adjusted—Q.

Error to Superior Court of Detroit. Submitted January 12. Decided April 13.

ASSUMPSIT. Plaintiff brings error. Affirmed.

Chas. M. Swift and *Alfred Russell* for plaintiff in error.

Otto Kirchner for defendant in error. Lunatics can purchase *sub modo* (2 Bl. Com. 292) and their heirs can avoid the purchase: 2 Sugd. Vendors 122; Shelford on Lunatics 265; the conveyance is not void, as the grantor could not allege the grantee's incapacity: *Allen v. Berryhill* 27 Ia. 534: 1 Am. Rep. 309; and as the title descends to the heirs in case of the grantee's intestacy the conveyance could not be avoided without reconveyance: *Gibson v. Soper* 6 Gray 279; Tyler on Infancy 77; for effect of lunacy on contracts, see *Lincoln v. Buckmaster* 32 Vt. 658; *Molton v. Camroux* 2 Exch. 487: 4 Exch. 17.

GRAVES, J. The court below, after hearing the evidence, directed a verdict for defendant, and the general question is whether the plaintiff is entitled to complain of this ruling.

Margaret Hack otherwise called Margaret Taufkirch died in March, 1870, and the plaintiff was appointed administrator in August, 1880. As shown by his testimony the plaintiff's case presents in substance the following state of facts.

In 1863 decedent placed $1276 in defendant's hands and received his note therefor; that she drew the amount down to $910; that in the summer of 1868 she fell into a state of *dementia* bordering on idiocy, and that whilst she was in that condition an arrangement was made by defendant with her by which he was to deed to her a house and lot on Sherman street in Detroit for the $910 remaining in his hands, the property being fairly worth that amount; that on the fourth of January, 1869, and in accordance with this arrangement, the defendant executed the deed and acknowledged it before Eugene Fecht and then delivered it to that gentleman to be by him delivered to decedent, and the note held by decedent for the money was returned to defendant; that the deed was placed on record and decedent, together with two of her children and Mr. and Mrs. Cuff, immediately proceeded to occupy the place, the latter acting as decedent's nurse; that after some few weeks decedent wanted to return to her former residence, and on this account such occupation was discontinued; that at her death in 1870 she left three children her sole heirs-at-law, and that two of them subsequently deeded their interest, more or less, to the defendant for a money consideration which he paid. There are some other incidents but they are not important on this inquiry.

The action is claimed to be for the recovery of the residue of the old deposit, and plaintiff's counsel has ingeniously arrayed the facts and has sought to place the defendant in the attitude of a debtor who is called on to make proof of payment by means of a regular transfer of land. The defendant, it is argued, must acquit himself by satisfactory proof of payment and hence must show that the transfer of the house and lot in exchange for the $910 was binding on the decedent. But this is scarcely a just theory. The plaintiff has found it to be impossible to get his case before the court without showing a state of facts not in unison with such view. When all refinements and all technicality are put aside, it seems to be the meaning of the proceeding to evade all questions of liability respecting the re-establishment of rights and interests as they were prior to the giving of the

deed, and by means of an action at law simultaneously avoid the conveyance and compel the defendant to refund the consideration.

In passing it occurs to observe that any attempts to deal with a transaction of this nature and which is complicated by such incidents as are here manifest, in an ordinary suit at law, must be attended by very serious difficulties, and that in case of the existence of any substantial cause for judicial interference it might be well to consider whether the remedy would not have to be sought in a court of equity where all persons interested could be made parties and all rights and liabilities be equitably and safely adjusted. For the purpose of this review the decedent's state of imbecility, as represented by the plaintiff must be admitted.

The first point requiring notice relates to the delivery of the deed; and in regard to this it is argued that, if the facts are viewed apart from the circumstance that decedent was imbecile, the law will not consider them as amounting to a delivery. Upon this question the authorities are decisive against the plaintiff. *Hosley v. Holmes* 27 Mich. 416; *Latham v. Udell* 38 Mich. 238; *Gardner v. Collins* 3 Mas. 398; *Gould v. Day* 94 U. S. 405; *Church v. Gilman* 15 Wend. 656; *The Lady Superior of the Cong. Nunnery of Montreal v. McNamara* 3 Barb. Ch. 375; *Concord Bank v. Bellis* 10 Cush. 276; *Regan v. Howe* 121 Mass. 424; *Hastings v. Merriam* 117 Mass. 245; *Buffum v. Green* 5 N. H. 71; *Merrills v. Swift* 18 Conn. 257; *Frost v. Peacock* 4 Edw. Ch. 678; *Tompkins v. Wheeler* 16 Pet. 106; *Tibbals v. Jacobs* 31 Conn. 428; *Jones v. Swayze* 42 N. J. L. 279; *Mitchell v. Ryan* 3 Ohio St. 377; *Berry v. Anderson* 22 Ind. 36, 39; *Kingsbury v. Burnside* 58 Ill. 310; *Robinson v. Gould* 26 Iowa 89; *Kerr v. Birnie* 25 Ark. 225; *Farrar v. Bridges* 5 Humph. 411; *Wesson v. Stephens* 2 Ired. Eq. 557; *Doe v. Knight* 5 B. & C. 671.

It is next contended that the deed was prevented from taking effect in consequence of the want of proper understanding by decedent to make an intelligent acceptance. The final meaning and effect of this argument is that an idiot or

lunatic cannot take at all by deed. Such must be the result if an intelligent acceptance by the donee or grantee is necessary for the vesting of the title when the gift or grant runs to one in that condition. But the law is otherwise. Lord Coke says that "a man of non-sane memory may, without the consent of any other, purchase lands" (lib. 1, c. 1, § 1, 2b) and that "persons deformed having human shape, ideots, madmen, lepers, deafe, dumbe, and blinde, minors, and all other reasonable creatures, have power to purchase and retaine lands or tenements," (3b;) and see 2 Bl. Com. 291; 1 Stephen's Com. 441, 442; 2 Broom & Had. Com. (Am. ed.) 714; 2 Washb. R. P. (1st ed.) 567; 3 Bac. Ab. *Idiots and Lunaticks*, D; Touchstone, *Feoffment*, 204; *Grant*, 235. Alluding to this, Chief Justice Shaw observed that a good conveyance could be made by a deed-poll to a lunatic although the grantee would be under a legal disability to make a conveyance, and that the delivery to a third person unconditionally for the use of the grantee would give effect to the deed. *Concord Bank* v. *Bellis*, supra.

The rule of course may not apply to an instrument which goes further and assumes to impose a burden, liability or obligation on the grantee, and there is no occasion to inquire whether a deed would operate in case the incapable grantee were under guardianship. The transaction in question is the simple case of a deed-poll lawfully delivered to a third person unconditionally for the use of decedent and followed by circumstances inclining towards actual acceptance. The objection that the deed was wholly void is substantially answered by what has been said. It could not be so, and at the same time take effect as a conveyance. The authorities last cited are sufficient. The rule contended for would cause great hardship as well as mischief. A gift or grant unfettered by any condition, and however just and beneficial in itself (not being for necessaries) would, if made to a person not capable of expressing acceptance by intelligent action, be nugatory and totally unavailable to him. No grant or gift except for necessaries could vest in such a person in the absence of trust or guardianship.

The general rule is that transactions which are not necessarily binding are yet to be considered as standing until regularly assailed by some one whose position or interests entitle him in the view of policy or justice to assail them, and the cases where transactions are regarded as having no force at all as between any persons or any parties for any time whatever, are comparatively few and the present is not one. The title vested in decedent and at her death descended to her heirs, and admitting, though not deciding, that she might have maintained an action of this kind had she regained understanding, or that her guardian as lawful manager of her property and interests, in case one had been appointed, might have done so, and in each case on the ground that the action prosecuted by such a plaintiff to regain the consideration would in itself be a waiver or rejection of the grant, the circumstances are now wholly different. It will be conceded probably that the right to have back the money cannot exist, unless the transaction, which at the utmost is only voidable and not void, is actually avoided.

No one can at the same time insist that a contract is in force and is not in force, nor recover on a basis which his proceedings contradict; and whilst a voidable transaction remains unavoided it operates as one that is binding; and no action that contemplates it as one which has been avoided can be maintained. The result is that if the arrangement with decedent has been suffered to remain, which is a fact unquestioned, and if this action has no force to avoid it, a complete denial is necessarily implied of all right to recover what is sued for. Is there, then, any efficacy in this case to avoid that arrangement? The answer is obvious. The administrator has no power either directly or indirectly to waive the conveyance. The law casts the right on the heirs who have the title by descent (Coke on Litt. 2*b*, and Bac. Ab. *supra*) two of whom seem to have dealt with the premises in a manner wholly at variance with any right of avoidance.

An administrator has no commission from the law to intervene and by his election unsettle the landed possessions held by the heirs through inheritance, on the specific ground that

the ancestor, at the time when the property vested in him, was not of sound mind. Neither is it his province to proceed in disregard of the fact whether the heirs have or have not elected to abide by the grant, and sue to reclaim the purchase money.

As something has been said about the defendant's mode of dealing with the two heirs in obtaining their deeds it may be proper to observe that whether he acted fairly and justly therein does not concern the administrator and is not a question to be adjudicated in this action. Whatever grievance the heirs may have in that regard must be redressed on their complaint.

While disagreeing with the plaintiff we do not fail to recognize the skill displayed by his counsel.

Judgment must be affirmed with costs.

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

CAMPBELL, J. did not sit in this case.

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NELSON HANSEN v. ARTHUR C. PRINCE.

Right of action on lease—Enforcement of lien against lessee—Effect of deed of leased land.

An agreement that a person who retains no ownership in the lease and has sold the land should receive certain portions of the rent thereafter payable, gives him no title to enforce such payment by any action founded directly on the lease itself. All rights of that kind belong to the assignee of the land under lease, where they cannot be separated from the ownership of that instrument, and the beneficial interest in the partial revenues must be enforced in some other way.

A lien on property given by a lease, to secure the performance of its conditions, is inseparable from the lease, and can only be enforced against the lessee by the landlord or his assignee.

A deed of land under lease conveys the landlord's rights, as against the lessee, without further ceremony.

Case made from Kent. Submitted January 19. Decided April 13.

REPLEVIN. Plaintiff had judgment below. Affirmed.

Taylor & Eddy for plaintiff.

Drury & Maher for defendant.

CAMPBELL, J. Hansen replevied certain household furniture taken from him by defendant Prince as agent for one Young under a provision in the nature of a chattel mortgage in a lease, August 15, 1877. Young, as owner of certain premises in Grand Rapids, leased them to Hansen for three years, at $500 per annum, payable monthly in advance. The lease contained clauses whereby a lien or mortgage was to exist on all property then or thereafter on the premises, with authority in default of rent or other covenant broken, to seize and sell enough to pay the amount due and costs.

On the 29th of July, 1878, when no rent was in arrears, and none would accrue until August 15, Young sold and conveyed the leased property by warranty deed to Mrs. Lucinda E. Judd. At about that time it was agreed between Mrs. Judd and Young that Hansen should pay to Young the rent to grow due up to December 1st, and Hansen was notified of this and paid rental to Young up to September 15th. It is not found that this agreement was in writing or was in the deed or in any way referred to in it, and it is not found it was made at any particular time as simultaneous, anterior or subsequent.

On September 16, 1878, Mrs. Judd sued Young before a justice and garnished Hansen, who answered and admitted his liability as before described. In each instance of suing out garnishee process the rent sought to be reached by it had already accrued. Judgment was recovered before the justice against Young, for more than the amount disclosed, and he removed it by *certiorari* into the circuit court, and gave the statutory bond. The judgment was affirmed March 20, 1880.

The present replevin suit was begun August 15, 1879, and tried on April 26, 1880. The circuit court held that by the sale to Mrs. Judd all of Young's rights under the lease itself and the security contained in it passed to the vendee, and that the arrangement to allow rent to be paid to him until December did not give him any right to enforce the mortgage clause. It was also held that the garnishee proceedings were not destroyed by the *certiorari*.

We think that the court held correctly that the right to receive payments up to December, 1878, did not involve any assignment of the lease itself or any direct interest in it. The agreement was simply that certain moneys which belonged to Mrs. Judd should be paid to Young. There was no reservation whatever in the deed to Mrs. Judd, and she was thereby vested with the entire title to the land, subject only to Hansen's tenancy. She was thereafter the only landlord, and Young ceased to have any interest in the freehold, or any claim except such as Mrs. Judd gave him, which is not found to be any control over the securities. Such an interest carries no legal title. *Hartford Fire Ins. Co. v. Davenport* 37 Mich. 609.

The claim that under our present laws a deed of land does not transfer rights to enforce existing leases is unfounded. It has been decided otherwise. *Perrin v. Lepper* 34 Mich. 292; *McGuffie v. Carter* 42 Mich. 497. There can only be one landlord at a time, entitled to enforce claims under leases. The questions relating to the garnishee proceedings are, therefore, not important and we do not consider them.

The judgment must be affirmed with costs.

The other Justices concurred.

JOHN R. GATES v. HIRAM FISK.

Partnership note a joint contract.

A partnership note is a joint contract within the meaning of Comp. L., § 7165, so that a payment thereon by one partner within the period of the statute of limitations will not bind the other if the firm had previously dissolved to the payee's knowledge.

The partnership name represents the constituents of the firm, and when it is rightly pledged the respective partners are jointly bound.

The Supreme Court will not weigh evidence in law cases and ascertain facts as a ground of final judgment.

Error to Washtenaw. Submitted January 21. Decided April 13.

ASSUMPSIT. Defendant brings error. Reversed.

Beakes & Cutcheon for plaintiff in error. After dissolution of a firm the power of one partner to bind the firm to a more extended liability on a partnership debt by payment on new promise wholly ceases: *Atwood v. Gillett* 2 Doug. (Mich.) 216; *Pennoyer v. David* 8 Mich. 408; *Thompson v. Waithman* 3 Drew 628; *Bristow v. Miller* 11 Irish L. R. 461; *Kilgour v. Finlyson* 1 H. Bl. 155; *VanKeuren v. Parmelee* 2 Const. 523; *Bloodgood v. Bruen* 4 Seld. 362; 2 Pars. N. & B. 657; 1 Dan. Neg. Inst. § 370; payment by one partner after dissolution does not destroy the effect of the statute of limitations as to the other: *Rogers v. Anderson* 40 Mich. 290; *Myatts v. Bell* 41 Ala. 222; *Balcom v. Richards* 6 Cush. 360; *Graham v. Selover* 59 Barb. 313; even when made with the other's consent: *Sigler v. Platt* 16 Mich. 206; *Cockrill v. Sparkes* 1 H. & C. 699; see *Bush v. Stowell* 71 Penn. St. 208; *Coleman v. Fobes* 22 Penn. St. 156; *Levy v. Cadet* 17 S. & R. 126; *Searight v. Craighead* 1 Pen. and Watts 135; *Schoneman v. Fegley* 7 Penn. St. 433; *Hance v. Hair* 25 Ohio St. 349; *Day v. Baldwin* 34 Ia. 380; *Cowing v. Vincent* 25 U. C. (Q. B.) 427; after disso-

lution the liability of the partners on a firm debt is that of joint debtors, and the remaining member cannot bind the others as partners: *Coleman v. Fobes* 22 Penn. St. 156; *F. & M. Bank v. Kercheval* 2 Mich. 518.

Sawyer & Knowlton for defendant in error. A partnership debt once created always continues such unless changed by the act of the creditor: *Botsford v. Kleinhans* 29 Mich. 332; *Bedford v. Deakin* 2 B. & Ald. 210; *Ault v. Goodrich* 4 Russ. 430; *Cady v. Shepherd* 11 Pick. 400; *Bridge v. Gray* 14 Pick. 55; *Gay v. Bowen* 8 Met. 100; *Wood v. Braddick* 1 Taunt. 104; even after dissolution, since they are still partners as to existing debts in making settlement: Coll. on Part. § 432; *Bissell v. Adams* 35 Conn. 299; *Smith v. Winter* 4 M. & W. 461; *Butchart v. Dresser* 10 Hare 453; *Patterson v. Choate* 7 Wend. 441; *Murray v. Mumford* 6 Cow. 441; the statute of limitations does not apply to partners, while making payments on partnership debts: Parsons on Part. (3d ed.) 307, note *y y; Willis v. Green* 5 Hill 232–234; *Gates v. Beecher* 60 N. Y. 518; Story on Part §§ 89–90; Lind. on Part 31–32; a distinction has always been made between payments made by partners before and those made after the statute of limitation has attached: 1 Greenl. Ev. § 112; Coll. on Part. 177; *Bowdre v. Hampton* 6 Rich. (S. C.) 208; *Fisk v. Frank* 1 McCourt. Ch. 175; *Scales v. Jacob* 3 Bing. 638; *Gardner v. M'Mahon* 3 A. & E. (N. S.) 566; until the payee knows of the dissolution, any contract made by one partner within the scope of the partnership business binds the other partner also: *Pratt v. Page* 32 Vt. 15; payment by the liquidating partner would take the case out of the statute of limitations: *Reppert v. Colvin* 48 Penn. St. 248; a partnership debt remains so after dissolution: Parsons on Part. (3d ed.) 395, 398, 388, 421, 457; Coll. on Part; § 106; *Whiting v. Farrand* 1 Conn. 60; *Gay v. Bowen* 8 Met. 100; the partners are all responsible *in solido*, and all the joint property of the firm is just as liable for the partnership debts after as before dissolution, any arrangement between the partners to the contrary

notwithstanding: Parsons on Part. (3d ed.) 428, *395; Story on Part. § 334; Coll. on Part. § 106; the power of a partner to bind each member of the firm remains the same after as before dissolution, when his acts or admissions are confined to partnership matters then existing in which they all still have a common interest, even with creditors having knowledge of the dissolution, but he cannot create a new debt or revive one barred by the statute: *Pennoyer v. David* 8 Mich. 407; *Smith v. Shelden* 35 Mich. 42; *Cady v. Shepherd* 11 Pick.400; *Holmes v. Shands* 27 Miss. 44; Parsons on Part. § 395; he can close all business transactions of the firm: *Palmer v. Dodge* 4 Ohio St. 21; settle up the business of the firm: *Parker v. Cousins* 2 Gratt. 372; *Long v. Story* 10 Mo. 637; *Marton v. Walton* 1 McCord 16; *Parker v. Macomber* 18 Pick. 505; *Fellows v. Wyman* 33 N. H. 351; settle all demands in favor of *or against* the firm: *Lockwood v. Comstock* 4 McLean 383; sign the firm name for that purpose: *Hamilton v. Seaman* 1 Ind. 185; *Martin v. Kirk* 2 Humph. 529; assign to a creditor of the firm a demand due to the partnership: *Milliken v. Loring* 37 Me. 408; *Daby v. Ericsson* 45 New York 786; *Loeschigk v. Hatfield* 51 N. Y. 660; but not indorse a note due the firm; *Sanford v. Mickles* 4 Johns. 224; draw bills upon debtors, and when accepted, bring suit in name of firm: *King v. Smith* 4 C. & P. 108; collect, compound and release debts of the firm: *Napier v. McLeod* 9 Wend. 120; *Huntington v. Potter* 32 Barb. 300; sell goods consigned to the firm before dissolution: *Heberton v. Jepherson* 10 Penn. St. 134; acknowledge in the partnership name a balance due from the firm: *Ide v. Ingraham* 5 Gray 106; *Temple v. Seaver* 11 Cush. 314; *Bank v. Pratt* 51 Me. 563; *Gannett v. Cunningham* 34 Me. 58; *Cunningham v. Bragg* 37 Ala. 436; arrange-*liquidate and pay* existing firm indebtedness: *Darling v. March* 22 Me. 184; borrow money to pay partnership debts: *Estate of Davis & Desanque*, 5 Wheat. 530; pay from his own means a valid subsisting debt against the firm and the right to claim an allowance and contribution from the others therefor: *Gates v. Beecher* 60 N. Y. 524; do "every act of

administration necessary to winding up the firm, and *bind all the rest*:" 2 Bell. Com. Book 7, ch. 2, p. 643; partners do not become joint debtors after dissolution of the partnership: *Schoneman v. Fegley* 7 Penn. St. 433; *Whipple v. Stevens* 22 N. H. 219; part payment by one partner before the statute of limitations attached, forms a new point from which the statute begins to run as to all the partners: *Hicks v. Lusk* 19 Ark. 692; *Burr v. Williams* 20 Ark. 171; *Pennoyer v. David* 8 Mich. 407; *Tillinghast v. Nourse* 14 Ga. 641; *Partlow v. Singer* 2 Ore. 307; *Palmer v. Dodge* 4 Ohio St. 21; *Turner v. Ross* 1 R. I. 88; *Joslyn v. Smith* 13 Vt. 353; *Carlton v. Ludlow Woolen Mill* 28 Vt. 504; *Mix v. Shattuck* 50 Vt. 421; *Bank v. Hartfield* 5 Ark. 551; *Coleman v. Fobes* 22 Penn. St. 156; *M'Intire v. Oliver* 2 Hawks (N. C.) 209; *Brewster v. Hardeman* Dudley (Ga.) 138; where the dissolution is by mutual consent those who deal with the firm are entitled to notice, or the firm is bound, even by any new contract the partners may make with such creditor: Story on Part § 334; *Vice v. Fleming* 1 Young & J. 227; *Pecker v. Hall* 14 Allen 532; *Dickinson v. Dickinson* 25 Gratt. (Va.) 321; actual notice of its dissolution must be brought home to the creditor: *Johnson v. Totten* 3 Cal. 343; *Page v. Brant* 18 Ill. 37; *Vernon v. Manhattan Co.* 17 Wend. 524.

GRAVES, J. Fisk brought this action on the 27th of February, 1878, to recover under the common counts against Gates on a promissory note of the following tenor:

"300. CHELSEA, Nov. 27, 1868.

One day after date we promise to pay Hiram Fisk, or bearer, three hundred dollars, at ———, value received, with interest at 10 per cent.

CONGDON & GATES."

There were indorsements of six payments: $30 November 25, 1869; $30 November 27, 1870; $30 November 27, 1871; $30 November 27, 1872; $30 November 27, 1873, and $30 November 27, 1874. The defense relied on was the statute of limitations. The trial was before a jury, and the

circuit judge, entertaining doubt respecting the rule of law, directed a verdict for the plaintiff.

Some further explanation is necessary. On the 27th of November, 1868, and for some time prior thereto, the plaintiff in error and one Albert Congdon were merchandising at Chelsea as copartners under the name of "Congdon & Gates" and the note in suit was duly given by the firm to the defendant in error. February 1, 1870, the partnership was dissolved by mutual agreement. It was arranged that Congdon should settle up the business and pay the debts and for the time being he continued merchandising as successor of the firm at the same place. The payments indorsed were all made by him to Fisk and there was abundant evidence direct and circumstantial for the judgment of the jury as to whether Fisk did not become aware of the dissolution prior to the payment of November, 1872. June 27, 1877, Congdon died. The material question is whether, supposing Fisk to have become aware that the firm had been dissolved, the payment to him by Congdon in November, 1872, operated to charge Gates with liability on the note for the ensuing six years; because if it did not, the action, as counsel admit, cannot be maintained.

The case has been presented with marked ability, and the rulings of many courts as well as the views of eminent text-writers have been critically examined and compared.

The authorities are irreconcilably at variance and it would be a bootless task to attempt their classification. There is much eminent opinion that on general principles, a payment by one partner, if there be nothing more, after dissolution and before any bar has attached, will not affect the right of another partner to plead the statute. But the question is not one of practical importance in this State in case the provision of our statute (Comp. L. § 7165) is applicable and the counsel on each side assume that the event of this suit depends on whether it is applicable or not. The provision referred to is as follows: "If there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter,

so as to be chargeable by reason only of any payment made by any other or others of them."

The counsel for the defendant in error has dwelt with much ingenuity on the relations which obtain in point of law between the members of a dissolved firm in respect to firm contracts which remain binding on them after dissolution: and has proceeded to contrast those relations with such as exist in the case of parties who have become joint debtors through other than partnership transactions, and to point out some material distinctions, and the existence of these distinctions is made use of to found an inference that persons under mere partnership obligations are not after voluntary dissolution either joint debtors or joint contractors, and hence are not within the meaning of the statute above quoted.

Is not this reasoning calculated to mislead? That important distinctions obtain there is no doubt. But the bare fact that differences exist cannot exclude the partnership obligations from the category of joint contracts unless they show that an obligation of that kind lacks some quality which is inherently indispensable to a joint contract, or possesses some quality which cannot in the nature of things co-exist with one. But nothing of that kind appears.

The partnership name represents the constituents of the firm, and when it is rightly pledged the respective partners are jointly bound. *Condee and Scribner v. Clark and Brown* 2 Mich. 255.

It is entirely consistent with reason that joint contracts should arise under various producing causes and be distinguished from each other by particular incidents of more or less importance. The grounds of distinction may supply criteria for proper and convenient classification under the common head, but will not justify the rejection of any form from the general group to which its nature assigns it. The contract of the obligees in a bond, the undertaking of the ordinary co-makers of a promissory note, and the agreement by a partnership which is left unperformed on the occurrence of a voluntary dissolution, are distinguishable in many respects which are quite material; yet they possess certain

very substantial properties in common, and all fall under the denomination of joint contractors.

Without extending these observations it remains to say that in *Peirce v. Tobey* (5 Met. 168) the Supreme Court of Massachusetts ruled expressly that their statute, which is the same as our own (*Faulkner v. Bailey* 123 Mass. 588) was applicable to partnership contracts remaining unperformed after voluntary dissolution, and very recently the Vice-Chancellor of England has decided in the same way on a statute which, as to this question, is not distinguishable. *Watson v. Woodman* L. R. 20 Eq. Cases 721 : 15 Eng. 572.

The case has been argued on the assumption on both sides that, to constitute a defense for Gates under the statute, it should appear that Fisk at the time of receiving the payment, 1872, had notice or knowledge of the fact that a dissolution had taken place, and there is no question before the court on that subject. The view in which counsel have thus concurred has respectable support. *Sage v. Ensign* 2 Allen 245 ; *Tappan v. Kimball* 30 N. H. 136.

As already mentioned, there was evidence in regard to notice for the jury to consider ; but the fact has not been found and remains to be settled by the proper tribunal of original jurisdiction. It is not the province of this court to weigh evidence and ascertain the facts as a ground of final judgment here. Assuming that Fisk knew or had reason to believe that a dissolution had taken place, it follows that Gates is entitled to the benefit of the statute.

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

The other Justices concurred.

MILAN D. REYNOLDS v. WILLIAM P CAMPBELL.

Correction of deed requires clear showing.

A bill to correct a deed so as to make the conveyance subject to mortgages, and excepting a crop from its operation, cannot be maintained except upon a very convincing preponderance of evidence in favor of complainant, showing that it had been so agreed between the parties.

Appeal from Washtenaw. Submitted January 2. Decided April 13.

BILL to reform deed. Defendant appeals. Reversed.

Beakes & Cutcheon for complainant. A deed was corrected on the testimony of one witness supported by corroborating circumstances, though the mistake was denied by a sworn answer: *Pember v. Mathers* 1 Br. Ch. 52; *Clifford v. Turrell* 1 Y. & C. 137; a reasonable presumption of mistake is enough: *Simpson v. Vaughan* 2 Atk. 33; if a deed fails to embody the actual bargain, the mistake may be corrected in equity: *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 319; *Hunt v. Rousmaniere* 1 Pet. 13; *Woolam v. Hearn* 2 Lead. Cas. in Eq. 355; *Welles v. Yates* 44 N. Y. 525; Story's Eq. § 115; Kerr on Fraud 418; *Bingham v. Bingham* 1 Ves. Sr. 126; *Willan v. Willan* 16 Ves. 72; *Earl of Beauchamp v. Winn* L. R. 6 Eng. &. Ir. App. 223: 6 Eng. Rep. 47; *Langley v. Brown* 2 Atk. 203; *Canedy v. Marcy* 13 Gray 373; *Snell v. Ins. Co.* 98 U. S. 85; *Kosterboder v. Peters* 8 Penn. St. 438; *Wake v. Harrop* 6 H. & N. 768: 1 H. & C. 202; *Druiff v. Parker* L. R. 5 Eq. 137; *Sparks v. Pittman* 51 Miss. 511; *Green v. Morris etc. R. R.* 12 N. J. Eq. 165.

Albert Crane for defendant. Upon a bill to reform a deed parol stipulations omitted therefrom with complainant's knowledge cannot be inserted: *Andrew v. Spurr* (1864) 8 Allen 412; nor can a deed be reformed on the ground that

complainant did not know what he was doing: *Bentley v. Mackay* (1862) 31 Beav. 143; the complainant must show that there was a mutual mistake of fact: *Sawyer v. Hovey* (1862) 3 Allen 331; *Nevius v. Dunlap* (1865) 33 N. Y. 676; *Ledyard v. Hartford F. Ins. Co.* (1869) 24 Wis. 496; *Bryce v. Lorillard F. Ins. Co.* (1873) 55 N. Y. 240; *Jackson v. Andrews* (1874) 59 N. Y. 244; the mistake must be established by clear and convincing proofs: *Irnham v. Child* (1781) 1 Br. Ch. 93; *Youell v. Allen* (1869) 18 Mich. 107; *Martin v. Hamlin* (1869) id. 354; *Tripp v. Hasceig* (1870) 20 Mich. 254; *Case v. Peters* (1870) id. 298; *Hudson etc. Co. v. Stockbridge etc. Co.* (1869) 102 Mass. 45: (1871) 107 Mass. 290; *Potter v. Potter* (1875) 27 Ohio St. 24; *Mead v. Ins. Co.* (1876) 64 N. Y. 453; *Vary v. Shea* (1877) 36 Mich. 388; *Howland v. Blake* (1878) 97 U. S. 624; *Moran v. McLarty* (1878) 75 N. Y. 25; *Ford v. Joyce* (1879) 78 N. Y. 618; complainant's uncorroborated testimony, though uncontradicted, would not be sufficient: *Kent v. Lasley* (1869) 24 Wis. 654, *McClellan v. Sanford* (1870) 26 Wis. 695; *Hurter v. Christoph* (1873) 32 Wis. 245; defendant's denial should have weight: *Fowler v. Fowler* (1859) 4 DeG. & J. 250.

Campbell, J. In January, 1873, Reynolds conveyed to defendant ninety acres of land in Washtenaw county at an agreed price of sixty dollars per acre, amounting in all to $5400.

When this land was sold it had on it about thirty acres of wheat, of which Reynolds claims it was agreed he should retain thirteen and one-half acres, of which twelve were in one parcel and the remainder in another field. There were also three mortgages against complainant at that date—one for $117 due to L. D. Watkins, one to Charles Wells on which there was to become due $2245, with interest from 1868, but which was not payable for some time thereafter, and a smaller mortgage to Wells which covered only a small part of these premises with adjacent lands, which had been originally for $375, but on which the principal had been due

several years, and with interest amounted to something more than $600.

Complainant claims that defendant purchased subject to all three of these mortgages, and was to pay and did pay the remainder of the $5400 partly in cash, and partly in a mortgage on lands in Jackson county of $900.

Defendant admits that he agreed to pay the two mortgages which covered his farm, but denies that he agreed to except the wheat, or to pay the smaller Wells mortgage, and insists that he paid the full balance above the $900, in cash.

The deed given by complainant was an ordinary warranty deed with no exceptions. In 1876 this bill was filed to correct this deed by excepting the wheat and making the grant subject to all the mortgages.

The $900 had been paid, as well as the Watkins mortgage and most of the large Wells mortgage, which it was understood between Wells and defendant the latter was to pay in full.

Defendant gathered the wheat. He also from the beginning refused to recognize the smaller Wells mortgage as binding on him.

The court below decreed for complainant for the wheat and all the mortgages. Defendant appeals.

In this case the testimony of the parties and of their wives is positively contradictory, upon all of the points involved. The outside testimony does not appear at all conclusive. There are many circumstances which in our view rather tend to confirm the statements of the defendant. But it is enough to say that without a very convincing preponderance of evidence in favor of complainant no relief can be granted. We do not think there is such a preponderance or any preponderance and therefore no decree should have been granted.

The answer is sufficient to determine, in any future controversy, the liability of defendant to pay what is left of the large Wells mortgage. It is not clear that any further relief could have been granted in any case, and nothing is shown to indicate that defendant would ever have objected to sign any proper instrument to that effect.

The decree must be reversed and the bill dismissed with costs.

MARSTON, C. J. concurred.

GRAVES, J. concurring. How far soever this case may be thought to go in breeding suspicion that it was part of the agreement that defendant should assume and pay the small mortgage given to Wells, and which amounted to more than $600 at the time of the bargain, yet the showing is obviously not so clear and positive as to warrant a finding to that effect and a consequent change in the operation of the deed. *Vanderkarr v. Thompson* 19 Mich. 82; *Martin v. Hamlin* 18 Mich. 354; *Tripp v. Hasceig* 20 Mich. 254; *Case v. Peters* id. 298; *Ivinson v. Hutton* 98 U. S. 79, 82, 83; *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453; *Ford v. Joyce* 78 N. Y. 618; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290.

The elements of proof are unwritten, conflicting and uncertain. The failure of that part of the bill relating to the right to retain the thirteen and one-half acres of wheat is still more conspicuous. In giving the opinion of the Court in *Case v. Peters*, supra, Mr. Justice Christiancy observed as follows: "It would, we think, be exceedingly dangerous, and tend to weaken confidence in titles generally, if the effect of deeds of conveyance, leases or other written evidences of title could be thus changed by a verbal agreement, except in very clear cases, where the contract is proved to the entire satisfaction of the court. It should never be done upon a slight preponderance of evidence. The court should be satisfied beyond a reasonable doubt. *Hunter v. Hopkins* 12 Mich. 229; and see *Jones v. Tyler* 6 Mich. 368." Page 303.

COOLEY, J. dissenting. I do not concur in the foregoing opinion, but think the decree appealed from was correct.

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FERDINAND W. TILDEN v. LORENZO STREETER.

Bill to give a deed the effect of a mortgage—Weight of evidence.

One who files a bill to have a deed given by him, construed as a mortgage, has the burden of proving beyond reasonable doubt that this was actually meant to be its effect.

A complainant seeking to have his deed construed as a mortgage is confined to the ground on which he filed his bill and cannot afterward claim that he was unduly influenced to execute the paper as a deed.

The fact of relationship between the parties to a bill filed to have a deed construed as a mortgage has no force except as it is pertinent to the case and will aid in proving or disproving it.

A bill to have a deed construed as a mortgage cannot be sustained unless there is convincing proof in complainant's favor, even though defendant's showing is such as to establish no claim on the confidence of the court.

Appeal from Wayne. Submitted Jan. 21. Decided April 13.

BILL to declare a deed to have been given as security. Defendant appeals. Reversed and bill dismissed.

Julien Williams and *William Jennison* for complainant.

Robbins & Davis and *Baldwin & Drapers* for defendant.

GRAVES, J. In approaching this contention it seems needful to refer at some length to certain historical data about which there is no room for controversy. It must be borne in mind however that there are many incidents of special significance more or less connected with these facts; but which, as being mere disputes or matters of dispute, are in such shape that no account can be given of them in their natural order without digressing into utter confusion. Their bearing and the color they lend to particular points and their ultimate effect can only be understood by a thorough study of the record. This intimation is needed to warn against hasty inferences and implications. By disregarding it and confining attention to a group of undisputed facts exhibited apart

from their surroundings and unattended by the conflicting explanations of parties and witnesses there would be great danger of forming most distorted and erroneous views of the actual case on which the court is compelled to adjudicate.

Prior to 1862 complainant's father and mother lived in the little hamlet of Waterford in Oakland county. The place, as may be inferred, contained less than two hundred inhabitants. The dwelling was a small cheap structure, designed to serve as a lean-to for a future upright, and the lot consisted of an acre of ground enclosed with a rail fence, and the whole premises were in a rude condition. The title was in the wife. Complainant's father went into the army and in 1862 lost his life. Complainant was the only child and was about six years of age. In 1866 his mother intermarried with defendant who was then nearly destitute of property. His business was that of carriage-maker, trimmer and painter. They made the premises referred to their place of abode. From this time forward during the life-time of complainant's mother the relations between the three appear to have been not merely pleasant, but affectionate. Complainant was well provided for by defendant and evidently treated with indulgence. He was kept at school and no further tasked apparently than was conducive to his own good. The prevalence of good feeling was reciprocal and constant, and the intercourse was very frank, the complainant manifesting no reserve in his conversation with defendant, nor anything like unpleasant subordination in his deportment. There is not a hint in the case of any approach towards ill feeling or disagreement or any jar in their association prior to this controversy. The correspondence in the record affords the strongest evidence of the closeness of their intimacy and the absence of all constraint in their mutual communication.

Sometime after the marriage, but the date is not explained, complainant's mother, in character of his guardian, received from the United States $649. But before this money was received the defendant commenced improving the little homestead; yet the greater portion of the improvements and indeed nearly all were made afterwards. In the course of a

few years a considerable amount in money and labor was expended. He smoothed the face of the lot, planted trees, made fence, erected a barn and outbuildings and added a two-story front to the house. In carrying on this improvement, however, the most of which was about 1870, he used a little over $400 of the money so received by Mrs. Streeter as the guardian of complainant. During these events complainant's maternal grandfather and grandmother lived near. A married aunt resided in the vicinity and two uncles in Detroit. One of the latter is the gentleman who now appears as complainant's solicitor. The other subsequently removed to Florida. The defendant had two married sisters in Waterford. A state of ill feeling existed between defendant and his mother-in-law, the grandmother of complainant, and complainant felt that his mother's relations were neither warm nor just and not entitled to his hearty love and respect. He was not inclined to confer with them freely and fully.

In August, 1878, his mother died intestate, leaving him her sole heir-at-law. The record contains intimations that there were some small parcels of real estate at or near Detroit, which fell to him in addition to his right at law, to the place at Waterford. A few days succeeding his mother's death, and about the 9th of September, 1878, complainant, who was then nearly 22 years of age, went to Detroit. It seems to have been his purpose to seek employment there if practicable. His uncle, the solicitor in this case, gave him some assistance. He likewise received aid from his grandmother and from the defendant. He soon entered a business college there and pursued a six months' course. During this time he corresponded with defendant, and complained that his uncle and grandmother were not disposed to give him much assistance, and were far from being warm and generous towards him. The other uncle, previously mentioned, owned a large tract of land in southern Florida, and was getting ready to remove there and settle, and complainant desired to go with him. But he lacked the necessary means, and neither of his relations tendered any, nor attempted to help him

obtain them. He wished to procure from $75 to $100, and expected on reaching Florida to get wages by laboring for his uncle, and imagined that he might in time succeed in getting a fruit farm for himself, and that possibly the defendant would finally join him. He suggested his desires and speculations to the latter, and spoke of one or two schemes for hiring the money. December 24th he went to Waterford, and visited defendant; and on the 27th the two went to Pontiac, and complainant there gave him a quit-claim deed of the homestead, and at the same time each executed a will in favor of the other. Complainant then returned to Detroit; but on the 7th of January, 1879, he again visited defendant, who at that time gave him $100. It was mutually understood that in consequence of the attitude of complainant's relatives and the desire expressed by complainant to escape their intermeddling and annoyance the existence of the deed should be kept from their knowledge until he should be away from them, and beyond their reach. Soon after the reception of the $100, his uncle was apprised of it, and was led to suppose it was an advance from defendant, and that the latter had nothing to show for it, and he instructed complainant that it was not proper to transact business in that way, and that he must give defendant his note for the money. With a view of keeping the real transaction from his uncle and his other relatives, he at once executed a note and gave his uncle to understand that he would forward it. He subsequently cut his name off and sent the note, thus mutilated, to defendant. He explained to the latter how the note came to be made, and that his purpose in forwarding it was that it might be represented that his uncle's directions had been complied with. He observed, that of course he would not have the money to pay it on its coming due, and if his uncle or his grandmother should wish to pay it, it would be all right, and he would be $100 better off. These explanations were made by letter after complainant had gone south, which was on the 15th of January, 1879. They kept up a frank and cordial correspondence until the summer of 1879.

June 30, 1879, defendant sold the Waterford property,

and received therefor $250 cash, a horse worth from $50 to $80, according to the testimony, and a house and lot in Detroit, said to be of the value of eight or nine hundred dollars, and on the 10th of August he married. Complainant almost immediately returned to Detroit, and in September he filed this bill. The case made by it, which was set forth under oath, cannot be misunderstood. It is in substance that the transaction covering the deed and the furnishing the $100, was exclusively an advance of money by defendant to be repaid, and a giving of security therefor by complainant, and was not intended to be, and in fact was not a sale nor a conveyance of complainant's estate in the land. In support of this claim, and for the purpose of accounting for the form and appearance given to the transaction, the complainant makes this sworn representation in the bill:

"Your orator further shows that in the month of December, 1878, that he was in poor and failing health, and had been for several months prior thereto; that he became anxious to go to the State of Florida for the purpose of recovering the same, and to obtain employment there; that the said defendant advised and encouraged him to go to Florida, and offered to furnish him money to defray his traveling expenses, on conditions hereinafter mentioned, as your orator had no means of his own; that thereupon the said defendant stated to your orator, that if he would execute a conveyance of said premises to him he would advance to your orator the sum of $100 for the purpose aforesaid, and hold the same as security therefor; that said defendant further stated to your orator that if he executed said deed to him he would neither sell nor dispose of said premises; that he would not record said deed until your orator had come into possession of other property, either by inheritance or otherwise, and that he only wanted said deed to secure himself for said advances in case of accident, or the death of your orator; that he would never marry again, and that upon his death the property shold revert to your orator, and that he, said defendant, would make his will in your orator's favor for that purpose; and your orator further shows that said defendant used every argument he could to induce your orator to execute said deed, and resorted to every means to excite your orator's sympathies. Amongst other things he stated in the most affecting manner, with tears in his eyes,

that he was growing old; that his working days were about over; that he was your orator's dearest friend; that your orator's other relations were unfriendly, and took no interest in your orator. Your orator further shows that the said defendant is now about the age of forty-two years.

"Your orator further shows that he was so filled with the idea of going south, and *being ignorant of the effect of executing such a paper as the defendant desired*, and relying entirely upon the honesty of said defendant, as well as the said representations so made, and believing that the said conveyance was merely to secure the payment of the said $100 until his return from Florida, agreed to do as he desired, and thereupon on the 27th of December, 1878, he executed and delivered to said defendant a *paper which he supposed was a mere security for said advance, but which he has since been informed and believes was an absolute conveyance of said premises*, as a reference to the record thereof, in the office of the register of deeds for said Oakland county will show when produced and proven," and "*your orator avers that he would not have executed such paper unless he had supposed* it was a mere security for said advances, and that, as he *relied entirely* on his said stepfather's good faith and relations towards him, he took no advice or counsel *as to the nature* or effect of said paper."

The answer positively denies every material matter here stated except the fact of the giving of the deed and the payment of the $100, and proceeding to give his version the defendant explains substantially that in view of all the circumstances, including the furnishing of the $100, and considering how large a proportion of the existing value of the homestead was owing to defendant's means, labor and management, and considering how long and well he had provided for complainant and his mother, the complainant avowed his purpose to recognize the defendant's moral right by resolving it into legal interest through an absolute conveyance, and that he understandingly and freely gave the deed in execution of this purpose. The answer also sets up in substance that all the improvements were made by the defendant and without any extrinsic aid, and that it was expressly understood between himself and decedent that he should have a lien for his labor and expenditures.

The position of complainant not only as having the affirmative of the issue concerning the nature of the transaction between himself and the defendant, but also as insisting that the effect *prima facie* due to the deed is not the effect equitably due to it, subjects him to the burden of proof to show that the effect was actually intended to be as claimed. *Howland v. Blake* 97 U S. 624, 626; *Haines v. Thomson* 70 Penn. St. 434; 1 Jones on Mort. (2d ed.) § 326 and cases.

Without losing sight of this consideration it may be well to pause a moment at this point and see how far these claims must be regarded as palpably untenable. In the first place it is clear enough that complainant's profession of being ignorant of the difference between a deed and mortgage is not worthy of belief. It is not possible to read his correspondence without seeing that the statements in the bill on this subject have no foundation. When he executed the deed he must have known its nature and mode of operation as contradistinguished from the nature and mode of operation of a mortgage. Again, the proof in the case is ample to show that the representation made in the bill, of the state of his health and of the influence it had upon him to raise money to enable him to go to the South, is grossly exaggerated. In respect to what was said between the parties in the course of their arrangement for the conveyance and the payment of the money, there is no evidence except their testimony, and their statements on the subject are fatally conflicting. The representation by defendant that there was nothing in complainant's condition of health to stimulate his desire to go to Florida is too broad and is not warranted by the evidence. There was just enough in his state of health to give somewhat more tone to the purpose which other considerations generated.

The claim that the improvements were all made by defendant or at his cost was not true. He admitted on the stand that more than $400 which his wife held as guardian was thus applied. Again, no proof has been offered to sustain the allegation that he was to have a lien for improvements. The result of this review is, therefore, that whilst the defend-

ant's explanations are materially impeached, the case set forth by complainant is in part disproved, and in what remains is very much weakened. The actual transaction is left without any other direct explanation than is furnished by the papers and the account given by Brown and others as to what occurred when they were made; and the complainant is necessarily compelled to rely on the acknowledged incidents and on such other circumstantial indications as the case affords. And one considerable difficulty is that several matters are of equivocal import, and may be as well accounted for on one theory as another. For example, the parties were evidently bent on misleading complainant's relatives in respect to the extent and true nature of their dealing, and their course and pretences in furtherance of this design may be as well credited to defendant's theory as to that of complainant.

In applying this jurisdiction it is needful to proceed with great circumspection. The natural and *prima facie* effect of a conveyance expressing no condition, and regularly executed in the presence of attesting witnesses and duly acknowledged as an absolute deed, ought not to be controlled and qualified by oral evidence, and brought down to the effect due to a mere security, on a slight showing. The great current of authority is distinct in holding that the party thus seeking to modify the operation of the instrument and prove himself entitled against the terms of his own deed to an equity of redemption is not only bound to make out that the transaction was in truth and justice nothing more than the giving of security, but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind. Unless the testimony, say the Supreme Court of the United States, is entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. *Howland v. Blake*, supra. And many cases use much stronger language. *Bingham v. Thompson* 4 Nev. 224; *Zuver v. Lyons* 40 Iowa 510; *Schade v. Bessinger* 3 Neb. 140; *Stall v. City of Cincinnati* 16 Ohio St. 169; *Haynes v. Swann* 6 Heisk. 560; *Campbell v. Dearborn* 109 Mass. 130. A very full reference to the

authorities will be found in 1 Jones on Mortgages, ch. 8 (2d ed.).

Another point worthy of attention may be noticed here. The complainant is confined to the ground of action on which he has founded his case. He is not permitted to say now that he misstated the transaction and that he admits that he meant to convey the land fully and absolutely, but that the vice he wishes to complain of is that the defendant induced him thereto by undue influence. This would be in direct contradiction of the positive allegations of the bill and contrary to the scheme and equity of the case. The very gist of the bill is that the transaction was in truth *not a sale* nor an *absolute conveyance*, but an arrangement having no other end than the obtainment by complainant of $100 by way of loan and the giving of security therefor.

In dealing with the facts their applicability must be observed. They can have no force except as they are pertinent to the case made by the bill and are fitted to help prove or disprove it, and hence the relations of the parties, in so far as they have that tendency, are worthy of consideration. Beyond that they are of no importance now. The case must be examined and determined with reference to the principles which are appropriate to it, and not under a doctrine which is only germane to a claim of a different nature. The circumstance that defendant was complainant's stepfather—that they were close friends and mutual confidants—has been made conspicuous, and no doubt it is worthy of attention on this issue. Still the bearing of the fact is not exclusively applicable to the theory of complainant. So far as it has any aptness to influence the case at all, its character as well fits it to be pressed into the support of defendant's contention as into that of complainant. The argument is certainly admissible that it was a natural tendency of the relation to lead the complainant to espouse what was morally just and right towards the defendant, and that the existence of the relation is consequently entitled to weigh in favor of the construction that complainant's purpose was to make defendant the absolute owner of the little homestead, and not merely a mort-

gagee for the one item of $100 then or thereafter furnished. It is only necessary to read the correspondence to see that when the transaction took place the defendant held no ascendancy over complainant. The latter was about twenty-two years of age and was not destitute of self-sufficiency nor lacking of self-reliance. The glimpse afforded by the evidence of what occurred at the law office in Pontiac is pretty significant in its indication that he was very far from being the weak and passive victim of the stronger will, superior intelligence and overreaching craft and influence of the defendant. The case, however, creates an impression that there was some competition for his partiality. The defendant appears to have taken pains to fix and preserve his attachment and to strengthen his dislike of his mother's relatives, and they seem to have tried to dislodge his regard for defendant and induce him to side with them against the latter. The evidence that strong antipathies existed between defendant and his relations on the one side and the relatives of complainant on the other may be easily traced. It appears in some parts of the testimony which it undoubtedly colors. A careful scrutiny results in the opinion that neither complainant nor defendant has established any claim on the confidence of the court.

The evidence of admissions and declarations is conflicting and much of it comes from biased sources. Moreover, a portion of it, if not the most important, is equivocal. It would not disagree with the theory that the deed, while understood as a full transfer of ownership, and so meant, was intended to be concealed from complainant's relatives, who, as both parties desired, were to be misled in regard to what was actually done.

The cost to defendant for the improvements on the premises is a subject of dispute. The evidence is utterly conflicting, and it is also widely at variance in reference to the value of the place at the time of defendant's marriage. The difficulty encountered in dealing with these matters is greatly enhanced by the fact that there was an extreme fluctuation in prices. The special expense which complainant caused defendant is not explained. That there was considerable can

hardly be doubted, and there is ground for supposing that the actual outlay of defendant in expenses on the property for permanent objects, and in the support and assistance of complainant until he went south, may have been nearly if not quite equal to the cash value of the property in December, 1878. If such was the case there was a moral consideration sufficient to explain the transaction in harmony with the natural import of the deed. But whatever may be the truth in regard to this, it is sufficient that after rejecting whatever is not worthy of belief and judging as well as possible on the numerous contradictions, the matter available to make out the case and prove that the transaction was a giving of security is too slight and uncertain. It falls far short of what is required, according to the authorities, to authorize a court to decree that the intent the parties chose to manifest by their solemn deed is not the true one.

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

The other Justices concurred.

LUTHER BEECHER, RELATOR v. ANDREW A. ANDERSON, SHERIFF.

Mandamus to compel service of warrant for perjury.

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In mandamus cases the party interested is permitted to be heard in resisting the application.

Prosecuting attorneys have no discretion allowed them to stop all criminal prosecutions instituted before justices of the peace; but a justice ought seldom to hold a respondent to bail, or convict him on trial, when the prosecuting attorney advises him in good faith that no crime is made out.

A justice of the peace may properly take the advice of the prosecuting attorney before issuing a warrant, and refuse it even when the accuser can make a *prima facie* showing of a technical offense, if the prose-

cuting attorney thinks that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution.

A prosecuting attorney can in nowise control the action of the sheriff when a writ has been placed for execution in the latter's hands; the sheriff may take his advice if doubtful as to his duty; but is not relieved from responsibility if he fails in his duty in following it.

A wilfully false oath in a judicial proceeding is not perjury, even if it states material facts, unless the oath itself is material to the proceeding.

The answer of a corporation to a bill in equity is not required to be sworn to, but is attested by the corporate seal. If a discovery is sought, individual corporators may be sworn, but they must be named as defendants in the bill.

Where a bill in equity, not seeking discovery, is filed against a corporation, the general manager, if not himself made a defendant, need not swear to the answer; and if he does so in a case where his oath could not affect the issue or strengthen the answer, his oath, if false, will not sustain a complaint for perjury.

A person arrested on a defective complaint issued by a justice, is entitled to his discharge; and the chance that it may be supplemented by facts not yet shown to the justice, will not justify a mandamus compelling the sheriff to serve it where it will be necessary to take the respondent several hundred miles for his examination.

Mandamus. Submitted Jan. 25. Decided April 13.

F. A. Baker, *John Atkinson*, *H. M. Cheever* and *J. P. Whittemore* for relator. A warrant may be sufficient to give jurisdiction, even though it is not as full as it should be. *Boyd v. State* 17 Ga. 194; *Pratt v. Bogardus* 49 Barb. 89; *People v. McLeod* 1 Hill 378; *Atchinson v. Spencer* 9 Wend. 62; *Pardee v. Smith* 27 Mich. 43; *People v. Lynch* 29 Mich. 274; *Turner v. People* 33 Mich. 363; *Annis v. People* 13 Mich. 511; an answer to a bill in chancery is evidence; *Hart v. Carpenter* 36 Mich. 402; and must be verified, 1 Barb. Ch. Pr. 142.

Don M. Dickinson (*Griffin & Dickinson*) for respondent.

Cooley, J. We are asked in this case to issue the writ of *mandamus* directed to the respondent, who is sheriff of

the county of Marquette, commanding him to serve a warrant for the arrest of one William W. Wheaton on a charge of perjury, and for his conveyance before one O'Keefe, a justice of the peace of said county, to be dealt with according to law. The facts of the case are so peculiar that it seems desirable to recite them with more fulness and particularity than is commonly deemed essential.

The warrant was issued November 25, 1879, and delivered to the sheriff on or about the tenth day of December following. The sheriff in response to the application for the writ of *mandamus* says that:

"Before the warrant was placed in his hands, respondent spoke to J. Q. Adams, prosecuting attorney for Marquette county, about the execution of the same; and said Adams told him to arrest said Wheaton, as soon as security for costs was filed with the justice.

"A short time after receiving the warrant, which was soon after such security was filed, respondent saw said Adams, told him he had the warrant, and asked him what he should do. Adams then told him that he had examined the warrant, and complaint, with said Mapes; that they were all regular and straight. But that he wanted the money put up as security, instead of a bond, and to delay the service until the money was deposited, and that one hundred and fifty dollars was the amount that he wanted.

"After a time, Luther Beecher's check, on a Detroit bank, the name of which he does not remember, was sent to respondent, payable to the order of said Adams. And said respondent thinks the same was certified, but is not positive. But there was a condition written on the check, that it was given to secure the bond filed. This was not satisfactory to said Adams. He wanted the money deposited with the county clerk, to indemnify the county against loss, and told respondent, that as soon as he (respondent) became satisfied that the money was deposited, that he should make the arrest.

"Respondent returned the check to the drawer of the same, and then the money was deposited.

"When respondent became satisfied that the money was deposited, he went to Detroit, and arrested said Wheaton, on or about the sixth day of February, A. D. 1880, in a store, near the city hall, at about ten o'clock in the forenoon. That he went from there to the office of Griffin & Dickinson, attorneys, with said Wheaton, at his request, where they saw

both of said attorneys. The attorneys told said respondent, and said Wheaton, that respondent could not take him through another State, to reach Marquette county, and told Wheaton to use violence in resisting any detention after leaving this State.

"Respondent then told Wheaton and his attorneys that if he could not take him through another State, he would have to take him through Michigan, by way of Mackinac.

"They then proposed to give bonds for the appearance of Wheaton, at Marquette. Respondent and his advisers were uncertain whether such bonds could be accepted; and Mr. Griffin went off, as he said, to consult one of the judges of the Supreme Court; returned, after a time, and said that the judge was of the opinion that the statute did not provide for such cases, but that the common law might include such a case, and protect the sheriff. This was on Friday. Wheaton then agreed to give bonds the next day for his appearance in Marquette. The next day he refused to give bonds, and respondent told him he should start with him for Marquette that evening. Then his attorneys suggested, that if respondent would stay in Detroit, until the next Tuesday, they would pay his expenses, and then they, and respondent and his attorney, would go to Lansing, where the Supreme Court would be in session. A writ of *habeas corpus* should be sued out, served on respondent, and a hearing had in the matter at once. This was agreed to by all concerned, and all separated.

"About eleven o'clock Saturday night, respondent received, at the Michigan Exchange, a note from A. H. Mead, stating that 'Mr. John Q. Adams, of Negaunee, is at the Russell House. If you would like to see him, you can meet him there.' Respondent started at once for the Russell House, and met said Wheaton on the sidewalk, in front of the same. Wheaton had before this told respondent, that he thought Adams did not know anything about the matter. And when they met on the street, Wheaton said: 'Did not I tell you that Adams did not know anything about it, and that you were not acting under his advice.' Respondent then said: 'Either you or Adams are liars,' and asked where Adams was. Wheaton said he was up in the hotel. Wheaton and respondent went up and saw Adams. Adams then told respondent that he had agreed to release Wheaton, on condition that Wheaton would appear at Marquette, at any time that Adams would call for him. Respondent told Adams of the agreement he had made with Wheaton and his attorneys

to go to Lansing on the following Tuesday, and that he was not willing to release Wheaton, unless he (Adams) took all the responsibility of the matter upon himself, and that he would see that respondent was paid back the money expended, and for time lost. Adams said he would do so—that he took all responsibility upon himself, and that he had authority, as prosecuting attorney, to do so. Respondent then released Wheaton, and went home. Respondent further says, that he acted in the matter entirely under the instructions of J. Q. Adams, as prosecuting attorney, and that if said Adams had not interfered, respondent would have taken said Wheaton to Lansing, and before the Supreme Court, if a writ of *habeas corpus* had been procured, and if he had not been released, or a bond given, would have brought him before the justice, as by said warrant he was commanded. Respondent has been ready and willing, at all times, to execute said warrant, if not interfered with, and has no other cause to show in this matter than as hereinbefore stated."

It thus appears that the respondent raises no question of the sufficiency of the warrant, and that he declines to serve it for no other reason than that the prosecuting attorney of the county instructs him not to do so. His recital of facts makes out a somewhat extraordinary case of interference on the part of the prosecuting attorney, but it is possible that if we had his explanation it would assume a somewhat different aspect. In *mandamus* cases, however, the party interested is permitted to be heard in resisting the application, and in this case the counsel for Mr. Wheaton have not only contended that the sheriff was justified in obeying the direction of the prosecuting attorney, if not bound to obey it, but they have insisted further that the warrant was invalid, so that the sheriff would have been a trespasser had he assumed to execute it. This last is the point mostly relied upon.

It is not claimed—nor can it be with any plausibility—that the prosecuting attorney has a right at discretion to stop all criminal prosecutions instituted before justices of the peace. The statute gives no such power. It requires him to "appear for the State or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications, and motions whether civil or criminal, in which the State or county may be a party or interested." Comp.

L. § 529. But by "the courts of the county" is evidently intended the courts of record only; for by the next section he is required to appear to prosecute complaints before a magistrate only when the magistrate requests it. No doubt when he appears the magistrate should govern his official action somewhat by his advice: he certainly ought very seldom to hold a party to bail or to convict him on trial when the prosecuting attorney in good faith advises him that no crime is made out. It would be proper, also, in many cases that he should seek the advice of the prosecuting attorney in advance of the issue of any warrant, and refuse a warrant even when the complainant is able to make *prima facie* showing of a technical offense, if the prosecuting attorney is of opinion that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution.

But in this case it does not appear that the magistrate had called upon the prosecuting attorney for his assistance. A warrant had been issued and placed in the hands of the sheriff, and if it was valid in point of law, it had become the duty of the sheriff to execute it. The action of the sheriff could not in any manner be restrained or controlled by the prosecuting attorney; he might with great propriety take his advice in a case where he was in doubt what his duty required of him, but if the advice proved to be erroneous, it would not relieve him from responsibility if, in following it, a duty enjoined by law failed of performance.

We must see, then, whether the sheriff in this case had in his hands a warrant which it was his clear duty to obey.

The warrant recited that one John Simmons had made complaint to the justice in writing and on oath

"That heretofore, to wit, on the 10th day of September, A. D. 1878, at the city of Marquette in the county aforesaid, Luther Beecher did exhibit his bill of complaint in writing against the Marquette & Pacific Rolling Mill Company, a corporation organized and existing under the general mining and manufacturing laws of the State of Michigan and doing business in the said county of Marquette, and

having its office for the transaction of business located in the city of Marquette in said county—said corporation in said bill being more particularly described in the circuit court for the county of Marquette in chancery. And the said Luther Beecher in and by his said bill of complaint, among other things stated and alleged in substance, and to the effect following, to wit:

"That he, the said complainant, was a stockholder and owner of a portion of the capital stock of said corporation defendant. That said defendant was, and for a long time previous thereto had been, carrying on the business of mining and selling iron ore, having its works and mines in said county of Marquette; and had in its employ a large number of laborers, workmen and servants, for hire, in and about its said business; and that the stockholders were and were becoming personally liable to such laborers, workmen and servants, for their services performed and to be performed in and about the business of said corporation; and that the said corporation was insolvent; had not and was unable to pay its laborers, workmen and servants, and was not then paying the same for the labor and services performed, and being performed, in and about the business of said defendant, as aforesaid, as in and by the said bill of complaint of the said Luther Beecher, duly verified, remaining filed of record, in the said circuit court for the county of Marquette, in chancery, among the other things more fully appears.

"That William W. Wheaton, general manager of said corporation defendant, afterwards, that is to say, on the 16th day of September, A. D. 1878, at the city of Marquette, in the county of Marquette, aforesaid, did come, in his own proper person, before Herman E. Pearce, a notary public, in and for said county of Marquette, duly commissioned, and then and there did exhibit and produce to the said Herman E. Pearce, Esq., then and there, a notary public as aforesaid, the answer, in writing, of the said Marquette & Pacific Rolling Mill Company to said bill of complaint," "subscribed by him, the said William W. Wheaton. And the said William W. Wheaton was then and there sworn in due form of law, and took his corporal oath touching and concerning the matters stated and contained in the said answer, by and before the said Herman E. Pearce so then and there being a notary public in and for said county of Marquette, and then and there having sufficient power and authority to administer an oath to the said William W. Wheaton in that behalf, and that the said William W. Wheaton being so

sworn as aforesaid, and being then and there lawfully authorized and required to declare and depose the truth in a proceeding in a court of justice, did upon his oath aforesaid concerning the matters contained in said answer before the said Herman E. Pearce, Esq., then as aforesaid being a notary public in and for said county of Marquette, then and there swear: that the said answer was true, except as to the matters stated therein to be on information and belief, and those he believed to be true; and that the said William W. Wheaton, being so sworn, as aforesaid, intending unjustly to aggrieve the said Luther Beecher, the said complainant, as aforesaid, in his oath aforesaid, to the answer aforesaid, before the said Herman E. Pearce, Esq., being then, as aforesaid, a notary public in and for the county of Marquette, and having sufficient and competent authority, as aforesaid, falsely, knowingly, wilfully and corruptly, by his own act and consent, upon his oath aforesaid, did answer and affirm, among other things, in substance, as follows. That is to say: 'That the said defendant (meaning the Marquette & Pacific Rolling Mill Company) was not in possession (meaning in possession of the iron mine of said Marquette & Pacific Rolling Mill Company, at Negaunee, in said county,) and was not engaged in its (meaning the Marquette & Pacific Rolling Mill Company) business of mining and selling iron ore, and that said defendant (meaning the Marquette & Pacific Rolling Mill Company) did not have in its (meaning the said Marquette and Pacific Rolling Mill Company) employ in and about said business (meaning the business of mining and selling iron ore) a large number of laborers, workmen and servants (meaning persons employed by said Marquette & Pacific Rolling Mill Company in and about its business of mining and selling iron ore), for hire (meaning persons to whom money was agreed to be paid for services performed).'

"'That the stockholders (meaning the stockholders of the Marquette & Pacific Rolling Mill Company, a corporation organized, existing and doing business under the general mining and manufacturing laws of the state of Michigan) were not becoming liable (meaning personally liable as stockholders) to any laborers, workmen or servants, for labor (meaning labor performed for said Marquette & Pacific Rolling Mill Company), or that they (meaning said stockholders) were personally liable for any labor, in case the said Marquette & Pacific Rolling Mill Company should make default in any payment of wages whatsoever.

"'That said company (meaning the Marquette & Pacific Rolling Mill Company, defendant, as aforesaid) had no workmen, laborers or servants, belonging (meaning employed and hired) in and about said business (meaning the business of said Marquette & Pacific Rolling Mill Company, defendant) of mining iron ore, and selling the same, or any business carried on by said company (meaning said Marquette & Pacific Rolling Mill Company, a corporation, as aforesaid), for which the stockholders of said defendant (meaning said Marquette & Pacific Rolling Mill Company) could in any event become liable (meaning that no persons were employed or working as laborers for said Marquette & Pacific Rolling Mill Company, in and about its business of mining and selling iron ore), as by the said answer of the Marquette & Pacific Rolling Mill Company, defendant, still remaining on file and of record in the circuit court for the county of Marquette in chancery, aforesaid, at the city and county of Marquette aforesaid, among other things appears.'"

The recitals then negative the truth of the facts so sworn to by Wheaton, and conclude as follows: "That the matters so falsely sworn to as hereinbefore stated were material to the issue made by said bill and answer. That the said William W. Wheaton falsely, wickedly and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury.

This is the complaint as it is recited by the justice in his warrant. The justice goes on to say that "on examination on oath of the said John Simmons by me the justice of the peace, it appears to me, the said justice of the peace, that said offense has been committed, and there is just cause to suspect the said William W. Wheaton to have been guilty thereof," and he thereupon commands the arrest.

Does this complaint show by its recitals a case of perjury? If not, the sheriff may perhaps be excused for declining to serve the warrant. In considering this question, however, we shall look for no technical defects, but shall concede that if all the substantial allegations necessary to make a good complaint are to be found in this, the fact that some of them are not made with the fullness and accuracy required in indictments will be no sufficient reason for a refusal to execute the process. The question is one of substance, not of

technical precision, and it is presented to us much as it would be if the accused had been arrested, and had applied for a discharge on *habeas corpus*.

Perjury is committed "when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely, and falsely, in a matter material to the issue or point in question." 3 Inst. 164; 4 Bl. Com. 137; *People v. Fox* 25 Mich. 492. By this is meant that the oath must be material: the facts sworn to may be material, and yet the false swearing be no perjury because the oath performed no office in the case, and was wholly unimportant and immaterial. This point is well illustrated, in the case of *People v. Fox*, just referred to. Fox was informed against for having made a false affidavit in a suit at law pending in the circuit court for the county of Branch wherein he affirmed that one of the defendants in said suit did not execute the obligation sued upon. The fact sworn to was material, but it did not appear from the information that the affidavit was made to be used in the case, or that it actually was used, or that it performed or was to perform any important office whatever in the case. It did not therefore appear that the oath was of any materiality. *People v. Gaige* 26 Mich. 30 is, if possible, still more directly in point. The alleged perjury was committed in swearing to a bill in chancery. It was averred that the facts sworn to were material, but the information did not show that the bill was one of a character required by law to be under oath, or that it was sworn to in order to be used as the foundation of any motion or other application to the court. So far as appeared, therefore, the oath was a merely idle ceremony, and its being taken in the case was of no importance. And it was held in that case that the defect in the information could not be supplied by proof showing that the bill was in fact sworn to in order that it might be used as the foundation for a motion for an injunction.

The alleged perjury in this case consists in swearing to an answer to a bill in chancery filed against a corporation. Wheaton was not a party defendant, but signed and swore to the answer as general manager of the corporation. A few

general principles, it seems to us, must govern the case. The answer of a corporation is not required to be sworn to, but is put in without oath under the corporate seal. *Wych v. Meal* 3 P. Wms. 310; *Dummer v. Chippenham* 14 Ves. 245; *Haight v. Proprietors, etc.*, 4 Wash. 601; *Vermilyea v. Bank, etc.*, 1 Paige 37; *Baltimore etc. R. R. Co. v. Wheeling* 13 Grat. 40. If a discovery is required, individual members of the corporation may be called upon to answer under oath, but for that purpose it is necessary that they be named as defendants in the bill. *Brumly v. Westchester etc. Co.* 1 Johns. Ch. 366; *Buford v. Rucker* 4 J. J. Marsh. 551; *Dummer v. Chippenham*, supra.

The bill in this case does not appear from the complaint to have been a bill for discovery. None of the officers of the defendant corporation was made a party, and therefore none of them was placed in a position demanding from him an answer under oath. It does not appear from the complaint that the answer was to be used for any purpose for which an oath to it could be of any importance. So far as appears, therefore, the oath of Wheaton to the answer was wholly an idle ceremony. The answer was no better with it than without it; it affected the issue in no manner whatever; it strengthened no statement made by the answer, and it made no statement evidence that would not have been evidence without it, and gave no statement weight or force that it would not otherwise have possessed. As an information the complaint would therefore have been fatally defective. *People v. Gaige*, supra.

But it is said that the actual showing before the justice may have been more full, and may have disclosed the fact that the answer was to be used as evidence in some collateral proceeding or on some motion. This may be admitted, and it may also be admitted that the warrant is not so defective in its allegations as to be void. The fact remains that it is perfectly consistent with all the facts set forth in the complaint that no perjury has been committed. The application is to compel the sheriff of one of the counties in the Upper Peninsula to serve a warrant in the city of Detroit. The

distance is considerable when the most direct route can be taken, but the warrant could not have been executed at the time the application was made without taking the defendant several hundred miles through other states. When the defendant should be brought before the justice and should move for a discharge on the ground of a defective complaint, he would be entitled to it as a matter of right. Under these circumstances it seems plain that justice does not require the service of this warrant.

It is not improbable that a better complaint could be made if the defendant were to be discharged from this; but if so, it can be made now as well. Indeed it would seem that there had already been sufficient time for that purpose, for it is more than a year since this warrant was issued. We cannot compel the officer to take the defendant several hundred miles on the mere chance that papers now showing by their recitals no crime may be made complete by the proof of facts which do not as yet appear to have been put in evidence before the justice.

The writ of mandamus must be denied.

The other Justices concurred.

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LORETTA E. MCCULLOUGH v. HIRAM DAY, ESTHER DAY AND WILLIAM DAY.

Bill in aid of execution—Non-leviable property.

A bill in aid of execution cannot be so drawn as to reach property that is not leviable if filed while the execution is still in force and before it is returned.

Where a bill in aid of execution is sustained as to part of the property it is filed to reach, but is dismissed as to the rest, and only the defendant appeals, it is understood that complainant's claim to the latter description is not pressed.

Complainant in a bill in aid of execution filed to set aside a conveyance which defendant is alleged to have delivered after verdict had been

rendered against him, has the burden of proving that delivery was not made until after verdict.

In deciding whether a deed was delivered at its date or at some other time the material inquiry is when did the minds of the parties meet in regarding it as unconditionally belonging to the grantee.

Where a deed was ready for delivery at its date and delivery was practicable and there is positive evidence that it was delivered, evidence to the contrary, consisting of verbal admissions and the testimony of prejudiced parties, cannot, in a proceeding in equity, be regarded as convincing.

On appeals in equity the Court inquires into the facts and forms its own conclusions.

Appeal from Washtenaw. Submitted January 25. Decided April 13.

BILL in aid of execution. Defendant appeals. Reversed and bill dismissed.

Albert Crane for complainant.

Joslin & Whitman for defendants.

GRAVES, J. On the 24th of January, 1879, the complainant obtained a verdict against defendant in the sum of $1000 in a suit for libel. He procured an order staying proceedings thirty days, but after the termination of the stay and on March 25th judgment was entered on the verdict. It appears that in 1840 he became grantee of a farm of sixty two and a half acres in the township of Ypsilanti and in 1865 the grantee of a house and lot in the city of Ypsilanti; and that both pieces of property stood as his on the records of the register of deeds until the 18th of February, 1879. On that day, however, and whilst the stay of proceedings was running, two quit-claim deeds from him to his wife, the defendant Esther, being one for each parcel, were placed on record. The deed of the city lot was dated March 7, 1871, was witnessed by Thomas Ninde and Chauncy P. Worden and acknowledged before Judge Ninde the next day, March 8, 1871. The deed of the farm was dated March 28, 1873, was witnessed by James Arnold and by Mr. Babbitt, now one of

complainant's counsel, and was acknowledged before the latter gentleman on the same day. March 4, 1879, Mrs. Day conveyed the whole property to their son, the defendant William Day, who on the 22d mortgaged the same with other lands to Daniel Forbes for $3000. May 5, 1879, complainant sued out an execution on her judgment returnable the first Tuesday of August, and on the day of its issue the sheriff levied on the house and lot and the sixty-two and a half acres, and filed the usual notice in the office of the register of deeds. On the 3d of July, 1879, and whilst the execution was still running, complainant brought this bill to assist it.

We notice that it contains some matters which are only appropriate where the object is to reach classes of property that are not liable to seizure on execution, but there was no foundation of course for anything of that kind. The execution being still out and active at the time the suit was commenced, no necessity was legally apparent for seeking through equity to discover and subject to the judgment any non-leviable interests. *Smith v. Thompson* Walk. Ch. 1; *Williams v. Hubbard* id. 28; *Tyler v. Peatt* 30 Mich. 63.

The bill charged that no delivery of the deeds to Mrs. Day was made prior to the verdict; and that they and also her deed to William were entirely devoid of consideration, and were in fact given and received with the intent to prevent collection of the verdict. The defendants answered and fully denied these allegations, and both parties proceeded to adduce testimony at great length. The circuit judge came to the conclusion that in respect to the farm the case was made out, but not so in regard to the city lot, and he decreed accordingly. The complainant acquiesced, but the defendants took an appeal to this court.

It thus appears that the city lot is not a subject of discussion in this Court, and that the controversy is only whether the two deeds given for the farm ought to be put out of the way of complainant's execution, and the only essential issue on this inquiry is a very narrow one. It was naturally a part of complainant's case to contend that there was no delivery

of the deed from defendant Hiram until her right had attached to question its good faith, and she accordingly charged that delivery was withheld until after the verdict, and it is needless to go further than this question. It was an obvious consequence of the position of complainant that she had the burden of proof and was bound to support her allegations by satisfactory evidence. *Darling v. Hurst* 39 Mich. 765. And the record shows with what diligence and ability the learned counsel labored to satisfy the requirement.

There is little scope for investigation, and a minute discussion of the testimony would not be profitable. A careful examination of the record with the aid received from counsel has led us to a result which we consider indubitable. On the part of the defense we have positive statements that delivery was actually made in 1873, and also other statements by way of corroboration. The case in evidence for complainant contains statements of declarations and admissions of the different defendants made at various times and under various circumstances tending to negative the idea that the deed was considered as having taken full effect, and besides these items there are incidents tending to create belief that the elder Day and wife did not regard the title as having passed at any time prior to the verdict. But when this testimony is sifted, and full allowance is made for the elements of fallibility in that part of it relied upon to prove admissions and declarations made casually in conversation in former years, we are quite unable to regard it as having much value on the point at issue. 1 Greenl. Ev. § 200; *Pawling v. United States* 4 Cranch 219.

Some portion of defendant's testimony is exposed to the same consideration. Moreover, the most material oral evidence on that side is not derived from impartial sources. It comes from parties or persons closely related, and in view of the history and surroundings of the case this fact must necessarily have influence. On the whole we repose our chief confidence in the natural and legal import and significance of certain incontestable facts. That the deed was in truth exe-

cuted and acknowledged on the 28th of March, 1873, and that the grantor immediately carried it to his residence where the grantee was, cannot be questioned. That it was in readiness for delivery, and that delivery was entirely practicable, is certain, and it is equally certain that a delivery actually took place either at that time or at some other on or before the 18th of February, 1879, and the further fact must be admitted that no occurrence is proved to have taken place at any time near the date of the deed to frustrate or hinder delivery. Now in all cases of this class, whatever physical disposition of the instrument may have been made, the fundamental inquiry is whether the minds of the parties were agreed in regarding the deed as presently the deed of the grantee, and without any condition or reserve. And as this is a suit in equity the court must conduct this inquiry, and make the proper deductions from the circumstances, and the opinion formed is that the facts just noticed are sufficient to authorize the inference that the union of minds required to effectuate delivery really occurred on the 28th of March, 1873. The following authorities explain the subject, and support the view taken: *Doe v. Knight* 5 B. & C. 671; *Clavering v. Clavering* 2 Vern. 473; *Exton v. Scott* 6 Sim. 31; *Fletcher v. Fletcher* 4 Hare 67; *Brown v. Brown* 1 W. & M. 325; *Scrugham v. Wood* 15 Wend. 545; *Brinckerhoff v. Lawrence* 2 Sandf. Ch. 400 406; *Dempsey v. Tylee* 3 Duer 73 95, 96; *Roosevelt v. Carow* 6 Barb. 190; *McLean v. Button* 19 Barb. 450; *Moore v. Hazelton* 9 Allen 102.

Having thus found on the facts mentioned a case of *prima facie* delivery long prior to the verdict, it remains to observe that the complainant has not succeeded, by virtue of the other evidence *pro* and *con*, in making out a case entitled to weigh against it. No doubt the question on the delivery of the deed of the house and lot is a plainer one, and so far as the result is concerned, was correctly disposed of. This reference is made to that part of the case because the parties seem to have taken it for granted that the determination against the complainant, though not appealed from, was yet open and a subject for discussion.

Several topics noticed by counsel are not material, and call for no remarks.

It follows from what has been said, that the decree must be reversed, and the bill be dismissed, and that defendants will be entitled to the costs of both courts.

The other Justices concurred.

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NATHANIEL SIMPKINS, ALEXANDER AGASSIZ AND QUINCY A. SHAW v. JOHN E. WARD, COUNTY TREASURER, W. IRVING LATIMER, AUDITOR-GENERAL, AND SCHOOL DISTRICT NO. ONE OF MICHIGAMME.

Enlargement of school-districts—Taxation—Statutory construction.

It has always been the policy of the Michigan school laws that no primary school-district should contain more than nine sections of land.

Township school inspectors cannot enlarge a graded school-district by adding unorganized territory, though they may, with the consent of the trustees, transfer to its jurisdiction territory previously organized into primary districts.

Statutes *in pari materia* must be construed together, and the meaning of later enactments determined by comparing them with the others.

Injunction lies to restrain the sale, for school taxes, of lands unlawfully included within the taxing district.

Appeal from Marquette. Submitted January 26. Decided April 13.

INJUNCTION to restrain tax sale. Dismissed on demurrer, but without prejudice. Reversed, and decree entered.

Dan. H. Ball for complainants.

W. P. Healy for the defendant school-district.

GRAVES, J. The complainants are owners of large bodies of wild land situated within the limits of the township of

Michigamme as at present organized. The lands are from two to twenty miles remote from any settlement and are as yet a part of a vast unbroken wilderness. After the township of Michigamme was organized the school inspectors proceeded to form school-district number one, embracing the village of Michigamme in sections nineteen and thirty of town forty-eight N., in range thirty W., and other lands immediately contiguous.

The district authorities subsequently converted it into a graded school-district. Prior to this change of *status*, which was self-effected, no enlargement of territory was possible beyond nine sections. But having changed the organization the trustees signified their willingness that the rest of the township should be added, and the inspectors, proceeding to act on this assent, made an order to attach the territory mentioned, which consisted of five surveyed townships of wild land.

The parcels owned by complainants belong to this tract, and in 1879 the district officers and other authorities treated them as lands taxable within the district and proceeded to rate them accordingly, and a tax for school purposes of the district other than the one mill tax was imposed. It was not paid and proceedings being taken to enforce it by means of a public sale under the direction of the Auditor General, complainants brought this bill to enjoin it. The defendants filed a general demurrer which was sustained by the circuit court and complainants appealed.

The general question is, whether the act of the school inspectors operated to incorporate complainants' land in the district; and the answer depends on the power of these officers, in the case of a graded district engrafted on a single ordinary one, to enlarge the domain if the trustees so desire by adding any outlying unorganized and unpeopled territory, however extensive, which may happen to be temporarily within the bounds of the organized township. Defendants contend for the authority and the complainants deny it. As it did not exist before the change of corporate character, but was denied during the primitive stage of the district, it

must have arisen, if it now exists, because the distinction between the former and present conditions has been supposed to point it out as necessary. It is not found in any express terms and, if present, it rests on implication. This is admitted.

The general law for organizing school-districts has always maintained certain distinct characteristics. The original arrangement of townships into districts, and the right to make alteration from time to time of such original districts has been confided without exception to the inspectors by the general law. At the same time, however, there has been no deviation from the rule that no primary district should contain more than nine sections. The attention of the Legislature has been repeatedly drawn to the subject, and the result has been uniform. The evidence of fixed policy is conclusive. Rev. St. 1838, p. 245, § 24; Rev. St. 1846, p. 227, § 71; Act 119 of 1873, p. 164; Act 230 of 1875, p. 281; Act 77 of 1877, pp. 60–61.

It became apparent to many at an early day that although a great deal in the total was being spent under our system of primary schools, there was yet in many cases no corresponding return of benefits, and the belief spread that the chief reason was that the means expended were too much scattered and that combination of expenditures and concentration of effort so far as fairly practicable would cause a great improvement. The Revised Statutes of 1846 recognized this phase of public sentiment, and made provision for the formation of union school-districts. The plan was not to construct new districts from aboriginal territory, but to provide for consolidating existing districts when deemed expedient. The new district was to be a *union district*, that is to say, one formed from two or more of the elementary districts. Rev. St. 1846, ch. 58, § 92.

Now as each original district might lawfully embrace any quantity of land not exceeding nine sections, and as the union district was to be formed by uniting two or more of such original districts, it is manifest that it might contain more than nine sections. Hence the method for constructing these districts was independent of the restriction limiting the area

to nine sections, and this was considered unobjectionable in the first setting up of a district where the change would consist in uniting territory and interests already under district organization and moreover where would be contemplated such a multiplication and distribution of school accommodations as would be just and reasonable for all parts of the territory.

No one could doubt however that changes might become needful at some time; but it was not regarded as wise to allow to inspectors the same power over the geographical extent of these districts that they held over that of primary districts. The provisions for establishing these districts were however interwoven with the general law, and it was understood that the inspectors' power under that law to alter districts was applicable to these. Impressed by these considerations the Legislature proceeded to qualify the power by requiring the assent of the district, as a preliminary, to any alteration of the bounds of a union district. This was effected by amendment of section 92, supra. Laws 1849, pp. 227, 228; Laws 1850, p. 20.

The next change to which it is necessary to refer was 1855. An elaborate act was then passed to enable school-districts to acquire school-house sites and for other purposes. A section was inserted providing that no alteration should be made in the boundaries of any school-district having a *union school* without the written consent of a majority of the district board of such district. Laws 1855, § 13, p. 42. Four years later "an act to establish graded and high schools" was passed. Laws 1859, p. 446. The last section declared the repeal of section 92 with the amendments of 1849 and 1850, supra. And the effect was to remove all the positive injunctions against altering the bounds of union districts except the injuction contained in section 13, supra, of the act of 1855. It also had the effect to efface from the general chapter concerning primary schools the provision for forming union districts. The great purpose of the act of 1859 was to provide for forming union districts through the concurring votes of the districts desiring union, and that certain single

districts on voting in favor thereof might transform themselves into graded and high-school districts.

So far the special provision against alteration of the bounds of districts had been confined specifically to union districts. But after this statute of 1859 permitting certain single districts to organize themselves into graded districts, and in 1871, the Legislature proceeded to amend section 13, supra, of the act of 1855. It was then ordered to read as follows:

"(2411.) Sec. 13. No alteration shall be made in the boundaries of any school-district organized under the law for *graded and high schools*, without the consent of a majority of the trustees of said district, which consent shall be spread upon the records of the district, and placed on file in the office of the clerk of the board of school inspectors of the township of which the reports of said district are made; and districts organized under the law aforesaid shall not be restricted to nine sections of land." Laws 1871, p. 277.

It is on this enactment that defendants rely. The district was converted from a single primary one to a graded district under the law mentioned in this amendment of 1871, and the proceeding to annex the outlying territory was taken on the strength of said amended provision.

When this statute is read in connection with the various other provisions of the school law, it appears to be wanting in precision and to be difficult of application in many cases to which the generality of the terms may be said to extend. It forbids any alteration in the boundaries of such districts as are organized under the law for graded and high schools except in so far as the trustees make known their consent to the inspectors. The restraint in terms applies to every kind of alteration, whether by increase or diminution of territory or by any change not affecting the quantity of territory. And there is no express mention of any right to add territory either from organized or unorganized tracts with or without the consent of the trustees. The statute applies to the districts as it finds them after their being framed into graded districts under the law therefor; and hence contemplates them under two classes, one comprising graded districts converted from single primary districts, and which on such conversion are

necessarily not more than nine sections in territorial extent, and the other consisting of districts formed by the union of two or more primary districts and which on such formation may contain more than nine sections.

Again, the terms of this act seem to imply an existing power in the inspectors to alter the bounds of these districts, and that such power is free from district control except as qualified by requiring corporate assent. And the final clause appears to convey the implication that the restriction to nine sections would apply unless expressly precluded. The peculiar structure of this statute no doubt lends a pretty strong support to the contention of defendants; but so exorbitant would be the results to which their construction would lead that it ought not to be adopted if any other more satisfactory on the whole can be found, and in my judgment the case is open to a different view, which is not only reasonable in itself, but exempt from the mischiefs, or at least the main ones, which appear incident to the position of the defendants.

The act of 1871, and section 71, supra, of the law, are *in pari materia.* Both provisions relate to the organization and arrangement of school-districts, and the former one indubitably refers to and is connected with the latter. The reason is extremely strong for concluding that it was the grant of power to inspectors in section 71 to change districts bounds that the Legislature had in mind in passing the provision of 1871 concerning the stability of boundaries, and no one will hesitate to admit that the clause exempting graded districts from the limitation to nine sections was intended as a virtual qualification of section 71; and this fact is sufficient to confirm the previous inference that the one provision about changing boundaries was made in reference to the other and to go along with it. These regulations must therefore be considered together, and the meaning of the act of 1871 must be judged of by comparing it with the others. *Joy v. Thompson* 1 Doug. (Mich.) 373; *United States v. Freeman* 3 How. 556; *Rex v. Loxdale* 1 Burrow 445.

Applying attention then to the 71st section of the General Law we immediately perceive that no power was then given

or contemplated to alter districts by additions from unorganized territory. The power to alter was confined to territory already cut up into districts, and was to be exercised among existing organizations, when the change would merely consist in withdrawing territory from the jurisdiction of one corporation and placing it under the jurisdiction of another. The only mode permitted for dealing with aboriginal territory was by dividing it into ordinary primary districts, and the same rule remains. The act of 1871 has not attempted to change it. In this and some other respects it is dependent on the other statute, and is explained and controlled by it. It was not the purpose of the Legislature in passing the statute of 1871 to enlarge the powers of school inspectors over aboriginal territory and give them a new and unprecedented authority to annex to a district at its request an unorganized region as large as some states.

It is unnecessary to go further. In my judgment the act by which complainants' lands were brought within the district was not warranted by law and the relief sought should have been given.

The decree must be reversed and one entered in accordance with the prayer of the bill.

The other Justices concurred.

JOHN HUMPHREY v. WILLIAM A. BAYN.

Judgment for return or value on quashing writ of replevin.

Where property is described in a writ of replevin and taken under it, and the writ is quashed, the defendant is entitled to a judgment of return or for its value on waiver of return.

The fact that the description given in the writ is of such an interest as should not be made the subject of replevin, does not deprive the court of jurisdiction to award such judgment. It is only where no description is set forth at all in the writ that the jurisdiction, which is confined to what is thus set forth, fails.

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A waiver of return in a justice's court, made in open court and entered by the justice at defendant's request, is sufficient to authorize a judgment for value instead of for a return.

If a writ of replevin is sworn out in a justice's court for less than $100, the justice may give defendant judgment for the value although exceeding that sum: *Henderson v. Desborough* 28 Mich. 170 followed.

Parsell v. Genesee Circuit Judge 39 Mich. 542, distinguished on the question of jurisdiction, as a case where the writ described nothing.

Error to Jackson. Submitted Jan. 26. Decided April 13.

REPLEVIN. Defendant brings error. Reversed.

Melville McGee for plaintiff in error.

A. & C. A. Blair for defendant in error.

CAMPBELL, J. Bayn sued out a writ of replevin from a justice of the peace in Jackson county, in which the officer who served it was directed to levy it upon "one lot of wheat, it being $\frac{1}{8}$ of $\frac{17}{32}$ parts of wheat raised by John Humphrey on the old Bayn farm, in Spring Arbor, that being the share of the said William Bayn of the crop coming to him as owner of one-half and one-fourth of one-eighth of said farm," etc. Seizure was made of a specific number of bushels, amounting to something over 92 bushels, and the wheat was delivered to Bayn. Bayn declared for "about one hundred bushels of wheat," etc., "which said wheat was the portion belonging, coming to, and due to said plaintiff, as owner of $\frac{17}{32}$ parts of land on which said defendant raised the same, the amount being $\frac{1}{8}$ of $\frac{17}{32}$ parts of the wheat raised by the defendant on said land, more or less," etc.

The writ and proceedings were quashed on motion of defendant Humphreys, on the ground that it appeared from the writ and affidavit that the parties were tenants in common, and the interest sued for was an individual interest. Thereupon defendant waived a return, and the court, after taking time to consider, rendered judgment of $106.80 for the value of the wheat, and $8.42 costs.

Bayn removed this judgment to the circuit court of Jackson county, by *certiorari*, setting up want of jurisdiction,

absence of written waiver of return, lack of evidence, and unlawful adjournment, as causes of reversal. The judgment was reversed, and the case comes up for review.

The waiver was entered by the justice at the request of the defendant, and nothing more seems to be required by law. The return shows that there was evidence of the value of the wheat, and also shows that the adjournment was made for less than four days after hearing and by consent of parties. These objections, therefore, are not sound.

It was decided in *Henderson v. Desborough* 28 Mich. 170 that a justice could render judgment for more than $100, if the writ was sworn out for less.

It is claimed that this case comes within the principle of *Parsell v. Genesee Cir. Judge* 39 Mich. 542, where it was held the court could not assess the value of the property because the writ contained no description of any, and had been quashed on that account. That decision was based on the statute which allows an assignment only in cases where "the property specified in the writ" had been delivered to the plaintiff. Comp. L. §§ 6758–9. The writ there specified nothing at all.

There was no such defect in this case. The property was sufficiently described and identified, and it was seized under the writ. If there was any defect it was in attempting to reach an undivided interest, when the defendant could not lawfully be dispossessed of such an interest by replevin. It was not a void writ, or one which gave no jurisdiction, and the seizure under it was of the property *in specie*. It is certainly open to question whether the description is not consistent with a lot of wheat separated from the entire crop and amounting to Bayn's share. The officer seems to have so treated it, and to have seized what was supposed to be that share. If the case had gone to issue and trial, there can be no doubt the property actually taken would have been lawfully involved in the proceedings. We think the case was one where the justice could deal with the question disposed of.

Counsel on both sides agree that the judgment quashing the proceedings was equivalent to a judgment of nonsuit or

discontinuance. In such a case, when the property has been given to plaintiff under the writ, the party dispossessed has a right to have a return, or to waive a return and have a judgment for the value of the chattels replevied. Comp. L., §§ 6758–9. This case is within the rule laid down in *People v. Tripp* 15 Mich. 518, and *Forbes v. Judge of Washtenaw* 23 Mich. 429.

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

The other Justices concurred.

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JOHN MABEE v. LESTER MINER, DRAIN COM'R.

Extension of ditch—Estoppel by acquiescence.

Objections to calling a jury in proceedings to extend a ditch are rendered immaterial by the abandonment of the purpose to extend it across the lands of those who refuse to release damages.

One who has consented to the extension of a ditch which does not cross his land, and has promised to dig his part and tried to let a job therefor, cannot, after partial construction thereof and consequent benefit to himself, complain of being assessed for it.

Certiorari. Submitted Jan. 26. Quashed April 13.

Melville McGee for plaintiff in certiorari.

G. T. Gridley for defendant in certiorari.

MARSTON, C. J. Some of the questions which the plaintiff seeks to raise in no way concern him, as the matter complained of could not injuriously affect him. So the objections based upon the fact that a jury was called are of no sort of consequence, as the jury was called because one party over whose land it was supposed the ditch would extend would not release.

As however all the others did release, and the ditch was not extended, but abandoned, over the lands of those not releasing, the action of the jury became immaterial.

The drain does not extend over the plaintiff's lands, but as a part of his lands were benefited by the drain, he was assessed a small amount, which gave him a cause of complaint. The return of the commissioner shows that the said "Mabee was present when I apportioned the construction of said drain and expressed his entire satisfaction at the part apportioned to him, and promised that he would construct his part as soon as any one else, and then and there tried to let out a job for the same." A party thus consenting should not after the ditch has been constructed in part and his lands benefited thereby, as the return shows to be the fact, come into court and be heard to complain. *Roediger v. Drain Com'rs* 40 Mich. 745.

The writ must be quashed with costs as improvidently granted.

The other Justices concurred.

CHAS. H. HACKLEY AND JAS. MCGORDON v. JOHN HEADLEY.

Logging contract—Scale—Expense of scaling—Usage—Duress.

Where a lumberman, in contracting with his jobber for getting out logs, agrees to divide the expense of scaling them and the scaler stipulates that the jobber shall board him, the cost of boarding him is an item of the expense to be divided, and the lumberman is liable for half of it and cannot show that it is the custom of jobbers to board their scalers at their own expense. But if the scaler does not stipulate for his board the lumberman is not liable, and the transaction is between the jobber and scaler alone.

A contract for getting out logs to be scaled "in accordance with the standard rules or scales in general use" on the stream, is governed by the scale in use at the time of scaling.

Duress exists where one is induced, by another's unlawful act, to make a contract or perform some act under circumstances which prevent his

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exercising free will. It is either of the person or the goods of the party constrained.

Duress of the person is by imprisonment, threats or an exhibition of apparently irresistible force.

Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them but refuses to surrender them unless the exaction is endured.

There is no duress where the act threatened is nothing which the party has not a legal right to perform.

Refusal, on demand, to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress if the debtor has done nothing unlawful to cause the financial embarassment which compelled him to submit to the extortion.

A receipt obtained by improper means and assuming to discharge any indebtedness not honestly in dispute between the parties and known by the debtor to be owing, is to that extent without consideration and ineffectual.

Error to Kent. Submitted Jan. 26. Decided April 13.

ASSUMPSIT. Defendant brings error. Reversed.

Smith, Nims, Hoyt & Erwin for plaintiffs in error. Duress is that degree of constraint that is sufficient to overcome the mind and will of a person of ordinary firmness: *Brown v. Pierce* 7 Wal. 214; as a defense it must be made in good faith and seasonably: *Lyon v. Waldo* 36 Mich. 356; *DeArmand v. Phillips* Wal. Ch. 199; a payment is not compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom it is made: *Radich v. Hutchins* 95 U. S. 213; it is not ordinarily duress to refuse to pay without litigation: *Mayhew v. Phœnix Ins. Co.* 23 Mich. 105.

John C. FitzGerald for defendant in error. Procuring a settlement of a debt by taking advantage of the creditor's financial embarassments is duress of goods; *Moses v. Macferlan* 2 Burr. 1005; *Irving v. Wilson* 4 D. & E. 485; there is no consideration for a receipt obtained by taking such advantage, to the extent to which it releases the debt: *Ryan*

v. Ward 48 N. Y. 206; *Harrison v. Close* 2 Johns. 448; *Seymour v. Minturn* 17 Johns. 170; *Mech. Bank v. Hazard* 9 Johns. 393; *Hendrickson v. Beers* 6 Bosw. 639; contracts must be carried into effect according to the intention of the parties at the time of making them: *Heald v. Cooper* 8 Me. 32; a logging contract providing for scaling by the rule in general use means in use at the time: *Williams v. Gilman* 3 Me. 276; *Homer v. Dorr* 10 Mass. 26; *Robinson v. Fiske* 25 Me. 405; *Dawson v. Kittle* 4 Hill 108; *Thomas v. Wiggers* 41 Ill. 470; *Karmuller v. Krotz* 18 Ia. 352; *Rindskoff v. Barrett* 14 Ia. 101; 1 Chitty Cont. 135, n 3.

Cooley, J. Headley sued Hackley & McGordon to recover compensation for cutting, hauling and delivering in the Muskegon river a quantity of logs. The performance of the labor was not disputed, but the parties were not agreed as to the construction of the contract in some important particulars, and the amount to which Headley was entitled depended largely upon the determination of these differences. The defendants also claimed to have had a full and complete settlement with Headley, and produced his receipt in evidence thereof. Headley admitted the receipt, but insisted that it was given by him under duress, and the verdict which he obtained in the circuit court was in accordance with this claim.

I. The questions in dispute respecting the construction of the contract concerned the scaling of the logs. The contract was in writing, and bore date August 20, 1874. Headley agreed thereby to cut on specified lands and deliver in the main Muskegon river the next spring 8,000,000 feet of logs. The logs were to be measured or scaled by a competent person to be selected by Hackley & McGordon, "and in accordance with the standard rules or scales in general use on Muskegon lake and river," and the expense of scaling was to be mutually borne by the parties.

The dispute respecting the expense of scaling related only to the board of the scaler. Headley boarded him and claimed to recover one-half what it was worth. Defendants offered

evidence that it was customary on the Muskegon river for jobbers to board the scalers, at their own expense, but we are of opinion that this was inadmissible. If under the contract with the scaler he was to be furnished his board, then the cost of the board was a part of the expense of scaling, and by the express terms of the contract was to be shared by the parties. If that was not the agreement with him, Headley could only look to the scaler himself for his pay.

This is a small matter; but the question what scale was to be the standard is one of considerable importance. The evidence tended to show that at the time the contract was entered into, scaling upon the river and lake was in accordance with the "Scribner rule," so-called; but that the "Doyle rule" was in general use when the logs were cut and delivered, and Hackley & McGordon had the logs scaled by that. By the new rule the quantity would be so much less than by the one in prior use that the amount Headley would be entitled to receive would be less by some $2000; and it was earnestly contended on behalf of Headley that the scale intended, as the one in general use, was the one in general use when the contract was entered into.

We are of opinion, however, that this is not the proper construction. The contract was for the performance of labor in the future, and as the scaling was to be done by third persons, and presumptively by those who were trained to the business, it would be expected they would perform their duties under such rules and according to such standards as were generally accepted at the time their services were called for. Indeed such contracts might contemplate performance at times when it would scarcely be expected that scalers would be familiar with scales in use when they were made. It is true the time that was to elapse between the making of this contract and its performance would be but short, but if it had been many years the question of construction would have been the same; and if we could not suppose under such circumstances that the parties contemplated the scalers should govern their measurements by obsolete and perhaps now unknown rules, neither can we here. It is fair to infer that

the existing scale was well known to the parties, and that if they intended to be governed by it at a time when it might have ceased to be used, they would have said so in explicit terms. In the absence of an agreement to that effect, we must suppose they intended their logs to be scaled as the logs of others would be at the place and time of scaling.

II. The question of duress on the part of Hackley & McGordon, in obtaining the discharge, remains. The paper reads as follows:

"MUSKEGON, MICH., August 3, 1875.

Received from Hackley & McGordon their note for four thousand dollars, payable in thirty days, at First National Bank, Grand Rapids, which is in full for all claims of every kind and nature which I have against said Hackley & McGordon.

Witness: THOMAS HUME. JOHN HEADLEY."

Headley's account of the circumstances under which this receipt was given is in substance as follows: On August 3, 1875, he went to Muskegon, the place of business of Hackley & McGordon, from his home in Kent county, for the purpose of collecting the balance which he claimed was due him under the contract. The amount he claimed was upwards of $6200, estimating the logs by the Scribner scale. He had an interview with Hackley in the morning, who insisted that the estimate should be according to the Doyle scale, and who also claimed that he had made payments to others amounting to some $1400 which Headley should allow. Headley did not admit these payments, and denied his liability for them if they had been made. Hackley told Headley to come in again in the afternoon, and when he did so Hackley said to him: "My figures show there is 4260 and odd dollars in round numbers your due, and I will just give you $4000. I will give you our note for $4000." To this Headley replied: "I cannot take that; it is not right, and you know it. There is over $2000 besides that belongs to me, and you know it." Hackley replied: "That is the best I will do with you." Headley said: "I cannot take that, Mr. Hackley," and Hackley replied, "You do the next best thing you are a mind to.

You can sue me if you please." Headley then said: "I cannot afford to sue you, because I have got to have the money, and I cannot wait for it. If I fail to get the money to-day, I shall probably be ruined financially, because I have made no other arrangement to get the money only on this particular matter." Finally he took the note and gave the receipt, because at the time he could do nothing better, and in the belief that he would be financially ruined unless he had immediately the money that was offered him, or paper by means of which the money might be obtained.

If this statement is correct, the defendants not only took a most unjust advantage of Headley, but they obtained a receipt which, to the extent that it assumed to discharge anything not honestly in dispute between the parties, and known by them to be owing to Headley beyond the sum received, was without consideration and ineffectual. But was it a receipt obtained by duress? That is the question which the record presents. The circuit judge was of opinion that if the jury believed the statement of Headley they would be justified in finding that duress existed; basing his opinion largely upon the opinion of this Court in *Vyne v. Glenn* 41 Mich. 112.

Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. It is commonly said to be of either the person or the goods of the party. Duress of the person is either by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. It is not pretended that duress of the person existed in this case; it is if anything duress of goods, or at least of that nature, and properly enough classed with duress of goods. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession but refuses to surrender them unless the exaction is submitted to.

The leading case involving duress of goods is *Astley v. Reynolds* 2 Strange, 915. The plaintiff had pledged goods for £20, and when he offered to redeem them, the pawnbroker

refused to surrender them unless he was paid £10 for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. This, say the court, "is a payment by compulsion: the plaintiff might have such an immediate want of his goods that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again." The principle of this case was approved in *Smith v. Bromley* Doug. 696, and also in *Ashmole v. Wainwright* 2 Q. B. 837. The latter was a suit to recover back excessive charges paid to common carriers who refused until payment was made to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances. *Harmony v. Bingham* 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid. *Scholey v. Mumford* 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays. *Chase v. Dwinal* 7 Me. 134. Other cases in support of the same principle are *Shaw v. Woodcock* 7 B. & C. 73; *Nelson v. Suddarth* 1 H. & Munf. 350; *White v. Heylman* 34 Penn. St. 142; *Sasportas v. Jennings* 1 Bay, 470; *Collins v. Westbury* 2 Bay 211; *Crawford v. Cato* 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. *Chandler v. Sanger* 114 Mass. 364. See *Spaids v. Barrett* 57 Ill. 289. Nor is the principle confined to payments made to recover goods: it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to: *Bates v. Insurance Co.* 3 Johns. Cas. 238; or

a creditor witholds his certificate from a bankrupt. *Smith v. Bromley* Doug. 696. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it. *Beckwith v. Frisbie* 32 Vt. 559; *Adams v. Reeves* 68 N. C. 134; *Briggs v. Lewiston* 29 Me. 472; *Grim v. School District* 57 Penn. St. 433; *First Nat. Bank v. Watkins* 21 Mich. 483.

But where the party threatens nothing which he has not a legal right to perform, there is no duress. *Skeate v. Beale* 11 Ad. & El. 983; *Preston v. Boston* 12 Pick. 14. When therefore a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress. *Wilcox v. Howland* 23 Pick. 167. Many other cases might be cited, but it is wholly unnecessary. We have examined all to which our attention has been directed, and none are more favorable to the plaintiff's case than those above referred to. Some of them are much less so; notably *Atlee v. Backhouse* 3 M. & W. 633; *Hall v. Schultz* 4 Johns. 240; *Silliman v. United States* 101 U. S. 465.

In what did the alleged duress consist in the present case? Merely in this: that the debtors refused to pay on demand a debt already due, though the plaintiff was in great need of the money and might be financially ruined in case he failed to obtain it. It is not pretended that Hackley & McGordon had done anything to bring Headley to the condition which made this money so important to him at this very time, or that they were in any manner responsible for his pecuniary embarrassment except as they failed to pay this demand. The duress, then, is to be found exclusively in their failure to meet promptly their pecuniary obligation. But this, according to the plaintiff's claim, would have constituted no duress whatever if he had not happened to be in pecuniary straits; and the validity of negotiations, according to this claim, must be determined, not by the defendants' conduct,

but by the plaintiff's necessities. The same contract which would be valid if made with a man easy in his circumstances, becomes invalid when the contracting party is pressed with the necessity of immediately meeting his bank paper. But this would be a most dangerous, as well as a most unequal doctrine; and if accepted, no one could well know when he would be safe in dealing on the ordinary terms of negotiation with a party who professed to be in great need.

The case of *Vyne v. Glenn* 41 Mich. 112, differs essentially from this. There was not a simple withholding of moneys in that case. The decision was made upon facts found by referees who reported that the settlement upon which the defendant relied was made at Chicago, which was a long distance from plaintiff's home and place of business; that the defendant forced the plaintiff into the settlement against his will, by taking advantage of his pecuniary necessities, by informing plaintiff that he had taken steps to stop the payment of money due to the plaintiff from other parties, and that he had stopped the payment of a part of such moneys; that defendant knew the necessities and financial embarrassments in which the plaintiff was involved, and knew that if he failed to get the money so due to him he would be ruined financially; that plaintiff consented to such settlement only in order to get the money due to him, as aforesaid, and the payment of which was stopped by defendant, and which he must have to save him from financial ruin. The report, therefore, showed the same financial embarrassment and the same great need of money which is claimed existed in this case, and the same withholding of moneys lawfully due, but it showed over and above all that an unlawful interference by defendant between the plaintiff and other debtors, by means of which he had stopped the payment to plaintiff of sums due to him from such other debtors. It was this keeping of other moneys from the plaintiff's hands, and not the refusal by defendant to pay his own debt, which was the ruling fact in that case, and which was equivalent, in our opinion, to duress of goods.

These views render a reversal of the judgment necessary, and the case will be remanded for a new trial with costs to the plaintiffs in error.

The other Justices concurred.

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White River Log & Booming Co. v. Swen Nelson.

Floating Logs—Injury to riparian owners by overflowing banks.

In an action against a booming company for injury to plaintiff's land resulting from jams of logs and consequent overflows, a charge is erroneous which assumes that the company is an insurer against such injuries, and which makes no account of evidence tending to show that some of the overflows were caused by extraordinary rainfalls.

A booming company is not liable for damages caused to riparian owners by a proper and reasonable use of the right of floating logs; but it is liable if by wilful or negligent mangement it creates or enlarges jams in the stream and thereby overflows its bank to their injury.

The rights of the public to run logs in a navigable stream are not subordinate to the rights of riparian owners, but are concurrent, and each must be exercised without unnecessarily interfering with the other and without negligence.

Error to Muskegon. Submitted Jan. 26. Decided April 13.

Case. Defendant brings error. Reversed.

Smith, Nims, Hoyt & Erwin for plaintiffs in error. The right to float logs on navigable streams is recognized in *Lorman v. Benson* 8 Mich., 32; *Middleton v. Flat River Boom Co.* 27 Mich. 533; *Brig "City of Erie" v. Canfield* id 482; *Thunder Bay River Boom Co. v. Speechly* 31 Mich. 344; *Atty-Gen. v. Evart Boom Co.* 34 Mich. 462; the right of navigation is paramount to all others: *Moore v. Sanborne* 2 Mich. 526; *Brown v. Chadbourne* 31 Me. 9; *Treat v. Lord* 42 Me. 552; *Morgan v. King* 35 N. Y. 458;

the question what is a reasonable use of a right depends on the subject matter and the circumstances: *Davis v. Winslow* 51 Me. 295; *Michigan Central R. R. Co. v. Coleman* 28 Mich. 440; *Underwood v. Waldron* 33 Mich. 239; *Scripps v. Reilly* 38 Mich. 27: *Weise v. Smith* 3 Or. 445: 8 Amer. 621; whatever injury is incidental to the reasonable use of the water of a running stream is *damnum absque injuria:* Cooley on Torts, 585; right of passage upon public highways is subject to such incidental, temporary or partial obstruction as manifest necessity requires: *Clark v. Fry* 8 Ohio St. 358; *Fisher v. Thirkell* 21 Mich. 21; *Haight v. Keokuk* 4 Ia. 214; Whart. Negligence § 518; *Mich. Cent. R. R. v. Anderson* 20 Mich. 244; the right to build sawmills on running streams is not destroyed by the fact that they injure the water: Cooley on Torts 588; *Snow v. Parsons* 28 Vt. 459; *Hayes v. Waldron* 44 N. H. 580; *Merrifield v. Worcester* 110 Mass. 216; *Burroughs v. Housatonic R. R.* 15 Conn. 124; when there is neither negligence nor folly in doing a lawful act, the person doing it is not liable for the consequences: *Clark v. Foot* 8 Johns. 421; *Panton v. Holland* 17 Johns. 92; *Thurston v. Hancock* 12 Mass., 220; *Bachelder v. Heagan* 18 Me. 32; *Vaughan v. Taff Vale Ry Co.* 5 H. & N. 679; *Dunn v. Birmingham Canal Co.* L. R. 7 Q. B. 244: 1 Eng. 283; *Nichols v. Marsland* 10 Exch. 255: 14 Eng. 538; *Holmes v. Mather* L. R. 10 Exch. 261: 14 Eng. 548; an overflow of land caused by a jam of an unusual quantity of logs in a boom but without the fault of its owner does not render the owner liable: *Lawler v. Baring Boom Co.* 56 Me. 443.

Stephenson & McLaughlin for defendant in error.

GRAVES, J. Nelson, being a riparian owner on White River, brought this action on the case for certain damages alleged to have been caused by the Booming Company. He claimed that a distinct but exactly similar injury was committed in each of the years 1873, 1874, 1875, 1876, 1877 and 1878, and employed a separate count for each year. The

only variation in the counts was in the year in which the injury was alleged to have been done, and a reference, therefore, to the first will suffice for all the others. The actionable fault imputed to the Booming Company is charged in this wise—that "well knowing the premises but contriving and intending to injure and prejudice the plaintiff in this behalf, heretofore, to wit: On the first day of May, A. D. 1873, at the township of Whitehall, the county of Muskegon aforesaid, and divers other days and times afterwards, and before the commencement of this suit, with certain booms, timber, logs, boards, pins, poles, wood, ropes and chains, and other appliances, *dammed up and obstructed* the running and flowing of the waters of said White River as the same had run and flowed and still ought to run and flow, and thereby caused the waters of said White River to flow upon and cover the aforesaid lands of the said plaintiff, and to stand and remain upon the aforesaid lands of the plaintiff for a long space of time, to wit: for the space of five months, and thereby destroyed the aforesaid products, pasture, meadow and growing crops and improvements of said plaintiff, and greatly injured the said lands and the timber thereon, and prevented the plaintiff from, and deprived him of, the use, tillage and cultivation thereof, and depriving him of the products, produce and income and profits of said lands, whereby the said plaintiff has lost and been deprived of a great number, to wit, five hundred tons of hay," etc.

Complaint is made that these various counts overlap, and that a claim is set up for repeated recoveries on account of the same flowage. But this is a misapprehension. It was the obvious design of the pleader to describe a flowage through a certain specified period of time in each year (Gould's Plead. ch. 3 § 85), and to effect this object he resorted to the expedient of a separate count for each year. The declaration may show that in this regard it is not framed with perfect accuracy and that there exist some formal imperfections. But there is nothing substantial; nothing which may be taken advantage of by exception. It is further objected that as to the several injuries alleged to have been

committed in the years preceding 1877 the action was barred by Comp. L. § 7149, which limits the bringing of actions for trespass on land to two years after the accruing of the cause of action: There is no foundation for the point. The action is case for consequential damages, and not trespass, and the Legislature has seen fit to authorize case to be brought except in certain instances, of which this is not one, at any time in six years. Comp. L. § 7148 subd. 7.

The plaintiff's evidence was in substance that in each of the years mentioned, the Booming Company dealt in such manner with the masses of logs running in the river that at the sorting ground below the plaintiff they were arrested and turned into jams, which caused the water to dam up and overflow his land and cut off certain of his crops and preclude him from making and getting others. And on the part of the Booming Company the evidence was aimed to show that part of the overflow complained of was caused by heavy rainfalls, and that considering the great quantity of logs which were put afloat by the various persons who engaged therein, and considering the absence or almost entire absence of river banks, and some other conditions, there was no practicable way for getting the logs to their destination with any less overflow of plaintiff's land than actually occurred.

When the judge came to charge the jury he laid down the duty of the Booming Company in these terms: "This corporation has a duty to perform, that is, to drive the logs down with ordinary care so as not to injure any of the parties who may own land along the stream or adjacent thereto. It is their duty to furnish a sufficient amount of men to drive those logs down the river, without injury to those owning land along and adjacent to the stream, and so far as this case is concerned they were to drive the logs along the plaintiff's land so as not to injure the land or crops; it doesn't matter whether there is one hundred million or a thousand million; they must navigate it in such a manner as not to injure those who own lands along the stream, that is, they must put on a sufficient force to pass those logs down the surface of that

stream without injury to the plaintiff in this case." The jury found for the plaintiff below in the sum of $400.

So much in these controversies depends on circumstances which may vary indefinitely that it is not practicable to lay down a specific rule applicable to all occasions, places and conditions, as to the duty which may be fairly due to riparian proprietors from the corporations and such private persons as may be engaged in using streams for these immense lumbering operations. The subject is one of considerable difficulty in any case, and, unless the question be confined to a given state of facts, it would be rash to hazard any other than very general views. According to the present record the facts appear to be neither numerous nor intricate and the inquiry seems to be restricted to narrow limits. Premising therefore that in what is said strict reference is made to the case actually presented, it remains to state with as much brevity as practicable the opinion entertained.

The charge given is not correct. It was likely to lead the jury to suppose that the Booming Company was in the condition of an insurer and bound at all hazards to guard the plaintiff against loss arising from the presence of the logs in the river; and of course there is no foundation anywhere for such a doctrine. No notice was taken of the evidence for the Booming Company that some of the overflows were caused by extraordinary rainfalls, and finally the drift of the instruction was not adapted to the case. The view which the facts called for in my judgment may be thus stated: As between the plaintiff and the Booming Company it was the duty of the company to see that its connection with the logs did not result in causing any more flowage of the plaintiff's land than would occur by the passage of the logs in a purely natural way. It had no right to deal with them in any mode whereby jams would be formed or enlarged so as to cause the water to overflow the plaintiff's land when it otherwise would not; or cause it to overflow there more than it would were the logs left to themselves; and if jams were formed or enlarged in that way to such extent that they did cause the water to flow the plaintiff's land the company is liable for all

that flowage beyond what the flowage would have been, if any, had the logs been allowed to float down naturally and without artificial interference. It may be objected that this affords an uncertain criterion; because it cannot be known what the consequences would have been in case the Booming Company had had no connection of any sort with the logs. And it is true that the element of uncertainty exists. But that is no reason for rejecting the rule unless a better one can be found. It is not admissible to wholly deny redress because there is infirmity in the method, and on the other hand, it is equally inadmissible to make this imperfection an excuse for compelling the company to pay damage which it never had any agency in causing. The uncertainty referred to is no greater nor more embarrassing than is often met with where estimates of damage are to be made, and where such difficulties are never allowed to stand in the way. Actions for injuries to health, to reputation, and for injuries which reach forward into the future, and the like, will exhibit conspicuous examples. In such cases the jury must apply their common sense and experience to the whole facts and act on the rule of probability. No rule more safe or practical is discerned to exclude all ground of damage not chargeable to the company and at the same time allow the plaintiff whatever damage he ought to have from it. The other points were abandoned.

I think the judgment should be reversed with costs and a new trial granted.

Cooley, J. I agree with Mr. Justice Graves that the instructions given to the jury in this case were erroneous. I also agree that if the Booming Company so dealt with the logs in the stream as to cause jams to be formed or enlarged, and thereby to raise the water in the stream to the injury of the plaintiff, the company must be held responsible for the resulting damages. But if the company only makes use of the right of floatage in a proper and reasonable way and without negligence, it is not responsible even though some injury may be suffered by the riparian owner. The rights of the

public to run logs in the stream are not subordinate to those of the owner of the bank, but they are concurrent, and each must be enjoyed reasonably, and without any unnecessary interference with the enjoyment of the other, and without negligence. But this is all that can be required. No man can be punished in damages for an enjoyment of his undoubted rights, when he acts reasonably and with prudence.

MARSTON, C. J. concurred.

CAMPBELL, J. I do not feel quite satisfied that the charge of the court in this case was designed to convey so extreme a doctrine as would hold plaintiffs in error responsible for injuries to which they did not contribute. But as the language has impressed my brethren as leading to that inference, I do not feel justified in holding that it will not properly bear that construction, and concur in a reversal. I am not prepared on this record to lay down any specific rule, as the testimony is not completely given.

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ABSALOM BACKUS, JR., ET EL. v. HUGH COYNE.

General average—Counsel fees.

One who stands in the position of a surety is justified in employing counsel and incurring costs in defending, for the common benefit, against illegal demands; and his co-sureties must contribute to make him good, whether he succeeded or not, provided that he acted prudently in the light of facts indicating the probability of a sufficient recovery to justify the expense.

Contribution cannot be enforced on the ground merely that a liability exists, or even that a judgment has been recovered; there must have been either a payment of the demand, or such an assumption of it as imposes on the claimant more than his share, and correspondingly releases the others.

A surety is not the agent of the common creditor to enforce the latter's demand, for the creditor would not be bound by the surety's act, and until payment may look to any or all the other sureties.

Freight lightered away from a grounded vessel, in order to save the rest of the cargo, is not liable to contribute to the expense incurred in doing so.

The sum for which a vessel is sold on execution must be accepted as its true value in a suit for contribution on a claim for general average, unless the claimant had caused it to be sold for less than its value.

Error to Superior Court of Detroit. Submitted January 26. Decided April 13.

ASSUMPSIT for a claim of contribution under the doctrine of general average. The action was brought by Coyne, as assignee of the owner of the vessel. Backus had a lot of lumber on board, part of which had been thrown off to keep the vessel from foundering. A part of the remainder was afterward lightered off in order to save it, and various expenses were incurred for these purposes, and for towage, repairs and wages, and also for defending against a libel in the Admiralty for a portion of these same claims, on which judgment was recovered, and the vessel sold to satisfy them.

Plaintiff recovered below, and defendants bring error. Reversed.

Barbour & Rexford and *Hoyt Post* for plaintiff in error. There is no liability for contribution in general average until the claim is paid: *Douglas v. Moody* 9 Mass. 548; nor until the surety has paid more than his share: De Golyer on Guaranties, 341; the amount at which a vessel should contribute after being sold on execution, is the amount of the sale: *Bell v. Smith*, 2 Johns. 98.

George H. Prentiss for defendant in error.

MARSTON, C. J. Coyne as assignee brought *assumpsit* for contribution upon a general average claim. It appeared on the trial that immediately on the arrival of the vessel in Detroit, she was libelled in the United States court for the recovery of certain claims, and amongst them claims for towing the vessel from Port Huron, where she was aground, to Detroit, and the wages of the captain and crew. It also

appeared that the vessel was sold under a decree of said court, that eighty per cent. of such claims were paid out of the proceeds, except wages which were paid in full, and that a portion of the proceeds were used to pay costs and proctor's fees in said suits, and that but for the payment of these the other claims might have been paid in full, and the court permitted the jury to take into consideration the payment of such costs and fees. Just what part this matter of costs and fees played in the case is not clearly apparent.

There can be no doubt but that a surety, or one standing in such a position, will be justified in employing counsel and incurring costs and expenses, to which his co-sureties must afterwards contribute, in defending against illegal demands. Nor will the right of the surety to recover in such cases be made dependent upon his success in the cases, as that would compel him to act at his peril. It is sufficient if he acted as a prudent man would, in the light of facts and circumstances, showing a probability of success in whole or in part sufficient to justify the expense likely to be incurred. The foundation for the right of contribution in such cases is the fact that the expense was incurred in defending for the common benefit. This will not, therefore, permit him to incur expense in uselessly resisting a legal demand, or in creating needless or unnecessary costs and expenses. *Knight v. Hughes* 3 C. & P. 467; *Henry v. Goldney* 15 M. & W. 494; *Kemp v. Finden* 12 M. & W. 421; *Davis v. Emerson* 17 Me. 64. I am also of opinion that the mere fact of liability, and even of a judgment thereon, is not sufficient to entitle the surety to enforce contribution. There must be a payment or such assumption of the demand, as imposes upon the claimant more than his share, and a corresponding release of those against whom he claims. The surety is not the agent of the common creditor to enforce the demand, as the latter would not be bound by his act, and until payment he may look to any or all the others, and they should not thus be put to needless litigation and the danger of having to respond to the principal, notwithstanding the payment by the surety.

The record in this case does not negative the fact that evi-

dence was given on the trial which, under the above views, would have and did justify the court in the rulings made. No error, therefore, is apparent of record in this part of the case.

The lumber lightered off the vessel while aground, was not liable to contribute to the expenses afterwards incurred in saving the vessel and balance of the cargo. The expense afterwards incurred was not for the protection of this lumber, nor necessary for such purpose. It had its own risks and perils to run while being forwarded to its destination. *Hugg v. Baltimore etc. Co.* 35 Md. 414; *Job v. Langton* 6 El. & Bl. 779.

It appeared that the vessel was sold under the decree of the United States court in the cases referred to for upwards of $1600, while evidence was introduced tending to show her value to have been $2000, and the jury was permitted to find either value as the basis of their verdict. This we are of opinion was erroneous. The vessel was actually sold and realized to the owner in the payment of the claims against her, upwards of $1600. In any action thereafter arising between such owner or his assignee and others interested in such claims for contribution, the actual amount for which the vessel was sold must be accepted as the true value. If the owner, in defending without good cause claims apparently legal, or otherwise, caused a sale and sacrifice of the vessel for less than her value, there would be good reason for permitting the actual value to be shown. Where, however, a sale has been made, even at a price above what some might consider the actual value, all interested therein should have the full benefit and advantage thereof.

We are of opinion, therefore, that for these reasons the judgment should be reversed with costs, and a new trial ordered.

The other Justices concurred.

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FRANK S. DYER v. WILLIAM S. ROSENTHAL.

Trover for goods levied on—Value—Damages for breaking up business—Fraudulent payment of debts.

In trover for the conversion of goods taken on execution, plaintiff cannot introduce an estimate of damages due him by the consequent breaking-up of his business until he has shown that his business was actually broken up.

The transfer of cheques or of receipted bills has no tendency to prove an indebtedness or loan, but rather a payment; they prove nothing of themselves but may be used as memoranda in connection with the testimony of the parties.

Receipted bills are no evidence of value.

One who has merely been into a store without inspecting the goods there is not competent to express an opinion as to their value on mere inspection of the inventory and invoices.

In trover for goods taken on execution defendant may show what they brought at public auction, as bearing on their value, even though the sale was made at a different place from that of the alleged conversion, if there is no reason for supposing that values were essentially different at the two places.

The appraisal of goods taken on an attachment is inadmissible as evidence of their value if offered by the officer who levied the attachment and appointed the appraisers in a suit against him for their conversion.

A transfer of property in payment of a debt is fraudulent and void if the property was transferred at a price greatly below its real value, with intent to defraud other creditors

Error to Alpena. Submitted Jan. 26. Decided April 13.

TROVER. Defendant brings error. Reversed.

Kelley & Clayberg for plaintiff in error. In trover for articles taken under levy, a person not actually familiar with the articles cannot testify to their value: *Greeley v. Stilson* 27 Mich. 153; *Gilbert v. Kennedy* 22 Mich. 117; *Newlan v. Dunham* 60 Ill. 233; but the price they brought at auction would be evidence: *Jennings v. Prentice* 39 Mich. 121; *Roberts v. Dunn* 71 Ill. 46; *Campbell v. Woodworth* 20 N.

Y. 499; *Gill v. McNamee* 42 N. Y. 44; so would be the appraisal: *Walrath v. Campbell* 28 Mich. 111; *Hunt v. Strew* 33 Mich. 85; *Sisson v. C. & T. R. R.* 14 Mich. 489; *Cliquot's Champagne* 3 Wal. 114; *Fennerstein's Champagne* 3 Wal. 145; a transfer of goods in payment of an honest debt is void as a fraud on creditors if intended to be: *Pierce v. Rehfuss* 35 Mich. 53; *Allen v. Kinyon* 41 Mich. 281; *Beurmann v. Van Buren* 44 Mich. 496; *Boies v Henney* 32 Ill. 130; *Hanford v. Obrecht* 49 Ill. 146; *Atwood v. Impson* 20 N. J. Eq. 150; *Chapel v. Clapp* 29 Ia. 191; *Tatum v. Hunter* 14 Ala. 557; *Pulliam v. Newberry* 41 Ala. 168.

J. D. Holmes for defendant in error. The transfer of goods in payment of an honest debt is valid even if intended to cut off the redress of other creditors: *Hill v. Bowman* 35 Mich. 191; *Jordon v. White* 35 Mich. 253.

Cooley, J. Rosenthal sued Dyer for the conversion of a stock of goods which were taken from the possession of plaintiff at Sheboygan. Dyer was at the time sheriff of Alpena county, and justified under an attachment against Samuel Rosenthal who, he claimed, was the real owner of the goods and had transferred the possession to plaintiff with intent to defraud his creditors. Plaintiff recovered judgment in the circuit court, and the case comes up for review upon exceptions.

I. Plaintiff, after proving the seizure of the goods, was permitted against objection to give to the jury an estimate of the damage he had suffered by the breaking up of his business. This evidence could only have been admissible after he had shown that his business was actually broken up. This he had not shown: it was consistent with all that appeared that he may have gone on without serious interruption.

II. Under a claim that it would tend to show an indebtedness from Samuel Rosenthal to himself which may have constituted a consideration for the transfer of the goods to him, plaintiff was permitted to show that Samuel received from him certain checks a year before. But these had no tendency to show an indebtedness. The more legitimate inference

was that they constituted a payment, rather than a loan. The parties were competent to testify on that subject, and might use the checks as memoranda; but by themselves the checks proved nothing.

III. Receipted bills of goods from Samuel Rosenthal to the plaintiff were offered and received in evidence for the double purpose of showing payment and also of showing the value of the goods. We may say of these as of the checks, that they might be used in connection with the evidence of the parties to show a debt and its payment, but the fact that goods are put down in such bills at a certain price is no evidence they were worth it.

IV. One Anspach, a witness for the plaintiff, was permitted to give his opinion of the value of the goods on inspection of the inventory and invoices, when his evidence showed he had no personal knowledge on the subject. He had been in the store when the goods were there, but had never inspected them, and was as incompetent to express an opinion upon value as if he had never been near them.

V. As having some tendency to show value, defendant offered to show that he sold the goods at public auction at Alpena, and that they brought certain prices which were much less than the value which plaintiff claimed to have proved. This evidence, we think, was improperly excluded. It was within the rulings in *Smith v. Mitchell* 12 Mich. 180; *Davis v. Zimmerman* 40 Mich. 24, and other cases decided by this court. It is true the sale was made at a different place from that of the alleged conversion, but no reason is given for supposing the values would have been essentially different at the two places. The auction sale does not fix the price; it is only evidence bearing upon the value; and the jury are likely to make all proper allowance.

VI. Defendant also offered in evidence on the question of value the appraisal made of the goods when they were taken on the attachment; but this, we think, was rightly excluded. The appraisers were chosen by the defendant himself; and it would be unsafe to permit him to select the persons whose appraisal should be evidence in his own favor. Such an

appraisal was received in evidence against the sheriff in *Worthington v. Hanna* 23 Mich. 530, but even there, was considered but slight evidence. To put the witness upon the stand is much more satisfactory, and more likely to reach a just result.

VII. The trial judge, in his instructions to the jury, informed them that if the goods were transferred by Samuel Rosenthal to plaintiff in payment of an existing debt, "it is no matter what the intentions of the parties may have been; how immoral, how dishonest, how unfair or how fraudulent in respect to creditors,"—"no matter what may have been the condition of the minds of the parties as to whether the intent was to delay, hinder or defraud other creditors," and the plaintiff would then be entitled to recover. This was putting it altogether too strong. It is quite possible to pay an honest debt in an unlawful way; and if the property had been transferred at a price greatly below its real value, the jury would have been perfectly warranted in finding the transaction fraudulent and void. But it might have been equally void on other grounds.

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

The other Justices concurred.

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CHARLES W. RICHARDSON ET AL., GARNISHEES OF THE ALPENA LUMBER COMPANY, AND JESSE P. BISHOP AND JOHN G. BEEKMAN, ASSIGNEES v. ENOCH ROGERS FOR THE USE OF SAMANTHA HITCHCOCK.

General assignment for an insolvent corporation—Assignments executed in other States.

If an assignment for the benefit of creditors contains a power to sell on credit, it is void as against the garnishment of a judgment recovered by the insolvent, though it may be valid as against the assignor and also as regards creditors and others not seeking to avoid it.

An assignment for the benefit of creditors executed in another State but with express reference to Michigan and intended to have its first operation in Michigan, is to be treated, in passing upon its validity, as if originally executed in Michigan.

A general assignment by an insolvent corporation was executed by the directors, and next day, by their direction, the president executed another, incorporating the first, in another State where the property was. The assignees accepted and acted upon the trust and no attempt was made to set it aside, but more than a year later the president was directed, at an informal meeting of directors, to execute another assignment, the former being supposed defective. *Held* that the last assignment could not be sustained, not being made by direct sanction of the corporation, and the power first delegated to the president being insufficient as it was already exhausted.

Whether the president of a corporation has authority to execute a general assignment for the benefit of its creditors.—Q.

Error to Alpena. Submitted Jan. 27. Decided April 13.

GARNISHMENT. The assignees of the principal defendant bring error. Affirmed.

J. D. Holmes for plaintiffs in error. The acts of directors of a corporation may be valid though done at informal meetings: Field on Corp. § 235; *Samuel v. Holladay* 1 Wool. 400; directors may act separately without a board meeting: *Bank of Middlebury v. Rutland etc. R. R.* 30 Vt. 159.

Kelley & Clayberg for defendants in error. A general assignment permitting the assignee to sell on credit is void: *Ryerson v. Eldred* 18 Mich. 12; a corporation cannot exercise acts in another sovereignty except by the latter's permission: *Cin. Mut. H. A. Co. v. Rosenthal* 48 Ill. 85; or until authorized by the State in which it was incorporated: *Bank of Augusta v. Earle* 13 Pet. 519; Field on Corp. 254; a voluntary assignment made abroad and substantially inconsistent with home statutes should not be put in execution at home to the detriment of the citizens; but for all other purposes, if valid, it should be operative: *Bentley v. Whittemore* 19 N. J. Eq. 462; *Moore v. Bonnell* 31 N. J. L. 98;

Ingraham v. Geyer 13 Mass. 146; *Zipcey v. Thompson* 1 Gray 245; *Boyd v. Rockport Mills* 7 Gray 406; *Benedict v. Parmenter* 13 Gray 88; *Graydon v. Church* 7 Mich. 36; *Wood v. Parsons* 27 Mich. 159; *Burrows v. Keays* 37 Mich. 430; *McEwan v. Zimmer* 38 Mich. 765; a second assignment, therefore, could cover no property unless subsequently obtained: *Brennan v. Willson* 71 N. Y. 502; *Hone v. Woolsey* 2 Edw. Ch. 289; Bump Fraud. Conv. 333; Burrell on Assignments § 354.

GRAVES, J. The Alpena Lumber Company is a domestic corporation which was organized for manufacturing purposes under our general law, in the year 1874. It recovered a judgment in the circuit court for Alpena county against Richardson & Co. for about a thousand dollars and the judgment was affirmed in this court at the January term for 1879: 40 Mich. 203.

During the pendency of that suit the corporation claimed to be insolvent and took measures to assign all its property to Bishop and Beekman for the benefit of its creditors.

The proceedings to accomplish this end were singular. The directors met at Cleveland in the State of Ohio on the 27th of July, 1877, "and finding that the company was unable to meet its paper at maturity" unanimously resolved that it "make an assignment of all its property and effects both real and personal to Jesse P. Bishop of Cleveland, Ohio, and John G. Beekman of Alpena, Michigan, for the equal benefit of the creditors of said company" and that the president proceed to "execute on behalf of the company the necessary papers." In pursuance of this resolve an instrument was forthwith drawn up and executed. It purported to convey to Bishop and Beekman the entire property and effects of the corporation in Ohio, Michigan and elsewhere upon trust for the equal benefit of all the creditors. But it provided, expressly, that the assignees might sell at public or private sale upon such terms as they might deem for the best "interest of the creditors, and either for cash or upon reasonable credit as they might deem best, and that they

should have the right to manufacture lumber from the pine logs assigned in case they should consider it for the interest of the creditors so to do in order to dispose of the same to the best advantage."

Bishop immediately endorsed his acceptance. But during the forenoon of the next day, namely July 28th, the directors met in the city of Detroit and unanimously ratified the action had at the Cleveland meeting and directed the president to renew the execution of the instrument there made. In compliance with this direction a formal paper was executed incorporating the first, and constituting a complete Michigan transaction. The assignees immediately endorsed their acceptance of the trust contained in it, and both papers were soon after recorded in the office of the register of deeds. As soon as the transaction was completed by the ratification and re-execution on the 28th, the assignees assumed exclusive possession of the general property, and have since continued to handle it, the corporation not having had any control whatever. A large portion was disposed of.

After the lapse of some fifteen months during which time the assignees were proceeding in the execution of the trusts the corporation was informed that the transaction was not sufficient to bind Michigan creditors and that they might avoid it on the ground that power was given to dispose of the assets on credit. Influenced by this advice, the directors came together at Cleveland in an informal way on the 14th of November, 1878, but not as a meeting of the board, and a conference was had about making a new assignment. The result was that the president was directed by general consent to make one, and a third instrument was then executed and accepted by the assignees. It was framed as an original assignment and made no reference to prior transactions. There was no re-assignment by the assignees nor any interference with their dispositions or possession and, so far as appears, no creditors had refused to acquiesce in what had been done. The instrument assumed to express its purpose in these terms: "The object of this conveyance being to include all the property and effects of said company of every

kind and wherever situated, to have and to hold the same to said Bishop and Beekman and their successors for the equal *pro rata* benefit of the creditors of said company, with full power on the part of said trustees to sell and dispose of all said property and effects and convert the same into money for the purposes aforesaid."

The defendant in error, being a Michigan creditor of the corporation, and having brought suit for the demand in the circuit court for the county of Alpena, proceeded in January, 1879, against Richardson & Co. as garnishees, and they in due time appeared and made disclosure. They admitted their indebtedness under the judgment but were unable to say whether it was payable to the corporation or to the assignees; and the latter at once intervened as claimants and denied the right of the garnishee plaintiff to intercept the fund. The controversy was brought to issue and tried before a jury, and the circuit judge directed a verdict against the assignees and they allege error. The whole evidence is returned, and the first question is whether, on their own showing, they made a case on which the jury could have found in their favor under a proper view of the law, because if they did not the result is correct.

The whole foundation of their right is the proceeding by the corporation and its officers to transfer the judgment and other property for the benefit of creditors.

The plaintiffs claimed that they were lawfully vested with the title, by means of the assignment, and it was incumbent on them to establish this claim. They were bound to show a good title, not merely as against the corporation or passive creditors, but as against the defendant in error who by proper adverse proceedings had put the question to the proof.

There is no occasion to discuss the influence of foreign law or the obligations of comity. The paper made on the 28th of July was executed here and was in every respect a domestic transaction. As against the attachment of the judgment under the garnishee process it is void in conse-

quence of the power inserted to sell on credit: *Sutton v. Hanford* 11 Mich. 513.

If the paper made the day previous in the state of Ohio can be said to have a distinct existence, it is of no greater force in this contention than the other. Granting all that can be claimed for it as an intended disposition of Michigan property, and it must be then admitted that it was made with express reference to this State, and with the positive intent that its first taking effect on such property, including the judgment in question, should be in this State. The object was to convey the entire assets found here, and the executory operation of the instrument as a conveyance of such assets was meant to take place here. For the purpose of deciding on its validity in this controversy it must be viewed as though it had been made in this State.

It remains to notice the third paper executed by the president of the corporation in Ohio nearly a year and a half later. This paper was made without any direct sanction of the corporation. The assignees contend that it was authorized by the resolution of the directors on the prior occasion. The explanation is that the president was then directed to provide and execute valid papers and, having failed, the duty and power remained. On this ground it is claimed that the last assignment was an act of the corporation and a lawful transfer. The facts exclude all implication of a purpose that the president should execute any general assignment for the benefit of creditors on his own authority, and we are not satisfied that he had power to do so.

The case is certain that there was to be no transfer except as ordered by the directors. Can this last instrument be referred to the resolution made by the directors in July, 1877, for the purpose of making out title in the assignees against this creditor for the corporation? The Court think not. The power conveyed by the resolution was acted upon, and the assignments made under it were valid against the corporation and valid, also, as regards creditors and others not attempting avoidance. And for the year and some months elapsing between the transactions, and during which period the

assignees exercised full control, there was no attempt to avoid or defeat the transfer. Moreover the assignees never restored anything or offered to renounce their trust or waive any right. They were not disturbed and they proceeded as though an avoidance of the transfer was impossible.

Under these circumstances it is the opinion of the court that the power given by the directors was exhausted before the last paper was made and that as no new delegation of power took place, the assignees cannot make title to the judgment on the strength of that paper against the garnishee plaintiff.

The result is that the assignees failed to make their claim good and hence the judgment must be affirmed with costs.

The other Justices concurred.

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JOHN GAVIGAN AND ELLEN GAVIGAN v. EDWARD EVANS AND BENJAMIN KILMASTER, SURVIVORS.

Established fact—Passage of title—Modification of contracts—Right of sale—Presumptions of title.

Where the testimony on both sides agrees in establishing a right in a party to sell property in dispute, it should not be left to the jury as an open question.

An agreement by parties for whom lumber is to be got out, to advance money and supplies to an amount stipulated, to the contractors, gives title to the supplies when furnished, and they belong to the contractors unless that contract is modified to the contrary.

A contract is not affected by a subsequent agreement which does not refer to it, and the provisions of which are not so framed as to furnish means for connecting them.

An understanding had subsequently with one of two joint contractors that certain property should not pass until paid for, without evidence of the price and terms of payment, and without any evidence of its connection with the lumber contract is not proven in such a manner that it can be applied as a modification of that contract and must be treated as a separate understanding.

Where authority is given to a person to sell property for the purpose of raising means to pay debts, the vendee cannot be required to see that the money is properly applied.

Abstract presumptions as to title from possession become inapplicable when evidence is introduced of the actual title.

Error to Alpena. Submitted Jan. 27. Decided April 13.

Replevin. Defendants bring error. Reversed.

Turnbull & McDonald for plaintiffs in error.

Kelley & Clayberg for defendants in error.

Campbell, J. Evans and Kilmaster, as survivors of themselves and Henry Kilmaster, deceased, who had been partners, brought replevin against the Gavigans, and others not now in the record, for two oxen. These oxen had been conveyed to Mrs. Gavigan by one Sebra Proper, who sold them under transfer from Albert Pinkham, who was owner of the assets of a firm of Pinkham & Flemming by whom these oxen and some other oxen and horses had been obtained from the firm of Evans, Kilmaster & Co. Pinkham & Flemming had contracted to cut and sell certain timber to that firm, who were to advance $2800 in supplies, and make various other payments. One important question on the trial was whether these oxen were furnished under that contract, or whether they had been delivered to Pinkham & Flemming to become their property when paid for.

It appeared also in the case that Pinkham executed a chattel mortgage on the oxen, which Henry Kilmaster, one of the firm of Evans, Kilmaster & Co., obtained from the mortgagee and had assigned in the name of Henry D. Kilmaster & Co. This mortgage was not properly recorded, and was ruled out as a ground of replevin, but some other questions arose in regard to it. Other questions arose upon rulings.

The contract for lumber becomes important, as under the rulings the jury must have found that the oxen were subject to some other arrangement. This contract was dated October 21, 1875, and bound Pinkham and Flemming to cut from

land described and sell two million feet of white pine timber to be delivered in rafts on or about June 10, 1876, at seven dollars and twenty-five cents per thousand. The quality and method of cutting were provided for. If the land should not provide enough white pine, of the required sizes, the deficiency was to be made up of Norway and smaller white pine of the largest attainable size at six dollars. Some white ash and basswood was also allowed for at fixed rates. Payments were to be made as follows: $2800 in supplies at cost in Bay City; $1500 stumpage was to be paid to Mason, Luce & Co.; $4500 in cash from time to time as the work progressed, until delivery, and the balance in 3, 6 and 9 months from delivery. The bill of sale from Mason, Luce & Co. of the timber was to be transferred as collateral security. No security was to be given by Evans, Kilmaster & Co.

The replevin suit was brought in August, 1876. The chattel mortgage was made March 29, 1876, and assigned May 30, 1876. The sale by Proper to Mrs. Gavigan was made August 8, 1876, a few days before suit.

The testimony for plaintiffs below, and some of the other testimony was in the form of copies of testimony given previously in another case wherein Proper had been tried for the larceny of the oxen and acquitted.

The testimony seems to have been uncontradicted that Henry Kilmaster consented to have the oxen sold, and the proceeds applied in paying the men employed by Pinkham. If the record is correct, it is difficult to see how this question could have been treated as an open one before the jury; and it is not disputed that the oxen were released by Pinkham to Proper for the purpose of paying such debts, some of which Proper assumed to represent, and for which he had seized the property.

As much of the case seemed in the opinion of the court below to have turned upon the transaction between the firm of Pinkham & Flemming and that of Evans, Kilmaster & Co. at the time of the furnishing of the oxen, the nature of that transaction becomes material here, in one view of the case. Flemming testifies distinctly that they were furnished

as supplies. The only testimony to the contrary is Pinkham's. His version amounts to this: He dealt with the horses and oxen in various ways as if he owned them, made some sales and mortgages, and made other dispositions such as an owner would, but claims he did not own them. He says in substance that the oxen were bought to do the lumbering job, within a few days after the contract was made, and states—"Kilmaster was with me at the time for the purpose of helping me to buy supplies, and get some teams for me. We saw the cattle and liked them, and he bought them for me to get out timber for the company." "The cattle were not sold to me. They were furnished to me to be mine when paid for. They were to belong to the company until paid for." There is some other testimony of the same witness, not changing this in any material way.

This testimony, if believed by the jury, would indicate that the purchase of the oxen was entirely independent of the lumber contract. The witness does not swear that the consideration entered into any of the lumber arrangements, or in any way changed the obligations of the written contract. It is left in doubt whether Pinkham, on this theory, acted on behalf of Pinkham & Flemming or individually, and there is no evidence which would indicate whether such a purchase outside of the lumber contract would have been within Pinkham's authority. Moreover it does not appear what price, if any, was to be paid for the oxen, or when or how it was to be paid. Pinkham's testimony fails entirely to show what the bargain was, which he asserts, and, consequently, what were the rights of the various parties under it. For the purposes of the questions before us it is chiefly important to note that his testimony tends to show that if not regarded as supplies the oxen had nothing to do with the lumber contract. He is the only witness whose testimony bears in that direction.

Several requests to charge were made and refused, the purport of which was that, if the oxen were advanced under the written contract, they belonged to Pinkham & Flemming;—and further that the question of property depended

on the intention of the parties at the time of the transfer, to be gathered from the contract;—that under the contract plaintiffs below were bound to make advances in cash and supplies, and no lien would arise for such advances as against the cattle.

Upon the first of these propositions, which bore directly on the main issue, and on which definite instructions should have been given, the request was correct. The supplies and other advances to be furnished were in the nature of advance payments and when furnished belonged absolutely to Pinkham & Flemming. Upon this point it is claimed by defendants in error the court did charge substantially as requested.

There is a little difficulty in determining how far this is so. In an early part of the charge, the court instructed the jury that there was nothing in the written contract which retained in Evans, Kilmaster & Co. the title to any supplies furnished. But before giving any further directions on this matter the court referred at length to the claims of the plaintiffs below upon several points in the case, and instructed the jury concerning the chattel mortgage. Then referring also to defendant's claim, the court proceeded to tell the jury that it was a question for them to determine "whether there was any understanding or agreement between Pinkham & Flemming and the plaintiffs in this case, subsequent to this written agreement, by which the plaintiffs were to retain the general ownership of these cattle until such time as they were paid for by Pinkham & Flemming. If you should so find that there was such an understanding and agreement between Pinkham & Flemming, or between Pinkham for Pinkham & Flemming and the plaintiffs in this case, that the plaintiffs were to retain the general ownership of the property until such time as the property should be fully paid for by Pinkham & Flemming, and if you should find that Pinkham & Flemming did not pay for the cattle, then your verdict would be for the plaintiffs in the case; unless you should find that the plaintiffs, by some act of theirs afterwards, constituted Mr. Pinkham an agent, or in some way gave him authority to sell these cattle," etc. Upon a repetition of the request for a charge

that "if the oxen" were furnished under this written contract for the "*supplies*" they became the absolute property of Pinkham & Flemming, the court refused it, saying plaintiffs had a right to argue to the jury what conversation was had between Pinkham and Kilmaster, and when; and further that if not treated as part of the supplies within the meaning of the written agreement, either of the parties could make a contract concerning them. Further language was used of similar import.

There seems to have been a misapprehension as to the points presented, and some confusion as to what had really been testified. The advances to be made under the written contract were not confined to "supplies," in any technical sense, but included $4500 in addition, to be advanced from time to time. Any advances, whether in cash or in property, would become the property of Pinkham & Flemming. But further than this, it is to be observed that the case was treated as if there had been evidence of some modification of the written contract concerning advances. We find no evidence tending to show that, if these oxen were furnished under any different understanding, it had anything to do with the lumber contract. If furnished conditionally, the oxen were to be paid for specifically, and there is nothing to show that this payment was to be made out of the lumber, or charged against it. And the jury were allowed to inquire whether the oxen had been paid for, when there was no testimony concerning their price whatever. If there was any such agreement as Pinkham averred, there was nothing by which any one could find out its terms, beyond the single one that it was conditional. It seems to us that the jury were not instructed in such a way as to give them the proper means of judgment.

The court properly declined to tell them the continued possession of Pinkham & Flemming created of itself a presumption of ownership to be rebutted by a preponderance of evidence. This was true as an abstract proposition, but when the testimony was put in on both sides as to the title and its origin, the question of possession became unimportant as a

presumption of title, and had little bearing except possibly as one of the circumstances marking the transaction.

The court erred in charging that if Proper had no title and if the property belonged to plaintiff they should recover. There was evidence tending to show that the property was disposed of by consent or direction of Henry Kilmaster, and Proper in that case had power to sell whether owning it or not. It was also error to refuse the instruction that, if Pinkham owned the property, his release to Proper was equivalent to a sale. Unless we have misunderstood the testimony there seems to be no contradiction concerning the authority given to Pinkham to sell, whether as owner or otherwise, and if so, the purchaser could not be required to see to the application of the purchase money by Pinkham or Proper, although the sale appears to have been made in fact for the purpose authorized. The charge given on this subject and the refusal of the one asked, left the jury to hold Mrs. Gavigan's title to depend on Pinkham's good faith.

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

The other Justices concurred.

THOMAS TOOHEY v. ANDREW W. COMSTOCK ET AL.

ANDREW W. COMSTOCK ET AL v. THOMAS TOOHEY.

Agreement to pay wages of another's workmen—Authority to increase wages.

A firm of lumbermen who had made a logging contract wrote to the jobber with whom it was made that he might say to his men and show them "that we here agree to pay every man in your employ to the last dollar that may be due him, that stays by you until you put in your logs." *Held,* that this was a promise made directly to the employees; that the firm made the jobber their agent to bring it to their notice, and that any of the workmen who accepted its terms by serving, unless sooner discharged, until the logs were put in, could

maintain an action upon it against the firm for so much of their wages as had fallen due before the date of the letter as well as for what fell due after. And after its date the jobber could increase the pay of the workmen, and represented the firm for that purpose.

Error to Alpena. Submitted Jan. 27. Decided April 13.

Assumpsit. Both parties bring error. Reversed.

Kelley & Clayberg for Toohey. A promise to pay the debt of another is an original promise if based on an independent consideration: *Leonard v. Vredenburgh* 8 Johns. 29; *Farley v. Cleveland* 4 Cow. 432; *Mallory v. Gillett* 21 N. Y. 412; *Dyer v. Gibson* 16 Wis. 557: *Wyman v. Goodrich* 26 Wis. 21; *Dearborn v. Parks* 5 Greenl. 81; *Hilton v. Dinsmore* 21 Me. 410; *Todd v. Tobey* 29 Me. 224; *Clifford v. Luhring* 69 Ill. 401; *Nelson v. Boynton* 3 Met. 400; *Walker v. Penniman* 8 Gray 233; *Curtis v. Brown* 5 Cush. 492; *Alger v. Scoville* 1 Gray 391; *Jones v. Palmer* 1 Doug. (Mich.) 382; *Bonebright v. Pease* 3 Mich. 318; *Thomas v. Dodge* 8 Mich. 51; *Brown v. Huzen* 11 Mich. 221; *Warnick v. Grosholz* 3 Grant 234; *Brown v. George* 17 N. H. 128; *McKeenan v. Thissel* 33 Me. 368; *Mathews v. Chrisman* 12 S. & M. 595; *Watkins v. Perkins* 1 Ld Raym. 224; but see *Bresler v. Pendell* 12 Mich. 224; *Hite v. Wells* 17 Ill. 88; *Brown v. Weber* 38 N. Y. 187; such a promise covers wages due when made: *Vinal v. Richardson* 13 Allen 521.

Turnbull & McDonald for Comstock et al. The agreement sued upon was not an original undertaking, but a collateral one: *McDonald v. Bewick* 43 Mich. 438; *Waldo v. Simonson* 18 Mich. 345; *Eddy v. Roberts* 17 Ill. 505; *Larson v. Wyman* 14 Wend. 246. A declaration on an undertaking as original will not sustain a recovery if it be a collateral promise: *Lyon v. Chamberlain* 41 Mich. 119; *Welch v. Marvin* 36 Mich. 59.

Marston, C. J. Toohey recovered a judgment in the court below, but being of opinion that he was entitled to a

still larger amount, of which the charge of the court deprived him, he brings the case here on writ of error.

The defendants below also being dissatisfied with the judgment, but for a different reason, also ask a review on writ of error. Both parties agree only in asking a reversal of the judgment and for a new trial, and so seldom have we an opportunity to please both parties, that we must grant their joint request, reverse the judgment and order a new trial.

Bewick, Comstock & Co. let to D. A. Kennedy the contract of putting in for them a quantity of logs. Kennedy employed Toohey to work for him, and also employed certain other parties and a part of the work was performed. Toohey seeks to recover upon the following instrument:

"ALPENA, MICH., May 10, 1878.

Mr D. A. Kennedy Wilson Township Mich.

I am told that there are some fears expressed by some of your men, that they will not get their pay. You may say to them all, and show them, or any of them, that we here agree to pay every man in your employ, to the last dollar that may be due him, that stays by you until you put in your logs.

BEWICK, COMSTOCK & Co."

This instrument was brought to the knowledge of Toohey and he continued to work and gave evidence tending to prove, that he thereafter looked to the defendants for his pay. Under the charge of the court the plaintiff was not permitted to recover for the work done previous to May 10th and this is the main cause of his complaint.

Defendants claim that the instrument sued on was either a mere power authorizing Kennedy to bind them, a guaranty, or an original undertaking between defendants and the men in Kennedy's employ on May 10th, and that under either view there were difficulties in the way of plaintiff's recovery under the pleadings, as he had declared upon the instrument as an original undertaking.

A similar case was in this court once before and is reported in *McDonald v. Bewick* 43 Mich. 438.

A number of authorities have been cited in the present case, in some of which instruments supposed to resemble the

one here sued upon were construed. A layman of ordinary intelligence would have no trouble in construing the instrument sued upon. It contains a very plain proposition. Bewick, Comstock & Co. were interested in having the logs put in; the men at work in putting them in were afraid Kennedy would not pay them; this coming to the knowledge of the log owners, the instrument in question was written, to be shown to the men, and promising to pay them, or those who would stay until the logs were in. Who can doubt but that the men would, on seeing, or hearing read this instrument, and knowing the responsibility of the signers thereto, look upon it as a promise to pay them their wages—not for future work only, but "to the last dollar that may be due" them when the work was finished, as no payment was contemplated until then. This must have been what the men would understand, and this is just what the parties making the instrument intended they should understand. Why then should the defendants not do as they agreed? What rule of law is violated in holding them bound by their obligation? Courts may refine upon such agreements, at the expense of justice, and render them a mere snare to mislead men.

To say that these men can have no right of action because their names did not appear in the instrument would be but to render it nugatory as to them. This was not a promise made to some third persons for their benefit. It was made to the men directly, and Kennedy was made the agent of defendants, to bring this to the attention of the men, and upon this being done all who accepted its terms by remaining until the logs were put in, unless sooner discharged by defendants or their agent Kennedy, would have a right to recover. In this way and none other can full effect be given to the terms of the instrument, and to what must also have been the understanding of all the parties. We are also of opinion that Kennedy had power to increase the rate of wages to be paid the men after the 10th of May. He was in charge of the work and represented the defendants.

The ruling of the court below was more favorable to

defendants than we think was warranted, and not sufficiently so to the plaintiff.

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

The other Justices concurred.

DAVID RODMAN v. DANIEL NATHAN.

Replevin—Rights of parties to a voluntary assignment—General and special ownership—Contradictory verdict.

An assignee for the benefit of creditors is the general owner of the assigned goods until his trust is fully performed, and then the resulting trust restores to the assignor the general ownership in what is left. But during the trust, the assignor has no lien upon the goods, or special property in them.

A debtor, who had made an assignment, afterward resumed control of the goods and the assignee brought replevin for them. *Held* that losses by the assignee's negligence could not be charged on him in this or in any suit at law.

An accounting in respect to a trust can present questions of losses caused by the trustee's negligence only in a court of equity.

A finding in replevin that plaintiff has the general property but that defendant did not unlawfully detain the goods is contradictory and cannot sustain a judgment in a case where it is impossible that a special property should co-exist with the general ownership.

Error to Alpena. Submitted Jan. 27. Decided April 13.

REPLEVIN. Plaintiff brings error. Reversed.

Turnbull & McDonald for plaintiff in error. An assignment for the benefit of creditors divests the assignor of his entire interest: Burrell on Assignments 399; *Briggs v. Palmer* 20 Barb. 392; *Pettit v. Johnson* 15 Ark. 55; while

the deed of trust is operative the trustee holds the whole title: *Steevens v. Earles* 25 Mich. 44.

Kelley & Clayberg for defendant in error.

Cooley, J. In December, 1877, Nathan executed and delivered to Rodman as trustee a general assignment in trust for his creditors. The property assigned consisted of a stock of merchandise, and Rodman proceeded to dispose of it in the store where it was when the assignment was made, retaining Nathan as his clerk. In August, 1878, Rodman undertook to discharge Nathan from his service, whereupon the latter assumed the right to control, and declared the assignment at an end. As Nathan then had physical possession of the goods, Rodman replevied them, and they were appraised at $2824.13.

On the trial of the replevin suit, the questions litigated appear to have been, whether Rodman as assignee had honestly and fully discharged his duty as trustee under the assignment, or whether he had been negligent and losses had been suffered by the trust fund in consequence. The inquiry thus assumed as wide a range as it would have done had the case been a suit in equity for an accounting. There was no showing that all the debts had been paid. The circuit judge in charging the jury instructed them in substance that the assignment made the assignee the general owner of the goods until the time had arrived when he ought to account, but that if they should find that the debts, legal charges and disbursements had been paid, and that there still remained in the assignee's hands moneys and property derived from the assignment, they should then find that the assignor had a special interest in the property to the amount so found, with interest from the time when the accounting should have taken place.

This instruction seems to have been given on the supposition that the case was within Comp. L. 1871, § 6754, which provides that "when either of the parties to an action of replevin, at the time of the commencement of the suit,

shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages, in all cases arising under this chapter; and the finding of the jury, or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties."

It was a mistake to suppose this statute had any application to the case. The assignor had no lien on the property assigned, and neither did he have any special property therein. The assignee was general owner until the trust had been fully performed. When the trust was discharged the assignor would become entitled to have any surplus restored to him, not because of any special property, but because the resulting trust then restored to him his former rights as general owner. But in a suit at law questions of negligence in the assignee and of consequent loss could not be gone into with a view to punish the assignee therefor by charging losses upon him: an accounting in respect to a trust which can present such questions, can only be had in a court of equity.

But the jury rendered a verdict which was not only not warranted by the charge but was inconsistent with itself. The verdict was that Rodman was general owner of the goods, but that Nathan had a special property therein to the amount of one thousand dollars. The court accepted this verdict, and gave judgment that Nathan recover the sum named. Of course if Rodman was general owner, he was such by virtue of the assignment, and because the trust under it was not yet discharged. Nathan under such circumstances could have only a wholly contingent and uncertain equitable right; a right to have a surplus returned to him if one remained after the debts and all expenses of the trust had been paid: he could have no present legal right whatever. A finding, therefore, that Rodman was general owner would be inconsistent with any right of Nathan to recover anything, and a finding that Nathan was entitled to a certain sum would be equally inconsistent with the supposed continuance of Rod-

man's general ownership. Indeed we cannot understand this verdict unless we suppose the jury understood that if the assignee had in his hands property more than sufficient for the payment of the debts and charges, the assignor was entitled to a judgment for the surplus. But if he could be so entitled at any time before the trust was performed, he would be entitled the moment the trust was created: and we need only suggest this to show how erroneous is any such supposition.

The plaintiff claims judgment in his favor on the verdict; and if the finding of a general property in him stood alone, he would be entitled to it. But the verdict also finds that the defendant did not unlawfully detain the property; and in this contradictory finding one party is no more entitled to demand judgment than the other.

The judgment which was rendered in the circuit court must therefore be reversed with costs and a new trial awarded.

The other Justices concurred.

GEORGE R. NICHOLSON v. FRANK H. DYER.

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Replevin—Plaintiff's title—Credibility of witness.

Execution was levied on an express package of money sent by the judgment debtor to an agent of his firm to repay advances made by the agent in the interest of his principals. The agent brought replevin against the sheriff. *Held* (1) that as between these parties the question of defendant's right to seize money in the hands of the express company was immaterial; (2) that if the money was mutually meant as payment, plaintiff could recover, but if it was meant to be used by the agent in the principal's business, he could not; (3) that defendant was not concluded by the concurrent testimony of the consignor and the consignee that it was a payment, but was at liberty to show the contrary if he could. Nor was the jury bound by the plaintiff's version.

It is the jury's duty to judge of the credibility of witnesses as well as to form their beliefs from the facts and circumstances shown.

In replevin it is competent to disprove plaintiff's title to the goods, and one way to do this is to show that some one else owns them.

A plaintiff in replevin cannot be allowed to prevail upon a ground which he has virtually repudiated by resorting to that form of action, as by relying on his right as consignee.

The wisdom of a verdict is not for the appellate court to consider.

Error to Alpena. Submitted Jan. 27. Decided April 13.

REPLEVIN. Plaintiff brings error. Affirmed.

Turnbull & McDonald for plaintiff in error.

Kelley & Clayberg for defendant in error. Title to property sued for in replevin is a question for the jury: *Merch. Nat. Bank v. Bangs* 102 Mass. 291; *McKay v. Ross* 40 Mich. 548; where a transfer of title is in dispute the intention of both parties to it must have concurred to pass title: 2 Greenl. Ev. § 525; *Pratt v. Parkman* 24 Pick. 45; *Wakefield v. Lithgow* 3 Mass. 249; *Gurney v. Howe* 9 Gray 404: *Crane v. Pratt* 12 Gray 348: Benj. Sales § 710.

GRAVES, J. March 15, 1879, Charles E. Mason sent by the American Express Company from Detroit a package of $800 consigned to the plaintiff at Alpena. The defendant was then sheriff of Alpena county and held for collection an execution from the circuit court of that county in favor of Bradford & Cady and against said Mason and one Luce for $632.82, and as the wagon of the express messenger was in front of the postoffice in Alpena on its way to the express office the defendant discovered the package lying on the seat by the driver and immediately seized it on the execution. This was in the afternoon of the 19th of March. He opened the package the next morning and applied so much as necessary of the contents to satisfy the execution, and offered the remainder to the plaintiff who refused to accept less than the whole amount and immediately brought replevin.

No seizure was effected on the writ of replevin, and under the rulings of the circuit judge the plaintiff failed to recover. He complains that errors were committed to his prejudice. The objections stated are very numerous but many of them are irrelevant, and most of the others are so plainly without merit that they are not pressed.

It is expedient to bear in mind the relations of the parties and the character of the action. It is not between the consignor and consignee nor between either of them and the carrier. Neither is it founded on the contract for carriage. But it is a case of replevin where the consignee has brought suit as owner for the possession against a stranger who has dispossessed the carrier. The action is avowedly based on the right of property and possession.

Mason & Luce carried on business at Alpena, and the plaintiff, as he testified, did "pretty much all of the office business and a great deal of outside business." He was their agent. There was evidence tending to show that he had advanced from time to time for the concern during the preceding winter something more than $800, and that it was arranged between him and Mason that the latter should send him the money by express to repay such advances, and that the package in question was forwarded pursuant to that arrangement. There was also evidence tending to show that the money was forwarded to be received by the plaintiff as the agent of Mason & Luce, and not as his money, and other evidence tending to negative his ownership.

From what has been said it is quite apparent that the question made prominent in the plaintiff's brief relative to the defendant's right to seize money on execution when in the charge of an express company and in the course of being carried from the consignor to the consignee is in no manner involved and is altogether immaterial. The controversy is not between the execution debtor, or one in his shoes, and the officer. The position taken and maintained by the plaintiff is that on the consignment and dispatch of the money it became his property and was at his risk. He insists that it belonged to him exclusively at the time the defendant made

the seizure, and the establishment of this proposition he makes essential to his recovery.

Now if he did not own it, the question of its liability to execution is unimportant. His want of interest is fatal on his own theory. On the other hand if he did own it, the question is equally uncalled for. Because the only execution connected with the transaction was not against him nor leviable on his property. Therefore the point concerning the legal practicability of taking money on execution whilst in such custody is to be laid out of the case. The event of the action could in no manner be influenced by it. As already observed the vital question which the jury had to settle was whether, at the time the defendant seized it, the money did or did not belong to the plaintiff. But in order to reach a conclusion on that inquiry it was necessary they should consider not only the evidence by the plaintiff that he was the owner, and the evidence of others of his admissions that he was not; but also the circumstantial grounds of inference that the package was dispatched as the money of Mason, and in order that it should be received by the plaintiff and disbursed in his character of agent in the affairs of Mason & Luce.

If the latter explanation was found to be the true one the necessary consequence was that it indirectly but conclusively negatived the plaintiff's ownership and right of action. It was no less the duty of the jury to judge for themselves in regard to the credit of witnesses than it was to look into their own minds for the state of belief which was generated by the facts and circumstances. There was nothing to which the law had assigned a fixed evidentiary effect, and which was consequently removed out of the sphere of moral reasoning. Without withholding from the jury anything pertinent, the judge explained the claims made on each side, and submitted the case on the only issues which were involved in it.

The main part of the charge was as follows:

"The defendant's theory of this case is that on account of the relations which existed between Mason, Luce & Co. at the time of making this affidavit in replevin, and for sometime previous to that time, that this money was not sent at

that time for the purpose of paying Nicholson, but was sent for the purpose of being used in the business of the firm, in paying off the men; and they offer in evidence the admissions and declarations of Nicholson, as bearing on the probabilities of the case as to whether Nicholson was really the owner of that money at the time when he brought this action of replevin, or whether it belonged to Mason, Luce & Co.

"The whole testimony in the case goes to you together, gentlemen. You will consider it all for what you deem it to be worth, and after having fully considered the evidence in all its bearings in the case, you will then ascertain what impression this testimony, taken as a whole, has made on your minds. If the impression made on your minds by the testimony in this case, taken as a whole, is that Mr. Nicholson, at the time he swore out this affidavit in replevin, was the owner of the money, that it was really sent to him by Mason for the purpose of paying the debt which Mason, Luce & Co. owed him, then he will recover in this action, in the manner in which I will hereafter state. If, however, you think the probabilities are the other way, then he will not recover anything in this action. For the purpose of informing you further in regard to the law of this case, as I understand it, I will give you some of the requests to charge.

"But before giving you the requests I will give you the law upon one of the points in the case.

"If the jury find that Mason was owing plaintiff and it was understood between them that Mason should express or send this money to him for the purpose of paying the debt which was then owing by Mason, Luce & Co. to Nicholson, and that Nicholson so understood it and assented to it being sent by express in the manner in which it was sent for the purpose of paying the Nicholson debt, and the jury find that it was thus sent, the jury will find for the plaintiff."

It seems to be claimed that as there was evidence for the plaintiff, and Mason & Luce were owing the plaintiff an amount equal to or exceeding the money sent, and that it was agreed between Mason and the plaintiff that it should be sent by express, and that the package in question was dispatched to the plaintiff's address accordingly, it was conclusive on the defendant that the money belonged to the plaintiff.

Here, as elsewhere in the case, the issue made by the plaintiff is to be kept in mind. As before stated he rests his right to recover on the ground of ownership. And on this issue

it was certainly competent to disprove his title, and as one mode of doing so it was competent to show that the money was owned by Mason or by Mason & Luce. If by either it was not the plaintiff's money and his action of replevin for it was not maintainable on his own theory. This seems not to be questioned, but the point relates to the proper mode of proving their ownership and to what is claimed to be the exclusive nature of certain *indicia* of title. The objection seems to be that the form given to the transaction by Mason and the plaintiff was, as between the plaintiff and defendant, absolutely controlling and decisive that the plaintiff was in fact the owner.

Whatever the effect might have been in a controversy between the plaintiff and Mason, or in one between the carrier and either of them, it is a great mistake to suppose it was necessarily conclusive in this action against Dyer. He was not concluded by the appearance which they had given to the business, but was wholly at liberty to satisfy the jury, if he could, that what was set up as a transfer of Mason's property in the money to the plaintiff was nothing more than a dispatch of the funds by Mason to the plaintiff as his agent, in order that they might be disbursed by the latter in the business and for the use of the principal. There is no question about the rule. 2 Whar. Ev. § 923 and notes.

A further consideration must be noticed. The objection assumes that the version given by Mason and the plaintiff was binding on the jury, and that nothing remained except to infer from it conclusively that the plaintiff owned the money. Of course there is no warrant for any such theory. There was evidence directly opposed to their claim that the package belonged to the plaintiff, and there were surrounding circumstances of an unfavorable tendency which might naturally have influence.

The observations of Mr. Justice Cooley in *Moliter v. Robinson* have a close application. He said: "The jury were under no obligation to believe the plaintiff's statement, and unless it convinced their reason, they were entirely at liberty to reject it altogether. They must take the evidence with

all its surroundings; and often other things which go to characterize a transaction are more convincing than positive evidence of any single witness, especially if an interested witness." 40 Mich. 200. Mr. Mason's connection with the case does not avert the principle.

Several criticisms are urged against the portion of the charge quoted; but they are not approved. They either proceed on misconception or rest on verbal refinements which have no importance. The charge was adapted to the facts, and on the whole was fair and the jury could not have been misled by it.

A suggestion appears in the brief that if the money belonged to Root, as the plaintiff said it did, according to the testimony of one or two witnesses, the action was still maintainable by Nicholson in his character of consignee. It is a sufficient answer that this would be to allow him to take contradictory positions and to prevail finally upon a ground which he has never taken but has virtually repudiated throughout. To repeat what has been noticed more than once already, his case, as maintained by his own oath and that of his chief witness Mr. Mason, is that he sues as exclusive owner of the entire interest. It is needless to say more on this point and there is nothing further that demands discussion.

The exceptions to evidence noticed in the brief have no merit. Whether the jury decided wisely is not a matter of inquiry here. They must have found that the package was not the property of the plaintiff, and that is decisive.

There being no error the judgment should be affirmed with costs.

The other Justices concurred.

MONT VERNON OLMSTEAD ET AL. v. WM. MATTISON.

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Validity of chattel mortgage—Delay to other creditors.

Chattel mortgage security is not invalidated by the mere fact that the creditor knows the debtor is in failing circumstances and that the intended effect of giving the security will be to delay or defeat other creditors in the collection of their dues.

Where a chattel mortgage security largely exceeds the debt, the fact may be considered as tending to show that the creditor's intention, in taking it, is not in good faith to secure himself, but to hinder, delay or defraud other creditors.

Error to Ionia. Submitted Jan. 27. Decided April 13.

REPLEVIN. Defendants bring error. Reversed.

Lemuel Clute for plaintiff in error. A purchase from one's debtor for the purpose of obtaining payment of an honest debt, is not made void by the fact that the debtor intends to hinder or defraud other creditors thereby, unless the purchaser participates in the fraudulent intent: *Beurmann v. Van Buren* 44 Mich. 496; *Hill v. Bowman* 35 Mich. 191; *Loomis v. Smith* 37 Mich. 595; *Jordan v. White* 38 Mich. 253; *Dudley v. Danforth* 61 N. Y. 626; *Blodgett v. Chaplin* 48 Me. 322; *Lyman v. Cessford* 15 Ia. 229; *Drummond v. Couse* 39 Ia. 442; *Van Patten v. Burr* 52 Ia. 518.

Wells & Morse and *John Toan* for defendant in error. A chattel mortgage is void as to creditors if delivered and received with intent to hinder or defraud them: *Wright v. Irwin* 35 Mich. 347; *Pierce v. Rehfuss* id. 55; *Ulrich v. People* 39 Mich. 245; *Campau v. Dubois* id. 274; *Coots v. Chamberlain* id. 565; a mortgagee is made a participator in the fraudulent intent by his knowledge of it: *Stearns v. Gage* 79 N. Y. 102; *Jones v. Hetherington* 45 Ia. 681; *Zimmerman v. Heinrichs* 43 Ia. 260; *Preston v. Turner* 36 Ia. 671; *Steele v. Ward* 25 Ia. 535; *Bridge v. Eggleston* 14

Mass. 249; *Foster v. Hall* 12 Pick. 89; *Miller v. Bryan* 3 Ia. 58; *Adams v. Foley* 4 Ia. 44; *Hughes v. Monty* 24 Ia. 499; a sale by way of security is void if there is the fraudulent intent on both sides, even though full value is paid: *Chapel v. Clapp* 29 Ia. 194; *Wilson v. Horr* 15 Ia. 490; *Davenport v. Cummings* id. 219; a sale made for the double purpose of securing an actual debt and of preventing other creditors from attaching the goods, is void: *Crowninshield v. Kittridge* 7 Met. 522; *King v. Hubbell* 42 Mich. 597.

MARSTON, C. J. The plaintiffs in error received a bill of sale of certain personal property from Henry C. Keyes, to secure them against certain liabilities they had incurred, and which they had duly filed as a chattel mortgage. Mattison as sheriff, under certain writs against Keyes, levied upon the property. His right to levy upon and sell the mortgagor's interest in the property was not questioned, but his right to levy upon and sell in parcels was denied. Upon the trial the *bona fides* of the security given was questioned. The court charged the jury upon this branch of the case as set forth in the margin.*

We are of opinion that the authorities will not sustain the charge thus given. In very many cases, where security is

*I come now to the point as to whether this was or was not a good and valid chattel mortgage. It is claimed by the plaintiff that all that is necessary for them to establish is the fact that Keyes acted fraudulently. It is claimed on the part of the defense that the jury must be satisfied that this bill of sale and chattel mortgage was an arrangement between the parties, and that they both acted fraudulently. That Keyes meant to cheat and defraud his creditors, or hinder and delay his creditors in their collections, and that Olmstead and Martin knew about it. That is the claim on the part of the defense, and is correct.

Then comes the question whether you are satisfied that Keyes acted fraudulently, intending to cheat and defraud or hinder and delay his creditors. If you find that fact established, then comes the question whether they were aware of that fact. Whether the conduct of Keyes, the situation of his property, the situation of his indebtedness, what he did as to covering up his property, was known to them. Or whether the facts and circumstances were such in relation to the matter, within their knowledge, that would reasonably put them upon their guard or upon their inquiry. For instance, these defendants may have had a claim against Keyes for a thousand dollars, and Keyes may come and slip into their hands a chattel mortgage and not say a word about it, upon

given, the mortgagee may know or have good reason to believe that his debtor is in failing circumstances. Indeed such knowledge may be the very cause of the creditor's insisting upon security. And in all such cases the creditor may be fully aware of the fact that the effect of the security given him will be to hinder and delay if not, indeed, defeat other creditors in the collection of their just claims, and that the debtor in giving the security must, indeed, so intend. All this however does not take away or deprive a creditor from insisting upon payment or security of an honest existing indebtedness—or to secure him against endorsements or other liabilities incurred. The rule in this case laid down would put the honest, vigilant creditor on an equal footing with the negligent, and such has not been the aim of the law. It is true that the value of the property upon which security is given may be out of all proportion to the debt secured, and this would be a circumstance that could be considered by the jury, and from which, with other facts, they might find that the creditor's intention was not in good faith to secure himself, but to hinder, delay or defraud others. Such however was not the theory upon which this case was submitted to the jury. See *Allen v. Kinyon* 41 Mich. 285; *Loomis v. Smith* 37 Mich. 595.

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property that is worth ten thousand dollars, and chattel mortgage property to that amount simply to secure an indebtedness or a liability of a thousand dollars. That would be a pretty large amount of property to place in that shape for that purpose, and it would be a circumstance which, it seems to me, should put them upon inquiry. If they should find or know that he had been putting mortgages upon all his real estate, and that he was largely indebted, if there were any facts and circumstances which would indicate to a reasonable man that he was in failing circumstances and covering up his property, of course it would depend upon the strength of the facts and what they were. They might be held and considered to have notice of facts that should put them upon inquiry, and the question will arise from the entire testimony which the counsel upon both sides have referred to so often that it is unnecessary for the court to do so. But the entire case must be considered by the jury to decide as to whether in receiving and taking this chattel mortgage they understood what Keyes was about. If they had sufficient notice that to reasonable men would be information that he was engaged in a fraudulent transaction, they would be parties to it. And if they should receive a bill of sale or chattel mortgage under such circumstances, it would be invalid, as I have before stated. If invalid, then a proper levy upon a portion of that chattel-mortgage property would be good.

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

The other Justices concurred.

GEORGE HOSFORD v. DELIA M. KANOUSE.

Action on common counts for money received to plaintiff's use.

An action on the common counts for money had and received to the plaintiff's use from the estate of plaintiff's father, is supported by evidence that the father had assigned his property to another person in consideration that the latter should take care of his children; that the assignee had transferred the trust to defendant and paid him a certain sum of money for the children, defendant agreeing to pay each its proportion on becoming of age; and that he had not done so and plaintiff had brought suit for her share on learning the facts.

Error to Ionia. Submitted Jan. 27. Decided April 13.

ASSUMPSIT. Defendant brings error. Affirmed.

Lemuel Clute for plaintiff in error.

A. B. Morse for defendant in error.

COOLEY, J. As we view this case the questions which arise upon the record are almost exclusively questions of fact.

Mrs. Kanouse was plaintiff in the court below, and sought to recover on the common counts for money had and received by Hosford from the estate of her father to her use. Her case was that some thirty-five years before suit was brought, and shortly before his death, her father made an arrangement with one Richardson whereby what property the father had was assigned and transferred to Richardson in consideration of the agreement of Richardson that he would take care of the assignor's three minor daughters of whom plaintiff was

one; that Richardson for a time undertook to carry out his agreement, but in 1854 transferred the trust to Hosford, and paid him for the children one hundred and fifty dollars; Hosford agreeing to pay to each of them the sum of fifty dollars on her coming of age; that the facts were concealed from the children until recently, and that plaintiff brought suit as soon as they came to her knowledge.

In the circuit court the plaintiff recovered judgment, and the defendant insists that there was no evidence to warrant it.

We are of opinion that the facts above recited make out a case if there is evidence which warrants their being found. The receipt of money by Hosford from Richardson under the circumstances detailed was equivalent to a receipt from the father's estate, and might properly be described as a receipt from the estate in the pleadings. We are also of opinion that there was some evidence to go to the jury in support of every material fact.

Many rulings of the circuit judge were excepted to, but the most of them were fairly within the limits of judicial discretion, and no one seems to us clearly erroneous.

The judgment will therefore be affirmed with costs.

The other Justices concurred.

JACOB DARMSTAETTER v. JOHN F. MOLONEY.

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Municipal taxation—Assessor's certificate—Amendment by implication.

Where specific regulations in a general law are adopted in a local law by words of general reference, subsequent changes therein are not necessarily adopted also, unless the intent to do so is clear.

A municipal charter invested the assessor with the powers and duties of a supervisor. The general tax law prescribed a form of certificate to be appended by supervisors to tax-rolls. This form was afterward amended. *Held*, that whether the assessor was required to add the certificate originally required, or not, his failure to make it correspond to the amended form did not invalidate the roll.

Where the assessor is a member of the board of review, and is the officer designated by law to present the assessment roll to the board, it does not need to be authenticated by his certificate.

A requirement that the board of review shall sign the assessment roll after correcting it, is substantially complied with if the board sign a certificate pasted to the roll and certifying that they have completed the review, correction and approval thereof.

Case made after judgment from the Superior Court of Detroit. Submitted January 27. Decided April 13.

ASSUMPSIT. Plaintiff had judgment below. Reversed.

Otto Kirchner for plaintiff, as to the signing, cited *Colby v. Russell* 3 Me. 227; *Sibley v. Smith* 2 Mich. 501; *Clark v. Crane* 5 Mich. 151.

F. A. Baker for defendant. The signing of a tax list is sufficient if the name is so attached as to show the intent to give it sanction: *Johnson v. Goodridge* 15 Me. 29; *Bangor v. Lancey* 21 Me. 472.

GRAVES, J. The defendant, an assistant receiver of taxes in the city of Detroit, levied on certain chattels of the plaintiff for city taxes assessed against him on personal estate and the plaintiff thereupon paid the taxes under protest and brought this action for their recovery back. The court decided in his favor and the defendant questions the judgment on a case framed under the statute. The right to recall the money is rested on what are claimed to be two fatal errors connected with the roll, and unless the plaintiff is able to vindicate one or the other of these objections his recovery cannot be maintained.

The first objection is grounded on a supposed defect in the assessor's certificate appended to the roll. In framing the certificate the assessor adhered strictly to the form, which was in force as a part of the general tax law at the time the city charter underwent full revision in 1857. Comp. L. 1857, § 806. He accordingly left out the statement superadded in the form given in the later general tax law (Comp. L. 1871,

§ 991) that the property was not assessed "at the price it would sell for at a forced or auction sale," and the plaintiff contends that in consequence of this omission the roll was invalid. He cites the provision of the revised charter of 1857 vesting the assessor with the powers and duties of a supervisor (§ 3, ch. 9, Laws 1857, p. 140) and then argues that it requires that the assessor shall now make the same certificate which the existing general law requires at the hands of a supervisor. And as tending to fortify this view he further observes in effect that in making the assessor liable in general terms to the same duties as supervisor the Legislature must have contemplated that a proper certificate would be necessary as a means of authenticating the roll to the board of review. The defendant's counsel encounters these propositions by saying that in respect to the incidents in the assessment and collection of *city* taxes the *charter* prescribes the course of proceeding, and in so doing requires no certificate whatever. Hence the circumstance that the assessor attached one not conformable to the general tax law is wholly immaterial.

I do not deem it needful to discuss the case on this theory. The facts do not require it. For the purpose of the present controversy it may be assumed that the plaintiff is correct in claiming that the charter of 1857 made it the duty of the assessor to append the same certificate which the general tax law required from a supervisor, and the investigation may then be reduced to the question whether the duty originally imposed in this respect has been changed so as to require a different certificate. The facts permit the case to be considered under the assumption stated, and without deciding whether any certificate is or is not necessary; because the assessor did certify in exact accordance with the form prescribed for supervisors in the general tax law which was in force in 1857.

Although not necessary in the view taken, it may be well to notice the idea of the plaintiff that there was occasion for a certificate at that time for the purpose of authenticating the roll to the board of review. It is only necessary to recur to

the composition of the board then provided for (§ 6, ch. 9, p. 141, Laws 1857) to see that there was no such necessity. The assessor was himself a member of the board and by tracing out the proceedings it will be seen that he was to be the official bearer of the roll to the board. Such was the regulation in the same act which originated the provision for vesting the assessor with the powers and duties of a supervisor. And whatever may be said as to what has now become needful in consequence of changes in the constitution of the board, there is no foundation for the argument that the provision was originally made with any view to the necessity for a certificate as a means of authenticating the roll to the board. Certainly the purpose of the provision cannot be explained on any such theory.

Proceeding on the assumption heretofore stated that the general terms in the charter included the duty to certify in the form which was then prescribed in the general tax law, and recurring to the question, the point presented is, whether the legislation which changed the general tax law in respect to the contents of the certificate changed *ipso facto* the operation of the charter and so altered the duty of the assessor as to require him to certify in the mode newly prescribed in the amended tax law, and an answer in the negative appears unavoidable. It being granted that the reference to the duties of supervisors embraced the duty to certify the tax rolls, the only construction fairly admissible is that it was limited to the duty then existing and understood, and did not contemplate that the assessor's duty should vary with the possible fluctuations in the general tax law.

The case falls under the rule that a piece of legislation for a particular city which adopts under general words of reference a specific regulation in a separate general law is not to be taken as adopting prospectively the future alterations in the provision of the general law so appropriated, unless the intent therefor is express or strongly implied. The case here is not aided by any proof of the existence of such an intent. The result is that the certificate which accompanied the roll was

not open to the exception taken to it, and the first objection to the authority to collect the tax cannot be sustained.

The other objection rests in the following charter provision: "The board, or a majority of them, having completed the review and correction of the assessment roll, shall respectively sign and return the same to the common council" (Laws 1861 p. 193), and the exception taken to the proceeding is that the roll *was not signed.* It appears in a statement of facts that a writing of the following tenor was drawn on a paper attached to the last page of the roll by paste, and "respectively signed" by the members of the board:

"*To the Honorable the Common Council of the City of Detroit:*

The undersigned, Board of Review of the city of Detroit, do hereby return in accordance with sec. 6, chap. 9, of the Revised Charter, the within annexed assessment roll of the ninth ward for the year 1879, the review, correction and approval of which they have completed.

A. SHELEY,
H. M. DEAN,
LEVI L. BARBOUR,
Board of Review."

Detroit, May 2, 1879.

The exact meaning of counsel in saying that this was not a signing of the assessment roll according to the requirement of the statute is not evident. If rightly understood the position is that the writing actually signed was a communication to the common council, and although pasted to the roll it was in point of sense a document separate therefrom, and that the signing on it was not operative on the roll. Whether this is the proper explanation or not, the objection does not impress one favorably.

No doubt the writing amounted to a communication to the common council. But what of it? It was a proper communication. By means of it the board communicated the roll and also the fact of completion of the review and correction of it. It was mechanically attached to the roll, and it was likewise joined to it in sense by reason of its nature and contents. Had the board done nothing more on the paper than to put their names on it, no one would venture the objection that such a signing could not

be deemed a signing of the roll to which the paper was pasted, and yet what was written over the signatures detracted in no way from the effect. The signing was no less applicable to the roll than it would have been if the paper had been signed in blank. But the writing increases the evidence of connection between the signatures and the roll. The written references co-operate with the other circumstances in establishing the applicability of the signatures, and there is no room for contending that they were not made to the roll.

The conclusion is therefore that the objections relied on by the plaintiff as entitling him to recover back the tax are not valid and that the judgment should be reversed and one entered here for the defendant with the costs of both courts.

The other Justices concurred.

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ADAM SCHEHR v. CITY OF DETROIT.

Private alleys—assessment of benefits.

Act 201 of 1877 is of doubtful constitutionality in that while its title provides only for taking private property for the *public* use and benefit, and for the opening of highways, streets and alleys, by the cities and villages of this State, the act itself also authorizes the opening of *private* roads and alleys. The title would have been sufficient, however, for alleys for the mixed use of the public and private individuals.

Whether part of the expense of opening a private road can be assessed in the shape of benefits upon the property taken therefor, when the owners have not petitioned for the road, and do not need it—Q.

Whether persons petitioning for a private road through the private property of others who do not desire it, should not pay the entire expense of opening it—Q.

Certiorari. Submitted Jan. 27. Decided April 13.

Otto Kirchner for plaintiff in *certiorari*.

City Counselor *F. A. Baker* for defendant in *certiorari*. The same statute may provide for the opening of public and of private alleys: Const., art. xv. § 15; art. xviii. § 14; and the title in this case is sufficient for the constitutionality of the statute: *Inkster v. Carver* 16 Mich. 484; *Kurtz v. People* 33 Mich. 280.

MARSTON, C. J. This is a *certiorari* to review the proceedings had in the Recorder's court in opening a private alley. The plaintiff raises a number of objections. Among others he insists that the act, under color of which the proceedings were taken, is unconstitutional in so far as it attempts to confer authority to open private ways, in that the act embraces more than one object; the title confines the object to the condemnation of private property for public use; and the act provides for an assessment for a private purpose.

The act in question, No. 201, Pub. Acts 1877, p. 246, seems to have been drafted with care, and yet in my opinion there are serious difficulties in the way of providing in the same act, for the opening of both public and private ways. The title of the act provides for the opening of highways, streets and alleys for the public use, but the act goes farther than this and also undertakes to give power to open private roads and alleys.*

There is no doubt but that alleys in cities and villages may be opened under the provisions of this act where necessary for the usual mixed use of the public and private individuals, as in a certain and qualified sense they may be. In this case the proceedings were to open the alley for the sole private use and benefit of certain individuals, and because of a private necessity therefor. While in either case the object of the act is to provide for the opening of ways, and while many of the provisions applicable to the opening of public highways would be equally pertinent in an act for opening

*The title of the act is: "An Act to provide for taking of private property for the public use or benefit and for the opening of highways, streets and alleys, by the cities and villages of this State."

private ways, yet the analogy beyond this is not so clear. To say the least it might be very questionable whether under the title of the act in question, provisions could have been incorporated in the body, applicable to or authorizing private property to be taken for railroad and similar purposes. It may be that the objects aimed at in the constitutional provision supposed to be violated, would not apply to the fullest extent in the present case, and yet we cannot say that some of them would not, and that the act in question therefore is free from doubt.

There is another serious difficulty in this case. That the legislature may provide for the opening of private roads under our Constitution is clear, and private property may be taken for such purpose. But can the property of an individual be taken for a private road for the use of one or more third parties, and a part of the expense of opening the same be assessed upon such property in the shape of benefits? Or must not the parties asking a private road, and whose necessities are the foundation for taking private property of others, pay the entire cost and expense? Can such private way be considered, within the meaning of the law, a benefit to any persons over whose land it may be laid, although they do not ask for or use the road, or at least to whom such road is not in any true sense a necessity? These are difficult questions to answer in the affirmative, and while it is possible the act in question could be so construed as not subject to any such objections, yet the proceedings in this case can receive no such favorable construction.

Without discussing the questions raised, at any greater length, I am of opinion that the proceedings in this case cannot be sustained and must be quashed, with costs to the plaintiff.

The other Justices concurred.

ALEXANDER McK. COWIE v. MAXWELL M. FISHER.

Presumption of payment from lapse of time.

Payment of a mortgage debt is not conclusively presumed from the lapse of many years, but there must be decisive proof that it is an existing lien to warrant a decree of foreclosure

Appeal from Wayne. Submitted January 28. Decided April 13.

FORECLOSURE. Complainant appeals. Dismissal affirmed.

C. I. Walker for complainant. Presumption of payment from lapse of time is open to rebuttal: Story's Equity § 1028*b*: *Abbott v. Godfroy* 1 Mich. 179; *Mich. Ins. Co. v. Brown* 11 Mich. 272.

Theodore Romeyn and *Ashley Pond* for defendant. The presumption of payment should be conclusive in this matter: *Demarest v. Wynkoop* 3 Johns. Ch. 129; *Hughes v. Edwards* 9 Wheat. 489; Mathews on Presump. Ev. ch. 19 p. 352; *Bailey v. Gould* Walk. Ch. 478; *Young v. McKee* 13 Mich. 552; *Piatt v. Vattier* 9 Pet. 405; *Wagner v. Baird* 7 How. 255; *Bowman v. Wathen* 1 How. 189; *Badger v. Badger* 2 Wall. 87; *Neely's Appeal* 85 Penn. St. 387.

MARSTON, C. J. Complainant seeks to foreclose a mortgage given July, 1827, by John McDonell of Detroit to his brother Allen McDonell of Montreal, to secure the payment of $6710 with interest by January 1st, 1830. No bond or other evidence of the indebtedness accompanied this instru ment. It is alleged in the bill of complaint that nothing whatever has been paid upon this mortgage, and that there was due thereon, at the time of filing the bill, $27,175. The record of this instrument, the death of the parties thereto, and other necessary facts are alleged in the bill.

Complainant's counsel concedes that there is no evidence

of any distinct acknowledgment of this debt as an existing lien by John McDonell, or of any claim made against him or his estate by Allen McDonell; that the mortgage has not been produced, was not found among the papers of the deceased, and that the only evidence thereof is the registry. It is also admitted that the statute of limitations began to run in this case in 1842, when Allen McDonell came into this State, and that it did not cease to run on his death.

The defendant purchased the property in 1867 and it is claimed had knowledge of the record of this mortgage before paying but a small part of the purchase price.

We have given due consideration to the argument advanced on behalf of the complainant, but it does not satisfy us that he has made such a case as would entitle him to a decree. While a conclusive presumption of payment may not arise from the lapse of time, yet so strong is it that clear and decisive proof should be required, to justify a court in granting a decree in such a case. In this case such proof is wanting, while the letters of Allen McDonell to his brother John do contain evidence inconsistent with the existence of an actual indebtedness. There would be great danger in granting the relief prayed for under the facts of this case.

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

The other Justices concurred.

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106 93

FRED SPICER v. OLIVER H. BONKER.

Power to direct a verdict—Assignee's right to benefit from estoppel—Assignment of the use of premises—Rent—Absence of seal—Notice from possession—Collection of rents under a mortgage.

A trial judge can direct a verdict for defendant when the plaintiff offers no evidence to establish a necessary part of his case.

The power to direct a verdict for defendant on counsel's presentation of plaintiff's case must be cautiously exercised; and if the case as stated is sufficient except on some particular point, the judge should always direct attention to the defect so that the omission may be supplied if accidental.

An assignee of property rights may have the benefit of an estoppel raised for their protection.

An assignment by a wife to her husband of "all the use" of certain premises leased to other persons, but held in her name, "for his use and benefit," is not specific enough to give him the right to rents under existing leases.

Although a deed is not void for want of a seal (Comp. L., § 6194) the absence of a seal may be significant in determining whether or not an instrument was meant as a conveyance.

B and S held mortgages on certain rented premises already heavily encumbered. S obtained an assignment of B's mortgage, and in order that his own might not be merged, procured a deed of the premises to be made to his wife, intending to collect the rents until a foreclosure of prior mortgages. His wife assigned to him "all the use of" the premises "for his use and benefit." B, who understood these arrangements, meanwhile procured assignments of the leases and collected the rents himself in advance. S sued him for money had and received to plaintiff's use. *Held*, that an instruction to find for defendant did not prejudice the plaintiff whose right of action arose under the assignment from his wife, and as she did not hold the leases, her right to collect the rents, if she had that right, rested on her ownership of the equity of redemption and on whatever estoppel may have arisen against B; but the word "use" in her assignment was too uncertain to cover rents under leases which she did not hold.

B collected in advance rents which he knew S intended to collect, and S sued him for money had and received to plaintiff's use. Both were mortgagees of the rented property. *Held*, that defendant was entitled to an instruction that plaintiff's knowledge of the actual possession by tenants was notice enough to exclude any benefit from the defendant's neglect to inform plaintiff of the advance payment.

Error to Eaton. Submitted Jan. 28. Decided April 13.

ASSUMPSIT. Plaintiff brings error. Affirmed.

H. A. Shaw for plaintiff in error. A claimant of an interest in land who sees it conveyed to others without objection or notice of his own right is estopped from afterward setting it up against the conveyances: *Cady v. Owen* 34 Vt.

598; *Nixon v. Carco* 28 Miss. 414; *Shapley v. Rangeley* 1 Woodb. & M. 213; *Brothers v. Porter* 6 B. Mon. 106; *Cochran v. Harrow* 22 Ill. 345; *Thompson v. Sanborn* 11 N. H. 201; *Trapnall v. Burton* 24 Ark. 371; his silent acquiescence is sufficient: *Blackwood v. Jones* 4 Jones N. C. Eq. 54; *Hollingsworth v. Handcock* 7 Fla. 338; *Morris Canal etc. Co. v. Lewis* 12 N J. Eq. 323; *Gregg v. Wells* 10 Ad. & El. 90; *Miranville v. Silverthorn* 48 Penn. St. 149.

I. H. & John M. Corbin for defendant in error. An estoppel *in pais* does not apply to divest an interest in lands: *Hayes v. Livingston* 34 Mich. 384; *Wright v. DeGroff* 14 Mich. 164; *Ring v. Burt* 17 Mich. 465; *Clark v. Evarts* 46 Ia. 248; *Showers v. Robinson* 43 Mich. 502; *Nims v. Sherman* 43 Mich. 45; *Fisher v. Meister* 24 Mich. 447

Cooley, J. In this case the circuit judge directed a verdict for defendant immediately that plaintiff's counsel had concluded his opening to the jury, and the case is before us on exception to that direction. It is denied that the circuit judge has any lawful authority for such direction in any case; the plaintiff in this State having always a right to go to the jury on the facts. *Cahill v. Ins. Co.* 2 Doug. (Mich.) 124. It is also insisted that the facts stated in the opening were sufficient, if proved, to entitle the plaintiff to a recovery; and therefore, if the circuit judge had the authority which he assumed to exercise, he erred in exercising it in this case. The record presents no other questions.

I. The authority to direct a verdict for defendant on the mere presentation of the plaintiff's case by his counsel, is no doubt one that ought to be very sparingly used if used at all, and the circuit judge ought first to be very certain that the presentation is full and complete, and covers all the points the plaintiff intends or expects to cover by his evidence. The circuit judge must not take advantage of mere accidental or inadvertent omissions as the defendant may when submitting the case after the proofs are all in; but if the case stated is sufficient except upon some particular point, should direct

attention to that point that the counsel may have opportunity to make his case more complete if he has unintentionally omitted anything. In replevin, for example, and trover, it is sometimes necessary to prove a demand; but the demand in any particular case may be only a formal requisite, and counsel in stating to the jury the merits of his case might not unnaturally fail to mention it. It would be inexcusable in a trial judge, under such circumstances, to turn the plaintiff out of court without first giving him the opportunity to perfect his opening after calling his attention to the omission.

But if he observes due care, the circuit judge commits no error in taking the course that was adopted here. The plaintiff's opening is in the nature of an offer of proofs, and the circuit judge directs a verdict for the defendant because, assuming the proofs to have been received, they fail to make a case. The trial is thereby shortened, and no wrong is done to any one. The circuit judge has an undoubted right, in any case, to advise the jury to return a verdict for the defendant, when the plaintiff gives or offers no evidence to establish any necessary part of his case. *Kelly v. Hendrie* 26 Mich. 255.

There is no claim in this case that counsel had failed to make his opening full and complete. We have, therefore, only to see whether a case was stated which would entitle him to ask from the jury a verdict in his favor.

II. The action was for money had and received by defendant to the plaintiff's use. The case stated was that for some time previous to 1878, one Sweezey had been in business at Eaton Rapids with the defendant Bonker, as his clerk; that in various ways he had become greatly embarrassed; that plaintiff and defendant were indorsers for him to the amount of $12,000 and upwards; that he had given to plaintiff mortgages as securities for this amount, and to defendant a mortgage for some $2500; that the property mortgaged was otherwise largely encumbered, and was soon to be taken to satisfy previous liens; that it was then in the hands of tenants; that plaintiff ascertained that defendant could do

nothing towards paying the Sweezey debts, and the whole burden thereof would consequently fall upon the plaintiff himself; that under these circumstances, in order to save to himself something from the Sweezey wreck, he made an arrangement whereby defendant was to, and did, assign to him the mortgage defendant held from Sweezey, and Sweezey was to, and did, deed over the property covered by both the Sweezey mortgages; that the purpose of the arrangement was to enable plaintiff to collect the rents of the mortgaged property until the premises were taken on foreclosures; that for convenience and to prevent his own mortgage being merged in the fee, he had the conveyance from Sweezey made directly to plaintiff's wife, but that defendant understood the whole arrangement, and knew that the object plaintiff had in making it was to secure the accruing rents. It was further stated that plaintiff subsequently discovered that defendant held assignment from Sweezey of leases of the mortgaged property, and had proceeded to collect rents thereon; and plaintiff insisted that in equity and good conscience these rents belonged to him, and that defendant was estopped from setting up any right to them by his failure to notify plaintiff of any claim at the time plaintiff was making the arrangement with Sweezey for the sole purpose of reaching these same rents. To show his right to the rents as between himself and his wife, counsel for plaintiff further stated that he should prove the execution and delivery by plaintiff's wife of the following instrument:

"For a valuable consideration I, Mrs. O. M. Spicer, have this 29th day of May, 1878, assigned over all the use of the brick and wooden buildings, also the brick hardware store, all in the village of Eaton Rapids, Michigan, known as the property bought of John T. Sweezey, on the 14th day of May last, to Frederick Spicer, for his use and benefit.

Spicerville, May 29th, 1878. MRS. O. M. SPICER.

Witness: GEORGE M. PIERCE."

The property described in the foregoing paper is the same property from the renting of which defendant had been

receiving rents. The question is, whether, admitting all these facts to be proved, the plaintiff makes a case.

The most obvious objection to plaintiff's recovery springs from the fact that the conveyance by Sweezey was not made to him, but to his wife. It was the wife, therefore, and not the plaintiff, who had a right to suppose that by Sweezey's conveyance she was obtaining a right to recover rents from his tenants. If, therefore, there was any estoppel in the case which should preclude defendant from collecting rents, it must be an estoppel which arises for the benefit of the wife herself. But plaintiff, conceding that this may have been so at the outset, insists that he, as assignee of his wife, is entitled to claim the benefit of it under the rule laid down by authorities of which *Wood v. Seely* 32 N. Y. 105 is an instance.

There is no doubt that where an estoppel arises for the protection of property rights, an assignee may have the benefit of it. It would fail to give adequate protection to the party in whose favor it arises if this were not the case. *Powell v. Smith* 30 Mich. 451. But the serious question in this case is, whether the plaintiff is the assignee of his wife, so as to be entitled to claim the rents as against her. It is not pretended that the instrument she gave him was intended as a conveyance of the equity of redemption; it does not purport to be so in terms; and is an assignment of the "use" only; and though the statute declares that no deed of conveyance shall be deemed invalid for want of a seal or scroll—Comp. L. § 6194—yet the absence of a seal may be significant when the purpose of an instrument is not clear, and its terms are indefinite. Indeed we do not understand that any one claims this paper was intended for a deed, and counsel for the plaintiff speaks of it as a parol assignment of the rents. But as a parol assignment there could be nothing for it to operate upon. Mrs. Spicer did not hold the leases; she was owner of the equity of redemption; and if she had any right to demand and receive moneys from the leases, it was because of that ownership and of the estoppel which was created in her favor when she acquired the title. Assignment of the "use" of the buildings separate from the ownership

could not be understood as an assignment of a right to rents under existing leases; for the tenants were entitled to the present use, and Mrs. Spicer to the use subject to the leases. It does not appear that the buildings were all under lease, and there may have been something upon which the assignment could presently operate, irrespective of the rents; but the operative word "use" which is employed in this instrument is too uncertain in meaning to be accepted as an assignment of rents, when the assignor herself does not hold the leases, and can only claim the benefit of them by virtue of an ownership which she still retains in her own hands.

Our conclusion is, that the plaintiff was not injured by the instruction which resulted in a verdict against him, and that the judgment must be affirmed with costs.

The other Justices concurred.

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CHICAGO & CANADA SOUTHERN R'Y CO. v. CHARLES PETERS.

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j153 ²415

Certiorari—Assignment of error—Account stated.

A judgment should be reversed if any substantial part of the cause of action is unsupported by proof.

Where a justice certifies that his return to a writ of certiorari contains all the testimony, the question whether any substantial part of the cause of action is unsupported by proof is sufficiently raised by assigning error on the affirmance of the judgment.

An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action.

Error to Monroe. Submitted Jan. 28. Decided April 13.

ASSUMPSIT. Defendant brings error. Reversed.

Frank H. Culver for plaintiff in error.

C. A. & J. A. Stacy for defendant in error.

GRAVES, J. Peters having recovered before a justice of the peace in a suit brought on an account stated and the judgment having been affirmed on *certiorari* the company has brought error. The point of primary importance under the objections taken is whether any substantial part of the cause of action was wholly destitute of proof. Because if such was the case the judgment has no foundation and should be reversed. *Cicotte v. Morse* 8 Mich. 424. The question is fairly presented by the record, because the justice certifies that his return contains all the testimony. The evidence tended to show that some person drawing ties to the railway left the fence down and that several sheep belonging to Peters passed through and were killed by a train on the company's road. There was likewise evidence that three persons appraised the value of the sheep. No proof was given to fix negligence on either party.

The theory on which the judgment is supported is that the persons who agreed upon the value were appointed by the parties for that purpose and were in fact arbitrators, and that their finding was the act of the parties. It is a sufficient reply to this idea to say that the record does not bear it out. There is no evidence whatever that the railway company became a party to the proceedings to ascertain the value of the sheep. There is not a scintilla of proof that it took any part in the choice of the persons spoken of as appraisers, or in any way recognized them as authorized to bind it by anything they might do. For all that appears they acted solely at the instance of Peters and not at all in character of umpires mutually agreed on. The case therefore fails on the only ground attempted to be urged in its defence.

The judgment below must be reversed and the company will recover its costs in all the courts.

The other Justices concurred.

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Carlos D. Shelden et al. executors v. Ebenezer Warner, Thomas Ryan, Louis P. Trempe, William Newcombe and Henry P. Smith.

Foreclosure—Lapse of time—Rights of subsequent purchasers—Evidence of fictitious date—Variance—Mortgage for indemnity—Condition and consideration.

The lapse of less than twenty years before filing the bill does not bar the foreclosure of a mortgage that has been given either for indemnity or for payment.

Where a foreclosure bill is filed against subsequent purchasers from a grantee whose deed was not recorded until after the mortgage, complainant is not concerned with the good faith of their grantor and need not investigate the merits of subsequent interests.

The holder of a mortgage dated and recorded before a deed of the same property is entitled to treat all subsequent rights as subordinate; and on a bill of foreclosure such rights need not be litigated.

The purpose of a mortgage is found in its condition and not in the formal consideration set out in its introductory part.

Where a mortgage is given to secure the sureties on an official bond, it is immaterial that a bill to foreclose it does not correctly state the date of the officer's appointment, if it correctly recites the mortgage and the breach, and the testimony makes out full ground for suit.

An exact similarity in the inks used in executing two different instruments dated differently, was treated, in connection with other suspicious facts, as tending to indicate that they were executed at the same time.

The only constructive record of a deed is the entry required by Comp. L. § 4227 to show the date at which it was received and its order.

Appeal from Chippewa. Submitted April 5. Decided April 13.

Foreclosure. Complainants appeal. Reversed.

Chandler & Grant and *Ashley Pond* for complainants.

Brennan & Donnelly for defendants. Variations between the pleadings on foreclosure and the proof as to the consid-

eration for the mortgage are fatal: 1 Greenl. Ev. §§ 66–9; the bill must also show the precise nature of the indebtedness and describe it accurately: *Pettibone v. Griswold* 4 Conn. 158; *Shepard v. Shepard* 6 Conn. 37; *North v. Belden* 13 Conn. 376; *Sanford v. Wheeler* id. 165; *Hart v. Chalker* 14 Conn. 77.

CAMPBELL, J. The bill in this cause was filed to foreclose a mortgage given by Warner to Ransom Shelden and Columbus C. Douglass to secure them as his bondsmen, they having with others become his sureties as receiver of the United States land office at Marquette in the Upper Peninsula. The bonds were executed in 1859. The mortgage was made in April, 1861, and recorded in Houghton county May 16, 1861, and in Chippewa county, September 30, 1863. The bill was filed originally by Ransom Shelden and the executors of Douglass, and now stands in the names of the personal representatives of Shelden also, he being deceased. It was filed in 1877 and regularly taken as confessed. Subsequently it was agreed that the default might be opened, and an answer put in on certain conditions which need not be recited.

The defendants, except Warner, all are brought in by the ordinary allegations in the bill applicable to subsequent purchasers. They defend on the ground that before the mortgage was recorded in Chippewa county, where their purchases lie, Ryan had purchased the premises and his deed was recorded in January, 1863; and the rest claim through Ryan as *bona fide* purchasers. Upon the testimony there is no plausible ground for holding Ryan to have been such a purchaser. But there is a contest concerning the date and record of his deed, under which the other parties insist that they are protected by priority of record, whatever may have been Ryan's equities.

The court below dismissed the bill as against all but Warner, giving costs to all but Ryan, and retained the case as against Warner.

Some preliminary questions first demand attention. It is

objected that the suit is barred by lapse of time. There is nothing in this objection. Whether treated as a mortgage of indemnity, or as one of payment, less than twenty years had expired before the bill was filed. *Michigan Insurance Co. v. Brown* 11 Mich. 265; *Powell v. Smith* 30 Mich. 451.

It is further objected that the bill is not properly framed to enable complainants to attack conveyances depending upon a record made earlier than the record of the mortgage, and therefore presumptively entitled to preference, as held in *Wurcherer v. Hewitt* 10 Mich. 453 and *Summers v. Bromley* 28 Mich. 125.

The controversy here is not against a deed to Ryan first recorded. If complainants are right on the facts they claim that Ryan's deed was not first recorded in fact. If so, and if when their mortgage was recorded he had no deed on record, they were not concerned with his good or bad faith, and were not required to investigate the merits of subsequent interests. *James v. Brown* 11 Mich. 25; *Cooper v. Bigly* 13 Mich. 463. Their mortgage being first in date and first recorded, would entitle them to treat all subsequent rights as subordinate, and there would be no occasion to litigate them.

It is also claimed that the consideration in the mortgage is variant from the bill. This objection is also unfounded. The purpose of a mortgage is found in its condition and not in the formal consideration set out in its introduction. The condition of this mortgage is distinctly referred to the official bond and made to secure Shelden and Douglass for signing it. The failure in the bill to state correctly and exactly the date of the appointment is of no consequence as it correctly sets out the mortgage itself and the breach, and the testimony makes out a complete cause of action.

The only controversy of real importance is upon the date and record of the deed to Ryan, under whom it seems to be conceded—although if not conceded it would be questionable whether the defense could be regarded as made out—that Trempe, Newcombe and Smith are *bona fide* purchasers for value.

The deed from Warner to Ryan of the premises in dispute purports to bear date and to have been acknowledged January 6, 1863, witnessed by Oran Lyon, the acknowledging officer, and by Fabian Launderville, who made his mark, and recorded on the day of its date by Ryan, who was himself register of deeds, in book 3 of Deeds, on pages 463 and 464.

It is stated that Ryan kept no entry book of deeds, to show the date of their reception and its order, as required by § 4227 of the Compiled Laws. The entry in this book is the only thing which operates as a constructive record, until the deeds are actually spread upon the records at large.

Mr. Ryan testifies quite positively that the deed was made and recorded as it purports to have been. Warner and the subscribing witnesses testify that it was not made at all until November 4th, 1863, and another witness who searched the record books testifies that the deed was not actually recorded until some time later. Without discussing the testimony at large, we have no doubt whatever that the deed was not made until November 4th, 1863, and we are satisfied that both deed and record are antedated. The witnesses being positive on both sides, it is only worth while to give an outline of the facts which complainants have introduced. Warner in November was in Canada, at the Sault, and was there to avoid legal process which might have put him under arrest. There is no doubt, and Ryan himself testifies that on this day, late in the evening, Warner came across the river and executed some documents, one of which was witnessed and acknowledged before Launderville and Lyon, and another witnessed by Launderville. One of those documents appears among the exhibits, and presents the remarkable coincidence, that it is written with the same poor and yellowish ink as the deed, and signed with the same blue ink by Warner, and contains a filling up of date, and writing of Launderville's name in a third kind of ink, quite black, and resembling the date of Ryan's deed. That the same diversities of ink should be found in papers executed at intervals of nine months, and

that they should both be witnessed at that interval by the same witnesses, one of whom could not write his name, would be remarkable if both were genuine. The recollections of the disinterested witnesses of the peculiar circumstances of the transaction in November are clear and positive, and to our minds satisfactory. We need not discuss any nice theories as to the amount of proof which should produce conviction. We have no doubts on the subject.

If Ryan's deed had been made and recorded in fact before complainant's mortgage was recorded, then it would become material to inquire into the good faith of the purchasers from Ryan, and, as this is not questioned, they would probably under the statutes be protected. But no rights originating under a conveyance to Ryan which was neither made nor recorded until after complainants' mortgage obtained a statutory preference, can prevail against it legally or equitably. Their equities are not superior to complainants' equities, and are subsequent in time.

Complainants are entitled therefore to treat them as subsequent purchasers and to foreclose on that basis. The decree dismissing the bill as against these defendants must be reversed with costs against them, and the cause remanded for the entry of a proper decree on the basis of such priority.

The other Justices concurred.

THE AMERICAN EXPRESS COMPANY v. LEONARD B. CONANT.

Service of process on foreign corporation.

Proof of service of process upon the "agent" of a foreign corporation in a suit begun before a justice is insufficient under Comp. L. § 1624, which provides for making service in such cases upon some one authorized by power of attorney to receive it.

Certiorari to A. T. Call, justice of the peace. Submitted April 5. Decided April 13. Proceedings quashed.

Wisner & Speed for plaintiff in *certiorari.*

Frank L. Allen and *Ellsworth & Sapp* for defendant in *certiorari.*

MARSTON, C. J. This action was commenced in justice's court, and the return of the constable showed that he served the summons "by reading the same to the defendant and delivering to R. G. Cooper, agent of the American Express Company at Lakeview, a copy thereof." The defendant did not appear. The statute, 1 Comp. L. § 1624, prescribes the mode of service of process in such cases. As there was no attempt to comply with such provisions the court acquired no jurisdiction. *Hartford Fire Ins. Co. v. Owen* 30 Mich. 443; *Hebel v. Amazon Ins. Co.* 33 Mich. 400; *L. S. etc. Co. v. Hunt* 39 Mich. 469.

The judgment of the justice must be quashed and held for naught with costs to plaintiff.

The other Justices concurred.

CORRECTIONS.

VOL. 39.

Page 365, line 14: Read "*of* pasture is not," etc.

VOL. 44.

Page 130, line 1: Read "final *judgment*" for "final *adjournment.*"

Page 222: Read "The judgment must be *reversed,*" etc.

Page 276, line 6: Read "law" for "land."

Page 382: The note is entirely wrong. It should be "A mere scintilla of evidence does not give the case to the jury."

Page 408, line 10: Read "could *not* have."

Page 712: Insert title "PARTITION" before "averment of interests" under "PARTIES."

INDEX.

[The light face figures indicate the paragraph referred to under the title mentioned, and the black face figures the paging of the case.]

ABANDONMENT
by delay, of proceedings in GARNISHMENT, 2,—**1.**
of execution sale, effect: EXECUTIONS, 19,—**469.**
of purpose to extend ditch: DRAINS, 3,—**568.**
ABATEMENT.
of mill-dam, denial of INJUNCTION, 1,—**176.**
ABSENCE
of seal, effect: DEEDS, 6,—**630.**
proof of, for order of publication: MORTGAGE OF LANDS, 26,—**348.**
ABUTTING OWNERS.
burden of repaving may be imposed on: HIGHWAYS, 3,—**431.**
ACCEPTANCE
by probate judge, of reduced SALARY, 1,—**479.**
of order for merchandise: SALE, 1,—**322.**
ACCOMMODATION PAPER.
mining corporation cannot issue: CORPORATIONS, 2,—**92.**
paper given to be applied on a debt, is not: NEGOTIABLE INSTRUMENTS, 7,—**92.**

ACCOUNTING.

1. Where a party to an accounting appeals from the decree, claiming that there is an error against him in an amount which he has himself previously reported as due to the other party, he has the burden of showing the error. *University v. Rose*, 284.
2. A bill for an accounting, brought by the Regents of the University of Michigan against the director of the chemical laboratory and his assistant whose duty it was to pay over to the director the money which he received, though both were responsible to complainant, charged them with a deficit in their accounts, and it was stipulated that each was to be held accountable for so much money as came into his own hands. The stipulation fixed, also, the amount of the entire deficit. *Held*, that proof that the assistant had received money would not alone establish liability against his superior, as it would not tend to show that the superior had received the money from the subordinate; and the burden of proving that he had received it was upon the complainant, and, as between the defendants, it was on the subordinate. *Id.*
3. On a bill for an accounting for a deficit the rules applicable to proof in civil cases must be observed, and the receipt of the money

by the defendant may be shown by any competent testimony fairly tending to prove it, either alone or in connection with other circumstances. *Id.*

4. Whether books carelessly kept by assistants who are not agents are admissible in evidence upon a bill for an accounting against their superior—Q. *Id.*
5. In a suit for an accounting, defendant was charged with the receipt of money as shown by his signature upon the stubs in certain stub-books. He testified that the signature was not in his handwriting. *Held*, that this put the stubs in issue as would an affidavit denying the execution of an instrument sued on. *Id.*
6. Where a defendant in a suit for an accounting denies the genuineness of part of the vouchers produced against him, but does not designate those which are spurious though he has an opportunity to do so, they must all be regarded as *prima facie* valid in the absence of other evidence that they are not so. *Id.*
7. Where a party to an accounting acquiesces in the disallowance of any of his claims and does not complain of it in the appellate court, it may be assumed that he is satisfied with the decree upon them and does not desire to have it reviewed. But the court will also assume that every claim made by the appellant is in issue, and will examine all the evidence for anything that will tend to show whether it ought to be allowed. *Id.*
8. A corporation organized under a void law cannot enforce a mortgage made to it; but if not organized for an unlawful purpose a receiver for it can demand in equity an accounting for the debt purporting to be secured thereby. Such accounting should be with interest after allowing all payments made upon the loan. *Burton v. Schildbach*, 504.
9. The Supreme Court may permit a bill of foreclosure, filed to enforce void securities, to be so amended, after the hearing, as to ask for an accounting for the debt. *Id.*

as to losses from trustee's negligence: TRUSTS, 1,—**607.**
of guardian: GUARDIAN AND WARD, 11, 12,—**265.**

ACCOUNT STATED.

1. An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action. *Chicago & Canada Southern Ry. Co. v. Peters*, 636.

burden of impeaching it: BANKS AND BANKING, 6,—**135.**

ACKNOWLEDGMENT

of wrong-doing, effort to obtain: CONFESSION, 1,—**284.**

ACQUIESCENCE

in an account stated: BANKS AND BANKING, 6,—**135.**
in decree on ACCOUNTING, 7,—**284.**
in forfeiture: LAND CONTRACTS, 1,—**223.**
in fraudulent assignment: DEBTOR AND CREDITOR, 13,
in running drain: DRAINS, 5,—**335.**
estopping complaint of assessment: DRAINS, 4,—**568.**

ACTION.

1. A statutory liability created in derogation of the common law cannot be enlarged by construction. *Detroit v. Putnam*, 263.
2. All public officers, even if not expressly authorized by statute, have a capacity to sue commensurate with their public trusts and duties. *Berrien County Treasurer v. Bunbury*, 79.
3. An ordinance requiring all persons to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises. *Taylor v. Lake Shore & Mich. S. R. R. Co.*, 74.

4. Breaches of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; though when the duty imposed is for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution. *Id.*
5. When a municipal charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for his default in neglecting to observe such regulations, no action against the lot owner can arise, if at all, until after the city has been held liable in a suit against it. *Id.*
6. A right of action either at law or in equity is not assignable if it does not, directly or indirectly, involve a right of property. *Dayton v. Fargo*, 153.
7. In Michigan, equity will not enforce an assignee's claim of a right to sue for a fraud to his assignor if that is the sole ground of the action. *Id.*
8. A right of action in trespass on the case for damages from deceit is not assignable. *Id.*
9. An action on the common counts for money had and received to the plaintiff's use from the estate of plaintiff's father, is supported by evidence that the father had assigned his property to another person in consideration that the latter should take care of his children; that the assignee had transferred the trust to defendant and paid him a certain sum of money for the children, defendant agreeing to pay each its proportion on becoming of age; and that he had not done so and plaintiff had brought suit for her share on learning the facts. *Hosford v. Kanouse*, 620.

for additional payment: REAL PROPERTY, 2,—**46.**
on bond to pay debts of PARTNERSHIP, 14,—**25.**
effect of rulings in equity: PRACTICE, 14,—**1.**
form of, for unpaid tax: TAXATION, 9,—**125.**
against stockholders for labor debts: CORPORATIONS, 1,—**92.**
proper officer to sue on BOND, 2,—**79.**
for maritime tort, jurisdiction of State COURTS, 1,—**65.**
of debt on appeal bond: JUSTICE OF THE PEACE, 5,—**181.**
for debt for which note was given: PARTNERSHIP, 13,—**237.**
for malicious prosecution, jurisdiction: JUSTICE, ETC., 1,—**324.**
against finder of LOST PROPERTY, 3,—**313.**
assumpsit when cannot arise between HUSBAND AND WIFE, 2,—**392.**
lies to recover back attorney fee: MORTGAGE OF LANDS, 28,—**455.**
between townships for tax-moneys: TOWNSHIPS, 4,—**442.**
for use and occupation: LANDLORD AND TENANT, 7,—**383.**
for rent on appeal bond: LANDLORD AND TENANT, 10-12,—**376.**
for rent, should be in lessors' names: LANDLORD, ETC., 8,—**376.**
contract to furnish wife's services: HUSBAND AND WIFE, 1,—**374.**
for obstructing ditch: DRAINS, 5,—**335.**
right of, on lease: LANDLORD AND TENANT, 9,—**519.**
to recover consideration for deed: ESTATES, ETC., 9,—**513.**
on agreement to pay another's workmen: CONTRACT, 12,—**603.**
See ATTACHMENT; EJECTMENT; GARNISHMENT; LIBEL; REPLEVIN; TRESPASS AND TROVER.

ADJOINING OWNERS.
liability for injury from ice on sidewalk: ACTION, 3-5,—**74.**

ADMINISTRATOR
cannot waive conveyance made to decedent: ESTATES, ETC., 9,—**513.**
mortgage to pay debts: ESTATES, ETC., 8,—**330.**
license to sell: ESTATES, ETC., 3, 4,—**457.**

ADMISSIONS
verbal, against delivery of DEEDS, 2,—554.
ADVERSE POSSESSION.
1. Adverse possession is a defense resting wholly upon facts. *Demill v. Moffat*, 410.
2. Adverse possession must be clear and distinct, and plainly proven, to establish title. *Campau v. Campau*, 367.
3. A claim of adverse possession by one tenant in common, as against another, must be clear and unambiguous, because the mere possession in a tenant in common would be rightful and would not imply an adverse holding, and the tenant is presumed to hold in recognition of the rights of his co-tenant unless his acts and declarations are clearly inconsistent with such presumption. *Id.*
4. The lessee of one tenant in common told the son of the other, while the father was living, that he (the lessee) had more right on the premises than he (the son) had. *Held*, that this had no tendency to prove that the tenant in common under whom he occupied the premises held adversely to the other. *Id.*
5. The rule invalidating a conveyance if the grantor is not in possession and the property is held adversely by another, is not in force in Michigan. *Mich. Cent. R. R. Co. v. McNaughton*, 87.

required to bar EJECTMENT, 3,—156.
AFFIDAVIT.
equities not to be decided upon: EQUITY, 26,—44.
for orders of publication in DIVORCE, 1-3,—358.
of publication of notice: DIVORCE, 4,—358.
description of affiant: DIVORCE, 4,—358.
AGENCY.
1. The general attorney of an Insurance Company, after foreclosing a mortgage in its name, took a tax-deed of the property, and after the tax-title became absolute gave a quit-claim to the company, which it accepted. *Held*, a recognition of his agency in making the tax purchase. *Connecticut Mut. L. Ins. Co. v. Bulte*, 113.

"agent" for service of process against CORPORATIONS, 11,—643.
authority to increase wages, CONTRACTS: 12,—603.
authority to sign checks: BANKS, ETC., 1, 2, 5, 6,—135.
in transferring goods: CARRIERS OF GOODS, 4,—51.
guaranty on contract of: GUARANTY, 1,—444.
liability of officers for assistant's acts: UNIVERSITY OF MICHIGAN, 2,—284.
surety, when not creditor's agent: SURETYSHIP, 3,—584.
ALIMONY
temporary, not collectable by execution: DIVORCE, 7,—150.
ALLEYS.
1. Act 201 of 1877 is of doubtful constitutionality in that while its title provides only for taking private property for the *public* use and benefit, and for the opening of highways, streets and alleys, by the cities and villages of this State, the act itself also authorizes the opening of *private* roads and alleys. The title would have been sufficient, however, for alleys for the mixed use of the public and private individuals. *Schehr v. Detroit*, 626.
2. Whether part of the expense of opening a private road can be assessed in the shape of benefits upon the property taken therefor, when the owners have not petitioned for the road, and do not need it—Q. *Id.*
3. Whether persons petitioning for a private road through the private property of others who do not desire it, should not pay the entire expense of opening it—Q. *Id.*

ALTERATION
releasing guarantor on contract of agency: GUARANTY, 1,—444.

AMENDMENT
of bill in EQUITY, 22, 24,—29.
of foreclosure bill, to ask for ACCOUNTING, 9,—504.
statute cures general *ad damnum* clause: PLEADINGS, 7,—324.
should be objected to below: PLEADINGS, 4,—376.
to pleading in name of public office: PLEADINGS, 3,—79.
to meet the evidence, of BILL OF PARTICULARS, 2,—436.
of constable's return: ATTACHMENT, 4; JUSTICE, ETC., 4,—181
of statutes by implication: STATUTES, 5,—621.
ANIMALS
not to be worked when taken on EXECUTION, 8,—181.
ANSWER.
right of, after publication: EQUITY, 26,—44.
APPEAL.
acquiescence in decree on ACCOUNTING, 7,—284.
by executors, hearing compelled by MANDAMUS, 3,—6.
by executors, from refusal of probate: WILLS, 6,—6.
from probate court, trial of: TRIAL, 17—265.
decree not changed for non-appellants: MORTGAGE OF LANDS, 27,—255.
extension of time for settling case: PRACTICE, 2,—223.
no costs to non-appellant: COSTS, 7,—404.
printing record: PRACTICE, 7, 8,—284.
signing transcript *nunc pro tunc:* PRACTICE, 3,—223.
supreme court inquires into the facts: PRACTICE, 11,—554.
jurisdiction to render judgment on: JUSTICE, ETC., 7,—324.
not to be taken after five days: JUSTICE, ETC., 8,—326.
APPEAL BOND.
action for rent on: LANDLORD, ETC., 10-12.—376.
action of debt on: JUSTICE, ETC., 5,—181.
releases lien of justice's ATTACHMENT, 2,—181.
APPEARANCE.
special, as ground for service on attorney: JUSTICE, ETC., 4,—181.
APPOINTMENT
of commissioners, notice: DRAINS, 2,—150.
of receiver, estoppel to dispute: DEBTOR, ETC., 3,—504.
of receiver for insolvent corporation: EQUITY, 28, 29,—453.
of STENOGRAPHER, 1, 2,—47.
recital of date of: MORTGAGE OF LANDS, 18,—638.
APPRAISAL.
ex parte, cannot sustain an ACCOUNT STATED, 1,—636.
when inadmissible to show value: EVIDENCE, 8,—588.
ARBITRATION AND AWARD.
ex parte appraisal cannot sustain an ACCOUNT STATED: 1,—636.
ARRAY.
challenge to, in superior court of Detroit: TRIAL, 1,—424
ASSAULT AND BATTERY.
constructive possession to justify: DWELLING HOUSE, 1,—418.
general *ad damnum* clause applicable to count for: PLEADINGS, 7, 324.
plea of former conviction: CRIMINAL LAW, 7,—486.
ASSENT
does not determine a question of law: PARTIES, 1,—29.
ASSESSMENT
of benefits from opening private ALLEYS, 1, 3,—626.
complaint of, estoppel by acquiescence: DRAINS, 4,—568.
certificate to roll: TAXATION, 5, 6,—621.
signing of roll by board of review: TAXATION, 7,—621.
see TAXATION, 2-8

ASSESSOR.
certificate of, to tax roll: TAXATION, 5, 6,—621.
presumption that he did his duty: TAXATION, 4,—156.
ASSIGNMENT.
assignee of mortgaged chattels: EXECUTION, 13; TROVER, 1,—277.
assignee's right to benefit from ESTOPPEL, 1,—630.
by indorsement, effect: VENDOR AND PURCHASER, 5,—488.
for benefit of creditors: DEBTOR, ETC., 11-14—Q.
executed in other States: DEBTOR, ETC., 12,—591.
for insolvent corporation: CORPORATIONS, 9, 10,—591.
negligence of assignee, losses from: DEBTOR, ETC., 16,—607.
of lease, bill to compel: EQUITY, 6-9,—493.
of lease, must be by both lessors: LANDLORD, ETC., 2,—376
of the use of premises: LANDLORD, ETC., 13, 14,—630.
rights of assignee under lease: LANDLORD, ETC., 9,—519.
of right of ACTION: 6-8,—153.
shown to be by way of security: CONTRACTS, 5,—357.
ASSIGNMENT OF ERRORS: *see* CERTIORARI, 1,—636.
ASSUMPSIT
between townships for tax-moneys: TOWNSHIPS, 4,—442.
when cannot arise between HUSBAND AND WIFE, 2,—392.
ATTACHMENT.
1. Attachment is a special and extraordinary remedy, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms. *Van Norman v. Jackson Circ. Judge*, 204.
2. An appeal bond releases the lien of a justice's attachment. *Bushey v. Raths*, 181.
3. If a constable's return to a justice's attachment is silent as to the place of seizure, it is presumed to have been, as directed by Comp. Laws, § 5275, "within his county." *Id.*
4. Whether there need be notice of an amendment of a constable's return to a justice's writ of attachment, where the writ was not personally served and the defendant has not appeared—*Q.* *Id.*
5. Where the indorsement on a writ of attachment shows that it was not levied subject to a mortgage lien, it cannot be contradicted in an action of replevin brought by the mortgagee against the attaching creditor. *Wallen v. Rossman*, 333.
6. A constable's return to a writ of attachment, reciting that he had "personally attempted to serve the within attachment on the defendant by reading the same and offering a copy to him at the house of Daniel Dean, but he ran away. I could not deliver a copy to him," is not valid as a return of personal service; it does not show that the officer was actually in the presence or hearing of the defendant or that the defendant knew that he had a writ against him, or that his flight had any connection with the suit. *Holden v. Ranney*, 399.

appraisal, when inadmissible to show value: EVIDENCE, 8,—588.
lien, whether bill lies to protect: EQUITY, 2,—204.
of corporate stock: CORPORATIONS, 5-7,—204.
question not to be retried: DEBTOR AND CREDITOR, 4,—333.
recognized as a lien: MORTGAGE OF LANDS, 1,—345.
released by appeal, action on appeal bond: JUSTICE, ETC., 5,—181.
whether discharged by TENDER, 6,—345.
ATTORNEY AND CLIENT.
interpleader by attorney: EQUITY, 20,—500.
surety justified in employing counsel: SURETYSHIP, 1,—584.
counsel fees, allowance of: WILLS, 3,—350.

ATTORNEY FEE
on foreclosure of MORTGAGE OF LANDS, 28-30,—455.
paid to garnishee's attorney: GARNISHMENT, 10,—413.
AUCTION.
sale as bearing on value: TROVER, 3,—588.
AUTREFOIS CONVICT.
plea of: CRIMINAL LAW, 5, 7,—486.

BANKRUPTCY.

1. Suit was brought in justice's court on a note purchased from the payee's assignee in bankruptcy. The defendant, on cross-examination of the plaintiff's witness, showed without objection that the payee was "thrown into bankruptcy," and that the note was purchased from his assignee. But plaintiff's introduction of the assignee's deed to the purchaser was objected to on the ground that the assignee's title was not proven. The deed, however, recited the grantor's authority by an order of sale from the bankrupt court. The plaintiff further put in evidence, against objection, an order by the Register in Bankruptcy reciting the choice of the assignee, ordering a bond and requiring him to signify his acceptance, and the assignee testified that he had no doubt he had filed his bond and acceptance. *Held*, that the defendant had a right so to call out record evidence of the bankruptcy and the authority for the sale, or to waive it; that the term "thrown into bankruptcy" implied an adjudication; and that the evidence introduced by the plaintiff against objection was admissible. *Wilcox v. Toledo & Ann Arbor R. R. Co.*, 280.

BANKS AND BANKING.

1. A bank was sued by a depositor for moneys paid out on checks signed in his name by other persons: *Held*, that plaintiff's testimony that when sick he signed checks himself, and that he never authorized his daughter and others who attended to writing his letters, to do so, had no tendency to show that he never gave such authority to the signer of the checks, and was inadmissible for that purpose. *American Nat. Bank v. Bushey*, 135.
2. In an action by a depositor against a bank for moneys paid out on checks signed in his name by another person, direct evidence of the incidents of another suit brought by the plaintiff against that person, but to which the bank had not been a party, was inadmissible to affect this litigation. *Id.*
3. Judicial notice must be taken of the ordinary rules and necessities of banking business. *Id.*
4. Banks have a right to expect their depositors to know and conform to the ordinary usages of business, and they may rely to a reasonable extent on the presumption that their customers deal with them accordingly. *Id.*
5. A depositor, long after he had supposed he had withdrawn all his deposits, sued the bank for a balance which the bank claimed he had drawn and part of which had been paid out on checks signed by another person in his name. But it appeared that the depositor had been in the habit of checking out the whole of a deposit shortly after making it, and had neglected to present his bank book for balancing or to withdraw his checks. *Held*, that it was misleading to treat this as bearing only on the probabilities as to whether the third person who had signed the checks would have risked detection by acting without authority, and not upon the probabilities as to whether the depositor in checking out had overlooked comparatively large sums and failed to find it out, or whether he had authorized another to sign. *Id*

6. A depositor who had been in the habit of checking out all his money shortly after he deposited it, was notified of a balance long after he supposed he had exhausted his account, and immediately withdrew it. He made no inquiry or objection but sued the bank, nearly two years afterwards, for an alleged balance including sums which had been paid out on checks signed by another in his name. The trial court charged that the bank had the burden of showing that these checks had been signed by authority. *Held*, that the depositor's course in withdrawing the balance on notification of it, was a strong case of acquiescing in an account stated, which required him to bring himself within some rule that would allow him to impeach it and that he had the burden of impeaching it. *Id.*

BILL IN AID OF EXECUTION.
mortgagee cannot file: EXECUTIONS, 5,—**147.**
effect upon garnishment proceedings: DEBTOR ETC., 14,—**1.**
see EXECUTIONS, 2–5.

BILL OF INTERPLEADER.
when lies: EQUITY, 19, 20,—**500.**

BILL OF PARTICULARS.
1. Where a bill of particulars gives the dates of charges, a due-bill of a later date and for a less amount than the aggregate of items, should not be rejected for variance if it tends to prove an indebtedness existing at its date. *Collins v. Beecher*, 436.
2. Where evidence is objected to solely for a formal variance from the bill of particulars, it is better to permit an amendment of the bill than reject the evidence, unless there is reason to believe the defendant will be prejudiced. *Id.*

BILL OF REVIEW.
what is a bill of review: EQUITY, 10,—**394.**

BILL TO CLEAR TITLE.
costs on: COSTS, 3,—**475.**

BILL TO COMPEL ASSIGNMENT OF LEASE.
parties to: EQUITY, 6–9,—**493.**

BILL TO CORRECT DEED
requires clear showing: EQUITY, 18,—**529.**

BILL TO HAVE DEED CONSTRUED AS A MORTGAGE
see EQUITY, 14–17, **533.**

BILL TO QUIET TITLE
to railroad lands: RAILROAD COMPANIES, 4,—**460.**

BILLS AND NOTES: see NEGOTIABLE INSTRUMENTS.

BOARD OF REVIEW
signing assessment roll: TAXATION, 7,—**621.**

BONA FIDE PURCHASER.
1. Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed. *Letson v. Reed*, 27.
2. A man gave a mortgage, in which his wife united, upon certain lands, which he held under a certificate of part payment from the State. He afterwards assigned his rights under this certificate to his brother, who, in turn, assigned his interest to the wife. On foreclosure the wife claimed that, as the brother had no notice of the mortgage, he was a *bona fide* purchaser and she was entitled to the same protection as he. But as it did not satisfactorily appear that actual payment had been made on the assignment, the defense was overruled. *Butler v. Hogadone*, 390.

burden of proof: EXECUTIONS, 18,—**469.**

BOND.
1. In an action by a public officer upon a bond running to him in his official character, the objection that it is not enough to designate

the plaintiff by his official title alone, but that his individual name should be given, is one that must be taken before pleading to the merits, and cannot be raised for the first time in the appellate court. *Berrien County Treasurer v. Bunbury*, 79.

2. Where a statute designates a public officer as the obligee in a bond required from another officer for the public security, he becomes the proper person to bring suit on the bond in the absence of statutory provisions. *Id.*
3. A city treasurer's bond to the county treasurer, after stating the duty covered by the obligation, added the words, "reference being had to the warrant of the supervisor of said township attached, or to be attached, to the assessment roll of the year 1872." This clause was in excess of the statutory terms of the bond. *Held*, that it was surplusage and a nullity, and that the absence of a warrant could not make the bond inapplicable to moneys actually received on the roll. *Id.*
4. Sureties on a bond given by a city or county treasurer are not liable in an action thereon for moneys not collected, or moneys lawfully accounted for. *Id.*

foreclosure by sureties: MORTGAGE OF LANDS, 18,—**638.**
liability of guardian on: GUARDIAN AND WARD, 13,—**343.**
of corporation, disposition of: CORPORATION, 4,—**103.**
to pay firm debts, action on: PARTNERSHIP, 14,—**25.**

BOOKS
need not be printed in record: PRACTICE, 7,—**284.**
kept by assistants as evidence against superior: ACCOUNTING, 4,—**284.**

BOOMAGE CHARGES: see LOGS AND LOGGING: 2,—**14.**

BOOMING COMPANIES.
liability of: LOGS AND LOGGING, 3, 4,—**578.**

BRIDGES.
authority of commissioners of HIGHWAYS, 1,—**340.**

BRIEFS.
submission of cause on: COSTS, 8,—**57.**

BURDEN OF PROOF
as to delivery of deed, on bill in aid of EXECUTION, 4,—**554.**
as to officer's receipt of money from assistant: ACCOUNTING, 2,—**284.**
in action for servant's NEGLIGENCE, 2,—**62.**
in *mandamus* proceedings to enforce payment: MANDAMUS, 5,—**340.**
of impeaching account stated: BANKS, ETC., 6,—**135.**
of showing one's own error in ACCOUNTING, 7,—**284.**
that goods were received in good order by CARRIERS, ETC., 2,—**51.**
under bill to declare deed a mortgage: EQUITY, 14,—**533.**

BUSINESS STOCK.
where taxable: TAXATION, 1,—**125.**

CARRIERS OF GOODS.

1. Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier, it is inferable, in the absence of evidence, that they continued so until received by the defendant. *Marquette, Houghton & Ontonagon R. R. Co. v. Kirkwood*, 51.
2. One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order. *Id.*
3. A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them; he has ordinarily no means of opening packages and examining their contents and has nothing to do with previous dealings with the property by independent carriers. *Id.*

4. A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent. *Id.*
5. A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him, or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods come into his charge, and until that is proved the contract is not. *Id.*

CASE MADE.
exception to special finding: PRACTICE, 4,—**156.**
neglect to serve statement of errors: PRACTICE, 5,—**156.**
CATTLE.
neglect to maintain side-fencing: RAILROAD COMPANIES, 2,—**451.**
CEMETERIES.
1. Trustees holding the legal title to a cemetery, for burial purposes alone, can bring ejectment for it against a municipal corporation that assumes and exercises an exclusive control adverse to them. *Board of Health v. East Saginaw*, 257.
2. Comp. L. § 766 in providing that where a township is divided, its burying ground shall belong to the township in which it lies thereafter, does not apply to a case where the cemetery falls within the limits of a city incorporated from the township. *Id.*

CERTIFICATE
as to settling case: PRACTICE, 3,—**223.**
of assessor to tax-roll: TAXATION, 5, 6.—**621.**
of election, issue of: MANDAMUS, 4,—**160.**
of sale, effect of record: EXECUTIONS, 16-18,—**469.**
to tax-roll, etc.: TAXATION, 10,—**125.**
CERTIORARI.
1. Where a justice certifies that his return to a writ of *certiorari* contains all the testimony, the question whether any substantial part of the cause of action is unsupported by proof is sufficiently raised by assigning error on the affirmance of the judgment. *Chicago & Canada Southern Ry. Co. v. Peters*, 636.

to review justice's proceedings in GARNISHMENT, 4,—**41.**
CHALLENGE
to the array in superior court of Detroit: TRIAL, 1,—**424.**
CHARGE TO THE JURY.
curing error in modification of request: TRIAL, 6,—**451.**
CHATTEL MORTGAGE.
when void as to creditors: DEBTOR, ETC., 5, 6,—**617.**
CHECKS.
authority to sign: BANKS, ETC., 1-6,—**135.**
transfer of, effect as EVIDENCE, 4,—**588.**
CIRCUIT COURT.
jurisdiction by value in REPLEVIN, 1,—**478.**
CITY TREASURER.
bond to county treasurer: BOND, 3, 4,—**79.**
bond to pay over taxes: TAXATION, 12,—**79.**
CLAIMS
against estates: ESTATES, ETC., 1, 2,—**457.**
CLOUD ON TITLE.
costs on proceedings to remove: COSTS, 3,—**475.**
COLLATERAL AGREEMENT
to pay wages of another's workmen: CONTRACTS, 12,—**603.**
COLLATERAL ATTACK
not allowed of proceedings after decree of DIVORCE, 5,—**358.**
of record of case: PRACTICE, 6,—**358.**

COMMISSIONERS.
notice of application for appointment: DRAINS, 2,—150.
COMMON COUNTS.
evidence to support: ACTION, 9,—620.
goods sold and delivered: PARTNERSHIP, 13,—237.
services in forwarding land sale: PLEADINGS, 5,—349.
suit of new township for tax moneys: TOWNSHIPS, 4,—442.
COMMON LAW
rules of, cannot override STATUTES, 1,—460.
COMPENSATION
of guardian: GUARDIAN AND WARD, 9, 10,—265.
COMPETENCY
to express opinion as to value: EVIDENCE, 6,—588.
CONDITION
of mortgage, shows its purpose: MORTGAGE OF LANDS, 1,—638.
what ones may accompany a TENDER, 1,—14.
CONFESSION.
1. An effort to make a suspected person acknowledge a wrong already committed is not unlawful if undue means, fraud, illegal compulsion or duress are not used. *University v. Rose*, 284.
CONSENT
not allowed to cut off intervening rights in GARNISHMENT, 2,—1.
CONSIDERATION
for payment of rent: LANDLORD, ETC., 6,—388.
for deed to insane decedent: ESTATES, ETC., 9, 10,—513.
CONSTABLE.
amendment of return: ATTACHMENT, 4; JUSTICE, ETC., 4,—181.
cannot work animals taken on EXECUTION, 8,—181.
presumption as to place of seizure: ATTACHMENT, 3,—181.
return of, to ATTACHMENT, 6,—399.
CONSTITUTIONAL LAW.
1. The Michigan Constitution provides that certain revenues shall be applied to paying the interest upon educational funds and the interest and principal of the State debt "until the *extinguishment* of the State debt," when they shall constitute a part of the Primary School Interest Fund (Art. xiv., § 1). *Held*, that for the purposes of the requirement, the debt is to be considered "extinguished" when there is money enough in the State treasury, not subject to other claims, to pay it, even though it has not matured and has not been actually paid. *Auditor Gen. v. State Treasurer*, 161.
against impairing contract obligations: RAILROAD COMPANIES, 3,—446.
opening of private roads: ALLEYS, 1-3,—626.
sufficiency of title of statute: ALLEYS, 1,—626.
void legislation, effect: STATUTES, 6,—103; 7, 8,—446.
CONSTRUCTION
of agreement between LANDLORD AND TENANT, 5,—388.
of declarations in justices' courts: PLEADINGS, 6,—349.
of devise: WILLS, 2,—350.
of will: WILLS, 1,—6.
of statutes *in pari materia*: STATUTES, 2,—559.
note and appended clause construed together: NEGOTIABLE INSTRUMENTS, 5,—371.
of note in aid of railroad: RAILROAD COMPANIES, 6,—364.
of obscure special agreement: CONTRACTS, 1,—439.
of policy of exemptions: EXECUTIONS, 6,—41.
of contract, not aided by conversations: CONTRACTS, 3,—14.
when cannot enlarge statutory liability: ACTION, 1,—263.
CONSTRUCTIVE RECORD.
what constitutes: DEEDS, 8,—638.

CONTINUANCE
of proceedings in GARNISHMENT, 2,—1.
necessary to keep open proceedings in GARNISHMENT, 2,—1.
CONTRACTORS.
passage of title in supplies to: CONTRACTS, 2, 8,—597.
CONTRACTS: *Construction*, 1-4; *Evidence to vary*, 5, 6; *Modification*, 7, 8; *Time*, 9; *Validity*, 10, 11; *Whether Original or Collateral*, 12.

1. Where a special agreement by one of the parties to a contract is obscure it may properly be interpreted most strongly against the party making it. *Wetmore v. Pattison*, 439.
2. An agreement by parties for whom lumber is to be got out to advance money and supplies, to an amount stipulated, to the contractors, gives title to the supplies when furnished, and they belong to the contractor unless that contract is modified to the contrary. *Gavigan v. Evans*, 597.
3. An unambiguous contract cannot be varied in its legal effect by the understanding of the parties at or before its execution; and where the only question is as to its legal meaning, its construction cannot be aided by oral evidence of conversations between the parties. *Johnson v. Cranage*, 14.
4. Parol evidence is admissible to explain the true consideration for a contract and apply the instrument to the subject matter. *Hyler v. Nolan*, 357.
5. One who has given a written assignment, absolute in form, of a particular payment described in a mortgage, and has also given the accompanying note, can nevertheless show by parol that the transfer was not unqualified but was made as security for repayment of money borrowed from the transferee. *Id.*
6. Contemporary parol agreements cannot be set up in violation of express written contracts. *Gram v. Wasey*, 223.
7. A contract is not affected by a subsequent agreement which does not refer to it, and the provisions of which are not so framed as to furnish means for connecting them. *Gavigan v. Evans*, 597.
8. An understanding had subsequently with one of two joint contractors that certain property should not pass until paid for, without evidence of the price and terms of payment, and without any evidence of its connection with the lumber contract is not proven in such a manner that it can be applied as a modification of that contract and must be treated as a separate understanding. *Id.*
9. In Michigan time is not usually so far of the essence of a contract that failure to perform within the time fixed will necessarily forfeit it; but when a vendee fails to perform his obligations relief is not a matter of right and will not be granted if, under all the circumstances, including the conduct of the parties, it does not seem just and reasonable. *Gram v. Wasey*, 223.
10. Transactions that are neither void nor necessarily binding must stand until they are regularly assailed by some one whose position or interests warrant him in assailing them. *Campbell v. Kuhn*, 513.
11. A Sunday horse trade is void and cannot be ratified on a week-day; and if possession is given the horse can be reclaimed unless a new contract is made with mutual assent. *Winfield v. Dodge*, 355.
12. A firm of lumbermen who had made a logging contract wrote to the jobber with whom it was made that he might say to his men and show them "that we here agree to pay every man in your employ to the last dollar that may be due him, that stays by you until you put in your logs." *Held*, that this was a promise made directly to the employees, that the firm made the jobber their agent to bring it to their notice, and that any of the workmen who accepted its terms by serving, unless sooner discharged, until the

logs were put in, could maintain an action upon it against the firm for so much of their wages as had fallen due before the date of the letter as well as for what fell due after. And after its date the jobber could increase the pay of the workmen, and represented the firm for that purpose. *Toohey v. Comstock*, 603.
acts impairing obligation of: RAILROAD COMPANIES, 3,—**446.**
act impairing, absolutely void: STATUTES, 8,—**446.**
binding retiring partners: PARTNERSHIP, 10-12,—**322.**
for carriage: CARRIERS OF GOODS, 5,—**51.**
for getting out logs: LOGS AND LOGGING, 6, 7,—**569**
for log driving: LOGS AND LOGGING, 1,—**14.**
guaranty on contract of agency: GUARANTY, 1,—**444.**
non-performance; measure of DAMAGES, 1, 2,—**439.**
note in aid of railroad construction: RAILROAD COMPANIES, 6,—**364.**
of infant. See INFANT, 1, 2,—**142.**
to allow interest in future; UNIVERSITY OF MICHIGAN, 1,—**284.**
to furnish saw logs: LOGS, 8,—**439.**
to furnish wife's services: HUSBAND AND WIFE, 1,—**374.**
CONTRIBUTION. See SURETYSHIP, 1-3,—**584.**
when freight not liable to: SHIPS AND SHIPPING, 1,—**584.**
from territory set off from MUNICIPAL CORPORATION, 2,—**496.**
on claim for general average: SHIPS AND SHIPPING, 2,—**584.**
CONTRIBUTORY NEGLIGENCE.
evidence of absence of: NEGLIGENCE, 5,—**65.**
CONVERSION.
officer cannot show value by appraisal: EVIDENCE, 8,—**588.**
CORPORATIONS: *Mining Company's Orders*, 1, 2; *Mortgages and Bonds of*, 3, 4; *Corporate Stock*, 5-7; *Transfer of Property*, 8; *Assignment by*, 9, 10; *Service on*, 11.

1. A mercantile firm delivered goods to the laborers of a mining corporation upon orders drawn in the following form: "[Date and number]. Due John Dacey, Sr., for labor, from the Marquette & Pacific Rolling Mill Company, four dollars, in goods, at the store of E. H. Mead & Co. $4.00. W. W. Wheaton, Treasurer, by C. S. W. Rice;" and on delivery of goods to the amount so called for, the firm stamped each order "paid." It was apparently understood that the firm should receive and honor the orders of the corporation, and that the latter should settle with it every month, and pay the amount of the orders taken by it. The firm became insolvent, and had among its assets a large number of these orders, on which suits were brought as for labor debts, and for the use of the persons to whom the orders were drawn, against one of the stockholders of the corporation. *Held*, that these actions would not lie; that the orders could not be treated as having been merely assigned to the firm by those in whose favor they were drawn; and that the use of the words "for labor" in the orders was simply to indicate the nature of the service for which they were given, and not to keep them alive as against stockholders. *Beecher v. Dacey*, 92.
2. A coporation organized for mining purposes would have no authority to issue accommodation paper and deliver it to strangers, *Id.*
3. Comp. L., § 2888, forbids a manufacturing corporation to mortgage its property unless authorized thereto by vote of stockholders holding three-fifths interest, and notified of the object of the meeting called to obtain such vote, and it provides that, without such notice, proceedings shall not be valid. Where notice was given of a meeting to authorize the issue of bonds to the extent of $100,000, secured by mortgage, and the meeting actually authorized an issue to the amount of $150,000, it was *held* that so long as the corpora-

tors raised no objection to the proceedings, no one else could. *Beecher v. Marq. & Pacific Rolling Mill Co.*, 103.

4. Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but were in fact pledged to a creditor as collateral to corporate notes held by him, the objection that this disposition of them is unlawful is one that is open only to the corporation or its stockholders, unless it also affected some existing right; it cannot be raised by one who holds the property of the corporation under a voluntary conveyance, nor by a purchaser, at execution sale, of the equity of redemption. *Id.*
5. Shares of corporation stock are intangible entities, and at common law are incapable of caption by levy; they cannot be subjected to legal process without specific legislation prescribing in substance all necessary procedure. *Van Norman v. Jackson Circ. Judge*, 204.
6. Executions and attachments cannot be levied on shares of corporation stock if the debtor is not himself the legal possessor of the interest, where he has only an equitable right or has regularly assigned his interest. *Id.*
7. An attachment cannot be levied on corporate stock previously assigned by the defendant to his wife, and as a bill cannot lie to protect the lien of such an attachment by enjoining the payment of dividends to the holder, such an injunction, if granted, can be vacated by mandamus. *Id.*
8. Corporate property is not affected at common law by changes which leave the corporate character in existence, and do not destroy the corporate identity; and there is no common law rule by which the property can be transferred to another corporation without grant. *Board of Health v. E. Saginaw*, 257.
9. A general assignment by an insolvent corporation was executed by the directors, and next day, by their direction, the president executed another, incorporating the first, in another State where the property was. The assignees accepted and acted upon the trust, and no attempt was made to set it aside, but more than a year later the president was directed, at an informal meeting of directors, to execute another assignment, the former being supposed defective. *Held*, that the last assignment could not be sustained, not being made by direct sanction of the corporation, and the power first delegated to the president being insufficient, as it was already exhausted. *Richardson v. Rogers*, 591.
10. Whether the president of a corporation has authority to execute a general assignment for the benefit of its creditors—Q. *Id.*
11. Proof of service of process upon the "agent" of a foreign corporation in a suit begun before a justice is insufficient, under Comp. L., § 1624, which provides for making service in such cases upon a person authorized by power of attorney to receive it. *American Express Co. v. Conant*, 642.

answer need not be sworn to by manager: CRIM. LAW, 9,—543.
answer to bill need not be sworn: EQUITY, 4,—543.
character of creditor's possession: DEBTOR AND CREDITOR, 10,—103.
joinder of stockholders in bill in EQUITY, 6-8,—493.
receiver for insolvent: EQUITY, 28, 29,—453.
void, cannot enforce mortgage: ACCOUNTING, 8,—504.
See MUNICIPAL CORPORATIONS.

COSTS.

1. Charges for the traveling of a party and for sundry expenses cannot be included in the legitimate costs of a suit. *McDonald v. McDonald*, 44.
2. Where costs for vexatious litigation are not applied for, a judgment, affirmed against a plaintiff who has made out no case, will

(The following title was accidentally left out of the Index to Vol. 45 It should appear between *Creditors* and *Cruelty* on page 659.)

CRIMINAL LAW.

1. Prosecuting attorneys have no discretion allowed them to stop all criminal prosecutions instituted before justices of the peace; but a justice ought seldom to hold a respondent to bail, or convict him on trial, when the prosecuting attorney advises him in good faith that no crime is made out. *Beecher v. Anderson* 543.
2. A justice of the peace may properly take the advice of the prosecuting attorney before issuing a warrant, and refuse it even when the accuser can make a *prima facie* showing of a technical offense, if the prosecuting attorney thinks that the case would fail on full hearing, or that the criminal intent was so far wanting that the cause of justice would not be advanced by the prosecution. *Id.*
3. A prosecuting attorney can in no wise control the action of the sheriff when a writ has been placed for execution in the latter's hands; the sheriff may take his advice if doubtful as to his duty; but is not relieved from responsibility if he fails in his duty in following it. *Id.*
4. A person arrested on a defective complaint issued by a justice, is entitled to his discharge; and the chance that it may be supplemented by facts not yet shown to the justice, will not justify a mandamus compelling the sheriff to serve it where it will be necessary to take the respondent several hundred miles for his examination. *Id.*
5. A plea of former conviction, in a justice's court, need not be in writing. *Preston v. People* 486.
6. Where the prosecution, in a criminal proceeding before a justice, does not demur or otherwise object to a special plea, for either form or substance, the justice should not reject it on grounds which the prosecution seems disposed to waive. *Id.*
7. A plea of former conviction to a charge of assault and battery is not legally inconsistent with a showing that the conviction was under a village by-law for disorderly conduct. *Id.*
8. A willfully false oath in a judicia proceeding is not perjury even if it states material facts, unless the oath itself is material to the proceeding. *Beecher v. Anderson* 543.
9. Where a bill in equity, not seeking discovery, is filed against a corporation, the general manager, if not himself made a defendant, need not swear to the answer; and if he does so in a case where his oath could not affect the issue or strengthen the answer, his oath, if false, will not sustain a complaint for perjury. *Id.*
10. Persons convicted under Comp. L. ch. 53, cannot be sentenced from another county to the State Reformatory at Ionia as provided by Act 110 of 1879, § 12, as chapter 53 permits their discharge on obtaining sureties, and this right would be practically destroyed if they were removed from the county. *Matter of Ryan* 173.

ad damnum clause for assault: PLEADINGS, 7,—**324.**

assault in defence of constructive possession: DWELLING HOUSE, 1,—**418.**

entry of defendant's plea on justice's docket: PLEADINGS, 8,—**486.**

forgery of initials on vouchers: FORGERY, **284.**

not necessarily give more than ordinary costs. *Underhill v. Muskegon Booming Co.*, 496.

3. Comp. L. § 5072 provides that in proceedings to remove a cloud from title, if complainant shall establish his own title, defendant shall release all claim and pay costs, unless in answering he *has disclaimed all title* AND *given a release* to complainant, in which case the costs are discretionary. *Held* (1) that there was no discretion in a case where defendant, while disclaiming all title of the nature set forth in the bill, set up an independent title which was disproved; (2) nor where while disclaiming he had not tendered a release. *Ellison v. Kittridge*, 475.
4. Costs are discretionary in cases determined in the circuit court on appeal from a justice, and their allowance will not be reviewed. *Pettibone v. Maclem*, 381.
5. Costs are not granted on dismissal of a writ of error where no motion was made for its dismissal. *First Nat. Bank of Port Huron v. Mellen*, 413.
6. Costs are not awarded where the result in the trial court is in the nature of mistrial. *Demill v. Moffat*, 410.
7. Costs are not awarded to a party who does not appeal from a decree, even where it is modified in his favor. *Pool v. Horton*, 404.
8. Costs as for a full hearing are granted on the submission of a case on briefs. *Engle v. Hall*, 57.
9. Costs on granting a mandamus to compel the payment of orders issued by a school-district were denied where the case involved new questions. *Turnbull v. Alpena School District*, 496.
10. Re-taxation of costs cannot be urged on a motion for a modification of the judgment. *Kraft v. Raths*, 20.

on remanding record for amendment of bill: EQUITY, 24,—**29.**
may include what charges: LAND CONTRACTS, 1,—**223**

COUNSEL.
signature necessary to bill in EQUITY, 3,—**394.**
fees in proceedings to obtain construction of WILLS, 3,—**350.**
surety justified in incurring fee: SURETYSHIP, 1,—**584.**

COUNTIES.
appointment and salary of STENOGRAPHER, 1-3,—**47.**
seizure within county presumed: ATTACHMENT, 3,—**181.**

CREDIBILITY
of witness, is for jury: TRIAL, 14,—**610.**

CREDITORS: see DEBTOR AND CREDITOR.

CRUELTY.
extreme cruelty warranting DIVORCE, 6,—**150.**

DAMAGES.
1. The measure of damages for failure to fulfill a contract to furnish saw-logs cannot be fixed by the loss occasioned to the other party from their own consequent failure to supply lumber therefrom under a contract subsequently made with other persons, the first contract not having been made on the strength of the second. *Wetmore v. Pattison*, 439.
2. Damages for non-performance of a contract of supply are such as result directly from the default and may be supposed to have been in contemplation of the parties, but are not such as would be measured only by the possibilities of whatever scheme may have been based on the contract by the party to whom performance was due. *Id.*

for breaking up business, evidence: TROVER, 2,—**588.**
general *ad damnum* clause: PLEADINGS, 7,—**324.**

DAMS.
injunction to abate denied: INJUNCTION, 1,—**176.**

DEBT.
action of, on appeal bond: JUSTICE OF THE PEACE, 5,—**181.**
"extinguishment" of State debt: CONSTITUTIONAL LAW, 1,—**162.**
DEBTOR AND CREDITOR: *Conclusiveness of Proceedings*, 1–4; *Fraudulent Mortgages and Transfers*, 5–9; *Payment*, 10; *Assignments*, 11–16.

1. An offer to buy up a claim does not estop one from disputing its validity. So *held* where creditors negotiate for a chattel mortgage which was void as to them. *Wallen v. Rossman*, 333.
2. A receipt obtained by improper means and assuming to discharge any indebtedness not honestly in dispute between the parties, and known by the debtor to be owing, is to that extent without consideration and ineffectual. *Hackley v. Headley*, 569.
3. A borrower, after making payments to a receiver appointed for his creditor in proceedings to which he was not a party, cannot afterwards, in proceedings against himself for the enforcement of his debt, question the validity of the appointment. *Burton v. Schildbach*, 504.
4. A mortgagee of chattels brought replevin against an attaching creditor, and sought to show that the demand in one of the attachment cases, which had passed into judgment, had been paid before judgment. *Held*, That, if there was no showing of collusion between the attachment creditor and the debtor, this would be an attempt to re-try the question involved in the attachment suit. *Wallen v. Rossman*, 333.
5. Chattel mortgage security is not invalidated by the mere fact that the creditor knows the debtor is in failing circumstances and that the intended effect of giving the security will be to delay or defeat other creditors in the collection of their dues. *Olmstead v. Mattison*, 617.
6. Where a chattel mortgage security largely exceeds the debt, the fact may be considered as tending to show that the creditor's intention, in taking it, is not in good faith to secure himself, but to hinder, delay or defraud other creditors. *Id.*
7. A transfer of property in payment of a debt is fraudulent and void if the property was transferred at a price greatly below its real value, with intent to defraud other creditors. *Dyer v. Rosenthal*, 588.
8. Where a debtor, in anticipation of proceedings against him, made a deed to his brother, the evident purpose of which was to hamper the title, and for which a very small part of the consideration was paid, the deed was held to be invalid as against creditors. *Chase v. Welsh*, 345.
9. A man made an absolute conveyance of his property to his brother in order to avoid the payment of certain paper upon which, he claimed, his liability had been fraudulently obtained. He was also otherwise indebted. In a suit by creditors to set aside the conveyance as fraudulent as against them, it was proved by the brothers to have been *bona fide*. The grantor afterwards filed a bill against his brother for an accounting and for leave to redeem, claiming that it had been further agreed between them that the defendant, after paying his debts out of the proceeds and profits of the property, should reconvey. *Held*, on the evidence, that the bill was rightly dismissed. *Nickodemus v. Nickodemus*, 385.
10. A creditor of a corporation, who held its bonds as collateral security, guaranteed its performance of a contract, and the corporation contracted with him to carry on its business and apply the proceeds to that purpose and to its current working capital, and agreed that any surplus might be applied to the payment of current

indebtedness. The bonds were secured by mortgage. *Held*, that this did not fix the character of his possession of the corporate property as that of mortgagee, and that the proceeds received by him did not apply as payment on the mortgage, and could only be so applied as set-off. *Beecher v. Murq. & Pacific Roll. M. Co.*, 103.

11. If an assignment for the benefit of creditors contains a power to sell on credit, it is void as against the garnishment of a judgment recovered by the insolvent, though it may be valid as against the assignor and also as regards creditors and others not seeking to avoid it. *Richardson v. Rogers*, 591.
12. An assignment for the benefit of creditors executed in another State but with express reference to Michigan and intended to have its first operation in Michigan, is to be treated, in passing upon its validity, as if originally executed in Michigan. *Id.*
13. A fraudulent assignment for the benefit of creditors is not so absolutely void that a creditor's right to complain of it may not be lost by waiver or acquiescence; he cannot attack it until he has in some way acquired a legal standing, and he may let it alone if he chooses to do so. *Blake v. Hubbard*, 1.
14. A judgment creditor took out a writ of garnishment and soon after levied on some lands. The garnishee then made an issue of fact to be tried at law whereby, so far as concerned personalty, the question whether the assignment was fraudulent could be determined. The creditor afterwards filed a bill in aid of his execution. *Held*, that the chancery suit could not affect the validity of the proceeding in garnishment, and a final decree by the Supreme Court in favor of the creditor could not preclude farther investigation at law as to whether he had not waived his right to complain of the assignment. *Id.*
15. An assignee for the benefit of creditors is the general owner of the assigned goods until his trust is fully performed, and then the resulting trust restores to the assignor the general ownership in what is left. But during the trust, the assignor has no lien upon the goods, or special property in them. *Rodman v. Nathan*, 607.
16. A debtor, who had made an assignment, afterward resumed control of the goods and the assignee brought replevin for them. *Held*, that losses by the assignee's negligence could not be charged on him in this or in any suit at law. *Id.*

assignment for insolvent corporation: CORPORATIONS, 9, 10,—**591.**
claims against estates: ESTATES, ETC., 1-4—**457.**
contribution between sureties: SURETYSHIP, 1-3,—**584.**
garnishees' liability to actual creditor: GARNISHMENT, 8-10,—**413.**
interpleading, when ordered: EQUITY, 19, 20,—**500.**
mortgage void as to creditors: MORTGAGE OF CHATTELS, 2,—**333.**
mortgage recorded in wrong office: MORTGAGE OF CHATTELS, 1,—**333.**
objection to disposition of bonds of CORPORATIONS, 4,—**103.**
receiver for insolvent corporation: EQUITY, 28, 29,—**453.**
void transfer not validated by TENDER, 6,—**345.**
what constitutes duress: DURESS, 1-5,—**569.**

DECEIT.
right of action not assignable: ACTION, 8,—**153.**

DECLARATION
by town treasurer for unpaid tax: TAXATION, 9,—**125.**
general *ad damnum* clause: PLEADINGS, 7,—**324.**
liberally construed in justices' courts: PLEADINGS, 6,—**349.**
objection for want of fullness: PLEADINGS, 1,—**381.**

DECREE.
effect upon proceedings in garnishment: DEBTOR, ETC., 14,—**1.**

stands if defendants do not appeal: MORTGAGE OF LANDS, 27,—**255.**

DEEDS.

1. In deciding whether a deed was delivered at its date or at some other time the material inquiry is when did the minds of the parties meet in regarding it as unconditionally belonging to the grantee. *McCullough v. Day*, 554.
2. Where a deed was ready for delivery at its date and delivery was practicable and there is positive evidence that it was delivered, evidence to the contrary consisting of verbal admissions and the testimony of prejudiced parties cannot, in a proceeding in equity, be regarded as convincing. *Id.*
3. A deed left unconditionally with a third person for the use of a grantee who is not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered, and conveys title even although the grantee be of unsound mind. *Campbell v. Kuhn*, 513.
4. An instrument purporting to convey land but providing that it shall remain the grantor's property during his life-time and go to the grantee on his death, is a mere devise, revocable at will, and passes no title; and the grantor's promise to pay the grantee to reconvey the land is without any consideration. *Bigley v. Souvey*, 370.
5. Destruction of an unrecorded deed does not revest title in the grantor, but only deprives the grantee of the means of proving his title. *Mette v. Feldman*, 25.
6. Although a deed is not void for want of a seal (Comp. L., § 6194) the absence of a seal may be significant in determining whether or not an instrument was meant as a conveyance. *Spicer v. Bonker*, 630.
7. Title by deed is a question of fact. *Demill v. Moffat*, 410.
8. The only constructive record of a deed is the entry required by Comp. L. § 4227 to show the date at which it was received and its order. *Shelden v. Warner*, 638.

bill to have deed declared a mortgage: EQUITY, 14–17,—**533.**
by grantor when another is in ADVERSE POSSESSION, 5,—**87.**
by plaintiff pending EJECTMENT, 2—87.
correction requires clear showing: EQUITY, 18,—**529.**
held void as to creditors: DEBTOR, ETC., 8,—**345.**
of leased land, conveys landlord's rights: LANDLORD, ETC., 4,—**519.**
question of priority: EVIDENCE, 9,—**638.**

DEFINITIONS.

"extinguishment" of State debt: CONSTITUTIONAL LAW, 1,—**162.**
of duress: see DURESS, 1-5—**569.**

DEGREE OF NEGLIGENCE

does not affect master's responsibility: MASTER, ETC., 1,—**62.**

DELIVERY.

burden of proof, on bill in aid of EXECUTIONS, 4,—**554.**
of deed: see DEEDS, 1,—**3.**
of logs, to authorize boom charges: LOGS, ETC., 2—**14.**
where grantee is insane: DEEDS, 3,—**513.**

DEMURRER.

effect of, as an admission: EQUITY, 21,—**453**; PLEADINGS, 2—**394.**
to plea of conveyance *puis darrein* in EJECTMENT, 2,—87.

DEPOSITS: see BANKS AND BANKING.

DESCRIPTION

in writ of REPLEVIN, 12,—**565.**
of lands to sustain lien: HOMESTEAD, 1; MECHANICS' LIEN, 1,—**11.**

DESTRUCTION.

of unrecorded DEEDS, 5; PARTNERSHIP, 14,—**25.**

DEVISE
in form of a deed: DEEDS, 4,—**370.**
DISCHARGE
for defective complaint: CRIMINAL LAW, 4,—**543.**
of defendant in foreclosure: MORTGAGE OF LANDS, 24,—**44.**
of one sentenced to Ionia Reformatory: CRIMINAL LAW, 10,—**173.**
penalty for refusal: MORTGAGE OF LANDS, 13, 14,—**57.**
DISCONTINUANCE.
stipulation for: REPLEVIN, 4, 5,—**251.**
DISCRETION
as to amendments to bill in EQUITY, 22,—**29.**
as to costs in appeal cases: COSTS. 4,—**381.**
of guardian: GUARDIAN AND WARD, 2, 3,—**265.**
of highway commissioners, building bridges: HIGHWAYS, 1,—**340.**
of p osecuting attorneys to stop prosecutions: CRIMINAL LAW, 1,—**543.**
DISCOVERY
sought against corporation, practice: EQUITY, 4,—**543.**
DIVORCE.

1. Where a wife, suing for a divorce, swears positively that her husband does not reside in this State but in a specified foreign locality, it is enough to support an order of publication. *Pettiford v. Zoellner*, 358.
2. A divorce granted upon an order of publication, issued by a circuit court commissioner on an affidavit based upon information and belief, was sustained in a collateral proceeding involving the validity of a later marriage and the consequent right to property. *Id.*
3. It seems that the affidavit for an order of publication in divorce is sufficient if it tends to establish a foundation for the order, and if the officer to whom it is presented finds enough in it to satisfy his judgment; and his decision cannot be set aside, in a collateral proceeding, for defects in the proofs submitted to him therefor. *Id.*
4. Affidavits of the publication of orders for defendant's appearance in a divorce proceeding are sufficient to give jurisdiction if they state positively the fact of publication, and if the affiant swears that he is employed in the office of the newspaper in which the order was published, and knew well the facts stated in the affidavit. It is unimportant that he does not describe himself as clerk, if it appears that he is entrusted with the duty of making affidavits of publication. *Id.*
5. Proceedings after a decree of divorce do not touch the right to adjudicate, and cannot be reviewed in a collateral proceeding *Id.*
6. A wife went to the house of her parents to be confined, and did so against the objection of her husband, who, however, was living with his own parents, and whose household arrangements were not, therefore, interfered with. When she was confined she sent word to him, but he did not go to see her at first, and when he did go in reply to a reproachful letter from her, he told her he had received a letter from her full of lies, and had come to warn her that if she was not back before the issue of the next week's paper he should advertise her; he also intimated that the child was her father's and not his own, saying that if it had been it would have been born at home, but now it had been delivered where it belonged. *Held*, a case of extreme and wanton cruelty entitling the wife to a divorce. *Palmer v. Palmer*, 150.
7. Execution cannot be awarded, under Act 44 of 1877, to enforce the collection of temporary alimony. *Id.*

DRAINS.
1. Where a ditch dug as a neighborhood drain has remained open as a watercourse for some years, it ought to be governed by the rules that apply to other water-courses. *Freeman v. Weeks*, 335.
2. Proceedings to lay out a drain were quashed because the record did not show that notice had been given that application would be made to the probate judge for the appointment of the commissioners to determine the necessity for constructing the ditch and to assess the consequent damages. *Lampson v. Ingham Drain Com'r*, 150.
3. Objections to calling a jury in proceedings to extend a ditch are rendered immaterial by the abandonment of the purpose to extend it across the lands of those who refused to release damages. *Mabee v. Miner*, 568.
4. One who has consented to the extension of a ditch which does not cross his land, and has promised to dig his part and tried to let a job therefor, cannot, after partial construction thereof and consequent benefit to himself, complain of being assessed for it. *Id.*
5. In an action for obstructing a ditch it is unimportant whether the ditch had been legally laid out, if the defendant had consented to it; it is also unimportant whether the parties originally agreed on the line of the ditch, if they acquiesced in what was done. *Freeman v. Weeks*, 335.

DUE BILL.
variance from: BILL OF PARTICULARS, 1,—436.

DURESS.
1. Duress exists where one is induced, by another's unlawful act, to make a contract or perform some act under circumstances which prevent his exercising free will. It is either of the person or the goods of the party constrained. *Hackley v. Headley*, 569.
2. Duress of the person is by imprisonment, threats, or an exhibition of apparently irresistible force. *Id.*
3. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them but refuses to surrender them unless the exaction is endured. *Id.*
4. There is no duress where the act threatened is nothing which the party has not a legal right to perform. *Id.*
5. Refusal, on demand, to pay a debt that is due, thereby forcing the creditor to receipt in full for only a partial payment, does not constitute duress if the debtor had done nothing unlawful to cause the financial embarrassment which compelled him to submit to the extortion. *Id.*

effort to obtain CONFESSION, 1,—284.

DWELLING HOUSE.
1. Getting into the back kitchen of an occupied house through an open door when no one is in the room, and boarding up the rest of the house on failing to secure an entrance thereto does not establish such a constructive possession of the premises as will justify committing assault and battery upon the occupants if they attempt to remove obstructions. *Soule v. Hough*, 418.
2. A house is an entirety so long as it is occupied as such by a tenant, and the possession, by an adverse party, of a single room cannot be held a possession of the building to the exclusion of the tenant. *Id.*

EJECTMENT: *When applies*, 1; *Right of*, 2, 3; *Election of Defendants*, 4; *Parties*, 5, 6; *Tax Deed as Defense*, 7; *Case for Jury*, 8; *Findings and Judgment*, 9–11.
1. Ejectment under Michigan statutes is substantially a real action and is a proceeding to try titles as well as to determine who has the right of possession. It applies where the remedy formerly was a

writ of right. It is the only action for determining titles to land. *Mich. Cent. R. R. Co. v. McNaughton*, 87.

2. The right of action in ejectment is not lost by conveying the premises after suit is brought; and a plea of such conveyance *puis dar rein continuance* is demurrable generally. *Id.*
3. An action of ejectment is not barred after ten years' occupancy by defendant if it does not appear that his possession was adverse to the plaintiff. *Perkins v. Nugent*, 156.
4. Comp. L. § 6230, in requiring that a plaintiff in ejectment against several defendants claiming under different sources of title shall elect against which he will proceed, does not apply where the action is against one claimant and those in possession under him and where the same defense is common to all. *Campau v. Campau*, 367.
5. Where the validity of a tax-title held by a stranger to the case, is an incidental question, as where it is relied on in defense to an action of ejectment as paramount title in a third person, *it seems* that the owner should be impleaded. *Jeffery v. Hursh*, 59.
6. Where an action of ejectment rests on the title obtained under a decree in foreclosure against a man and his wife and the wife remains in possession claiming title in her own right, she should be made a defendant in ejectment and it should be found whether she was so brought into the foreclosure suit as to be bound by the decree therein. *Sayles v. Curtis*, 279.
7. A tax-deed giving a *prima facie* title constitutes at law a perfect defense to an action of ejectment. *Conn. Mut. L. Ins. Co. v. Bulte*, 113.
8. An action of ejectment involved the questions of title by inheritance in the plaintiffs, or of title by conveyance, tax-deed and absolute possession in the defendant. The trial judge charged the jury simply that defendant was entitled to their verdict and did not specify on what grounds. *Held* that judgment should be reversed and a new trial ordered as for mistrial. *Demill v. Moffat*, 410.
9. In an action of ejectment a finding tracing title to two persons one of whom conveyed, as sole heir, to the other, is defective if there is no finding that he was sole heir or how he became so. *Sayles v. Curtis*, 279.
10. Comp. L. § 6232, in providing that if the title of plaintiff in ejectment expires after the commencement of the suit and before trial, he is still entitled to judgment for his damages, contemplates cases in which terms and rights expire, and not to cases where the right or title is simply transferred. *Mich. Cent. R. R. Co. v. McNaughton*, 87.
11. Judgment in ejectment relates back to the beginning of the suit. *Id.*

for cemetery: CEMETERIES, 1,—**257.**
who can rely on tax-titles: TAXATION, 14, 15,—**59.**
tax-title used in defense to: TAXATION, 16,—**113.**

ELECTION
among defendants in EJECTMENT, 4,—**367.**
by stockholders to waive lease: EQUITY, 7,—**493.**

ELECTIONS.
mandamus to issue certificate denied: MANDAMUS, 4,—**160.**

ENDORSEMENT. See INDORSEMENT.

EQUITY: *Province*, 1, 2; *Pleading*, 3–21; *Practice*, 22–29.

1. Equity relieves against forfeiture, when it would be oppressive or fraudulent not to. *Gram v. Wasey*, 223.
2. Whether a bill in equity can lie to protect and enforce the lien of attachment—Q. *Van Norman v. Jackson Circuit Judge*, 204.
3. A bill in equity, if not signed in person or with the responsible

signature of counsel, appended by himself or by some authorized representative, may be stricken from the files. A printed signature is not good, *Eveland v. Stephenson*, 394.

4. The answer of a corporation to a bill in equity is not required to be sworn to, but is attested by the corporate seal. If a discovery is sought, individual corporators may be sworn, but they must be named as defendants in the bill. *Beecher v. Anderson*, 543.
5. Where complainant's own showing proves that a person impleaded as defendant is not a proper party he will be relieved from liability even though he did not appear and defend. *Pool v. Horton*, 404.
6. Two of the three directors of a corporation allowed a mining lease thereto to be forfeited, and then took another for their own benefit. Two of the stockholders filed a bill against the two directors and the corporation to compel the directors to assign the lease to the corporation. *Held*, on demurrer that the remaining stockholders should have been brought in as complainants and the lessor as a joint defendant. *Bengley v. Wheeler*, 493.
7. Where a bill is filed by stockholders to compel the assignment to the corporation of a lease which had never belonged to it, all the stockholders should be made complainants because the corporation may elect to waive its right to the lease as well as to demand it and the election cannot be made unless all the stockholders are joined. *Id.*
8. Where a bill is filed by stockholders for the benefit of the corporation, the bill should state any reasons that exist for omitting to join all the stockholders as complainants in the bill. *Id.*
9. A bill to compel lessees to assign their lease should bring in the lessor as joint defendant as it is to be presumed that the landlord is interested in being heard as to who shall be his tenant. *Id.*
10. Any bill whose main purpose is to obtain a new hearing of a controversy already decided, either on questions of law or on the same or additional testimony, is a bill of review or in the nature of a bill of review, even though it involves matters of supplement or revivor or other additional elements. *Eveland v. Stephenson*, 394.
11. E. filed a bill to assure his title to land recovered from him by H. in a previous suit; he asked also that the former decree be declared void, or that a rehearing be allowed on the grounds that false testimony had been given in the previous suit; that after the decree both parties had agreed to a settlement, but that H. had repudiated the bargain when it was too late for E. to appeal; and that there was newly discovered evidence. *Held*, that this was merely a bill for a rehearing, and that not being sworn to, it could not stand as a petition for a rehearing under Chancery Rule 81. *Id.*
12. A bill to enforce an agreement involving an interest in land is demurrable if it appears that the agreement is void under the statute of frauds; and even if it does not appear, the defect is involved in the case. But the defense may be lost by not insisting on it. *Id.*
13. A bill in equity is not necessary to reach a reversion of land in which another person has held a life estate which has run out. *Id.*
14. One who files a bill to have a deed given by him construed as a mortgage, has the burden of proving beyond reasonable doubt that this was actually meant to be its effect. *Tilden v. Streeter*, 533.
15. A complainant seeking to have his deed construed as a mortgage is confined to the ground on which he filed his bill and cannot afterward claim that he was unduly influenced to execute the paper as a deed. *Id.*
16. The fact of relationship between the parties to a bill filed to have a deed construed as a mortgage has no force except as it is pertinent to the case and will aid in proving or disproving it. *Id.*

17. A bill to have a deed construed as a mortgage cannot be sustained unless there is convincing proof in complainant's favor, even though defendant's showing is such as to establish no claim on the confidence of the court. *Id.*
18. A bill to correct a deed so as to make the conveyance subject to mortgages, and excepting a crop from its operation, cannot be maintained except upon a very convincing preponderance of evidence in favor of complainant, showing that it had been so agreed between the parties. *Reynolds v. Campbell*, 529.
19. Interpleading cannot be ordered unless the claims threatening complainant negative each other; if one cannot be legally enforced without implying the other's invalidity there is nothing to be settled by interpleader. *Moore v. Barnheisel*, 500.
20. The attorney for several creditors having obtained from the debtor an assignment of certain policies of insurance then payable to him, thereupon executed a paper reciting that he was to pay from the proceeds the claims held by him and pay over the residue to the attorneys for certain other creditors. Before this was done he was garnished by still other creditors, but the attorneys to whom he was to pay the residue insisted that their claim thereto could not be affected by the garnishment. *Held*, that he could maintain a bill of interpleader against them and the other creditors to determine which was entitled to the fund. *Id.*
21. A demurrer to a bill admits the complainant's case for the purpose of that issue only, and not for the purpose of establishing a right to relief which the proofs might not sustain if defendant should be allowed to answer after his demurrer is overruled. *Cook v. Detroit & Milwaukee R. R. Co.*, 453.
22. Amendments to a bill in equity are discretionary with the court so long as they are not allowed to prejudice the substantial rights of the defendant. They should not be allowed at the hearing, however, if after amendment the case will be defective on the proofs. *Church v. Holcomb*, 29.
23. Where a bill in equity filed by the holder of mortgages supposed to be void, claimed an equitable lien in the nature of a mortgage, and the record showed that the parties had gone fully into their equities; that the proofs were all in; that there was no conflict on the facts constituting the complainant's case, and that the case that would have been made on a foreclosure bill was fully before the court, the record was remanded by the appellate court with leave to so amend the bill as to pray a foreclosure of the mortgages in case they were adjudged valid. *Id.*
24 Where a chancery record is remanded with leave to amend the bill without prejudice to any proceedings, the complainant can be placed in no better position as to costs than if the bill had been dismissed without prejudice, and must pay all costs to the time decree is entered on the amended bill. *Id.*
25. Due diligence in making service of a chancery subpœna upon a defendant who cannot be found is not exercised unless the effort to serve it is continued so long as service can lawfully be made. *Soule v. Hough*, 418.
26. Where a defendant brought in by publication, petitions to be heard, his right to be admitted to answer the complainant's bill on payment of costs (Comp. L., § 5127) is absolute: his equities cannot be decided on affidavits opposing his petition, or in any way except in a hearing on the merits. *McDonald v. McDonald*, 44.
27. A receiver cannot be appointed as a preliminary to filing a bill and beginning suit, and without any notice to parties interested in the property placed in his hands. *Jones v. Schall*, 379.

28. A receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation and pending the decision on a demurrer whereby the right to file the bill is put in issue *Cook v. Detroit & Milwaukee R. R. Co.*, 453.
29. Comp. L. § 6565, in providing for the sequestration of corporate property and for the appointment of a receiver, does not contemplate that an appointment shall precede an adjudication or the adjudication a hearing on notice. *Id.*

accounting in: See ACCOUNTING.
accounting to receiver for void corporation: ACCOUNTING, 8,—**504.**
allegation of foreclosure bill: MORTGAGE OF LANDS, 18,—**638.**
assignee's right to sue; ACTION, 7, 8,—**153.**
bill in aid of: EXECUTIONS, 2-5,—**554, 147.**
costs on bill to clear title: COSTS, 3,—**475.**
effect of objection to sufficiency of PLEADINGS, 2,—**394.**
foreclosure in: see MORTGAGE OF LANDS, 16,—**30.**
showing of defendant's interest: MORTGAGE OF LANDS, 22—**253.**
facts inquired into on appeal: PRACTICE, 11,—**554.**
recovery of consideration paid by decedent: ESTATES, ETC., 10,—**513.**
swearing to answer, perjury: CRIMINAL LAW, 9,—**543.**
validity of receiver's appointment: DEBTOR, ETC., 3,—**504**

EQUITY OF REDEMPTION.
not to be sold on EXECUTIONS, 5, 15,—**147, 174.**
conveyance of, whether fraudulent: EXECUTIONS, 15,—**174.**
purchaser of, disposition of bonds of CORPORATION, 4,—**103.**

EQUITY PLEADINGS. See EQUITY, 3-21.
EQUITY PRACTICE. See EQUITY, 22-29.

ERROR
cured, modification of request to charge: TRIAL, 6,—**451.**
does not lie on collateral order: GARNISHMENT, 7,—**413.**
judge's remarks prejudicing jury: GUARDIAN AND WARD, 1,—**265.**
neglect to serve statement of: PRACTICE, 5,—**156.**

ESTATES OF DECEDENTS: *Claims*, 1, 2; *Sale or Mortgage*, 3-8; *Conveyance to Decedent*, 9, 10; *Payments by Executor*, 11.
1. Creditors of a decedent's estate are not cut off from enforcing their claims so long as no commissioners are appointed upon the estate and no time or place appointed for the allowance of claims. *Pratt v Houghtaling*, 457.
2. Where a widow, after being made executrix, remarries and an administrator *de bonis non* is appointed, the interim between her disqualification and the new appointment may be added to the four years and six months allowed by law for the payment of claims against the estate. *Id.*
3. A probate court does not lose jurisdiction to license the sale of real estate for the payment of debts if the order is made within the period to which the time may properly be extended, even if the extension is not actually made. *Id.*
4. *It seems* that a probate license to sell real estate for the payment of debts will not necessarily be held invalid for having been granted after the period allowed therefor by statute when inquired into collaterally, as in an action of ejectment against the purchaser. *Id.*
5. A probate license to sell or mortgage real estate is not necessarily void for being granted after the expiration of the statutory time allowed for closing up the estate, if it has not been closed up in fact, and if the will contemplates that it shall remain in the hands of the executors for a longer period. *Church v. Holcomb*, 29.
6. Where a will provides that as the testator's children become of age the executors shall set off to them their shares of the estate, and it is obviously the intent that the executors shall receive and pay out

moneys in managing the estate and supporting, maintaining and educating the children, any resulting indebtedness incurred by the estate to the executors in the strict discharge of what they believe to be their duty will not stand on the same footing with debts contracted by the deceased in his life time, nor be subject to the statutory limitation requiring claims against the estate to be presented and allowed within four years and a half. *Id.*

7. Where a presumptively legal claim, approved by the probate court, exists against an estate which still remains unsettled after the time limited for that purpose, and is still, for some purpose, in the hands of the probate court, it is within the jurisdiction of that court to license the giving of a mortgage on the estate to meet the expenses of administration; and if no appeal is taken and the probate order is confirmed, the mortgage becomes a valid claim. *Id.*
8. An administrator's mortgage given upon the estate to raise money to pay its debts, is invalid if the order allowing it and the proceedings thereon do not comply with Comp. L., § 4626, and specify the time for which it may run, and the rate per cent. at which it shall be given; and the good faith of the parties will not save it. Whether the mortgagee could be subrogated to the rights of a prior mortgagee of the same property, for the payment of whose mortgage the administrator was allowed to raise money by giving another mortgage—Q. *Detroit F. & M. Ins. Co. v. Aspinall*, 330.
9. An administrator cannot waive a conveyance made to his decedent, either directly or indirectly; and if it is not avoided by the heirs who have the title by descent, he cannot sue the grantor to recover the consideration as if the transaction had been void. And if any of the heirs have reconveyed their interest to the grantor, the administrator is not concerned with the fairness of the latter's dealings towards them, but it is for the heirs to seek redress on their own complaint. *Campbell v. Kuhn*, 513.
10. Whether an attempt to recover the consideration paid by a decedent for a conveyance of land does not demand a resort to equity where all persons interested may be made parties and all rights and liabilities safely adjusted—Q. *Id.*
11. An executor intrusted with the duty of keeping a legacy for a minor heir until she was of age, paid it over to her guardian while she was still a minor. *Held*, that the payment did not discharge the executor, and that if the guardian did not pay the legacy to his ward when she became of age, the executor still remained liable. *Hinckley v. Probate Judge*, 343.

claim by husband against wife's estate: HUSBAND, ETC., 2,—**392.**
executors' appeal from refusal of probate: MANDAMUS, 3; WILLS, 6.
note payable to estate: NEGOTIABLE INSTRUMENTS, 1, 2,—**384.**

ESTOPPEL.

1. An assignee of property rights may have the benefit of an estoppel raised for their protection. *Spicer v. Bonker*, 630.

by acquiescence: DRAINS, 4,—**568.**
by destroying deed: PARTNERSHIP, 14,—**25.**
by buying up claim: DEBTOR AND CREDITOR, 1,—**333.**
to purchase tax title: TAXATION, 17,—**113.**
to question receiver's appointment: DEBTOR, ETC., 3,—**504.**

EVIDENCE: *Judicial Notice*, 1; *Res Gestæ*, 2, 3; *Memoranda*, 4; *Of value*, 5-8; *Of simultaneous execution*, 9.

1. A court cannot take judicial notice as to how much a particular city street is used. *Cleveland v. Newsom*, 62.
2. The acts, conduct and utterances of an accused party, if of the *res gestæ*, are competent evidence in a civil case as bearing on his culpability. *University v. Rose*, 284.

3. Where a boy who had driven against a foot passenger on the street immediately stopped the horse and came back and said he did not mean to, the fact was *held* to be as much a part of the *res gestæ* as an exclamation would be if made at the moment of the accident. *Cleveland v. Newsom*, 62.
4. The transfer of cheques or of receipted bills has no tendency to prove an indebtedness or loan, but rather a payment; they prove nothing of themselves, but may be used as memoranda in connection with the testimony of the parties. *Dyer v. Rosenthal*, 588.
5. Receipted bills are no evidence of value. *Id.*
6. One who has merely been into a store without inspecting the goods there is not competent to express an opinion as to their value on mere inspection of the inventory and invoices. *Id.*
7. The amount for which property has been sold may be put in evidence as tending to show its value. *Atwood v. Bearss*, 469.
8. The appraisal of goods taken on an attachment is inadmissible as evidence of their value if offered by the officer who levied the attachment and appointed the appraisers in a suit against him for their conversion. *Dyer v. Rosenthal*, 588.
9. A precise similarity of inks used in executing two different sets of instruments dated differently but executed by the same persons, was treated, in connection with other facts, as tending to indicate that they were executed at the same time. *Shelden v. Warner*, 638.

as to delivery of DEEDS, 1, 2,—**554.**
auction sale as showing value: TROVER, 3,—**588.**
books kept by assistants: ACCOUNTING, 4,—**284.**
directing jury's attention to: TRIAL, 9, 10,—**410.**
effect of interest on testimony: TRIAL, 7,—**51.**
execution sale as showing value: SHIPS, ETC., 2,—**584.**
explaining indorsement: NEGOTIABLE INSTRUMENTS, 10,—**488.**
finding of trial judge as to effect of: TRIAL, 19,—**357.**
in action against finder of LOST PROPERTY, 2,—**313.**
in bar of recovery of rent on appeal bond: LANDLORD, ETC., 11,—**376.**
in suit for deposits: BANKS, ETC., 1, 2, 5, 6,—**135.**
in suit for forcible detainer: FORCIBLE ENTRY, ETC., 1,—**337.**
judicial notice of banking usages: BANKS, ETC., 3,—**135.**
of authority to sign checks: BANKS, ETC., 1, 5, 6,—**135.**
of bankruptcy and authority for sale: BANKRUPTCY, 1,—**280.**
of damages for breaking up business: TROVER, 2,—**588.**
of due care on plaintiff's part: NEGLIGENCE, 5,—**65.**
of officer's intent in levy: EXECUTIONS, 9,—**333.**
of receipt of money, on bill for ACCOUNTING, 3,—**284.**
of *res inter alios*, inadmissible: BANKS, ETC., 2,—**135.**
of tender, to ground discharge of MORTGAGE OF LANDS, 13,—**57.**
oral, of testator's intent: WILLS, 5,—**350.**
parol, to explain transfer: CONTRACTS, 4, 5,—**357.**
rejection of specific items: TRIAL, 3,—**436.**
right to insist upon strict proof: TRIAL, 2,—**280.**
should be submitted on plaintiff's theory: TRIAL, 4,—**349.**
stubs put in issue by dispute as to signature: ACCOUNTING, 5,—**284.**
to establish liability of superior officer: ACCOUNTING, 2,—**284.**
to identify judgment: EXECUTIONS, 1,—**234.**
to identify property taken on execution: REPLEVIN, 2,—**234.**
to support action on common counts: ACTION, 9,—**620.**
to support claim for additional payment: REAL PROPERTY, 2,—**46.**
to vary contract: CONTRACTS, 3–7.
variance from BILL OF PARTICULARS, 1, 2,—**436.**
See PRESUMPTIONS.

EXCEPTIONS
to special finding: PRACTICE, 4,—**156.**

EXECUTION OF WRITTEN INSTRUMENTS.
use of similar inks: EVIDENCE, 9,—**638.**

EXECUTIONS: *Writ*, 1; *Bill in aid of*, 2–5; *Exemptions*, 6; *Search for Property*, 7; *Working animals*, 8; *Levy*, 9–14; *Sale*, 15–20.

1. The omission, from a justice's execution of the name of the county or of any township or city does not invalidate it, at least where the defendant does not complain of it; and as against a stranger resisting the claims of the execution purchaser the defect may be cured and the judgment identified by parol evidence. *Elliott v. Hart*, 234.
2. A bill in aid of execution cannot be so drawn as to reach property that is not leviable if filed while the execution is still in force and before it is returned. *McCullough v. Day*, 554.
3. Where a bill in aid of execution is sustained as to part of the property it is filed to reach, but is dismissed as to the rest, and only the defendant appeals, it is understood that complainant's claim to the latter description is not pressed. *Id.*
4. Complainant in a bill in aid of execution filed to set aside a conveyance which defendant is alleged to have delivered after verdict had been rendered against him, has the burden of proving that delivery was not made until after verdict. *Id.*
5. The grantor of land gave a mortgage on it, after the deed had been recorded, to a third person whose assignee obtained a judgment against him for the debt secured thereby, and while insisting on the validity of the mortgage, filed a bill against the grantee in aid of his execution, claiming that part of the debt antedated the deed: *Held*, that under Compiled Laws, § 4667, which forbids the sale of a mortgager's equity of redemption, the bill would not lie. *Gale v. Hammond*, 147.
6. The constitutional policy of exemptions is liberally construed by the courts. *Wilson v. Bartholomew*, 41.
7. A sheriff serving an execution is not bound to search for personal property beyond his own bailiwick. *Atwood v. Bearss*, 469.
8. A constable has no authority to work animals which he has taken on an execution, to pay the expense of keeping them. *Bushey v. Raths*, 181.
9. The question whether an officer has levied upon a complete title or only an encumbered interest is one of intent as to which the officer need make no statement beyond the indorsement on his writ, which is the evidence of his final action, whatever his intent may have been. *Wallen v. Rossman*, 333.
10. An officer who levies subject to a mortgage, can afterwards change the levy. *Id.*
11. An execution for an individual debt cannot be levied on specific articles of property in which defendant's only interest is that of a partner or joint owner. *Hutchinson v. Dubois*, 143.
12. If an execution against a partner for his individual debt can be levied at all on partnership property, it can be levied only on his interest in it, subject to all partnership debts and to the final accounting between the partners. *Id.*
13. The assignee of mortgaged chattels holding subject to the mortgage is not prejudiced by a levy on the mortgager's interest. *McLaughlin v. Smith*, 277.
14. Growing crops, though part of the realty, are treated as personalty for the purposes of levy and sale on execution. *Preston v. Ryan*, 174.
15. Comp. L. § 4667 forbids selling the equity of redemption when execution is levied on premises mortgaged for the debt; but it does not prevent a sale of a growing crop under such execution. Whether a conveyance of the equity of redemption by the mortgagee could be fraudulent as against the mortgage creditor—Q. *Id.*

16. Putting the sheriff's certificate of a sale on execution upon record is constructive notice to subsequent purchasers: Act 123 of 1875. *Atwood v. Bearss*, 469.
17. One who bids in lands under an execution therefor becomes a "purchaser" within the meaning of the registry laws even though he does not yet receive the sheriff's deed; and if he records his certificate of sale he is entitled to protection against subsequent purchasers until he can receive his deed. *Id.*
18. Where an execution purchaser of land has recorded the certificate of sale in advance of any conveyance from the debtor to other persons, he is presumed, until the contrary appears, to be entitled to recover in an action of ejectment against the latter, who have the burden of proving themselves to be or to derive title from *bona fide* purchasers. *Id.*
19. Abandonment of a sale on execution because of an error in the notice thereof does not necessarily invalidate a subsequent sale or notice if it does not appear that the execution debtor has been prejudiced. *Id.*
20. The issue of two executions at once upon the same judgment to the sheriffs of different counties is irregular; but in an action of ejectment for premises sold under one of them, the other not being returned, the sale will not necessarily be held void, nor will the officer's omission to return a want of personal property be fatal thereto, especially if there is no showing that there was any. *Id.*

not issuable for temporary alimony: DIVORCE, 7,—**150.**
on mortgager's interest, notice of defense in TROVER, 1,—**277.**
sale as showing true value: SHIPS, ETC., 2,—**584.**
upon corporate stock: CORPORATIONS, 5, 7,—**204.**

EXECUTORS.
indebtedness of estate to: ESTATES, ETC., 6,—**29.**
may appeal from refusal of probate: WILLS, 6,—**6.**
payment to guardian of devisee: ESTATES, ETC., 11,—**343.**

EXEMPTIONS.
constitutional policy liberally construed: EXECUTION, 6,—**41.**
from process in GARNISHMENT, 5,—**41.**
of homestead: see HOMESTEAD.

EXPENSES.
guardian's claim for: GUARDIAN AND WARD, 3,—**265.**

EXTENSION
of ditch: see DRAINS, 3, 4,—**568.**

EXTINGUISHMENT
of State debt, term construed: CONSTITUTIONAL LAW, 1,—**162.**

EXTREME CRUELTY.
case warranting a DIVORCE, 6,—**150.**

FACTS.
conclusions; when to be drawn by trial judge: TRIAL, 18,—**79.**
inquired into on appeal: PRACTICE, 11,—**554.**

FENCES.
contributory negligence does not affect liability of RAILROAD COMPANIES, 2,—**451.**
negligence in keeping up: RAILROAD COMPANIES, 1,—**329.**

FERRY.
nature and transfer of FRANCHISE, 2,—**65.**

FINDER: See LOST PROPERTY.

FINDINGS
of jury on probate appeal: TRIAL, 17,—**265.**
sufficiency of, in EJECTMENT, 9,—**279.**
by court, exception on case made: PRACTICE, 4,—**156.**
of trial judge, conclusiveness: TRIAL, 19,—**357.**

FORCIBLE ENTRY AND DETAINER.
1. Where suit is brought before a justice for a forcible detainer and the complaint alleges the entry to have been peaceable, defendant can show that he entered under a *bona fide* claim of title and without collusion with the complainant's tenant. *Farmer v. Hunter*, 337.
2. A proceeding for forcible entry and detainer does not lie against one whose entry was peaceable and without collusion with a tenant. *Id.*

FORECLOSURE. See MORTGAGE OF LANDS, 16-30.
bill amended to ask for ACCOUNTING, 9,—504.
defense of BONA FIDE PURCHASER, 2,—390.
right to answer, after publication: EQUITY, 26,—44.

FOREIGN CORPORATIONS.
service of process on "agent": CORPORATIONS, 11,—643

FORFEITURE
for failure to perform in time: CONTRACTS, 9,—223.
for guardian's failure to account: GUARDIAN, ETC., 12,—265.
not triable as a collateral issue: FRANCHISE, 1,—65.
when relief granted against: EQUITY, 1,—223.

FORGERY.
1. The Regents of the University of Michigan filed a bill against the director of the chemical laboratory and his assistant, an officer appointed by their authority, for an accounting for moneys received in that department and in which there was a deficit. The suit involved the question, as between the defendants, of the genuineness of the initial of the director, used in certain stub-books as a voucher to indicate that the assistant had accounted to him for moneys received. The director claimed that these initials were forged. So *held*, on appeal, upon comparison of the handwriting of both defendants, and especially of the director, which had changed somewhat, with that of the disputed vouchers; and in the light, also, of expert testimony and, particularly, of the conduct of the assistant in admitting delinquencies in his accounts of moneys received, when the deficit was first called to his attention, and in borrowing money and mortgaging his property to make them good, and giving security to meet whatever deficits might be discovered. *University v. Rose*, 284.

denial of genuineness must be specific: ACCOUNTING, 6,—284.

FRANCHISE.
1. Forfeiture of a franchise can only be determined in a direct proceeding, and not as a mere incident of an action in tort for the purpose of showing that the party injured was attempting to exercise rights which he had lost. *Billings v. Breinig*, 65.
2. The franchise of keeping a rope-ferry is property having the valuable incidents of other kinds of property, and transferable subject to conditions lawfully imposed and to such governmental control as results from its public nature. *Id.*

FRAUD.
assignees cannot sue for: ACTION, 7,—153.
by misrepresenting extent of land sold: VENDOR, ETC., 2,—481.
fraudulent payment of debts: DEBTOR, ETC., 7,—588.

FRAUDULENT ASSIGNMENTS.
See DEBTOR AND CREDITOR, 13, 14,—1.

FREIGHT
when not liable to contribution: SHIPS AND SHIPPING, 1,—584.

GARNISHMENT.
1. Garnishment proceedings should be speedy; they are not in the ordinary course of law, as they involve consequences that could not otherwise arise at law or in equity. *Blake v. Hubbard*, 1.

2. Garnishment proceedings against an assignee for the benefit of creditors were allowed to rest for two years until plaintiffs had obtained a decree on a bill in aid of execution which they had filed after taking out garnishment process. Plaintiffs then attempted to bring the garnishment issue to a hearing. *Held*, that the proceedings in garnishment could not have been kept open without either a formal continuance or some action equivalent to consent by the garnishee; and even consent might not be allowed to cut off intervening rights, as a garnishee cannot waive the rights of other persons. *Id.*
3. A writ of attachment and garnishment, returned on the day of issue not served upon the principal defendant, cannot bind him. *Kraft v. Raths*, 20.
4. Garnishment proceedings may be brought up from before a justice on a writ of *certiorari* sued out by the defendant in the principal case, if the latter's rights are cut off without his having an opportunity for a hearing. *Wilson v. Bartholomew*, 41.
5. Property exempt from execution is also exempt, at the election of the debtor, from process in garnishment. *Id.*
6. A garnishee cannot be held on a disclosure that he has nothing except a draft payable to the wife of the principal defendant. *Kraft v. Raths*, 20.
7. A garnishee disclosed an indebtedness in favor of the principal defendants, and judgment was rendered against him, but it afterward appeared that the debt was due to other persons on whose motion the judgment was vacated. The affidavit in garnishment was made to stand as a declaration and the real creditors were permitted to assume the defense. The garnishee, however, had paid over to the plaintiff the amount of the judgment against him before the judgment had been vacated, and an order was made that the plaintiff pay back to the real creditors the amount so received less an attorney fee paid to the garnishee's attorney. *Held*, that this order was not a judgment and would not support a writ of error, and that there was no suit pending between the plaintiff and the actual creditors in which a judgment could be entered, but the order was collateral to the suit in garnishment. *First Nat. Bank of Port Huron v. Mellen*, 413.
8. A judgment against a garnishee defendant does not bind his actual creditors where his indebtedness was to them and not to the principal defendant. And there is no need of a motion to vacate such a judgment unless, perhaps, where the debt was itself a judgment and proceedings to collect it had been stayed. *Id.*
9. A judgment against a garnishee, rendered upon a false disclosure, may be vacated in the discretion of the court, and if the garnishee has already made payment it will not protect him against the claim of his actual creditor. The plaintiff, also, will hold the money paid as to the creditor's use, and the latter is entitled to have it refunded to him on demand. *Id.*
10. One who has obtained a judgment against a garnishee upon a false disclosure must refund the money paid thereon to the garnishee's actual creditor upon the latter's demand after the judgment is vacated. And the plaintiff cannot retain the amount of the attorney fee paid to the garnishee's attorney. *Id.*

an assignment held void against: DEBTOR, ETC., 11,—591.
effect of chancery suit on the proceedings: DEBTOR, ETC., 14,—1.
of initials on vouchers: FORGERY, 1,—284.
GENERAL AVERAGE. See SHIPS AND SHIPPING, 1, 2,—584.
GENERAL ISSUE.
evidence under: TRESPASS, 1, 2,—402.
notice of defense in: TROVER, 1,—277.

GENUINENESS
of vouchers, denial to be specific: ACCOUNTING, 6,—284.
GOOD FAITH
of purchase, when not presumed: BONA FIDE PURCHASER, 1,—27.
GOODS SOLD AND DELIVERED.
action on common count for: PARTNERSHIP, 13,—237.
GRANTS
by Congress: RAILROAD COMPANIES, 4, 5,—460.
of the State, conditions on: PUBLIC LANDS, 1,—460.
payment by executor to guardian of devisee: ESTATES, ETC., 11,—343.
reversion to general government: RAILROAD COMPANIES, 3,—446.
GROWING CROPS.
sale of on execution: EXECUTION, 14, 15,—174.

GUARANTY.

1. A guarantor upon a contract of agency cannot be held if after signing a draft of the agreement to be submitted to the principal, the latter so alters it as to enlarge the agent's liability, as by requiring him to become responsible for more property or less salable property than at first contemplated. *Osborne v. Van Houten*, 444.

GUARDIAN AND WARD: *Accounting by Guardian*, 1–13; *Guardian for Incompetent*, 14.

1. In a proceeding between a guardian and ward it is error for the judge to make remarks in the course of the trial favoring the notion that the guardian has been culpably lax in his duties and that relations and others have supported the ward by reason of his neglect, and intimating that the present proceedings can properly be made to deter other guardians from doing as this one did. *Gott v. Culp*, 265.
2. A guardian's discretion in respect to the boarding and schooling of a ward stands on a similar footing with a parent's. He is not bound to prefer mere economy of cost to the welfare and comfort of the ward. *Id.*
3. A guardian's discretion in his expenditures for the clothing of a female ward cannot usually be reviewed if they are not out of proportion to her social position, and are made in good faith and do not exceed the ward's means. *Id.*
4. A guardian is not held responsible *ex post facto* on the ground, merely, that some other person might have done better; he cannot on an average be expected to be thoroughly versed in law or business, and honesty, kindness and a very ordinary skill in money matters are the most that can generally be required. *Id.*
5. A guardian whose ward's estate is sufficient to furnish an income that will, with economy, maintain and educate her suitably, should not exceed the income, without adequate reason, though if circumstances justify it he may look at future and probable resources as well as at the present and actual income, and though it would be prudent to obtain leave before drawing upon the principal, it is not absolutely necessary if the draft is one that ought to be made. *Id.*
6. A guardian may properly retain enough of the money of his ward to secure the means of making all necessary outlays; and in investing he may wait until he can find safe investments in sums of reasonable amount, looking not merely to the value of the security, but to the promptness of the borrower. *Id.*
7. A guardian intrusted with the investment of a ward's money should not be held for interest not actually received unless his delay to invest has been unreasonable; and he cannot be held for neglect beyond legal interest. *Id.*
8. A guardian cannot be censured for honestly investing his ward's money in public securities or at the best legal interest which he

finds readily obtainable; he represents the ward in taking securities and he may turn them. *Id.*

9. A guardian's compensation for the care of his ward is not an item of his account but is a matter for the consideration of the court which passes the accounts, and is not in any case to be determined by a jury. *Id.*
10. A guardian's duties are personal and honorary and the position is not to be given or assumed with a view of profit, but in Michigan he is entitled to such reasonable compensation as the circumstances warrant, such as the size and character of the estate, the amount and kind of his services, the duration of the trust, the obligation to maintain an oversight of the person, etc. *Id.*
11. A guardian's accounting is not a legal, but is an equitable proceeding, involving not merely the ordinary items of debit and credit but considerations as to the propriety of charges and investments and the allowance of compensation, with which a jury cannot meddle. It cannot become a common law controversy on removal from the Probate Court. *Id.*
12. Act 95 of 1873 requires a guardian to account on citation, but contemplates that he shall do so without; but the failure to do so, if not injurious, is not necessarily a cause of forfeiture. *Id.*
13. Money devised to a ward to be paid to her when she comes of age, but improperly paid over to the guardian while the ward is still a minor, is not received by him as guardian, because he has no business with it; and he is not liable for it on his bond. *Hinckley v. Probate Judge*, 343.
14. Comp. L. § 4822, permits the relations or friends "of any person who, by reason of extreme old age, or of other cause, is mentally incompetent to have the charge" of his property, to apply to the judge of probate and have a guardian appointed for him. Section 4825 provides that when any person by excessive drinking so wastes his estate as to expose himself or his family to danger of want, or the county to expense for their support, the county superintendent of the poor, or a township poor director, or justice of the peace, may complain to the judge of probate, and have a guardian appointed for him. *Held* (1), that a petition setting forth that "said A. B. is incompetent to have the care, charge and management of his property. He is old and infirm"—is insufficient, as it does not necessarily allege mental incompetency; (2), that the additional allegation, that he is so addicted to the excessive use of intoxicating drinks as to be liable to become the victim of designing persons, and that through intoxication and foolish speculation he has within fifteen years wasted more than half of a considerable estate, would be proper in a petition for the appointment of a guardian for a spendthrift as provided for in Comp. L., § 4825, but is surplusage in a petition based on mental incompetency. *In re Estate of Brown*, 326.

HEARING.
amendment on, of bill in EQUITY: 22,—**29.**
costs as for, on submission on briefs, COSTS, 8,—**57.**
right of defendant in foreclosure: MORTGAGE OF LANDS, 24,—**44.**

HIGHWAYS.

1. Highway commissioners have no authority to involve the township in debt, at their discretion, for building bridges. *Hosier v. Higgins Township Board*, 340.
2. Highway commissioners can only act when authorized; there is no general presumption that they can bind their township by obligations which they may see fit to issue, and if, in a proceeding to

enforce such obligations, there is no finding of their authority to issue them, it must be assumed that none existed. *Id.*

3. The Legislature has power to impose the burden of repaving as well as of paving streets, upon the abutting owners. *Sheley v. Detroit*, 431.

judicial notice as to use of street: EVIDENCE, 1,—**62.**
walking in traveled part of street: NEGLIGENCE, 3,—**62.**
injury from ice on sidewalk: ACTION, 3-5,—**74.**

HOMESTEAD.

1. A mortgage given by a married man will not bind the homestead unless it is in writing; nor will a mechanic's lien, if it does not identify the premises by written description. *Hammond v. Wells*, 11.
2. A wife has no equity to interpose her homestead right against a chattel mortgage which she had not signed, where it is given for moneys advanced for the purpose of establishing the homestead. *Fournier v. Chisholm*, 417.

HUSBAND AND WIFE.

1. A man can contract to furnish his own services and those of his wife, and if his wife makes no separate claim, can sue for them. And if the wife gives evidence in support of his demand, upon the trial, it is a sufficient ratification of his contract, if necessary to ratify it. *Harrington v. Gies*, 374.
2. A husband assigned to his wife a judgment recovered by him, but after her death he filed a claim against her estate for the money received on it as for money received to his use. It did not appear that she had received it on any trust in his favor, or that she owed him anything. *Held*, that in respect to this transaction the husband and wife were one in law unless he gave her the money or paid it to her as a part or concurrent consideration. If they were one, an *assumpsit* could not arise between them; if the money were given or paid to her, it was hers unconditionally, and there was nothing to support an *assumpsit* from the wife to the husband. *Bunt v. Jones*, 392.

assignment by wife of "use" of premises: LANDLORD, ETC., 13,—**630.**
chattel mortgage for moneys invested in HOMESTEAD: 2,—**417.**
wife as defendant, after foreclosure: EJECTMENT, 6,—**279.**
See DIVORCE.

ICE
on sidewalks, injury from: ACTION, 3, 5,—**74.**

IDENTIFICATION.
of property sold on execution, REPLEVIN, 2—**234.**
finders' right to: LOST PROPERTY, 1,—**313.**
of judgment by parol evidence: EXECUTIONS: 1,—**234.**

IMPEACHMENT.
of account stated, burden of: BANKS, ETC., 6,—**135.**

IMPLIED CONTRACT
to allow interest on public accounts: UNIV. OF MICHIGAN, 1,—**284.**

INCOMPETENTS
petition for guardianship: GUARDIAN, ETC., 14,—**326.**

INDORSEMENT.
evidence explaining: NEGOTIABLE INSTRUMENTS, 10,—**488.**
assignment by, effect of: VENDOR AND PURCHASER, 5,—**488.**
of agreement to pay higher interest: MORTGAGE OF LANDS, 4,—**253.**
on writ, evidence as to intent in levy: EXECUTIONS, 9,—**333.**
on writ, not to be contradicted: ATTACHMENT, 5—**333.**

INFANTS.

1. The statutory recognition of an infant's incapacity to make a contract is for the infant's protection and cannot be pleaded by a

stranger, and especially by a wrong-doer, to protect himself. *Holmes v. Rice*, 142.
2. An infant's contract is not void but is merely voidable, and may be avoided or ratified by the infant at his option; it is valid as to third parties who are strangers to it, and do not claim under either party. *Id.*

INJUNCTION,
1. An injunction to abate a dam which had existed about thirty years and had been erected under permission to raise the water to a certain height, was *denied* where the proofs did not conclusively show that the height agreed upon had been exceeded. But as the case contained facts that might properly be submitted to a jury, the denial was without prejudice to any proceedings at law, or to proceedings in equity, if these facts should be found against defendant. *Cobb v. Slimmer*, 176.
2. *Mandamus* lies to vacate an injunction where the bill upon which it was granted was devoid of substance, and could not therefore support the application for the writ. *Van Norman v. Jackson Circ. Judge*, 204.

to restrain payment of dividends: CORPORATIONS, 7,—**204.**
to restrain sale for school taxes: TAXATION, 8,—**559.**

INSANITY.
deed to insane grantee: DEEDS, 3—**513.**

INSTRUCTION.
as to effect of interest in witnesses: TRIAL, 7,—**51.**

INTENT
of defendant, materiality in TRESPASS, 3,—**402.**
of officer in making levy: EXECUTIONS, 9,—**333.**
of testator, oral evidence: WILLS, 5,—**350.**

INTEREST.
1. Interest cannot exceed seven per cent. in Michigan unless there is a written agreement for a higher rate. *University v. Rose*, 284.
2. Usury in Michigan is only such interest as exceeds ten per cent. *Havens v. Jones*, 253.

allowance of, to officer, effect: UNIVERSITY OF MICHIGAN, 1,—**284.**
stipulation for increased rate of: MORTGAGE OF LANDS, 3,—**253.**
increased, agreement not enlarging MORTGAGE OF LANDS, 4,—**253.**
allowance upon principal: MORTGAGE OF LANDS, 5,—**253.**
on public accounts: UNIVERSITY OF MICHIGAN, 1,—**284.**
upon loan made by void corporation: ACCOUNTING, 8,—**504.**
on orders issued by SCHOOL DISTRICTS, 5,—**496.**
liability of guardian: GUARDIAN AND WARD, 7,—**265.**

INTERPLEADER.
when allowed: EQUITY, 19, 20,—**500.**

INVESTMENTS.
by guardian, GUARDIAN AND WARD 6-8,—**265.**

IONIA REFORMATORY.
commitment to, CRIMINAL LAW, 10,—**179.**

JOINT CONTRACT.
partnership note is: STATUTE OF LIMITATIONS, 1,—**522.**

JUDGMENTS.
1. A judgment should be reversed if any substantial part of the cause of action is unsupported by proof. *Chicago & Canada Southern Ry Co. v Peters*, 636.

relate back, in EJECTMENT, 11,—**87.**
identification of, by parol evidence: EXECUTIONS, 1.—**234**
jurisdiction to render, on appeal from JUSTICE, ETC., 7,—**324.**
vacation of, for false disclosure: GARNISHMENT, 8, 9,—**413.**

of return or value in REPLEVIN, 9–12,—**565.**
not sustained by contradictory verdict: REPLEVIN, 13,—**607.**
JUDICIAL CIRCUIT.
appointment and salary of STENOGRAPHER, 1–3,—**47.**
JUDICIAL NOTICE
as to frequent use of street: EVIDENCE, 1,—**62.**
of usages in banking: BANKS, ETC., 3,—**135.**
JURISDICTION
of probate courts: COURTS, 3,—**29.**
of maritime torts in STATE COURTS, 1,—**65.**
by value, of circuit court in REPLEVIN, 1,—**478.**
of malicious prosecution: JUSTICES, ETC., 1,—**324.**
of Supreme Court in MANDAMUS, 1—**340,**
on appeal from JUSTICE, ETC., 7, 8,—**324, 326.**
to award judgment for return or value in REPLEVIN, 11, 12,—**565.**
to license sale: ESTATES, ETC., 3,—**457.**
JURY
findings on probate appeal: TRIAL, 17, —**265.**
instructions as to effect of interest: TRIAL, 6,—**51.**
not to determine guardian's compensation: GUARDIAN, ETC., 9,—**265.**
challenge to the array: TRIAL, 1,—**424.**
See QUESTIONS OF FACT.
JUSTICE OF THE PEACE.
1. The jurisdiction conferred upon the recorder of Corunna is that of a justice of the peace (Act 265 of 1869), and he therefore cannot entertain an action for malicious prosecution. Act 214 of 1875. *Sheldon v. Sullivan*, 324.
2. A defendant in justice's court moved for a nonsuit on the ground of variance between the declaration and the proofs in the matter of the assignment of the paper sued upon. *Held*, that an appellate court would not regard other variances to which the justice's attention had not been called. *Wilcox v. Toledo & Ann Arbor R. R. Co.*, 280.
3. The Supreme Court, in reviewing the proceedings of a justice, will disregard mere informalities and technicalities, and will not disturb his judgments upon objections which he was given no opportunity to examine, or which were so blindly stated as not to attract his attention. *Id.*
4. Special appearance in a justice's court for the sole purpose of moving to quash a writ, gives no right to thereafter serve the attorney with notice of an amendment of the constable's return. *Bushey v. Raths*, 181.
5. An action of debt lies upon a bond given on appeal from before a justice, where the effect of the appeal is to release an attachment lien, or to delay the levy of execution. *Id.*
6. Tenancy of any sort is a species of title; and where a defendant in an action brought before a justice and involving title, has not given notice that title will come in question, he cannot rely upon his tenancy as a defense. Comp. L. §§ 5326–9. *Vandoozer v. Dayton*, 247.
7. An appeal by the defendant in a justice's court from a judgment in an action which the justice had no right to entertain does not give the circuit court jurisdiction to render judgment for the plaintiff. *Sheldon v. Sullivan*, 324.
8. The circuit court obtains no jurisdiction by an appeal from a justice's court, if taken after the statutory period of five days allowed for taking it. *Franks v. Smith*, 326.

appeal bond releases lien of ATTACHMENT, 2,—**181.**
certiorari to review proceedings in GARNISHMENT, 4,—**41.**

declarations to be liberally construed: PLEADINGS, 6,—349.
discharge on defective complaint: CRIMINAL LAW, 4,—543.
duty as to volunteering objections: CRIMINAL LAW, 6,—486.
general *ad damnum* clause in declaration: PLEADINGS, 7,—324.
judgment for value in REPLEVIN, 9, 10,—565.
omission of venue from EXECUTIONS, 1,—234.
proof before, of lawful possession of land: TRESPASS, 4,—247.
service of process on "agent" of CORPORATIONS: 11,—643.
sufficiency of plea: PLEADINGS, 8,—486.
taking advice of prosecuting attorney: CRIMINAL LAW, 1,2,—543.

LABOR DEBTS.

orders in payment of: CORPORATIONS, 1,—92.

LAND CONTRACTS.

1. A contract for the sale of timbered land required the purchaser to pay current and back taxes, and an instalment of the price, annually, but stipulated against waste. Time was made essential, and the contract was subject to forfeiture on default. The purchaser did not pay the taxes, but within the first year cut a large quantity of pine, which he sold, besides selling a parcel of the land on time. The vendors also, within the year, sold their interest to W., who went on the land and began to lumber it without any objection from the original contract purchaser, who did not make any offer of payment, but some time afterwards assigned all his rights to G., who had full knowledge of the facts. G. then filed a bill against W. to restrain him from exercising acts of ownership. *Held*, that the bill could not be maintained, and that the complainant must be held responsible for all the expenses incident to the litigation, including charges, to which the suit gave rise, against lumber cut by W., who could include such charges in his costs. *Gram v. Wasey*, 223.

LANDLORD AND TENANT.

1. A tenant who has accepted his lease from several lessors jointly cannot inquire into their individual interests so long as he remains in possession undisturbed. *Hecht v. Ferris*, 376.
2. One of two lessors, even if the other be his wife, cannot assign the lease. *Id.*
3. A lien on property given by a lease, to secure the performance of its conditions, is inseparable from the lease, and can only be enforced against the lessee by the landlord or his assignee. *Hansen v. Prince*, 519.
4. A deed of land under lease conveys the landlord's rights, as against the lessee, without further ceremony. *Id.*
5. A three years' lease of farm lands began in March, 1877, and the rent was to be paid annually, October 15. September 2, 1878, the parties terminated the lease, but it was agreed that the tenant might keep possession until he could harvest his crops; that he was to pay no rent from that date, and that this stipulation was not to affect the rent to become due in October. *Held*, that this did not bind him to pay the rent for the whole year, but only until September 2, the date of the stipulation. *Bates v. Phinney*, 388.
6. Rent is the consideration for occupancy, and there is no consideration for its payment when the enjoyment of the rented premises ceases. *Id.*
7. An action for use and occupation will not lie where no actual use exists or is bargained for. *Id.*
8. An action for rent must be brought in the names of the lessors if the lease has not been assigned. *Hecht v. Ferris*, 376.

9. An agreement that a person who retains no ownership in the lease and has sold the land, should receive certain portions of the rent thereafter payable, gives him no title to enforce such payment by any action founded directly on the lease itself. All rights of that kind belong to the assignee of the land under lease, where they cannot be separated from the ownership of that instrument, and the beneficial interest in the partial revenues must be enforced in some other way. *Hansen v. Prince*, 519.
10. In an action for rent based on the condition of the appeal bond in proceedings for the recovery of the land, it was *held*, that proof of the writ of restitution was proper if it was served, and immaterial if complainant got possession without it. *Hecht v. Ferris*, 376.
11. An action for rent was brought on the condition of the appeal bond in proceedings to recover the land from the tenant. In bar of recovery proof was offered of an execution sale of the property against one of the lessors in favor of one of the sureties, and of a judgment in favor of the same surety in summary proceedings against the same lessor and the lessee for the possession of the same premises. But the lessee had enjoyed the premises for a certain period, and neither he nor his lessor had been ousted. *Held*, that the proof was properly ruled out. *Id.*
12. In an action for rent against the sureties on an appeal bond bringing up proceedings for the recovery of the premises leased by a man and his wife, an order payable out of the rent, signed by the man but not by his wife, and drawn upon the tenant, was held inadmissible where there was no assignment of the lease by both lessors. *Id.*
13. An assignment by a wife to her husband of "all the use" of certain premises leased to other persons, but held in her name, "for his use and benefit," is not specific enough to give him the right to rents under existing leases. *Spicer v. Bonker*, 630.
14. B. and S. held mortgages on certain rented premises already heavily encumbered. S. obtained an assignment of B.'s mortgage, and in order that his own might not be merged procured a deed of the premises to be made to his wife, intending to collect the rents until a foreclosure of prior mortgages. His wife assigned to him "all the use of" the premises "for his use and benefit." B., who understood these arrangements, meanwhile procured assignments of the leases, and collected the rents himself in advance. S. sued him for money had and received to plaintiff's use. *Held*, that an instruction to find for defendant did not prejudice the plaintiff, whose right of action arose under the assignment from his wife, and as she did not hold the leases, her right to collect the rents, if she had that right, rested on her ownership of the equity of redemption and on whatever estoppel may have arisen against B.; but the word "use" in her assignment was too uncertain to cover rents under leases which she did not hold. *Id.*
15. B. collected in advance rents which he knew S. intended to collect, and S. sued him for money had and received to plaintiff's use. Both were mortgagees of the rented property. *Held*, that defendant was entitled to an instruction that plaintiff's knowledge of the actual possession by tenants was notice enough to exclude any benefit from the defendant's neglect to inform plaintiff of the advance payment. *Id.*

tenant cannot take tax-title: TAXATION, 17,—**113.**
tenancy, when not a defense before JUSTICE OF THE PEACE, 6,—**247.**
bill to compel assignment of lease: EQUITY, 6-9,—**493.**

LAPSE OF TIME
as affecting foreclosure: MORTGAGE OF LANDS, 15-17.

LEASE. See LANDLORD AND TENANT.
bill to compel assignment of; parties: EQUITY, 6-9,—**493.**
LEGACY
paid by executor to guardian: ESTATES, ETC., 3, 11,—**343.**
LEGISLATURE.
misapprehension as to existence of remedy: STATUTES, 3,—**204.**
final judge on questions of policy: STATUTES, 9,—**431.**
LEVY.
intent in, evidence as to: EXECUTIONS, 9,—**333.**
on executions. See EXECUTIONS, 9-14.
subject to mortgage, may be changed: EXECUTIONS, 10,—**333.**
LIBEL.
1. A communication, representing that a certain person was of bad moral character, and wholly unfit to teach and have the care of a district school, was made to a township superintendent, by persons interested in a particular school within his jurisdiction, for the sole purpose of preventing the issue to the person so charged, of a license to teach the school. *Held*, that it was a privileged communication, and abundantly justified by proof that he was a habitual blasphemer and profane person, and an open violator of the Sabbath. *Wieman v. Mabee*, 484.
2. An action for libel will not lie on a communication relating to personal character, if made in good faith and for an honest purpose by persons concerned, and to the proper person. Nor will it lie when such a communication is untrue, if it is not maliciously made. *Id.*
3. A charge of bad moral character, if made generally, is not fully justified by proof of profanity and Sabbath-breaking. *Id.*
4. A person is responsible for such meaning of his language as is most natural and is actually by his own fault, accepted under the particular circumstances. But there is no responsibility for any other meaning than that which is shown to have been intended and actually understood. *Id.*

LIEN.
against lessee, enforcement of: LANDLORD, ETC., 3,—**519.**
appeal bond releases lien of justices' ATTACHMENT, 2,—**181.**
assignor has none during trust: DEBTOR, ETC., 15,—**607.**
description of lands: HOMESTEAD, 1; MECHANICS' LIEN, 1,—**11.**
for tax, not extinguished with MORTGAGE OF LANDS, 12, 13,—**113.**
for tolls for river improvement: LOGS AND LOGGING, 1,—**14.**
lands must be identified: MECHANIC'S LIEN, 1,—**11.**
of attachment, bill to protect: EQUITY, 2,—**204.**
of finder of LOST PROPERTY, 4,—**230.**
LIMITATION OF ACTIONS. See STATUTE OF LIMITATIONS.
in foreclosure: MORTGAGE OF LANDS, 15-17,—**629, 390, 638.**
LOANS
not proved by transfer of checks: EVIDENCE, 4,—**588.**
LOCAL ASSESSMENTS.
apportionment according to frontage: TAXATION, 2,—**431.**
LOGS AND LOGGING.
1. One who contracts to drive logs to a certain point at a fixed rate, is bound to discharge any lien for tolls imposed by river improvement companies. *Johnson v. Cranage*, 14.
2. Whether a boom company must not tender delivery of logs before being entitled to demand boomage charges thereon.—*Q.* *Id.*
3. In an action against a booming company for injury to plaintiff's land resulting from jams of logs and consequent overflows, a charge is erroneous which assumes that the company is an insurer

against such injuries, and which makes no account of evidence tending to show that some of the overflows were caused by extraordinary rainfalls. *White River Log & Booming Co. v. Nelson*, 578.

4. A booming company is not liable for damages caused to riparian owners by a proper and reasonable use of the right of floating logs; but it is liable if by willful or negligent management it creates or enlarges jams in the stream and thereby overflows its bank to their injury. *Id.*
5. The rights of the public to run logs in a navigable stream are not subordinate to the rights of riparian owners, but are concurrent, and each must be exercised without unnecessarily interfering with the other, and without negligence. *Id.*
6. Where a lumberman, in contracting with his jobber for getting out logs, agrees to divide the expense of scaling them and the scaler stipulates that the jobber shall board him, the cost of boarding him is an item of the expense to be divided, and the lumberman is liable for half of it and cannot show that it is the custom of the jobber to board the scaler at his own expense. But if the scaler does not stipulate for his board, the lumberman is not liable, and the transaction is between the jobber and scaler alone. *Hackley v. Headley*, 569.
7. A contract for getting out logs to be scaled "in accordance with the standard rules or scales in general use" on the stream, is governed by the scale in use at the time of scaling. *Id.*
8. In a contract by which one party was to furnish saw-logs to the other, the latter agreed that the former should not pay more than a fixed amount stumpage on certain lands. *Held*, that this implied that the parties contemplated that the logs were to be obtained from those lands, and that the party who assumed to fix the price of the stumpage claimed the right to dispose of it, and thereby assured to the other party the right to cut on those lands. *Wetmore v. Pattison*, 439.

damages for failure to supply saw-logs: DAMAGES, 1,—**439.**
agreement to pay another's workmen: CONTRACTS, 12,—**603.**
passage of title to supplies furnished: CONTRACTS, 2, 8,—**597.**

LOST PROPERTY.

1. It is a question of fact and not of law whether the finder of lost property has given fair and reasonable opportunity for its identification before restoring it and whether the claimant should have been given an opportunity to inspect it in order to decide whether it belonged to him. The jury's attention must be confined to the state of things preceding the beginning of suit. *Wood v. Pierson*, 313.
2. In an action against the finder of lost property for its conversion by refusing to give it up, the fact that after suit was begun the finder learned that it really belonged to the claimant has no tendency to show that he had fair and reasonable evidence thereof before suit. *Id.*
3. A right of action against the finder of property for which a reward has been offered is not defeated by neglect to tender the reward. *Id.*
4. A finder of lost property has no lien upon it as finder after he knows to whom it belongs; but he has a lien upon it for whatever reward may be offered for its recovery. *Id.*
5. A reward for lost property is not waived by insisting on its identification or any legal advantage connected with the finding. *Id.*

LOT OWNERS.

liability for accident from sidewalk: ACTION, 3-5,—**74.**

MALICIOUS PROSECUTION.
Corunna recorder has no jurisdiction: JUSTICE, ETC., 1,—324.
MANDAMUS.
1. The Supreme Court has plenary jurisdiction in *mandamus*, and will grant relief where a case is made out in part, even if it fails in other respects. *Hosier v. Higgins Township Board*, 340.
2. In *mandamus* cases the party interested is permitted to be heard in resisting the application. *Beecher v. Anderson*, 543.
3. *Mandamus* lies to require a circuit judge to hear an appeal by executors from an order of the probate court disallowing a will. *Cheever v. Washtenaw Circuit Judge*, 6.
4. *Mandamus* to compel a county clerk to issue a certificate of election to a person shown by the returns to have been legally elected, was denied when it would not have given substantial relief, and the question might be raised again in an issue as to the accuracy of the returns or by proceedings in the nature of *quo warranto*. *Sherburne v. Horn*, 160.
5. In *mandamus* proceedings to enforce the payment of money, as in any other, the claimant must make out his own case unless it is admitted expressly or by implication; the burden is not on the respondent to show that the demand is illegal. *Hosier v. Higgins Township Board*, 340.

costs on: see COSTS, 9,—496.
to compel payment of orders of SCHOOL DISTRICTS, 4,—496.
to compel service of warrant: CRIMINAL LAW, 4,—543.
to set aside order of removal: COURTS, 2,—416.
to vacate injunction: CORPORATIONS, 7,—204; INJUNCTION, 2,—204.
MANUFACTURING CORPORATIONS.
meeting to mortgage property: CORPORATIONS, 3,—103.
MARITIME LAW: See SHIPS AND SHIPPING.
failure to exhibit lights: NEGLIGENCE, 4,—65.
MARITIME TORTS.
jurisdiction of State COURTS, 1,—65.
MASTER AND SERVANT.
1. A master is liable for an injury done by his servant in the course of his employment, where the latter acted carelessly and recklessly and in negligent disregard of his master's instructions, but not if the injury was wanton, willful and intentional. Recklessness is only a high degree of negligence: the master's responsibility is not affected by the degree. *Cleveland v. Newsom*, 62.
2. An employer cannot be punished in damages for injuries received by employees who have voluntarily assumed the risks of the employment with full knowledge of the methods employed. *Mich. Central R. R. Co. v. Smithson*, 212.
3. *It seems* that a master need not expressly notify his servant of a risk where the nature of the business and of the risk is such that the only effective notice he can have is from his own general experience and the visible presence of that from which the danger is to be apprehended. *Id.*
4. A servant suing his employer upon a contract of service which the latter has prevented him from fulfilling by discharging him without cause before the expiration of the time for which he was hired, should meanwhile seek employment in his neighborhood, and if he fails to get it, and does work for himself its value cannot be deducted from the amount of his claim. *Harrington v. Gies*, 374.

burden of proof as to servant's course: NEGLIGENCE, 2.—62.
MEASURE OF DAMAGES
for non-performance of contract: DAMAGES, 1, 2,—439.

MECHANIC'S LIEN.
1. A mechanic's lien cannot be enforced against lands of which there is no written identification in the agreement for the work. *Hammond v. Wells*, 11.
must identify premises by writing: HOMESTEAD, 1,—**11.**
MEETING.
to mortgage property of manufacturing CORPORATIONS, 3,—**103.**
MEMORANDUM.
destroying negotiability of note: NEGOTIABLE INSTRUMENTS, 3,—**488.**
MERITS
not heard on motion for rehearing: PRACTICE, 13,—**20.**
MILL-DAM.
abatement: denial of INJUNCTION, 1,—**176.**
MINING CORPORATIONS.
no authority to issue accommodation paper: CORPORATIONS, 2,—**92.**
MISREPRESENTATION
of quantity, on sale of land: VENDOR, ETC., 1-3,—**481.**
MISTRIAL.
costs not awarded: COSTS, 6,—**410.**
MONEY HAD AND RECEIVED.
evidence to support ACTION, 9,—**620.**
MORTGAGE OF CHATTELS.
1. A chattel mortgage, where possession is not given, is void as against the mortgager's creditors, if not put on file in the proper office, even though recorded elsewhere by mistake. *Wallen v. Rossman*, 333.
2. Where a chattel mortgage is void as against a creditor levying attachments, it is not material that the mortgagee had taken possession before one of the attachments was levied. *Id.*
effect of discontinuance of REPLEVIN, 5,—**251.**
enforcement of, for moneys invested in HOMESTEAD, 2,—**417.**
levy on mortgager's interest: EXECUTIONS, 13,—**277.**
trover by assignee, notice of defense: TROVER, 1,—**277.**
levy subject to, may be changed: EXECUTIONS, 10,—**333.**
replevin for mortgaged chattels taken on attachment: DEBTOR, ETC., 4.—**333.**
unimpeached, validity is not open to jury: TRIAL, 16,—**338.**
when void as to creditors, DEBTOR, ETC., 5,—**617.**
showing intention to delay creditors: DEBTOR, ETC., 6,—**617.**
MORTGAGE OF LANDS. *Purpose*, 1; *Notice*, 2; *Interest*, 3-5; *Subsequent Rights*, 6-8, 19, 20, *Tax Payments*, 9-12; *Discharge and Tender*, 13, 14; *Payment*, 15; *Foreclosure*, 16-30.
1. The purpose of a mortgage is found in its condition and not in the formal consideration set forth in its introduction. *Shelden v. Warner*, 638.
2. A mortgagee of land against which attachment proceedings have been started is not without notice where his counsel, before advancing the money secured by the mortgage, recognized the attachment as a lien to be got rid of in order to clear the title, and caused money to be tendered for that purpose. *Chase v. Welsh*, 345.
3. A mortgagee has a right to stipulate for ten per cent. interest as a condition to extending time of payment, and if paid and applied as interest, the application will not be disturbed. *Havens v. Jones*, 253.
4. A note secured by mortgage was indorsed with an agreement to pay a higher rate of interest. *Held*, that the indorsement was a mere personal agreement and did not enlarge the mortgage. *Id.*
5. A mortgager who has paid interest upon ten per cent. interest, when

behind in his payments, is entitled to have it allowed on the principal, as ten per cent. is the statutory maximum of interest that may be taken in Michigan. *Id.*

6. Where a purchase-money mortgage contains a stipulation that it shall be "null and void" unless a certain other mortgage, already given by the vendor upon the same property, shall be discharged, the provision is for the benefit of the vendees who give the purchase-money mortgage, and if they do not insist upon it, the mortgagee in the prior mortgage cannot. *Pool v. Horton*, 404.
7. The mortgagers of property deeded it, and afterwards gave a new mortgage in place of the former one for the purpose of correcting an error of description. The consent of the grantees to the execution of the later mortgage was attached thereto in writing, but was signed by only one, the name of the other being added "by his attorney in fact." *Held*, that the giving of consent by the one who signed was equivalent to uniting in the mortgage, and bound his interest and that of any one claiming under him to the extent to which his interest was encumbered by this consent; but that the other's interest was not bound, as the deed antedated the later mortgage, to the execution of which it did not sufficiently appear that he had assented *Id.*
8. The owner of premises twice mortgaged conveyed them subject to the mortgages after the first had been foreclosed. Before the time of redemption had expired the grantee redeemed, and, having obtained a quit-claim to his wife from the first mortgagee, claimed that she held in her own right under a foreclosure from which the property had not been redeemed, and that the second mortgage was cut off. *Held*, that as her name was only used as a cover where her husband was the real party in interest, and as the transaction was probably understood by the mortgagee as substantially a redemption, no equity was made out in the wife's favor. *Wright v Patterson*, 261.
9. A second mortgagee is under no obligation to protect the lien of the first mortgagee by payment of taxes or by purchasing the premises for his benefit at a tax-sale; but if he does pay or purchase, the act *ipso facto* constitutes a protection. *Conn. Mut. L. Ins. Co. v. Bulte*, 113.
10. A mortgagee does not owe any duty to a subsequent mortgagee or to the owner, to protect the latter's lien as against tax sales; the duty is to the State, which will sell the interest of all if neither pays. *Id.*
11. The duty to pay taxes on mortgaged land is primarily in the mortgager, but if he makes default any mortgagee may pay, and if no one does so the land will be sold and his lien extinguished. But a payment by a mortgagee is allowed to increase the amount of his incumbrance in order to secure its repayment by the mortgager. *Id.*
12. Foreclosure cuts off a subsequent mortgage, but where the amount of a tax-purchase has been added to the later incumbrance the additional lien therefor is not extinguished with the mortgage. *Id.*
13. Where the discharge of a mortgage is demanded on the ground of a tender the evidence of tender must be clear and put defendant plainly in the wrong, especially where demand is made for the statutory penalty. *Engle v. Hall*, 57.
14. The purpose of the penalty imposed by statute for refusing to discharge a mortgage on tender of the amount due, is not only to indemnify the mortgagee for his trouble but to act as a punishment. *Id.*
15. Payment of a mortgage debt is not conclusively presumed from the lapse of many years, but there must be decisive proof that it is

an existing lien to warrant a decree of foreclosure. *Cowie v. Fisher*, 629.

16. Foreclosure of a mortgage dated in 1855 was not barred in 1878 where there was proof of payments made as late as 1866 by the mortgager as agent for his wife, who held the mortgaged interest under an assignment from a *mesne* purchaser. *Butler v. Hogadone*, 390.
17. The lapse of less than twenty years from filing the bill does not bar the foreclosure of a mortgage given for either indemnity or payment. *Shelden v. Warner*, 638.
18. Where a mortgage is given to secure the sureties on an official bond, it is immaterial that a bill to foreclose it does not correctly state the date of the appointment to the office, if it correctly recites the mortgage and the breach, and the testimony makes out full ground of suit *Id.*
19. The holder of a mortgage dated and recorded before a deed of the same property, is entitled to treat all subsequent rights as subordinate; and on his bill of foreclosure such rights need not be litigated. *Id.*
20. Where a foreclosure bill is filed against subsequent purchasers from a grantee whose deed was not recorded until after the mortgage, complainant is not concerned with the good faith of their grantor, and need not investigate the merits of subsequent interests. *Id.*
21. Where a mortgage is made subject to a life estate already vested in a third person, or where a third person had an undivided interest in the property before the mortgage was given, a foreclosure bill should be dismissed as to them. *Pool v. Horton*, 404.
22. A defendant in foreclosure whose connection with the mortgage or the equity of redemption is not shown by the bill, is not a proper party, and is entitled, so far as he is concerned, to have the bill dismissed with costs. *Havens v. Jones*, 253.
23. A foreclosure bill necessarily puts the defendant's title into the controversy; he can only be impleaded on the ground that he has or claims title. And the foreclosure would fail if one who claims title should be omitted. *McDonald v. McDonald*, 44.
24. Where a complainant in foreclosure is confident that a defendant has no interest, there is nothing to prevent his discharging him from the suit, but so long as he is kept on the record, he has a right to be heard. *Id.*
25. A foreclosure is invalid that is based on an order of publication made upon complainant's affidavit that defendants could not be found, the subpœna having been returned before the return day. *Soule v. Hough*, 418.
26. The proof of defendant's absence and of diligence in seeking to obtain service on him upon which to base an order of publication in foreclosure should rest on the applicant's own knowledge. *Id.*
27. A decree in foreclosure cannot be changed in favor of the defendants when they have not appealed. *Foster v. Malone*, 255.
28. An attorney fee paid under protest on redeeming from a statutory foreclosure may be recovered back. *Vosburgh v. Lay*, 455.
29. Redemption from a statutory foreclosure cannot be conditioned on the payment of any allowances in the nature of fees beyond what are authorized by statute. *Id.*
30. A stipulation in a mortgage fixing in advance a gross allowance for the attorney's fee in the event of foreclosure at law is against public policy, and cannot be enforced. *Id.*

answer after publication in foreclosure: EQUITY, 26.—**44.**
bill amended to pray foreclosure: EQUITY, 23,—**29.**
bill to give a deed the effect of: EQUITY, 14-17,—**533.**

by administrator to pay debts: ESTATES, ETC., 8,—330.
by manufacturing corporation: CORPORATION, 3,—103.
collection of rents under: LANDLORD, ETC., 14, 15,—630.
creditor in possession, not a mortgagee: DEBTOR, ETC., 10,—103.
defense overruled of BONA FIDE PURCHASER, 2,—390.
equity of redemption not to be sold on EXECUTIONS, 5, 15,—147,174.
foreclosure bill amended to ask for ACCOUNTING, 9,—504.
later mortgagee's purchase of tax-title: TAXATION, 16,—113.
mortgagee cannot file bill in aid of EXECUTIONS, 5,—147.
mortgager cannot use tax-title adversely: TAXATION, 17,—113.
must be written, to bind HOMESTEAD, 1,—11.
not enforcible by void corporation: ACCOUNTING, 8,—504.
of ESTATES OF DECEDENTS, 5-8.
growing crops sold on EXECUTION, 15,—174.
parol evidence to explain assignment of payment, CONTRACTS, 5,—357.
question of priority: EVIDENCE, 9,—638.
subrogation of mortgagee. ESTATES, ETC., 8,—330.

MUNICIPAL CORPORATIONS.

1. Act 244 of 1879 gives a right of action against municipal corporations for any injury sustained by reason of defective public highways, streets, bridges, crosswalks and culverts. *Held*, that it does not create a municipal liability for injuries caused by defective sidewalks. *Detroit v. Putnam*, 263.
2. A municipal corporation remains liable upon a debt which it has created, notwithstanding a subsequent change in its corporate limits. If contribution is required from territory set off from it, the corporation must obtain it, and not the creditors, unless otherwise provided. *Turnbull v. Alpena School District*, 496.
3. *It is suggested* that statutes passed to enable the debt of a municipal corporation to be distributed on the subdivision of the corporation, should provide that a failure to assign its share to each subdivision at the time appointed by the statute, shall not impair the right to do so afterward, and that full provision should be made for that purpose; if this is not done further legislation may be required. *Id.*

care of sidewalks, action for injury: ACTION, 3-5,—74.
ejectment against, for CEMETERIES, 1,—257.
property after division: TOWNSHIPS, 1, 2,—257.
transfer of property: CORPORATIONS, 8,—257.
signing of roll by board of review: TAXATION, 7,—621.
assessor's certificate to tax-roll: TAXATION, 5, 6,—621.

MUNICIPAL ORDINANCES.

as to keeping sidewalks free from ice; ACTION, 3,—74.

NAVIGABLE STREAMS.

logging rights concurrent with riparian: LOGS, ETC., 5,—578.

NEGLIGENCE.

1. One who claims damages for negligence must prove the negligence; it cannot be presumed. *Marquette H. & O. R. R. Co. v. Kirkwood*, 51.
2. Where a servant, while on an errand for his master, drove against a foot passenger, the plaintiff in an action for the injury has the burden of showing that the servant was not engaged in the course of his employment, but was driving around for pleasure. *Cleveland v. Newsom*, 62.
3. It is not necessarily negligence to walk in the traveled part of a city street if it is not shown that it is usually so occupied with teams as to make foot travel imprudent. *Id.*
4. It is negligence to disregard a positive regulation that boats moving at night shall exhibit lights, even though the practice may

have been otherwise; and if injury is done, it is for the jury to determine how far it was connected with such negligence. *Billings v. Breinig*, 65.

5. In an action for negligent injury the plaintiff must show that the person injured had exercised due care, and had not contributed to the injury; this need not be shown by direct evidence, but may be inferred from the circumstances. *Id.*
6. Business establishments are not bound at their peril to use only the best machinery and implements and the safest methods. *Michigan Central R. R. Co. v. Smithson*, 212.
7. It is not negligence for a railroad company to use machinery that is a necessity in its business and which all persons in its employment must be presumed to know is a necessity. *Id.*
8. A switchman had his hand crushed while coupling a freight car furnished with double deadwoods and received from another road where such a contrivance was generally used. He had not been expressly notified that he would be required to handle such cars, but in the course of commerce and as a matter of business necessity as well as of statutory obligation they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon. *Held*, that the switchman could not maintain a suit against the company as for negligent injury in receiving the cars or in omitting to notify him thereof. *Id.*

assignee's losses from: DEBTOR, ETC., 16, TRUSTS, 1,—**607.**
in keeping up fences: RAILROAD COMPANIES, 1,—**329.**
degree of, does not affect responsibility: MASTER, ETC., 1,—**62.**
of servant in driving, master's liability: MASTER, ETC., 1,—**62.**
to maintain side fencing: RAILROAD COMPANIES, 2,—**451.**

NEGOTIABLE INSTRUMENTS.

1. A note made payable to the "order of J. V. Mehling estate," and indorsed by the sole legatee who was also executrix, was *held* valid and payable to the proper representative of the estate. *Peltier v. Babillion*, 384.
2. In an action on the common counts by the indorsee of a note made payable to a specified estate and indorsed by the sole legatee and executrix, its negotiability is unimportant, because, if negotiable, it is indorsed by one who is presumed to hold the title to the estate, and if not, the assignee, under Michigan Statutes, can sue on it in his own name. *Id.*
3. The negotiability of a promissory note, made payable "on or before two years from date," is destroyed by a memorandum attached thereto providing that if paid within one year there shall be no interest. *Lamb v. Story*, 488.
4. A clause attached to a promissory note and providing that the payee or his assigns may indefinitely extend the time of payment, destroys its negotiability and makes it a simple contract. *Smith v. Van Blarcom*, 371.
5. Where a promissory note has a clause appended giving the payee the power to extend the time of payment indefinitely, the note and the clause must be construed together. *Id.*
6. A proviso in a promissory note is not void unless it is illegal or nugatory; and if innocent it does not make the note illegal though it may destroy its negotiability. *Id.*
7. Paper given to be applied upon a debt cannot be considered as accommodation paper. *Beecher v. Dacey*, 92.
8. Where a firm agreed to settle for merchandise with a note, and after dissolution a partnership note is given by the remaining partner, the other can repudiate his liability thereon, and if he is released

the vendor can treat the note as different from that agreed on, and it cannot then be regarded as payment. *Goodspeed v. South Bend Chilled Plow Co.*, 237.

9. In an action between the original parties to a note the circumstances of its issue are open to explanation. *Smith v. Van Blarcom*, 371.
10. In an action between original parties upon an instrument that is not negotiable, it is competent for the defendant to show the circumstances under which he indorsed it to the plaintiff, if the evidence does not vary any positive legal agreement made by him. *Lamb v. Story*, 488.

accommodation paper not to be issued by mining CORPORATIONS, 2,—92.
authority to sign checks: BANKS, ETC., 1, 2, 5, 6,—135.
note given after dissolution of PARTNERSHIP, 13,—237.
note in aid of railroad construction: RAILROAD COMPANIES, 6,—364.
transfer of paper when no PAYMENT, 1,—92.

NEW TRIAL.
when not granted on reversal: PRACTICE, 12,—153.

NOTICE
by record of execution sale: EXECUTIONS, 16-18,—469.
from possession by tenants: LANDLORD, ETC., 15,—630.
of application for appointment of commissioners: DRAINS, 2,—150.
of amendment of constable's return: ATTACHMENT, 4; JUSTICE, ETC., 4,—181.
of justification under legal proceedings: TROVER, 1,—277.
of meeting to mortgage property: CORPORATIONS, 3,—103.
of mortgage: BONA FIDE PURCHASER, 2,—390.
to servant, of risk: MASTER, ETC., 3; NEGLIGENCE, 8,—212.
to mortgagee, of attachment: MORTGAGE OF LANDS, 2,—345.

NUISANCE.
1. A wooden awning over a sidewalk in front of a store is not *per se* a public nuisance. *Hawkins v. Sanders*, 491

OFFICER.
acceptance of reduced salary, protest: SALARY, 1, 2,—479.
allegation of date of appointment: MORTGAGE OF LANDS, 18,—638.
allowance of expenditures by UNIVERSITY OF MICHIGAN, 1,—284.
assessor presumed to have done his duty: TAXATION, 4,—156.
capacity to sue: ACTION, 2,—79.
designation as obligee in BOND, 1,—79.
evidence of intent in making levy: EXECUTIONS, 9,—333.
liability of superior: ACCOUNTING, 2,—284.
nominal defendant cannot discontinue REPLEVIN, 4,—251.
pleading in name of public office only: PLEADINGS, 3,—79.
proper one to sue on BOND, 2,—79.
when cannot prove value by appraisal: EVIDENCE, 8,—588.

OFFICIAL BOND.
foreclosure by sureties on: MORTGAGE OF LANDS, 18,—638.

OPINIONS
as to value, competency: EVIDENCE, 6,—588.

ORDER OF PUBLICATION
in foreclosure, proof to base it on: MORTGAGE OF LANDS, 26,—348.
affidavit for, in DIVORCE, 1-3,—358.
affidavit of publication, the affiant: DIVORCE, 4,—358.

ORDERS
for merchandise: PARTNERSHIP, 11, 12; SALE, 1,—322.
in payment for labor; CORPORATIONS, 1,—92.

ORDINANCES
as to ice on sidewalks: ACTION, 3,—74.

ORGANIZATION
of township for taxation: TOWNSHIP, 3,—442.

PAROL AGREEMENT
cannot charge REAL PROPERTY, 1,—11.
PARTICULARS. See BILL OF PARTICULARS.
PARTIES.
1. The assent of parties does not determine a question of law, nor does their omission to contest a point urged against them. *Church v. Holcomb*, 29.
in bill to compel assignment of lease: EQUITY, 6-9,—493.
in foreclosure: see MORTGAGE OF LANDS, 21-24.
right to be heard, after publication: EQUITY, 26,—44.
wife when to be defendant in EJECTMENT, 6,—279.
wrongly impleaded, non-appearance of: EQUITY, 5,—404.
PARTNERSHIP: *Constructive*, 1-6; *Nature of Partner's Interest*, 7, 8; *When Partners Bound*, 9; *Retiring Partner*, 10-14.
1. A partnership cannot be implied, as matter of law, from a business relation, if the parties thereto have not made or intended to make a partnership contract and if they have done nothing to estop them from denying the existence of a partnership. *Beecher v. Bush*, 188.
2. Partnership involves community of interest in some lawful commerce or business for the conduct of which the parties are mutually agents for each other but with general powers within the scope of the business, which powers they can restrict by agreement to the extent of making one the sole agent of the rest and of the business. *Id.*
3. An arrangement by which one man "hires the use" of another's building from day to day and opens and keeps it as a hotel, paying the owner daily a sum "equal to one-third of the gross receipts and gross earnings," does not of itself constitute them partners. *Id.*
4. There can be no such thing as a partnership as to third persons when there is none as between the parties themselves, and third persons have not been misled by concealment of facts or by deceptive appearances *Id.*
5. The test of partnership, as between the parties themselves, is their interest. *Id.*
6. Participation in profits does not of itself make one a partner. *Id.*
7. One partner has presumptively an equal interest with another in the partnership property and an equal right to share in it when the partnership is dissolved; it is not, however, an interest in specific articles, but in the surplus that remains after the firm debts are paid, and as he has no separate property in the assets of the firm, his share is not separable from that of his partner, and is subject to the final adjustment of accounts between the partners themselves, when it may amount to little or nothing. *Hutchinson v. Dubois*, 143.
8. A partner is not merely part owner of the partnership property; he has an entire as well as a joint interest in the whole of it, and is in some sense a trustee of the partnership assets as a trust fund for the payment of creditors. One partner is, therefore, entitled to bring replevin for the whole property if it is seized on execution for the individual debt of another. *Id.*
9. The partnership name represents the constituents of the firm, and when it is rightly pledged the respective partners are jointly bound. *Gates v. Fisk*, 522.
10. A retiring partner is bound by all previous contracts made within the line of the business; but after the dissolution of the partnership

he is not bound by any new contract made by his former partner. *Goodspeed v. Wiard Plow Co.*, 322.

11. Where goods are ordered by one member of a firm, and the order has not been accepted, nor the goods shipped until after notice of its dissolution, and the shipment varies from the terms of the order, the retiring partner will not be bound on it. *Id.*
12. If the conditions of an order given by a firm are waived, after the dissolution of the partnership, by the remaining partner, it will not bind the retiring partner. *Id.*
13. A firm dissolved after ordering a lot of merchandise, but it was all forwarded before the assignors knew of the dissolution, and after they learned of it, they took a note, made in the firm name by the remaining partner, for the amount due. They afterwards brought suit against both partners on the common counts, and on the note. *Held* (1), that the retiring partner could not be held upon the note against his objection, as after the dissolution the other could not bind him; but (2) that an action on the common counts for goods sold and delivered would lie against both for the debt. *Goodspeed v. South Bend Chilled Plow Co.*, 237.
14. Certain land belonging to an individual partner was included as assets in the partnership articles, and the firm gave a mortgage on it. The owner drew up a deed conveying an undivided half of it to his partner, but it was not recorded and he afterwards destroyed the deed and took up the mortgage with partnership notes. When he went out of the firm he took a bond from his partner binding the latter to pay all partnership debts, and gave him clear title to the land which the partner bought with the other assets. *Held*, that by destroying the former deed he would have been estopped from enforcing payment of the notes, but for the subsequent conveyance of clear title, after which the notes constituted a liability enforceable by suit on the bond. *Mette v. Feldman*, 25.

execution for individual's debt: EXECUTION, 11, 12,—**143.**
note given after dissolution not payment: NEG. INSTRUMENTS, 8,—**237.**
note of, is a joint contract: STATUTE OF LIMITATIONS, 1,—**522.**

PAVING.

apportionment of tax: HIGHWAYS, 3; TAXATION, 2,—**431.**

PAYMENT.

1. Where a corporation gives its paper to a firm which holds orders issued by it, payable in goods, and there is no evidence that the paper was given or received in payment of the orders, the transfer of the paper must be held to be no payment. *Beecher v. Dacey*, 92.

additional, evidence to support claim for: REAL PROPERTY, 2,—**46.**
arresting statute of limitations: MORTGAGE OF LANDS, 16,—**390.**
assignment of, explained by parol evidence: CONTRACTS, 5,—**357.**
by executor to guardian of devisee: ESTATES, ETC., 11,—**343.**
extension of time of: NEGOTIABLE INSTRUMENTS, 4, 5,—**371.**
fraudulent, of debts: DEBTOR AND CREDITOR, 7,—**588.**
is shown by transfer of checks: EVIDENCE, 4—**588.**
note given by remaining partner: NEG. INSTRUMENTS, 8,—**237.**
of debts, after division of SCHOOL DISTRICTS, 3,—**496.**
of claims against ESTATES, ETC., 2,—**457.**
of taxes on mortgaged land: MORTGAGE OF LANDS, 11,—**113.**
on assignment, defense to foreclosure: BONA FIDE PURCHASER, 2,—**390.**
on partnership note after dissolution: STATUTE OF LIMITATIONS, 1,—**522.**
partnership note after dissolution, when not: NEGOTIABLE INSTRUMENTS, 8,—**237.**

presumption from lapse of time: MORTGAGE OF LANDS, 15,—**629.**
question as to, in REPLEVIN, 8,—**610**
tender of, see TENDER.
PENALTY
for refusal to discharge MORTGAGE OF LANDS, 13, 14,—**57.**
PERJURY; see CRIMINAL LAW, 8, 9,—**543.**
PERSONALTY.
growing crops treated as, on EXECUTIONS, 14,—**174.**
PETITION
for guardianship of incompetent: GUARDIAN, ETC., 14,—**326.**
to be allowed to answer: EQUITY, 26,—**44.**
PLEADINGS:
1. An objection to a declaration for not being full enough should be taken before going on with the trial. *Pettibone v. Maclem*, 381.
2. An objection to the sufficiency of a pleading only admits the facts stated for the temporary purpose of the pending suit. *Eveland v. Stephenson*, 394.
3. Pleading in the name of a public office without adding the name of the officer, if a defect, is amendable. *Berrien County Treasurer v. Bunbury*, 79.
4. Sureties on an appeal bond, being sued alone, did not plead the non-joinder of their principal, in abatement, but the court set aside a default for the non-joinder and allowed an amendment. On a new summons the principal was defaulted, but the sureties pleaded the general issue to the amended declaration, and went to trial, without legally objecting to it. *Held*, that on error they could not raise any question about the propriety of the new pleading. *Hecht v. Ferris*, 376.
5. Recovery can be had under the common counts upon an agreement to pay for services in forwarding the sale of one's land. *Fletcher v. Bradford*, 349.
6. Declarations in justice's courts are to be liberally construed. *Id.*
7. A general *ad damnum* clause at the end of a declaration in justice's court will apply to a count for assault and battery, especially if the other counts are invalid; and if there were any defect in making it general it would be within the statute of amendments. *Sheldon v. Sullivan* 324.
8. A justice enters what he understands to be the substance of a plea in his docket, and if none but a plainly untenable objection has been taken to it, a court of review will presume that it was otherwise sufficient. *Preston v. People*, 486.
9. A man bringing suit in his own name, put in evidence a contract under which he and his wife were to work for defendant. *Held*, that there was no material variance. *Harrington v. Gies*, 374.

allegations in foreclosure bill: MORTGAGE OF LANDS, 18,—**638.**
objection by justice to special plea: CRIMINAL LAW, 6,—**486.**
parties in bill to compel assignment of lease, EQUITY, 6-9,—**493.**
plea of former conviction: CRIMINAL LAW,—5, 7,—**486.**
plea of conveyance *puis darrein*, in EJECTMENT, 2,—**87.**
POSSESSION.
1. Abstract presumptions as to title from possession become inapplicable when evidence is introduced of the actual title. *Gavigan v. Evans*, 597.

continued in grantor, presumption: REAL PROPERTY, 3,—**59.**
creditor in, not necessarily a mortgagee: DEBTOR, ETC., 10—**103.**
lawful, of land, proof before justice: TRESPASS, 4,—**247.**
must be adverse to bar EJECTMENT, 3,—**156.**
of DWELLING HOUSE, 1, 2,—**418.**

POWERS
to sell on credit, avoids assignment: DEBTOR, ETC., 11,—**591.**
to execute assignment for insolvent CORPORATIONS, 9, 10,—**591.**
PRACTICE. *Writ of Error*, 1; *Settling Case*, 2, 3; *Case Made*, 4, 5; *Record*, 6–8; *Review*, 9–11; *New Trial on Reversal*, 12; *Re-hearing*, 13; *Conclusiveness of Rulings*, 14.

1. Where the prevailing party neglected to enter his judgment until after the return day of a writ of error which had been taken out, but to which return had not been made, a motion to dismiss a second writ sued out after judgment was entered, was denied. *Hinckley v. Probate Judge*, 343.
2. The Supreme Court will extend the time for settling a case in which the proofs were taken in open court, if the failure to settle it within the prescribed time could not have been prevented by the appellant. *Gram v. Wasey*, 223.
3. Where return has been made to a chancery appeal, the Supreme Court having obtained jurisdiction, will give opportunity to make good such defects as were not due to appellant's negligence: and if the transcript has not been signed it will allow the filing of a certificate from the trial judge that the case was settled and the proofs are correct. *Id.*
4. A special exception to the conclusions of law, where the case is tried without a jury, and the judge makes a special finding, is sufficient, on case made, to raise the point that the facts do not support the judgment. Circuit Court Rules 89 and 90. *Perkins v. Nugent*, 156.
5. Neglect to serve a statement of errors relied on in taking up a case made was overlooked by the court where the omission had not been complained of. *Id.*
6. Where the record of a case is questioned collaterally, only such objections can be noticed as affect the jurisdiction to dispose of it. *Pettiford v. Zoellner*, 358.
7. Books and similar exhibits need not be reproduced in the printed record of a case. *University v. Rose*, 284.
8. The Supreme Court declined to allow a chancery cause to go to hearing without printing the entire record, there being no appearance by counsel on one side with whom to agree, subject to the court's approval, as to how much ought to be printed. *Id.*
9. The Supreme Court will not weigh evidence in law cases and ascertain facts as a ground of final judgment. *Gates v. Fisk*, 522.
10. The Supreme Court reviews judgments in law cases upon questions of law only. It has no authority to review a case at law upon the facts and decide from the record whether the plaintiff has made out such a case as would entitle him to go to the jury, and if he has, whether the defendant has met it by so unquestionable a defense as to leave the jury no discretion to do anything but give him a verdict. *Demill v. Moffat*, 410.
11. On appeals in equity the court inquires into the facts and forms its own conclusions. *McCullough v. Day*, 554.
12. A new trial is not granted on reversal where the count of the declaration on which the verdict rests presents no cause of action, even though the plaintiff might have recovered on some other count. *Dayton v. Fargo*, 153.
13. Argument on the merits cannot be made on a motion for a re-hearing, but only on the re-hearing itself, if granted. *Kraft v. Raths*, 20.
14. The rulings of the Supreme Court in a dispute in equity are not binding in an action at law between the same parties in regard to the same subject matter, so long as the issues are distinct. *Blake v. Hubbard*, 1.

assignment of errors on CERTIORARI, 1,—**636.**
costs for vexatious litigation: COSTS, 2,—**496.**
costs on dismissal of writ of error: COSTS, 5,—**413.**
decree not altered for non-appellants: MORTGAGE OF LANDS, 27,—**255.**
duty of trial judge: TRIAL, 18,—**79.**
error does not lie on collateral order: GARNISHMENT, 6,—**413.**
full costs on submission on briefs: COSTS, 8,—**57.**
motion to modify judgment, re-taxation of COSTS, 10,—**20.**
notice of justification under legal proceedings: TROVER, 1,—**277.**
no costs on mistrial: COSTS, 6,—**410.**
no reversal for error cured; TRIAL, 6,—**451.**
objection to amendment should be made below: PLEADINGS, 4,—**376.**
objections to be raised below: BOND, 1,—**79.**
on trial of probate appeal: TRIALS, 17,—**265.**
reversal for want of proof: JUDGMENTS, 1,—**636.**
stipulation for discontinuance: REPLEVIN, 4, 5,—**251.**
review of justices' proceedings: JUSTICES OF THE PEACE, 3,—**280.**
objections should be clearly stated: JUSTICES OF THE PEACE, 3,—**280**
service of process on "agent" of CORPORATIONS, 11,—**643.**

PRESUMPTIONS
as to allowance of officer's expenditures: UNIVERSITY OF MICHIGAN, 1,—**284.**
as to application of charge: TRIAL, 5,—**381.**
as to assessor's performance of duty: TAXATION, 4,—**156.**
as to dealings of customers with BANKS, ETC., 4,—**135.**
as to grantor's continued possession: REAL PROPERTY, 3,—**59.**
as to holding by tenant in common: ADVERSE POSSESSION, 3,—**367.**
as to place of seizure under justice's ATTACHMENT, 3,—**181.**
as to purchase of tax-title: TAXATION, 17,—**113.**
as to reception of goods by CARRIERS, ETC., 5,—**51.**
as to sufficiency of plea before justice: PLEADINGS, 3,—**486.**
as to title from POSSESSION, 1,—**597.**
as to validity of tax-title: TAXATION, 3, 4,—**156.**
none, of NEGLIGENCE, 1,—**51.**
of action of counties appointing STENOGRAPHER, 2,—**47.**
of good faith: BONA FIDE PURCHASER, 1,—**27.**
of payment, from lapse of time: MORTGAGE OF LANDS, 15,—**629.**
that execution purchaser should recover in ejectment: EXECUTIONS 18,—**469.**
that goods continued in good order: CARRIERS, ETC., 1,—**51.**

PRIMARY SCHOOL DISTRICTS
not to contain more than nine sections: SCHOOL DISTRICTS, 1,—**559.**

PRIMARY SCHOOL INTEREST FUND.
when specific taxes to be applied to: CONST. LAW, 1,—**162.**

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRIVATE ROADS. See ALLEYS.

PRIVILEGED COMMUNICATION. See LIBEL, 1, 2,—**484.**

PROBATE APPEAL.
executors may appeal from refusal of: WILLS, 6,—**6.**
hearing compelled by MANDAMUS, 3,—**6.**
trial of, findings of jury: TRIAL, 17,—**265.**

PROBATE JUDGE.
implied assent to reduced SALARY, 1,—**479.**

PROBATE LAW.
action of court, when voidable only: COURTS, 3,—**29.**
counsel fees on construction of WILLS, 3,—**350.**
jurisdiction to license sale: ESTATES, ETC., 3,—**457.**
licensing sale or mortgage of real property: ESTATES, ETC., 3–7.
See ESTATES OF DECEDENTS; GUARDIAN AND WARD; WILLS.

PROFITS.
participation in, as a test of PARTNERSHIP, 6,—188.
PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS.
PROOF.
reversal for lack of: JUDGMENTS, 1,—636.
strict, conditions to insisting on: TRIAL, 2,—280.
PROPERTY.
franchise of keeping a rope ferry, is: FRANCHISE, 2,—65.
PROSECUTING ATTORNEY.
discretion to stop prosecutions: CRIM. LAW, 1,—543.
justice to take advice of: CRIM. LAW, 2,—543.
cannot control sheriff's action: CRIM. LAW, 3,—543.
PROTEST
on receipt of salary, effect: SALARY, 2,—479.
to whom should be made: SALARY, 2,—479.
PUBLICATION.
affidavits for order of: DIVORCE, 1-3,—358.
of notice, description of affiant: DIVORCE, 4,—358.
defendant's right to answer: EQUITY, 26,—44.
sufficiency of foreclosure by: MORTGAGE OF LANDS, 25, 26,—418.
PUBLIC LANDS.
1. The State, while acting under the Constitution, can impose its own conditions on its own grants. *Rogers v. Port Huron & L. Mich. R. R. Co.*, 460.
grants of, by Congress: RAILROAD COMPANIES, 4, 5,—460.
PUIS DARREIN CONTINUANCE.
plea of conveyance in EJECTMENT, 2,—87.

QUESTIONS OF FACT.
connection of injury with NEGLIGENCE, 4,—65.
credibility of witnesses: TRIAL, 14,—610.
in regard to LOST PROPERTY, 1,—313.
title by deed is: DEEDS, 7,—410.

RAILROAD COMPANIES: *Fencing*, 1, 2; *Land Grants*, 3-5; *Note in aid of*, 6.
1. Act 198 of 1873 gives damages against a railway company for cattle killed by reason of the company's negligence in not keeping up the fences along its track. *Held*, that where the fences had been accidentally destroyed by fire after the track inspector had made his daily inspection, and the fact was not known until after the injury had been done, the company was not guilty of negligence. *Toledo, Canada S. & Detroit Ry. Co. v. Eder*, 329.
2. The statutory liability of a railway company for injuries to cattle resulting from its neglect to put up and maintain side-fencing is not affected by the contributory negligence of the owner of the cattle. Act 198 of 1873. *Grand Rapids & Ind. R. R. Co. v. Cameron*, 451.
3. Act 132 of 1877, confirming the transfer, by the Governor and Board of Control of Railroads, to the Port Huron & Lake Michigan Railroad Company, of lands granted by Congress to the State in aid of the construction of railroads, and at first assigned to the Detroit & Milwaukee Railway Company, was void as impairing the contract obligation arising from the conditions of the grant whereby the lands were to revert to the General Government if the roads to which the State assigned them were not completed within a specified time. *Fenn v. Kinsey*, 446.
4. Congress, by an act passed June 3, 1856, granted certain lands to the State of Michigan to be used solely in aid of the construction

of railroads. The State, by Act 126 of 1857, set them apart for the benefit of certain designated roads on condition that the beneficiaries should accept them subject to the terms of the Act. *Held*, in a case in which the acceptance was qualified, that the company acquired no title, and that a bill would not lie to quiet a title to the lands obtained by execution against the beneficiary intended by the Statute. *Rogers v. Port Huron & L. Mich. R. R. Co.*, 460.

5. Railroad companies which accepted the congressional grant of public lands under the provisions of Act 126 of 1857, acquired rights which could not be destroyed except by their own neglect. *Id.*
6. A promissory note, payable to the treasurer of the Chicago and Canada Southern Railway Company, was made "in consideration of the construction of" the railway through or within half a mile of the village of Dundee "within three years after this date, and the building of passenger and freight depot" at Dundee; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through Dundee, and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond Dundee, so as to form a through line. *Held*, that the promise was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated. *Stowell v. Stowell*, 364.

RATIFICATION
of expenditures by officers: UNIVERSITY OF MICHIGAN, 1,—284.
of infant's contract: INFANT, 2,—142.
by wife, of contract of service: HUSBAND AND WIFE, 1,—374.
not valid, of Sunday bargains: CONTRACTS, 11,—355

REAL ACTION.
ejectment is, in Michigan: EJECTMENT, 1,—87.

REAL PROPERTY.
1. Charges cannot be imposed on real estate by oral agreements unless there are distinct and positive provisions enabling it to be done. *Hammond v. Wells*, 11.
2. Where a purchaser of land orally agreed that if the premises, when surveyed, should exceed a certain amount for which he paid, he would pay more, the vendor could not sue the purchaser's assignee for the additional sum if the deed was not put in evidence, and there was nothing to show what land or how much was conveyed by it. *Lewis v. Pond*, 46.
3. A grantor's continued possession is presumed to be in subordination to his own conveyance unless, while he is allowed to remain as apparent owner, third persons have in good faith and relying on appearances acquired rights under him. *Jeffery v. Hursh*, 59.

admitting title, before JUSTICE OF THE PEACE, 6; TRESPASS, 4,—247.
defense of statute of frauds, waiver, EQUITY, 12,—394.
good faith of purchase: BONA FIDE PURCHASER, 1,—27.
license to sell real property: ESTATES, ETC., 3, 4,—457.
possession of DWELLING HOUSE, 1, 2,—418.
title by deed is a question of fact: DEEDS, 7,—410.
See ADVERSE POSSESSION, EJECTMENT, FORCIBLE ENTRY, ETC., MORTGAGE OF LANDS.

RECEIPT
in full, for partial payment: DURESS, 5,—569.
without consideration: DEBTOR, ETC., 2,—569.

RECEIPTED BILLS
not evidence of value: EVIDENCE, 5,—588.
transfer of, effect in EVIDENCE, 4,—588.

RECEIVER.
validity of appointment, estoppel to question: DEBTOR AND CREDITOR, 3,—504.
for corporation organized under void law: ACCOUNTING, 8,—504.
See EQUITY, 27-29.
RECKLESSNESS
of servant, master liable: MASTER AND SERVANT, 1,—62.
RECORD.
collateral attack, what objections noticed: PRACTICE, 6,—358.
must show notice of application for commissioners: DRAINS, 2,—150.
printed, what should include: PRACTICE, 7, 8,—284.
construction, of DEEDS, 8,—638.
effect of record in wrong office: MORTGAGE OF CHATTELS, 1,—333.
of execution sale, as notice: EXECUTIONS, 16,—469.
RECORDER OF CORUNNA.
no jurisdiction for malicious prosecution: JUSTICE, ETC., 1,—324.
RECOUPMENT
for misrepresentation in sale: VENDOR, ETC., 1-3,—481.
REDEMPTION
from foreclosure: MORTGAGE OF LANDS, 8,—261.
from foreclosure, no attorney fee: MORTGAGE OF LANDS, 28-30,—455.
refusal, of absolute transfer by debtor: DEBTOR, ETC , 9,—385.
REFORMATION OF DEED
requires clear showing: EQUITY, 18,—529.
REGENTS: see UNIVERSITY OF MICHIGAN.
RE-HEARING.
bill for: EQUITY, 11,—394.
RELATION BACK
of judgment in EJECTMENT, 11,—87.
of tax-title: TAXATION, 13,—113.
RELATIONSHIP
between parties to a bill in EQUITY, 16,—533.
REMEDIES.
legislative mistake of fact: STATUTES, 3,—204.
REMOVAL OF CAUSES: see COURTS, 2,—416.
RENT: see LANDLORD AND TENANT, 5-15.
REPAVING.
abutting owners may be charged with: HIGHWAYS, 3,—431.
REPEAL
by implication, not favored: STATUTES, 4,—173.

REPLEVIN:—*Jurisdiction*, 1; *Description of Property*, 2, 3; *Stipulation for Dismissal*, 4, 5; *Evidence*, 6, 8; *Judgment*, 9-13.

1. Replevin for a fox skin worth a dollar and a half will not lie in the circuit court. *Kittridge v. Miller*, 478.
2. Replevin was brought for a building that had been sold on execution. The writ described it as on lot 7 of block 6, while the certificate of levy and notice of sale referred to it as on lot 8. *Held*, that the variance would not exclude evidence of the proceedings on execution, and that parol evidence was admissible to identify the property actually taken. *Elliott v. Hart*, 234.
3. Where a writ of replevin describes a building to be replevied as on a specified lot, it speaks from the time of the issuing of the writ; and the fact that at the time of suit the building was elsewhere does not defeat the proceeding. *Id.*
4. An officer who has seized goods by virtue of legal process is a merely nominal defendant to an action of replevin for them, and unless the real party in interest has refused to indemnify him cannot prejudice the latter's rights by stipulating with the plaintiff for the dismissal of the suit without judgment. *Casper v. Kent Circuit Judge*, 251.

5. A stipulation for the dismissal, without judgment, of a suit in replevin for property taken under a chattel mortgage, leaves the property in the mortgager's hands, releases the sureties on the replevin bond, and, if the property is beyond reach, leaves the mortgagee without adequate remedy. *Id.*
6. In replevin it is competent to disprove plaintiff's title to the goods, and one way to do this is to show that some one else owns them. *Nicholson v. Dyer*, 610.
7. A plaintiff in replevin cannot be allowed to prevail upon a ground which he has virtually repudiated by resorting to that form of action, as by relying on his right as consignee. *Id.*
8. Execution was levied on an express package of money sent by the judgment debtor to an agent of his firm to repay advances made by the agent in the interest of the principals. The agent brought replevin against the sheriff. *Held* (1) that as between these parties the question of defendant's right to seize money in the hands of the express company was immaterial; (2) that if the money was mutually meant as payment, plaintiff could recover, but if it was meant to be used by the agent in the principal's business, he could not; (3) that defendant was not concluded by the concurrent testimony of the consignor and the consignee that it was a payment, but was at liberty to show the contrary if he could. Nor was the jury bound by the plaintiff's version. *Id.*
9. A waiver of return in a justice's court, made in open court and entered by the justice at defendant's request, is sufficient to authorize a judgment for value instead of for a return. *Humphrey v. Bayn*, 565.
10. If a writ of replevin is sworn out in a justice's court for less than $100, the justice may give defendant judgment for the value although exceeding that sum. Henderson v. Desborough, 28 Mich. 170, followed. Parsell v. Genesee Circuit Judge, 39 Mich. 542, distinguished on the question of jurisdiction, as a case where the writ described nothing. *Id.*
11. Where property is described in a writ of replevin and taken under it, and the writ is quashed, the defendant is entitled to a judgment of return or for its value on waiver of return. *Id.*
12. The fact that the description given in the writ is of such an interest as should not be made the subject of replevin, does not deprive the court of jurisdiction to award such judgment. It is only where no description is set forth at all in the writ that the jurisdiction, which is confined to what is thus set forth, fails. *Id.*
13. A finding in replevin that plaintiff has the general property but that defendant did not unlawfully detain the goods is contradictory and cannot sustain a judgment in a case where it is impossible that a special property should co-exist with the general ownership. *Rodman v. Nathan*, 607.

by single partners for firm property: PARTNERSHIP, 8,—**143.**
for mortgaged chattels taken on attachment: DEBTOR, ETC., 4,—**333.**
REQUESTS TO CHARGE.
error in modifying, cured; TRIAL, 6,—**451.**
RES GESTÆ.
acts and utterances of accused: EVIDENCE, 2,—**284.**
statements following an accident; EVIDENCE, 3,—**62.**
RES JUDICATA.
effect of rulings in equity: PRACTICE, 14,—**1.**
question decided, not to be re-tried: DEBTOR, ETC., 4,—**333.**
RETIRING PARTNER: see PARTNERSHIP, 10-12,—**322.**
RETURN
on day of issue, of writ not served; GARNISHMENT, 3,—**20.**

of constable, amendment of: ATTACHMENT, 4; JUSTICE OF THE PEACE, 4, **181.**
of constable, to writ of ATTACHMENT, 6,—**399.**
not to be contradicted: ATTACHMENT, 4,—**333.**
REVERSION
of land grant to General Government: RAILROAD CO.S, 3,—**446.**
how may be reached in EQUITY, 13—**394.**
REVIVOR
of revoked WILLS, 7,—**241.**
REWARD
for recovery of LOST PROPERTY, 3-5,—**313.**
RIPARIAN RIGHTS.
injury from overflows: LOGS AND LOGGING, 3, 4,—**578.**
are concurrent with logging rights: LOGS AND LOGGING, 5,—**578.**
RIVER IMPROVEMENT COMPANIES.
lien for tolls, who discharges: LOGS AND LOGGING, 1,—**14.**
RULES.
Circuit Court Rule 9: Service, 420.
Circuit Court Rule 84: Case Made, 158.
Circuit Court Rules 89, 90: Findings, 158.
Chancery Rule 81: Rehearing, 399.
Supreme Court Rule 48: Costs, 59.

SALARY.

1. A probate judge's silent acceptance of his salary as reduced by the Board of Supervisors from the amount previously allowed him, is an implied assent to their fixing it at the lower rate, and precludes him from claiming more. *Thomas v. St. Clair Supervisors*, 479.
2. A protest is ineffective unless made to the body having power to act upon the subject matter. If a salaried officer protests that the amount of salary allowed him is less than he is entitled to, it is of no effect to make the protest to the functionary entrusted with the mere duty of paying him if the latter has no part in fixing the salary, and is under no obligation to report the protest to the body which fixes it. *Id.*

of STENOGRAPHER, 1, 3,—**47.**

SALE.

1. An order for goods does not amount to a contract binding the person who gives it until some act is done on the faith of it by the person to whom it is given, or until it is accepted; and if it is above $50, the acceptance, in Michigan, must be in writing.—*Goodspeed v. Wiard Plow Co.*, 322.

license for: ESTATES, ETC., 3, 4,—**457.**
of land, misrepresentation of quantity: VENDOR, ETC., 1-3,—481.
on execution: see EXECUTIONS,—14-20.
right to sell, when not for jury: TRIAL, 13,—**597.**
vendee's responsibility: VENDOR AND PURCHASER, 4,—**597.**
SCALE; see LOGS AND LOGGING: 6, 7,—**569.**

SCHOOL DISTRICTS.

1. It has always been the policy of the Michigan school laws that no primary school district should contain more than nine sections of land. *Simpkins v. Ward*, 559.
2. Township school inspectors cannot enlarge a graded school district by adding unorganized territory, though they may, with the consent of the trustees, transfer to its jurisdiction territory previously organized into primary districts. *Id.*
3. Where a school district has been subdivided and other districts set off, the debts of the original district cannot be parcelled out among all by a proceeding in the courts, so as to give creditors a remedy

against any but the original debtors. Maltz v. Board of Education, 41 Mich., 547; *Turnbull v. Alpena School District*, 496.
4. *Mandamus* lies to compel a school district to pay orders issued by it, even though the district has since been subdivided, where statutory provisions for distributing the original liability have not been carried out. *Id.*
5. Interest upon orders issued by a school district is denied on granting a *mandamus* to compel their payment if no authority has been given to impose it. *Id.*

SCHOOL TAXES.
injunction to restrain sale for: TAXATION, 8,—**559.**
SCHOOL TEACHER
privileged communication about: LIBEL, 1—**484.**
SEAL.
absence of, from deed, effect: DEEDS, 6,—**628.**
SERVICE.
presumption as to place of: ATTACHMENT, 3,—**181.**
of chancery subpœna, diligence in: EQUITY, 25,—**418.**
of process upon "agent" of CORPORATIONS, 11,—**643.**
proof or diligence in obtaining: MORTGAGE OF LANDS, 26,—**348.**
return of, in ATTACHMENT, 6,—**399.**
SETTLING CASE.
extension of time for: PRACTICE, 2,—**223.**
signing transcript *nunc pro tunc:* PRACTICE, 3,—**223.**
SHERIFF.
duty in executing criminal warrant: CRIMINAL LAW, 3,—**543.**
search for personal property on EXECUTIONS, 7,—**469.**
SHIPS AND SHIPPING.
1. Freight lightered away from a grounded vessel in order to save the rest of the cargo is not liable to contribute to the expense incurred in doing so. *Backus v. Coyne*, 584.
2. The sum for which a vessel is sold on execution must be accepted as its true value in a suit for contribution on a claim for general average, unless the claimant had caused it to be sold for less than its value. *Id.*

failure to exhibit lights is NEGLIGENCE, 4,—**65.**
SIDE FENCING.
liability of RAILROAD COMPANIES, 2,—**451.**
SIDEWALKS.
action against lot owner: ACTION, 5,—**74.**
liability for injury from: MUNICIPAL CORPORATIONS, 1,—**263.**
ordinance as to clearing them from ice: ACTION, 3,—**74.**
wooden awning over, not a public NUISANCE, 1,—**491.**
SIGNATURE
dispute as to, puts stubs in issue: ACCOUNTING, 5,—**284.**
of board of review to assessment roll: TAXATION, 7,—**621.**
printed, not sufficient, to bill in EQUITY, 3,—**394.**
SPECIAL QUESTION.
effect of failure to answer: TRIAL, 21,—**381.**
STATE OF MICHIGAN.
condition by, on grants: PUBLIC LANDS, 1,—**460.**
"extinguishment" of debt, term construed: CONST. LAW, 1,—**162.**
STATE UNIVERSITY. See UNIVERSITY OF MICHIGAN.
STATUTE OF FRAUDS.
contract to pay another's workmen: CONTRACTS, 12,—**603.**
defense of, how waived: EQUITY, 12—**394.**
STATUTE OF LIMITATIONS.
1. A partnership note is a joint contract within the meaning of Comp. L., § 7165, so that a payment thereon by one partner within the

period of the statute of limitations will not bind the other if the firm had previously dissolved to the payee's knowledge. *Gates v. Fisk*, 522.

as to foreclosure, proof of payments: MORTGAGE OF LANDS, 15,—390.

STATUTES.

1. Common law rules cannot override statutes. *Rogers v. Pt. H. & L. Mich. R. R.*, 460.
2. Statutes *in pari materia* must be construed together, and the meaning of later enactments determined by comparing them with the others. *Simpkins v. Ward*, 559.
3. The actual state of the law is not changed by any misapprehension of the Legislature concerning the real fact: and legislation enacted on the assumption that a certain remedy exists cannot establish such remedy. *Van Norman v. Jackson Circuit Judge*, 204.
4. Repeals by implication are not favored. *Patrick Ryan's Case*, 173.
5. Where specific regulations in a general law are adopted in a local law by words of general reference, subsequent changes therein are not necessarily adopted also, unless the intent to do so is clear. *Darmstaetter v. Moloney*, 621.
6. An act which the Legislature declares void on grounds of general policy is void to all intents; but if the manifest purpose of the law is to protect certain individuals in their own rights, they only are entitled to take advantage of it. *Beecher v. Marq. & P. R. M. Co.*, 103.
7. Void legislation should be treated as absolutely void until the Legislature, after obtaining authority to do so, re-enacts it. *Penn v. Kinsey*, 446.
8. Where an act of a State Legislature would impair a contract obligation existing between the State and the General Government, it is void, and cannot be given effect by a subsequent release from the contract obligation. *Id.*
9. The Legislature, when acting within the sphere of its powers in making laws, judges finally upon all questions of policy and of equity. *Sheley v. Detroit*, 431.

as to debts of MUNICIPAL CORPORATIONS, 3,—496.
for opening private ALLEYS, 1—626.
sufficiency of title: ALLEYS, 1,—626.

LAWS REFERRED TO.

PAGE

Revised Statutes of the United States:
§ 563, subd. 8: Jurisdiction of state courts 69
Statutes at Large:
10 Stat. at L., 21: Lands granted in aid of railroads..... 462
17 Stat. at L., 490: Interest in swamp lands released to State.. 450
Constitution of Michigan:
Art. vi. § 8: Jurisdiction of circuit courts..... 42
xiv. § 1: Specific taxes..... 164
§ 2: Sinking fund..... 166
§ 9: Internal improvements..... 463
xvi. § 2: Homestead exemptions..... 12
Revised Statutes of 1838:
Pt. 1, tit. xi, ch. 3, § 24, p. 245: School inspectors..... 561
Revised Statutes of 1846:
Ch. 126: Mechanic's liens..... 13
Ch. 58, §§ 71, 92: Primary school districts 561, 562–4
Ch. 106, § 10: Issue of several executions 473

Compiled Laws of 1857: PAGE
§ 806: Assessor's certificate 622
4448: Issue of several executions 473
Compiled Laws of 1871:
Ch. 53: Punishment of disorderly persons 173
93: Building and savings associations 505
95: Mining and manufacturing incorporations 105
206: Proceedings in chancery against corporations 453–4
213: Replevin 479
§ 477: Road and bridge tax 342
529: Prosecuting attorney's duties 548
681, 712, 713: Township treasurer's responsibility 82
766: Townships; division not to affect cemeteries 259, 260
974, 978, subd. 1: Taxation of partnership personalty 133
991: Assessor's certificate of valuation 623
1000: Notice of tax to township treasurer 82
1004, 1013: Taxation; extensions; treasurer's bond 131, 132
1014: Suit for unpaid township taxes 127, 130
1016: Tax roll *prima facie* evidence of legality of tax 127, 133
1194: Highway commissioner's annual report 342
1624: Service of process on corporation 643
1696: Board of health; purchase of cemetery 260
2411: School district boundaries 563
2887–8: Mining corporations; notice of directors' meeting 106
4209: Conveyance of land adversely held 90
4227: Register of deeds; entries 641
4236–7: "Purchaser" and "conveyance" defined 472
4253–65: Record of defective instruments 472
4291: Widow's right to remain in decedent's house 360
4596: Execution sales; irregularities 459
4626–7: Mortgage of estate for debts 332
4667: Sheriff cannot sell equity of redemption 148, 175
4706: Chattel mortgage; validity 334
4822, 4825: Estates of incompetents 327
5035: Stenographer's compensation 50
5060: Bill in aid of execution 209
5072: Bill to quiet title to lands 475, 477
5116: Proof of service on concealed defendants 420
5127: Hearing after decree 45
5220: Appeals in probate 276
5250: Jurisdiction of action for malicious prosecution 325
5274: Writ of attachment 184
5275: Attachment; service in the county 183
5277–9: Bond in attachment; surrender of property 186
5326–9: Justices' court; plea of title 249
5394: Attachment; execution of judgment 184
5408: Execution on judgment against joint debtors 325
5419, 5440: Duration of attachment lien 185
5518: Keeping animals under levy 185–6
5828: Survival of right of action 154
6084: Issue of several executions 473
6100: Levy on growing crops 175
6112–16: Levy on corporate stock 209, 210
6194: Absence of seal does not invalidate 635
6206–9, 6226: Right to recover in ejectment 90, 91
6230: Ejectment against joint defendants 369
6231, subd. 7, 6232, 6238–9: Ejectment; verdict and judgment. 91
6252–3: Ejectment; value of improvements 160
6392: Real action; alienation by the defendant 91
6440, 6455, 6458–9: Garnishment 43

Compiled Laws of 1871: PAGE
§ 6477, 6481: Garnishment; trial of statutory issue..... 3, 4
6498: Garnishment; property held under void conveyance..... 4
6565: Sequestration of corporation property 455
6724–5: Damages for fatal injury 68
6735: Replevin; forthcoming bond..... 479
6754: Replevin; judgment as to part ownership.....320, 608
6758–9: Replevin; non-suit; judgment for value..... 567
6768–9: Distraining cattle..... 568
7137: Limitation of action in ejectment..... 158
7148, subd. 7: Limitation of actions 581
7149: Limitations of actions for trespass..... 581
7165: Limitation of actions; payment by joint debtor 526
Session Laws:
Act 105 of 1847, § 13, p. 172: Executions..... 473
Act 183 of 1849, pp. 227–8: School district officers 562
Act 25 of 1850, p. 20: School district boundaries..... 562
Act 29 of 1855, § 13, p. 42: School district boundaries.....562–3
Act 55 of 1857, pp. 115–7: Detroit charter; jurors..... 426
Act 55 of 1857, ch. 9, § 3, 6, pp. 140–1: Detroit charter; assessors, 623–4
Act 126 of 1857, p. 346: Grant of lands.....461, 463
Act 134 of 1859, § 21, (p. 372), § 40, (p. 383), § 46, (p. 385): Niles charter 82
Act 143 of 1859, p. 396: Township cemeteries..... 260
Act 157 of 1859: Grant of lands for railroads..... 467
Act 161 of 1859, p. 446: Graded schools..... 562
Act 136 of 1861, p. 193: Detroit charter 625
Act 153 of 1863, p. 283–4: Board of control of railroads.....465–7
Act 318 of 1865, p. 669: Board of control of railroads 465
Act 90 of 1869, vol. 1, p. 157: Township treasurer's bond..... 49
Act 265 of 1869, ch. 6, §§ 9, 16, vol. 2, pp. 315, 317: Corunna charter..... 325
Act 82 of 1871, vol. 1, p. 109: Stenographers..... 49
Act 170 of 1871, § 13, vol. 1, p. 277: School districts..... 563
Act 68 of 1873, vol. 1, p. 80: Garnishment..... 4
Act 79 of 1873, vol. 1, p. 99: Railroad companies..... 222
Act 94 of 1873, vol. 1, p. 127: Damages for fatal injury..... 68
Act 95 of 1873, vol. 1, p. 128: Accounting by guardians..... 276
Act 119 of 1873, vol. 1, p. 164: School districts..... 561
Act 178 of 1873, vol. 1, p. 244; City incorporation act: ch. xii, (p. 303); police: ch. xxiii, (pp. 325–6); sidewalks.....75, 76
Act 186 of 1873, vol. 1, p. 472: Ejectment; improvements... 160
Act 198 of 1873, vol. 1, p. 538: Fencing railroad tracks..... 329
Act 42 of 1875, (Pub. Acts), p. 36: School teacher's moral status. 486
Act 123 of 1875, (Pub. Acts), p. 154: Sheriff's certificate..... 471
Act 214 of 1875, (Pub. Acts), p. 258: Malicious prosecution.... 325
Act 230 of 1875, (Pub. Acts), p. 281: School districts..... 561
Act 5 of 1877, (Pub. Acts), p. 3: Attachment of corporate stock, 210
Act 44 of 1877, (Pub. Acts), p. 32: Alimony..... 152
Act 77 of 1877, (Pub. Acts), pp. 60, 61: School districts..... 561
Act 132 of 1877, (Pub. Acts), p. 121: Board of control of railroads, 450
Act 201 of 1877, (Pub. Acts), p. 246: Eminent domain 627
Act 356 of 1877, (Loc. Acts), p. 486: Wilson school district.... 497
Act 358 of 1877, (Loc. Acts), p. 491: Long Rapids school district 497
Act 362 of 1877, (Loc. Acts), p. 500: Alpena school district.... 497
Act 97 of 1879, (Pub. Acts), p. 90: Superior Court of Detroit .. 426
Act 110 of 1879, [§ 12], (Pub. Acts), p. 105: Ionia reformatory, 173
Act 244 of 1879, (Pub. Acts), p. 223: Damages from defective sidewalks..... 263

STENOGRAPHER.
1. The stenographer's act (Comp. L. § 1528) contemplates that a person appointed stenographer shall hold his office indefinitely, and independently of the county and the electors; that the appointment may be made for an entire judicial circuit whatever the number of counties it contains; and that it may be made for a single county when the circuit contains no more. But the entire circuit cannot be compelled to pay the appointee more than the statutory salary of $2000, and this should be apportioned by the circuit judge among the counties composing it. § 5035. *Goodale v. Marquette Supervisors*, 47.
2. The several counties composing a judicial circuit should act affirmatively, through their respective boards of supervisors, as a basis for the appointment of a stenographer for the circuit; otherwise the law authorizing such appointments is not operative in every part of it. But, in the absence of evidence to the contrary, such action may be fairly presumed where a stenographer's commission has been issued. *Id.*
3. A stenographer appointed for a judicial circuit cannot compel the individual counties composing it to pay him specific sums by way of compensation, without showing that their respective quotas toward his statutory salary amount to those sums. *Id.*

STIPULATION
by nominal defendant for discontinuance of REPLEVIN, 4,—**251.**
fixing attorney fee on foreclosure: MORTGAGE OF LANDS, 30,—**455.**
in purchase money mortgage: MORTGAGE OF LANDS, 6,—**404.**

STOCK.
attachment of: CORPORATIONS, 5-7,—**204.**

STOCKHOLDERS.
joinder of in bill in EQUITY, 6-8,—**493.**
not liable on orders in payment for labor: CORPORATIONS, 1,—**92.**

STREETS
abutting owners charged with repaving: HIGHWAYS, 3,—**431.**
judicial notice as to frequent use: EVIDENCE, 1,—**62.**
walking in traveled part of: NEGLIGENCE, 3,—**62.**

STUBS
put in issue by disputed signature: ACCOUNTING, 5,—**284.**

SUBPŒNA IN EQUITY.
diligence in service of: EQUITY, 25,—**418.**

SUBROGATION
of mortgagee: ESTATES OF DECEDENTS, 8,—**330.**

SUBSEQUENT MORTGAGEE.
payments by: MORTGAGE OF LANDS, 9-12,—**113.**

SUBSEQUENT PURCHASERS.
constructive notice to, by record of sale: EXECUTIONS, 16-18,—**469.**
stipulation for: MORTGAGE OF LANDS, 6,—**404.**
consent to later mortgage: MORTGAGE OF LANDS, 7,—**404.**
redemption by: MORTGAGE OF LANDS, 8,—**261.**
rights are subordinate: MORTGAGE OF LANDS, 19, 20,—**638.**

SUNDAY
bargains void and cannot be ratified: CONTRACTS, 11,—**355.**

SUPERIOR COURT OF DETROIT.
challenge to the array in: TRIAL, 1,—**424.**

SUPREME COURT. See PRACTICE.

SURETYSHIP.
1. One who stands in the position of a surety is justified in employing counsel and incurring costs in defending, for the common benefit, against illegal demands; and his co-sureties must contribute to make him good, whether he succeeds or not, provided that he

acts prudently in the light of facts indicating the probability of a sufficient recovery to justify the expense. *Backus v. Coyne*, 584.

2. Contribution cannot be enforced on the ground merely that a liability exists, or even that a judgment has been recovered; there must have been either a payment of the demand, or such an assumption of it as imposes on the claimant more than his share, and correspondingly releases the others. *Id.*
3. A surety is not the agent of the common creditor to enforce the latter's demand, for the creditor would not be bound by the surety's act, and until payment, may look to any or all the other sureties. *Id.*

liability on city or county treasurer's BOND, 4,—**79.**
foreclosure by sureties on official bond: MORTGAGE OF LANDS, 18, **638.**
precluded from objecting to amendment: PLEADINGS, 4,—**376.**

SURPLUSAGE
in city treasurer's BOND, 3,—**79.**

TAXATION: *Place of*, 1; *Assessments*, 2–8; *Collection*, 9–11; *Payment over*, 12; *Tax-title*, 13–17.

1. Where the stock of a firm of lumber dealers is sold at their general place of business but is sawed and shipped elsewhere, it is taxable at the general place of business, and not in the township where it is manufactured. *Putman v. Fife Lake*, 125.
2. Local assessments may be apportioned according to frontage under legislation which permits that method to be followed. *Sheley v. Detroit*, 431.
3. A proceeding against the validity of a tax-title on the ground that for a portion of the period covered by it a part of the lands in the same township had not been assessed, was not sustained where it did not appear that such lands were worth anything during that time, and it was shown, on the other hand, that certain classes of real estate were then exempt. *Perkins v. Nugent*, 156.
4. The presumption that a public officer has done his duty, applies to an assessor who has omitted lands from assessment, if the facts as shown do not exclude it. *Id.*
5. A municipal charter invested the assessor with the powers and duties of a supervisor. The general tax law prescribed a form of certificate to be appended by supervisors to tax-rolls. This form was afterward amended. *Held*, that whether the assessor was required to add the certificate originally required, or not, his failure to make it correspond to the amended form did not invalidate the roll. *Darmstaetter v. Moloney*, 621.
6. Where the assessor is a member of the board of review, and is the officer designated by law to present the assessment roll to the board, it does not need to be authenticated by his certificate. *Id.*
7. A requirement that the board of review shall sign the assessment roll after correcting it, is substantially complied with if the board sign a certificate pasted to the roll and certifying that they have completed the review, correction and approval thereof. *Id.*
8. Injunction lies to restrain the sale, for school taxes, of lands unlawfully included within the taxing district. *Simpkins v. Ward*, 559.
9. Debt or *indebitatus assumpsit* is the proper form of the action which a township treasurer may bring in the name of the township, for the amount of the taxes assessed against an individual; the counts of the declaration should briefly explain the subject matter of the debt though a special declaration is not needed. By Graves, J. *Putman v. Fife Lake*, 125.

10. Comp. L. § 1016 provides that where a personal tax is returned for non-payment, the township treasurer may sue for it, and proof of the tax-toll and warrant shall *prima facie* attest the legality of the assessment. *Held*, that a certificate that "the foregoing is a true transcript of the tax-roll * * and the warrant thereto attached," did not cover a return indorsed upon the transcript, and that the whole document should have been excluded on objection if the offer was made as a unit and embraced the tax-roll, warrant and return together: By Graves, J. *Id.*
11. A township treasurer cannot sue for the amount of a tax after his warrant for collecting it has expired, and his warrant cannot be extended beyond the next annual session of the board of supervisors: By Graves, J. *Id.*
12. A city treasurer who has given bond to the county treasurer on being notified of the amount of state and county taxes apportioned to his district, is bound in the absence of protest from taxpayers, to pay over to him what he has received in payment of such taxes, even though the authority for their collection was irregular and informal. *Berrien County Treasurer v. Bunbury*, 79.
13. A tax-title relates back from the time it becomes absolute to the time of the tax-purchase for all purposes of substantial justice, but not otherwise; and it cannot be used to divest rights acquired since the period to which it would relate. *Conn. Mutual L. Ins. Co. v. Bulte*, 113.
14. Where there is a *bona fide* controversy as to a title and one of the claimants is in possession, he owes no duty to the other to keep the taxes paid, and he may therefore strengthen his claim by procuring tax-titles. But if a claimant cannot rely on a title purchased by himself, he cannot make use of one obtained by another. *Jeffery v. Hursh*, 59.
15. Whether one in possession of land and neglecting to pay the taxes on it can rely on a title derived from a sale for such taxes, for the purpose of defeating a conveyance which he has previously made but has not perfected by delivery of possession—Q. *Id.*
16. A second mortgagee who has foreclosed and bidden in the premises can obtain a tax-title to them, and if it is allowed to become absolute he has a right to use it as a defense to an action of ejectment brought by the first mortgagee, unless the latter tenders re-payment. *Conn. Mutual L. Ins. Co. v. Bulte*, 113.
17. A tenant who has covenanted to pay the taxes cannot, after neglecting to do so, take a tax-title and cut off his landlord's rights; nor can a purchaser in possession under an executory contract so cut off his vendor's rights, nor a mortgager those of his mortgagee. A purchase made under such circumstances will be conclusively presumed to have been made in the performance of duty and not in repudiation of it. *Id.*

action between townships for money collected: TOWNSHIPS, 4,—**442.**
duty to pay, on mortgaged land: MORTGAGE OF LANDS, 9-11,—**113.**
lien for tax-purchase not extinguished with MORTGAGE OF LANDS, 12,—**113.**
organization for, of TOWNSHIPS, 3,—**442.**
repaving chargeable to abutting owners: HIGHWAYS, 3,—**431.**
tax-deed as a defense in EJECTMENT, 7,—**113.**
tax-purchase, recognition of: AGENCY, 1,—**113.**

TAX-TITLE. See TAXATION, 13-17.
when owner to be impleaded in EJECTMENT, 5,—**59.**

TEMPORARY ALIMONY
not collectible by execution: DIVORCE, 7,—**150.**

TENANT IN COMMON.
adverse possession by: ADVERSE POSSESSION, 3, 4,—**367.**
TENDER.
1. A tender may be coupled with such conditions as the party making it has a right to impose; such as that he shall receive what a payment or tender legally made would entitle him to. *Johnson v. Cranage*, 14.
2. A tender need not be divided to meet separate claims where they are all held by one person. Where more is demanded than is due, the person making the tender cannot be put in the wrong by requiring him at his peril to separate just from unjust charges. *Id.*
3. A tender to satisfy a claim in litigation is not good if made in the street, without any computation or means of computation that would not require delay, and on the idea that the claim is in judgment when no judgment has been entered, and when no costs have been or could regularly have been taxed. *Chase v. Welsh*, 345.
4. A mere offer to pay whatever shall be ascertained to be necessary to discharge a litigated demand without taking any steps to find out, beyond preparing a receipt in blank purporting to discharge the judgment when, in fact, none has been entered, is no proper tender of payment. *Id.*
5. The effect of a tender made during suit or before judgment must always depend more or less on the views of the court and rarely affects anything but the liability for costs. It cannot discharge the debt until paid. *Id.*
6. Whether tender of an amount in litigation can discharge an attachment—Q. And if it could, it would not make valid a transfer of the property attached if void as against the creditor, or prevent assailing it on execution except as to intervening *bona fide* purchasers or encumbrancers. *Id.*

evidence of, to ground discharge of MORTGAGE OF LANDS, 13,—**57.**
of logs by boom company: LOGS AND LOGGING, 2,—**14.**
TIME.
extension of, for settling case: PRACTICE, 2,—**223.**
extension of warrant: TAXATION, 11,—**125.**
lapse of as affecting foreclosure; MORTGAGE OF LANDS, 15-17.
presumption of payment from: MORTGAGE OF LANDS, 15,—**629.**
power of extension: NEGOTIABLE INSTRUMENTS, 4, 5,—**371.**
when essential in CONTRACTS, 9; LAND CONTRACTS, 1,—**223.**
TITLE
by deed, is a question of fact: DEEDS, 7,—**410.**
expiration of plaintiff's title in EJECTMENT, 10,—**87.**
may be disproved in REPLEVIN, 6,—**610.**
not revested by destruction of DEEDS, 5,—**25.**
not passed by testamentary grant: DEEDS, 4,—**370.**
of statute, sufficiency of ALLEYS, 1,—**626.**
passage of, to railroad lands: RAILROAD COMPANIES, 4,—**460.**
passage of, as to supplies furnished: CONTRACTS, 2,—**597.**
presumption of, from POSSESSION, 1,—**597.**
sufficiency of finding of, in EJECTMENT, 9,—**279.**
to land, determined by EJECTMENT, 1,—**87.**
to land, question before JUSTICE OF THE PEACE, 6; TRESPASS, 4,—**247.**
TORTS.
maritime, jurisdiction of State COURTS, 1,—**65.**
TOWNSHIP.
1. A township's legal identity and property rights remain unchanged after its division, so far as corporate existence is concerned, unless otherwise provided by statute. *Board of Health v. E. Saginaw*, 257.

2. Where a city is incorporated from part of the territory of a township, the latter's property rights are not affected unless, perhaps, by some specific provision in the charter or some other statute. *Id.*
3. A township is not completely organized for the assessment, levy and collection of taxes until the election of its proper officers; and until then the township from which it is set off may levy and collect the taxes. *Comins v. Harrisville*, 442.
4. Assumpsit on the common counts will not lie at the suit of a township to recover from the township from which it has been set off the amount of school and township taxes collected by the latter under an assessment made upon the territory of the former before its township organization was perfected. *Id.*

authority of highway commissioners to bind: HIGHWAYS, 1, 2,—**340.**
burying grounds of: CEMETERIES, 1, 2,—**257.**

TOWNSHIP TREASURER.
suit by, for unpaid tax: TAXATION, 9–11,—**125.**

TRANSCRIPT.
signing *nunc pro tunc:* PRACTICE, 3,—**223.**

TRANSFER
of ferry FRANCHISE, 2,—**65.**

TRESPASS.
1. Where trespass for cutting and carrying away wheat is brought by an assignee of the party injured thereby, a plea to the general issue puts every part of the declaration in issue and denies not only the taking, but the plaintiff's ownership at the time of the alleged trespass. *Estey v. Smith*, 402.
2. A tenant who had sown a crop which would not ripen until after the expiration of his lease, gave a chattel mortgage on it to indemnify a surety upon the bond in a replevin suit brought by him against his landlord. The surety, however, verbally assigned his interest in the mortgage to S., on condition that S. should protect him. The landlord had judgment in the replevin suit and also in his action on the bond, which latter was paid in the tenant's behalf by E., to whom the tenant afterwards assigned his right to the wheat. The landlord, however, had previously sold it to S., who had cut and removed it, for which E. sued him in trespass. *Held*, that under the plea of the general issue, S. could show the transfer to him of the mortgage interest held by the surety on the replevin bond, and could introduce the mortgage itself; the evidence bore on the tenant's title to the wheat, or the fact of his possession, and on the question whether he had not abandoned it to the landlord. *Id.*
3. The mere intent of a defendant in trespass is not material if his conduct was not actionable. *Id.*
4. Comp. L., §§ 5326–9 provides that in any action involving title to land, a defendant, if the suit is before a justice, shall be deemed to admit any claim of title made in the declaration unless, in pleading the general issue, he gives notice that the title will come in question. *Held*, that in an action of trespass *quare clausum* in which such notice was not given, this rule will not preclude defendant's showing that he was lawfully in possession where the declaration did not aver title but merely that defendant broke and entered, etc., "the close of the said plaintiff," and "broke open the house of the plaintiff on said premises," since, for the purpose of the action, the close was that of the plaintiff if he had peaceable possession whether he had title or not, but it was not his close if defendant had peaceable possession. *Vandoozer v. Dayton*, 247.

TRESPASS ON THE CASE.
right of action for deceit not assignable: ACTION, 8,—**153.**

TRIAL. *Challenge*, 1; *Strict Proof*, 2; *Reception of Evidence*, 3; *Submission of Evidence*, 4; *Charge*, 5, 6; *Province of Court*, 7–12; *Province of Jury*, 13–16; *Findings and Verdict*, 17–21.

1. A challenge to the array in the superior court of Detroit was properly overruled where interposed on the ground (1) that the judge was not present when the names of the jurors were deposited in the jury box and those of former juries removed; (2) that he did not determine the number to be drawn, for the term, but that twenty-four were drawn, and he was not present at the drawing; (3) that they were drawn by the sheriff and the minute was kept by the clerk; (4) that the affidavit accompanying the list of 300 jurors filed in the clerk's office did not show in detail the proceedings taken to select the list, but only alleged that, as affiant verily believes, it was done in accordance with the statute. So *held*, by equal division of the court. *Gott v. Brigham*, 424.
2. A party insisting upon strict proof must do so consistently from the first; and if his own showing proves that his demand for something further cannot be in the interest of justice, it should not be favored. *Wilcox v. Toledo & Ann Arbor R. R. Co.*, 280.
3. Single items of evidence cannot be rejected for failing to establish the whole case, but must be received if they contribute to that end; and their sufficiency in connection with the other evidence will be determined on a review of the whole when the case is closed. *Collins v. Beecher*, 436.
4. Plaintiff has a right to have the evidence submitted to the jury on his theory of the case. *Fletcher v. Bradford*, 349.
5. Where the issue is distinctly set forth in the pleadings, and the evidence conforms to it, and the record does not show that the plaintiff took any ground inconsistent with the proofs, it is not to be assumed that the jury applied the language of the charge so as to make it cover anything foreign to the issue. *Pettibone v. Maclem*, 381.
6. Where a charge considered as a whole, cures an apparent error committed by the court in modifying a request for an instruction, the judgment will not be reversed for such error. *Grand Rapids & Ind. R. R. Co. v. Cameron*, 451.
7. A court has no right to instruct a jury, or suggest to them, that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony. *Marq. H. & O. R. R. Co. v. Kirkwood*, 51.
8. A trial judge should never take a case from the jury on the evidence unless it is very clear; and when he does so, he should specify the particular ground or grounds of his ruling. *Demill v. Moffat*, 410.
9. A trial judge has a right to direct the jury's attention to any essential point in the case which he thinks the plaintiff has given no evidence fairly tending to prove; and he may advise them to render verdict accordingly. *Id.*
10. A trial judge should advise the jury as to the bearing of the evidence upon any point in the case which may in any view be controlling. *Id.*
11. A trial judge can direct a verdict for defendant when the plaintiff offers no evidence to establish a necessary part of his case. *Spicer v. Bonker*, 630.
12. The power to direct a verdict for plaintiff on counsel's presentation of plaintiff's case must be cautiously exercised; and if the case as stated is sufficient except on some particular point, the judge should always direct attention to the defect, so the omission may be supplied if accidental. *Id.*

13. Where the testimony on both sides agrees in establishing a right in a party to sell property in dispute, it should not be left to the jury as an open question. *Gavigan v. Evans*, 597.
14. It is the jury's duty to judge of the credibility of witnesses as well as to form their beliefs from the facts and circumstances shown. *Nicholson v. Dyer*, 610.
15. A jury cannot guess at a fact if the evidence furnishes no basis for a judgment thereon. *Hutchinson v. Dubois*, 145.
16. The lessee of a farm made a settlement with his lessor in which he conveyed to him his undivided interest in certain personal property. The lessor immediately sold the personal property to the lessee's wife, giving her also a lease of the farm; and the husband gave him back a mortgage upon his own interest in the crops which under the first lease he and the lessor were to divide equally. Creditors of the husband levied upon the crops grown while the wife held the lease, and upon some of the personal property transferred to her, and she brought replevin against the sheriff, who claimed that the transfers of personal property were void as against creditors. But the validity of the mortgage was not questioned, though in submitting the case to the jury it was left for that body to pass upon, and their verdict was for the defendant. *Held*, error. *Richardson v. Coddington*, 338.
17. Comp. L. § 5220 provides that on appeal from the probate to the circuit court, the latter shall proceed to trial according to the rules of law, and if there be any question of fact it may be submitted to a jury. *Held*, that this does not contemplate a general trial or a general verdict; the findings of the jury are to aid the court in determining questions that belong to its own equitable discretion. *Gott. v. Culp*, 265.
18. In an action at law, tried without a jury, it is for the trial judge, and not for the appellate court, to hear argument as to the force of the evidence, and as to inferences and presumptions, and to draw therefrom and state the necessary conclusions of fact. *Berrien County Treasurer v. Bunbury*, 79.
19. The finding of a trial judge, sitting without a jury, is conclusive as to the witness' credibility and the effect of his evidence. *Hyler v. Nolan*, 357.
20. The wisdom of a verdict is not for the appellate court to consider. *Nicholson v. Dyer*, 610.
21. A general verdict need not be excluded for the failure of the jury to answer special questions that are of no legal consequence. *Pettibone v. Muclem*, 381.

objections to be made before, to PLEADINGS, 1,—381.
prejudicial remarks by judge: GUARDIAN AND WARD, 1,—265.
variance of evidence from BILL OF PARTICULARS, 1, 2,—436.

TROVER.

1. Where an assignee of mortgaged chattels holds them subject to the mortgage, and they are taken on an execution levied on the mortgager's interest, it is not necessary, in pleading the general issue to an action of trover brought in justice's court by said assignee, to give him notice that the taking will be justified under judicial proceedings. *McLaughlin v. Smith*, 277.
2. In trover for the conversion of goods taken on execution, plaintiff cannot introduce an estimate of damages due him by the consequent breaking-up of his business until he has shown that his business was actually broken up. *Dyer v. Rosenthal*, 588.
3. In trover for goods taken on execution defendant may show what they brought at public auction, as bearing on their value, even though the sale was made at a different place from that of the

alleged conversion, if there is no reason for supposing that values were essentially different at the two places. *Id.*
appraisal when not proof of value: EVIDENCE, 8,—588.
TRUSTS.
1. An accounting in respect to a trust can present questions of losses caused by the trustee's negligence only in a court of equity. *Rodman v. Nathan*, 607.
partner as trustee: PARTNERSHIP, 8,—143.
ejectment by trustees, for CEMETERIES, 1,—257.

UNDUE INFLUENCE
as to execution of deed: EQUITY, 15,—533.
UNIVERSITY OF MICHIGAN.
1. Where money had been paid out by an officer of the University of Michigan for the benefit of the University in cases in which the Regents could have expressly authorized its expenditure, it was *held* that they might ratify the act and direct repayment with interest at any rate not exceeding ten per cent., and that where they had made such payment with full knowledge of the facts, their action was final and could not be disturbed. And where there was no fraud or concealment in the presentation of the account for interest, it must be conclusively presumed that they acted with full knowledge, as it was their duty to do. But the allowance of interest would not imply a contract to allow it thereafter. *University v. Rose*, 284.
2. The Regents of the University of Michigan appointed a person to assist the director of the chemical laboratory in receiving and keeping account of moneys paid in to that department, and they paid said assistant from the University funds, which embraced, with other resources, the income of the laboratory. *Held*, that even though the director may have had power to appoint and discharge the assistant, yet as it was not made a part of his duty to keep strict watch and save the University from loss through him, he could not be held accountable for moneys received by him and not paid over, as the assistant was not his agent, but was in the employ of the University, and answerable to the Regents. *Id.*
accounting against director and assistant: ACCOUNTING, 2,—284.
USAGE.
as to expense of scaling: LOGS, ETC., 7,—569.
as to log scale: LOGS, ETC., 7,—569.
in banking business: BANKS, ETC., 3, 4,—135.
USE AND OCCUPATION.
action for: LANDLORD AND TENANT, 7,—388.
USURY.
what is: INTEREST, 2,—153.

VALUE.
amount of sale as showing: EVIDENCE, 7,—469.
appraisal when inadmissible to show: EVIDENCE, 8,—588.
as shown by execution sale: SHIPS, ETC., 2,—584.
auction sale as bearing on: TROVER, 3,—588.
judgment for, in REPLEVIN, 9-12,—565.
jurisdiction by, of circuit court in REPLEVIN, 1,—478.
opinion as to, competency: EVIDENCE, 6,—588.
receipted bills not EVIDENCE, 5,—588.
VARIANCE.
attention must be called to: JUSTICE OF THE PEACE, 2,—280.
between execution proceedings and writ of REPLEVIN, 2,—234.

in pleading contract of service: PLEADINGS, 9,—374.
of evidence from BILL OF PARTICULARS, 1, 2,—436.

VENDOR AND PURCHASER.

1. The right of a purchaser of land, in an action against him for the purchase price, to recoup the excess in price due to the vendor's misrepresentation of the extent of the property, is the same whether the misrepresentation be willful or innocent. *Baughman v. Gould*, 481.
2. Where the vendor of land, by misrepresenting its extent induces the purchaser to incur a liability for land which the vendor is unable to convey, the effect of the transaction, in the contemplation of the law, is a fraud upon the purchaser, even though both parties acted in good faith. *Id.*
3. A purchaser's right on being sued by the vendor, to recoup damages for the latter's misrepresentation in a sale including both real and personal property, is not affected by the fact that the misrepresentation referred to only one class of property, if the transaction was an entirety, and the consideration was not apportioned. *Id.*
4. Where authority is given to a person to sell property for the purpose of raising means to pay debts, the vendee cannot be required to see that the money is properly applied. *Gavigan v. Evans*, 597.
5. Where a vendor of a chattel takes a note for the purchase price in which he reserves the right to retake the chattel on default and retain what has been paid, or collect the note, his assignment of the note by indorsement does not of itself assign this right, and in an action brought against him on the note by the indorsee, he can show all the facts connected with the indorsement to fix and determine its character and extent. *Lamb v. Story*, 488.

VENUE.
omission of, from justice's EXECUTIONS, 1,—234.

VERDICT.
contradictory, in REPLEVIN, 13,—607.
failure to answer special questions: TRIAL, 21,—381.
power of trial judge to direct: TRIAL, 11, 12.—630.
wisdom not considered above: TRIAL, 20,—610.

VEXATIOUS LITIGATION: COSTS, 2,—496.

VOID SECURITIES.
foreclosure bill amended to ask for ACCOUNTING, 9,—504.

WAGES.
agreement to pay another's workmen: CONTRACTS, 12,—603.
authority to increase: CONTRACTS, 12,—603.

WAIVER.
garnishee cannot waive others' rights: GARNISHMENT, 2,—1.
of complaint of fraudulent assignment: DEBTOR, ETC., 13, 14,—1.
of condition of order for goods: PARTNERSHIP, 12,—322.
of conveyance made to decedent: ESTATES, ETC., 9,—513.
by corporation of right to lease: EQUITY, 7,—493.
of record evidence: BANKRUPTCY, 1,—280.
of return, authorizes judgment for value: REPLEVIN, 9,—565.
of reward for LOST PROPERTY, 5,—231.

WARRANT
for collecting tax, extension of: TAXATION, 11,—125.
justice to take advice of prosecuting attorney: CRIM. LAW, 2,—543.
mandamus to compel service of: CRIM. LAW, 4,—543.

WATER COURSES.
ditch governed by rules of: DRAINS, 1,—335.

WAYS. See STREETS.
opening of private ALLEYS, 1-3,—626.

WEIGHT OF EVIDENCE
not considered by Supreme Court in law cases: PRACTICE, 9,—**522.**
under bill to have deed declared a mortgage: EQUITY, 17,—**533.**
WILLS.
1. A will which provides that "after the death of testator's daughter, he gives her children and grand-children," etc., contemplates descendants then unborn who shall be in being at the time of the daughter's death. *Cheever v. Washtenaw Circuit Judge,* 6.
2. A woman devised to her husband the undivided half of certain descriptions of land, referred to as "containing 240 acres," and she made the devise subject to a right reserved by her grantor to occupy one-half of the dwelling house thereon. She devised the other undivided half to her children. The descriptions were according to the government subdivisions, but embraced only 140 acres, which was only a part of the 140 acres actually granted to her in one compact body, and no other disposition was made of the rest of this grant. The dwelling house was not upon the 140 acres devised. *Held,* that the testator's evident intent was to devise the entire 240 acres. *Waldron v. Waldron,* 350.
3. The allowance of counsel fees, in proceedings to obtain the construction of a will, is for the probate court. *Id.*
4. The reasons of a competent testator concern himself only. *Cheever v. Washtenaw Circuit Judge,* 6.
5. Oral evidence is not admissible to explain a testator's intent except so far as it brings before the court such circumstances surrounding the making of the will as may be necessary to an understanding of the terms employed. *Waldron v. Waldron,* 350.
6. Executors under a will which gives them exclusive powers and trusts, and provides for unborn heirs, may appeal from its disallowance though all the beneficiaries named in it, and all who would have been interested if the decedent had died intestate, should settle the estate among themselves and oppose the appeal. *Cheever v. Washtenaw Circuit Judge,* 6.
7. A will is not revived by the destruction of a subsequent will when the latter or any intermediate will had contained a clause revoking all former wills. *Scott v. Fink,* 241.

revocability of testamentary grant: DEEDS, 4,—**370.**
WITNESSES.
credibility is for jury: TRIAL, 14,—**610.**
finding of trial judge as to credibility: TRIAL, 19,—**357.**
instruction as to effect of interest: TRIAL, 7,—**51.**
WORDS
"extinguishment" of State debt: CONSTITUTIONAL LAW, 1,—**162.**
"purchaser" under registry laws: EXECUTIONS, 16.—**469.**
"thrown into bankruptcy": BANKRUPTCY, 1,—**280.**
"use" in assignment: LANDLORD, ETC., 13, 14,—**630.**
WRIT.
indorsement on is evidence of final action: EXECUTIONS, 9,—**333.**
indorsement not to be contradicted: ATTACHMENT, 5,—**333.**
of restitution, proof of: LANDLORD AND TENANT, 10,—**376.**
return not served on day of issue: GARNISHMENT, 3,—**20.**
WRIT OF ERROR.
costs on dismissal of: COSTS, 5,—**413.**
does not lie on collateral order: GARNISHMENT, 7,—**413.**
motion to dismiss: PRACTICE, 1,—**343.**
WRITTEN INSTRUMENTS.
proof of simultaneous execution: EVIDENCE 9,—**638.**
See BONDS; CONTRACTS; DEEDS; MORTGAGE OF LANDS; NEGOTIABLE INSTRUMENTS.

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