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HEARD AND DECIDED IN

The Supreme Court of Michigan

FROM

NOVEMBER 12, 1858, TO JULY TERM, 1859.

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Supreme Court of Michigan.

GEORGE MARTIN, Chief Justice.

RANDOLPH MANNING,
ISAAC P. CHRISTIANCY,
JAMES V. CAMPBELL,
} Associate Justices.

JACOB M. HOWARD, Attorney General.

Judges of Circuit Courts, &c.

First Circuit.
EDWARD H. C. WILSON.

Second Circuit.
NATHANIEL BACON.

Third Circuit.
BENJAMIN F. H. WITHERELL.

Fourth Circuit.
EDWIN LAWRENCE.

Fifth Circuit.
BENJAMIN F. GRAVES.

Sixth Circuit.
SANFORD M. GREEN.

Seventh Circuit.
JOSIAH TURNER.

Eighth Circuit.
LOUIS S. LOVELL.

Ninth Circuit.
FLAVIUS J. LITTLEJOHN.

Tenth Circuit.
WILBUR F. WOODWORTH.

DANIEL GOODWIN, District Judge of the Upper Peninsula.

HENRY A. MORROW, Recorder of Detroit.

NOTE.

THE hope was expressed, when the last volume was published, that the unreported decisions of the former bench could be collected, and included in this volume. It has, however, been found impracticable to obtain the most important of those decisions, and the intention to publish any is therefore abandoned.

TABLE OF CASES

REPORTED IN THIS VOLUME.

Abbott *et al.*, Galpin *v.* . . . 17
Ætna Insurance Co., Van Blarcom *v.* 299
Ames *et al. v.* Port Huron Log Driving and Booming Co. 266
Anderson *et al. v.* Baughman *et al.* 298
Angell, Rosenbury *v.* 508
Armstrong *et al.*, Bassett *v.* . 397

Baker *v.* Pierson 522
Barnard *et al. v.* Lapeer & Port Huron Plank Road Co. . 274
Bassett *v.* Armstrong *et al.* . 397
Baughman *et al.*, Anderson *et al. v.* 298
Beckwith *et al.*, Lockwood *v.* 167
Bentley, Farrand *et al. v.* . . 281

Cash, Appellant 193
Caswell *v.* Comstock *et al.* . 391
Chaffee *v.* Granger *et al.* . . 51
Chandler *et al. v.* McKinney . 217
Chapman *et al.*, Turner *v.* . 396
Comstock *et al.*, Caswell *v.* . 391
Coon *et al. v.* Fry 506
Craig *et al. v.* Grant *et al.* . 447

Daniels *et al v.* People . . . 381
Davis *et al.* Snook *v.* 156
Detroit City *et al.*, Chaffee *v.* 51
Dixon, Steward *v.* 391
Durfee *v.* McClurg 223

Edwards *v.* Sanborn . . . 348
Emery *v.* Whitwell *et al.* . . 474
Evans *v.* Norris . . . 69, 369

Farrand *et al. v.* Bentley . . 281
Fessenden *v.* Hill 242
Fry, Coon *et al. v.* 506

Galpin *v.* Abbott *et al.* . . . 17
George *et al.* Herschfeldt *v.* . 456
Getchell, People *v.* 496
Gibson *et al.*, Gray *v.* . . . 300
Goldsmith *v.* Goldsmith . . 285
Granger *et al.*, Chaffee *v.* . . 51
Grant *et al.*, Craig *et al. v.* . 447
Gray *v.* Gibson *et al.* . . . 300
Greusel v. Thomas *et al.* . . 76

Hale *et al.*, Michigan Central Railroad Co. *v.* 243

Herschfeldt *v.* George *et al.* . 456
Hill, Fessenden *v.* 242
Hodge *et al.*, Littlefield *v.* . 326
Hoover *et al.*, Emery *v.* . . . 474

Ingersoll, Maiden *v.* 373

Jackson *et al. v.* People . . 154
Jones, People *v.* 176
Jones *et al. v.* Tyler *et al.* . 364

Kibbee *et al.*, Michigan Insurance Co. *v.* 410
Kibbee *et al. v.* Thompson *et al.* 410

Lamb, Tower *v.* 362
Lapeer and Port Huron Plank Road Co., Barnard *et al. v.* 274
Littlefield *v.* Hodge *et al.* . . 326
Lockwood *v.* Beckwith *et al.* . 167
Lord *v.* Strong *et al.* 61

Maiden *v.* Ingersoll 373
Martin *et al. v.* McReynolds *et al.* 70
McClurg, Durfee *v.* 223
McGraw *et al.*, Pettibone *v.* . 441
McKinney, Chandler *et al. v.* 217
McReynolds *et al.*, Martin *et al. v.* 70
Michigan Central Railroad Co. *v.* Hale *et al.* 243
Michigan Insurance Co. *v.* Kibbee *et al.* 410
Moore *v.* Olin . . . 328, 396

Norris, Evans *v.* 69, 369
Nye *et al. v.* Van Husan *et al.* 329

O'Flynn, Appellee 137
O'Flynn *et al.*, Martin *et al. v.* 70
Olin, Moore *v.* 328, 396

Pack, Reeve *v.* 240
Parsons, Rawson *v.* 401
People, Daniels *et al. v.* . . 381
" *v.* Getchell 496
" Jackson *et al. v.* . . . 154
" *v.* Jones 176
" *v.* Rix *et al.* 144
" *v.* Scott 287
" Tully *v.* 273
Pettibone *v.* McGraw *et al.* . 441
Pierson *v.* Baker 522
Port Huron Log Driving and Booming Co., Ames *et al. v.* 266

Quirk *v.* Thomas *et al.* . . . 76

Rawson *v.* Parsons 401
Reeve *v.* Pack 240
Rix *et al.*, People *v.* . . . 144
Robinson, Estate, Matter of . 137
Rosenbury *v.* Angell . . . 508

Sanborn, Edwards *v.* . . . 348
Scott, People *v.* 287
Selby, Matter of 193
Sheeley *et al. v.* Lapeer and Port Huron Plank Road Co. 274
Smith *et al.*, Starkweather *v.* 377
Snook *v.* Davis *et al.* . . . 156
Snyder *v.* Snyder 470
Spalding, Appellant . . . 193
Starkweather *v.* Smith *et al.* . 377
Steward *v.* Dixon 391
Strong *et al.*, Lord *v.* . . . 61

Teller *v.* Wetherell *et al.* . . 46
Thomas *et al.*, Greusel *v.* . . 76
" Lockwood *v.* 168
" *et al.* Quirk *v.* . . . 76
Thompson *et al.*, Kibbee *et al. v.* 410
Tower *v.* Lamb 362
Tully *et al. v.* People . . . 273

Turner *v.* Chapman *et al.* . 396
Tyler *et al.*, Jones *et al. v.* . 364

Van Blarcom *v.* The Ætna Insurance Co. 299
Van Husan *et al.*, Nye *et al. v.* 329
Warner *v.* Whittaker *et al.* . 133
Wetherell *et al.*, Teller *v.* . . 46
Whittaker *et al.*, Warner *v.* . 133
Whitwell *et al.*, Emery *v.* . . 474
Wilson *v.* Wilson *et al.* . 9, 272
Winder *et al.*, Galpin *v.* . . 17

ERRATA.

Page 110, sixth line from bottom, for *hands* read *hand.*

Page 166, fourth line from bottom, for *term* read *terms.*

Page 406, sixth line from top, for *question* read *questions.*

Page 519, eleventh line from top, for *intrusted* read *interested.*

Page 519, fifteenth line from top, for *material* read *mutual.*

Page 521, twelfth line from top, for *three* read *others.*

Page 533, fifth line from bottom, for *mortgagees* read *mortgages.*

Page 534, sixth and sixteenth lines from top, for *mortgagees* read *mortgages.*

OCTOBER TERM, 1858, AT DETROIT.

Jane Wilson and Another v. Eunice T. Wilson.

The declarations of a person since deceased, can not be made evidence on behalf of his representatives, any more than on his own behalf while living, for the purpose of showing what were the terms of a parol contract made by him for the conveyance of lands, and which is sought to be enforced against such representatives.

On a bill for the specific performance of a parol contract for the conveyance of lands, the contract must be proved in the clearest manner, and must be substantially the same set forth in the bill.

Accordingly where wife and husband filed their bill on behalf of the wife, alleging a parol agreement on the part of the devisor of defendant to convey certain lands to the wife, and asking its specific performance, but, from the testimony, it appeared that the agreement was to convey to the husband;—*Held*, That the bill must be dismissed, notwithstanding there was evidence in the case that the husband afterwards directed the conveyance to be made to the wife, and the other party assented to its being so made.

Heard October 12th and 13th. Decided November 12th.

Appeal from Wayne Circuit in Chancery, where decree was rendered in accordance with the prayer of the bill.

The case, so far as necessary to illustrate the decision of the Court, is set forth in the opinion.

C. I. Walker, for complainants:

The testimony clearly shows that, by the contract of February 21st, 1853, the sixteen acres were to be conveyed to the complainant Jane. It also shows that she took possession of the premises, by her agents and tenants, and received the rents therefor.

The contract being proved as alleged in the bill, it is a clear case for a specific performance, under the most stringent

doctrine upon that subject. Here is a complete performance on the part of Charles M. Wilson, by the conveyance of February 21st, 1853, and the reception of the mortgage from Heath by Henry J. Wilson. Jane also took possession under the contract. All was completed, except the conveyance of the sixteen acres to Jane.—2 *Story Eq. Juris.* 759; *McMurtrie v. Bennette*, *Harr. Ch.* 124; *Ex parte Storer*, *Davies*, 294; *Gilmore v. Johnston*, 14 *Ga.* 683; *Wetmore v. White*, 2 *Cai. Cas.* 87.

J. M. Howard, for defendant:

Henry J. Wilson, according to the bill, was to hold, and, on the delivery to him of the deed, did hold, the premises, not for his own use and benefit, but for the use and benefit of Jane. The title was, therefore, held by him *in trust*, and he was a trustee. Such a trust is void by our Statute of Frauds, unless proved by some deed or conveyance subscribed by the party declaring the same, or by some person thereunto by him lawfully authorized by writing.—*Comp. L. p.* 912.

The present is not the case of a resulting trust, where the money is paid by one person, and the title taken in the name of another.—*White v. Carpenter*, 2 *Paige*, 238. But this kind of resulting or implied trusts is, by our Statute of Uses and Trusts, abolished, and the party paying the purchase money has no title or claim whatever.—*Brewster v. Power*, 10 *Paige*, 569; *Garfield v. Hatmaker*, 15 *N. Y.* 475. And where the trust is simple, and for the use and benefit of another, the beneficiary takes the whole title, legal and equitable.—*Selden v. Vermilyea*, 3 *Comst.* 535. Indeed, this case does not fall within any of the classes of resulting trusts defined by Lord Hardwicke, in *Lloyd v. Spillett*, 2 *Atk.* 148, and by Chancellor Kent, in 4 *Kent*, 305, 306. And such a trust is forbidden by our Statute of Uses and Trusts, secs. 1 and 5.

But reliance is placed on the agreement of February 21st, as a *contract* to convey to Jane. Such a contract is a mere

nullity.—11 *Paige*, 405, 410; 26 *Wend.* 34; 6 *Metc.* 319. But the bill relies upon part performance to take the case out of the statute. The part performance alleged is *the taking of possession* by Jane, and the *expenditure of moneys* in repairing the fences. To take the case out of the statute on this ground, it is indispensable that the acts done should be clear and definite, and referable exclusively to the contract, and the contract should also be established, by competent proof, to be clear, definite, and unequivocal in its terms. —2 *Story Eq. Juris.* 764; *Weed v. Terry*, 2 *Doug. Mich.* 352. The alleged possession should be notorious.—7 *Barr*, 157; 4 *Blackf.* 94; 19 *Pa. St.* 461; 6 *Watts*, 464; 7 *Barr*, 91. And under and in pursuance of the contract of sale.—8 *S. & R.* 543; 3 *Ves.* 378; 18 *Ves.* 328; 14 *Pa. St.* 260; 22 *Ibid.* 225. And with the knowledge and consent of the vendor.—1 *Bro. C. C.* 409; 18 *Ves.* 328; 9 *Watts*, 106.

The original arrangement, as proved, was to convey the premises in controversy to Charles Wilson, instead of Jane. If so, it divests the alleged possession and improvements of all the characteristics of part performance in favor of Jane. But this alleged possession is not sufficiently proved. And as the alleged rights of Jane arose, not out of the original contract, but, if at all, out of a subsequent verbal one, without consideration, it can not be enforced in her favor.—6 *Paige*, 288, 292.

Walker, in reply:

This was not a trust within the authorities cited, or within the statute. No agreement is alleged or proven that Henry Wilson was to *hold* this land *in trust* for any one; but he was to *convey*, immediately, on demand.

CAMPBELL J.:

The complainants file their bill for the conveyance of two lots of land in Wayne county, alleged to be held by the defendant as devisee of Henry J. Wilson, deceased.

The claim for relief is based upon an agreement which is averred to have been made by Henry J. Wilson during his lifetime, under the following circumstances:

In February, 1853, Charles M. Wilson was the owner of a tract of land lying partly south and partly north of the Grand River Road, the larger portion lying south of the road. The north tract was divided into three lots, the middle one being a tavern-stand then occupied by George Heath. Henry J. Wilson held a purchase-money mortgage on the whole property, for four thousand five hundred dollars. On the 21st day of February, 1853, Charles M. Wilson, and Jane Wilson, his wife, conveyed the whole premises to Henry J. Wilson, by a warranty deed. On the 27th day of the same month, Henry J. Wilson conveyed the tavern-stand, consisting of about eight acres, to George Heath, taking back a mortgage for four thousand five hundred dollars. In July, 1856, Henry died, seized of the remaining premises, and the defendant was made his universal legatee, and also took out letters of administration with the will annexed. The controversy in this case arises upon the lots north of the Grand River Road, upon each side of the Heath tract.

The bill sets up that Charles M. Wilson, being about to go to California, to be absent for some time, and being desirous of disposing of his remaining interest in the property, which was subject to the mortgage to Henry, and, at the same time, of making some provision for his wife Jane, entered into an agreement with Henry, on the 21st day of February, 1853, to sell and convey to him the whole property, including the Heath tract (which the bill states Charles was bound to convey to Heath), and that, in consideration thereof, Henry agreed to convey to Heath this tract, and also agreed, immediately, and whenever demanded, to execute to Jane Wilson, wife of Charles, a warranty deed of the two adjacent lots. That in pursuance of this agreement, Charles and his wife made the conveyance of February 21st to Henry, and Henry, also in pursuance of the agreement,

conveyed the tavern-stand to Heath, but neglected during his life to convey the other lots to Jane. That Charles immediately left for California, and was absent until June, 1856. The bill also contains statements of possession by Jane and her lessees.

The bill does not state whether the agreement was verbal or written. The answer admits nothing, and puts the whole case at issue.

The defense made upon the hearing was two-fold: *First*, That the complainants do not prove their case in substance, as alleged; and, *Second*, That the case which they seek to make is within the prohibitions of the Statute of Frauds and the Statute of Uses and Trusts.

We propose to examine first into the case made by the proofs. As the party in default, Henry J. Wilson, died before the bill was filed, and as Mr. Selkrig, a principal witness, died before proofs were taken, justice to all parties requires that the whole transaction should be carefully investigated.

It is very evident that whatever agreement was originally made between Charles and Henry Wilson, was made on the 21st of February, 1853. The bill alleges this, and Marvin's testimony confirms it. No witness testifies to any previous understanding. The conveyance being then made, and the bargain announced just after to Marvin and Selkrig, who witnessed and drew the deed, there can be no doubt that the conveyance and agreement were but one transaction. It is equally plain that when Henry received the conveyance, there was an understanding, not only that he should complete the bargain which Charles had made with Heath, but that the adjoining lots were in some way, and for some purpose, to be held or disposed of for the benefit of Charles or his wife. And in considering this branch of the case, we must determine whether we have evidence showing the whole contract, and, if so, what it was.

The natural inference from the bill would be that Henry was to take the fifty acres south of the road in satisfaction of his mortgage, and dispose of the rest as Charles then required, namely, by conveying the tavern-stand to Heath, and doing with the other two lots as was agreed. But the proof showing that Heath was to give, and did give, back a mortgage to Henry, nearly, if not quite, equal in amount to Henry's mortgage against Charles, leaves the case as if the whole fifty acres south of the road were a mere gift to Henry, or, what is equivalent, passed without any pecuniary consideration. The difference between the mortgages could not have exceeded three hundred dollars, which would be of no account in making up the price of the land. These facts are not in accordance with the theory of the bill, and it is not at all likely that this could have been all the arrangement. If such had been the real transaction, the magnitude of the gratuity to Henry would have made it probable, at least, that any conversation intended to inform relatives or witnesses of the terms of the arrangement would not have ignored so important an item. The matter is mentioned to Marvin as a *trade;* and such is the theory of the case. It is much to be regretted that we have not more light upon this part of the transaction. If any other consideration passed between the parties, it might go far to explain the whole affair.

Leaving this question, and looking simply to the equities claimed for Jane Wilson upon the two lots in controversy, the inquiry next arises concerning her individual rights—the bill being filed entirely on her behalf. The allegations are, that Charles was about leaving for California, and that the arrangement was made, partly to settle up his affairs with Henry, and partly to make provision for his wife. Such would be an appropriate and natural occasion for a settlement for her benefit. But, according to the testimony of the complainant's witnesses, his intention to go to California was formed some time after the date of this agreement,

and—whether formed or not—was not expressed either to his relatives or to those to whom the terms of the bargain were communicated. These witnesses do not connect the original bargain with any allusion to California. And inasmuch as the origin of the provision for Jane is made, by the bill, to spring from the intention of Charles to go there—and such would be a very likely thing to originate it—the evidence should be examined with some regard to this theory.

In looking into the testimony, to ascertain what the original bargain was, we are compelled to disregard almost entirely the depositions on behalf of the defendant. They are mainly declarations of Henry Wilson; and while the complainants are entitled to prove his admissions, the rule will not allow his declarations to be introduced on behalf of his representatives, any more than of himself if he were living. The case must therefore stand, so far as the terms of the contract are concerned, upon the testimony of Mary Wilson (mother of Charles and Henry), George Heath, and Russell Marvin, a brother-in-law of the Wilsons.

Mary Wilson testifies that Henry informed her that, in the trade, he had taken back the south tract, and Charles was to have the two lots, and they were to be deeded to the wife of Charles. She is not asked, nor does she testify, at what time this statement was made to her. Taken alone, it certainly has a strong tendency in favor of the complainant's case. George Heath, who was informed of the arrangement within a few days, testifies that it was agreed that Charles was to have the lots. The only allusion he heard to Jane was when he applied to Henry to buy the lots, and Henry replied he could not sell them; that they belonged to Charles; that he had not given Charles a deed of them; that Charles was going to California, and, if he never came back, he would give the deed to the wife of Charles. Marvin testifies that on the day the deed was made to Henry, the bargain was stated to him by the parties, in presence of Mr. Selkrig.

According to that statement, Henry was to allow Charles what he had already received from Heath, and give up the notes and mortgage, and give Charles the land on the north side of the road. No mention was made of its being deeded to any one in particular. But on the night before Charles left for California, which was the 30th of April or the 1st of May, the matter of the property was talked over at a family meeting at Marvin's, and Henry was to give a deed to Jane whenever she wished it.

Looking at the whole case, we can not avoid the conclusion that the probabilities are in favor of the idea that the disposition of these lots for the separate use of Jane was not determined on until Charles concluded to go to California, and formed no part of the original arrangement. That such an arrangement was finally made, is highly probable, but we can not satisfy ourselves that the testimony goes any further.

With this view of the facts, we can not grant the relief prayed for. Not only must the contract, when resting in parol, be proved in the clearest manner, but it must be substantially the same set forth in the bill. An original agreement to deed to Charles, or to hold subject to his disposal, might stand upon very different legal grounds from an original agreement to convey to Jane. And a subsequent agreement in her favor would also stand on a very different footing from an original one, and would require proof of the considerations which led to it.

The grave questions arising under our statutes touching the validity of any of these arrangements, we do not now propose to consider. They can only be applied with certainty where the facts are well ascertained, and proof is made of a definite agreement. If the parties should be enabled hereafter to procure such proof as will warrant them in seeking relief, those legal principles may come up in a shape to authorize action upon them. We refuse relief in this case because, whether the bargain in question would have

been regarded as legal or illegal, it is not made out to our satisfaction by the evidence.

The bill must be dismissed, but it may be done without prejudice.

The decree of the court below must be reversed, and a decree entered dismissing the bill of complaint, with costs, without prejudice.

The other Justices concurred.

Horace Galpin v. James Abbott and Others.

The record of a deed not executed in conformity with the recording laws is notice to no one.

Where, under the Code of 1833, a deed of lands within the territory of Michigan was proved or acknowledged in the state of New York, it was not necessary, to entitle the deed to record within the territory, that the acknowledgment be accompanied by a county clerk's certificate, proving the official character and signature of the officer taking the acknowledgment.

Under the Code of 1833, to entitle a deed acknowledged or proved out of the territory to be recorded within it, it was necessary that it be *executed and witnessed* in the same manner that deeds acknowledged within the territory were required to be, though the *proof or acknowledgment* might be in accordance with the laws of the state or territory where it was taken.

Heard October 15th, 19th, and 20th. Decided November 13th.

Appeal from Wayne Circuit in Chancery.

The bill was filed in the court below to redeem certain premises in the city of Detroit from a mortgage. It sets forth that on the 3d day of July, 1835, James Abbott, being the owner of said premises, conveyed the same to Francis G. Macy, for the consideration of $5,000, and the deed thereof was duly recorded: That, soon after said conveyance, Macy left Michigan, and has not since resided therein, and has been entirely ignorant of any use which may have since been made of said lots, and that he gave no assent to any such use: That, on receiving such conveyance, Macy gave a mortgage back to Abbott, executed and re-

corded in due form, to secure the payment of $4,000 of the purchase money, in four equal annual installments, with interest:

That on the 4th day of August, 1835, Macy being still the owner of said premises, subject to the mortgage, gave a warranty deed of a one-fourth undivided interest therein, to one Freeman Dodd, which latter deed was recorded in the office of the register of deeds of the city of Detroit, on the 9th day of October, 1835; that said Dodd never resided in Michigan, and never assented to, or knew of, any occupancy or use of said lots adverse to himself:

That on said 4th day of August, 1835, Macy being still the owner of a three-fourths interest in said premises, subject to said mortgage, gave a warranty deed of an undivided one-half interest therein to Joseph Hoxie; which last deed was recorded in the office of the register of deeds of the city of Detroit, on the 9th of October, 1835; and that said Hoxie never resided in Michigan, and never assented to, or knew of, any use or occupancy of said premises adverse to himself:

That on the 1st of November, 1837, Macy mortgaged his remaining one-fourth interest to the Farmers' and Mechanics' Bank of Michigan, which latter mortgage was by the bank subsequently assigned to Messrs. Trowbridge, Stuart, and Owen, and by them to G. V. N. Lothrop. Mr. Lothrop was made a party defendant, and allowed the bill to be taken as confessed.

The bill further states that the first and second installments of the mortgage given by Macy to Abbott, were duly paid; that the third and fourth installments remaining unpaid, Abbott, in or about the month of August, 1839, filed his bill to foreclose the said mortgage, in the then Court of Chancery for the first circuit of the State of Michigan; that such proceedings were thereupon had in said foreclosure suit that, on January 12th, 1841, said premises were sold by a master, pursuant to a decree of said court, to said Abbott,

for two hundred dollars, and a master's deed given therefor, which was recorded February 4th, 1841, in the register's office of Wayne county. The master made his report, which was confirmed by the court January 12th, 1841, and a decree entered against Macy for the balance:

That said Abbott was sole complainant, and Macy sole defendant in said foreclosure suit, although Abbott well knew, and had due notice, in law and in fact, of the conveyances to Dodd and Hoxie, and of the mortgage to said Farmers' and Mechanics' Bank, so that the rights, interests and equities of said parties, and their assigns, were wholly unaffected by said foreclosure proceedings; that Dodd and Hoxie had no notice of said foreclosure proceedings, nor did they in any way assent thereto, or to any conveyances or occupancy of said lots, since the conveyance thereof by Macy, as aforesaid:

That on the 4th of August, 1842, Abbott gave a warranty deed of said premises to John Winder, but neither Abbott nor Winder ever took or had any actual or legal possession after the said deed to Macy; or if they ever took possession, it was not till the year 1845:

That in 1852, Winder caused said premises to be surveyed and platted into city lots, and several persons became interested therein by purchase, who are made parties defendant to the bill:

That on the 4th day of October, 1854, said Hoxie, being still the owner of a one-half undivided interest in said premises, conveyed the same by deed, executed in due form, to the complainant; which deed was duly recorded:

That on or about January 8th, 1839, Dodd assigned all his interest in said premises to John Stevens and William Emerson, and the survivor of them, in trust for Dodd's creditors, with full power in the assignees to sell the same as they should see fit; that said assignees accepted the trust, and took on themselves its execution; that Stevens subsequently died, whereupon the title of Dodd in the property became vested in Emerson, the surviving assignee:

That on the 21st day of July, 1842, the said Dodd filed his petition in the District Court of the United States for the Southern District of New York, sitting in bankruptcy; and, pursuant to the statute and the practice of said court, he was duly declared a bankrupt by said court, September 5th, 1842; and W. C. H. Waddell, who was the general assignee in bankruptcy appointed by said court, became the owner of all the property of said Dodd, from the date of said decree:

That Waddell, on March 17th, 1855, pursuant to the order and direction of said court in bankruptcy, sold and conveyed to the complainant all the right and interest which he had in the premises, as assignee of Dodd, and by virtue of said decree in bankruptcy:

That after the death of said Stevens, assignee of Dodd as aforesaid, said Emerson, his survivor, on June 6th, 1855, sold and conveyed to the complainant all the interest he had in said premises, as assignee of Dodd, and as survivor of Stevens. And the bill charges that neither Stevens nor Emerson knew any thing of the foreclosure suit of Abbott against Macy, nor had notice of any conveyances, occupancy, or improvements, from and under Abbott and his assigns thereafter:

And complainant claimed, by virtue of said several conveyances, to be the owner in fee simple of an undivided three-fourths of said premises, subject only to said Macy mortgage.

Winder, and the several defendants deriving title under him, claimed to be purchasers in good faith under the proceedings had for the foreclosure of the Macy mortgage, and without any notice of the Dodd and Hoxie deeds, and insisted that the right of Macy and his grantees to redeem was extinguished by such foreclosure proceedings.

The cause having been put at issue, testimony was taken, of which it is only necessary to notice that relating to the Dodd and Hoxie deeds. These were both executed in the

city of New York, in 1835, and acknowledged before a commissioner of deeds, in all respects in conformity with the then laws of New York, and each had a single subscribing witness, who was the officer taking the acknowledgment: no county clerk's certificate was attached, showing the official character and signature of the commissioner. The deeds were recorded in the office of the register of deeds of the city of Detroit, on the 9th day of October, 1835; and the principal question in the case was, whether, having but one subscribing witness, and wanting such clerk's certificate, they were authorized, under the laws of the territory of Michigan, then in force, to be recorded, so that their being placed on record was constructive notice to Abbott and those claiming under him. There was no proof that Abbott had actual notice of these deeds at the time of the foreclosure.

L. Bishop and *C. I. Walker*, for complainant:

1. The record of conveyances, when authorized by law, is notice to the world of all rights and interests under them.

2. The Dodd and Hoxie deeds were executed and acknowledged in strict conformity to the laws of New York, and were therefore authorized to be recorded here under the act of 1827, embraced in the Code of 1833. This act did not specify what evidence should be deemed sufficient that a deed has been executed according to the foreign law, when it is presented to a register for record; and this defect is made the subject of comment by the Supreme Court in *Ives v. Kimball*, 1 *Mich.* 308. But it may be presumed, as say the Court, that the register did his duty, and that he had the proper evidence before him.—*Ewing's heirs v. Savary*, 3 *Bibb*, 287; *Hope v. Sawyer*, 14 *Ill.* 254. A register of deeds might record any deed which appeared to have the proper form, leaving the questions, whether it was *properly recorded*, and whether it was notice to subsequent purchasers, to be determined when they should arise.—*Talbot's lessee v. Simpson*, *Pet. C. C.* 188, 189.

3. Defendants claim that deeds executed out of the territory must conform not only to sec. 7, but also to sec. 1, of the act of 1827, and therefore that such deeds must have two witnesses, whether the law of the place where executed required them or not; and that they must, in all respects, be in accordance with all the provisions of our statute, and also with the *laws and usages* of the place where executed. To this most unnatural and forced construction of the statute we answer:

It is contrary to the plain and obvious intention of the Legislature, which must prevail, so that professional criticism shall not be necessary to understand it.—23 *Pa. St.* 231.

Nothing can be more manifest than that two classes of conveyances were intended to be provided for; that secs. 1 and 2 should cover the first class, composed of deeds executed in the territory, and sec. 7 the other class, composed of such as should be executed in other states and countries.

The object of the latter section was to facilitate the making of deeds of lands situated here, in parts of the world where the local law of Michigan might not be known.—*DeSegond v. Culver*, 10 *Ohio*, 191.

Sec. 8 of the act of 1820, which is incorporated into sec. 7 of the act of 1827, provides that all deeds which *had been* executed in other states and countries, according to the *laws and usages* thereof, should be confirmed; and they are declared to be as valid and effectual, to all intents and purposes, as though they had been acknowledged and proved in the territory.

From this clause we gather,—

First, That down to 1820, there was no law or statute which authorized a deed of lands here to be executed out of the territory; and,

Second, That foreign deeds were not intended, nor expected, to conform to the statute as to domestic deeds.

Why are deeds executed in other states, before and after the statute, classed together in the same section, and both

placed on the same footing? Why are the former deeds confirmed? And why are they not required to conform to sec. 1, as to two witnesses? There can be but one answer.

It is clear that sec. 1, which is general, relates only to deeds executed in Michigan, while sec. 7, being special, has reference only to such as might be executed elsewhere. This view is sustained by sec. 2, which specifies the officers before whom *such deeds* (before named in sec. 1) may be acknowledged or proved; and these officers can, of course, be only such as hold office under the laws of Michigan. Special provisions of a statute, relating to a particular subject or class, will not be controlled or affected by general provisions on the same general subject.—*United States v. Weise*, 2 *Wall. Jr.* 72; *Jones v. Jones*, 18 *Me.* 308; *Ottawa v. LaSalle Co.* 12 *Ill.* 339; *Rex v. Archbishop of Armagh*, 8 *Mod.* 8.

It is said that sec. 1 provides the mode in which all deeds shall be executed, and that sec. 7 only relates to the forms of authentication of foreign conveyances when they shall have been executed with two witnesses and according to sec. 1. But "statutes are to be construed in reference to the principles of the common law; and it is not to be presumed that the Legislature intended to make any innovation on the common law, further than the case absolutely required.' —1 *Kent*, 464; *Whitcomb v. Rood*, 20 *Vt.* 49; *State v. Mace*, 5 *Md.* 337; *U. S. v. Magill*, 1 *Wash. C. C.* 463; *State v. Norton*, 3 *Zab.* 33; *Adams v. Terrentine*, 8 *Ired.* 147. Now, sec. 1 speaks of deeds and other conveyances signed and sealed, and sec. 7 speaks of deeds and conveyances made and executed.

The word *deed* has a fixed and definite signification at common law. It "is a writing sealed and delivered by the parties." Independent of statutes, a deed requires no subscribing witness.—4 *Kent*, 451, 452; *Forsaith v. Clark*, 1 *Fos.* 409; *Dole v. Thurlow*, 12 *Metc.* 157, 165; *Long v. Ramsay*, 1 *S. & R.* 72; *Jackson v. Wood*, 12 *Johns.* 73; *Moore v. Vance*, 1 *Ohio*, 1; *Wilkins v. Wells*, 9 *S. & M.* 335.

When, therefore, the Legislature, in sec. 1, speak of a deed signed and sealed, and, in sec. 7, of a deed made and executed, they mean the same thing—"a writing sealed and delivered by the parties." Such is the long settled meaning at common law of the terms they use; which meaning was not changed, as there was no necessity for innovation, either in the subject or in the object of the legislation.

We have accordingly, under both sections, deeds fully executed, without witness, acknowledgment, proof, or certificate. The sections are alike in this respect, and the latter requisites relate to the forms of authentication only. We thus see the object of this statute; that these forms might be different in domestic and foreign deeds, and that in the latter they might vary so as to conform to the different local laws where they might be executed.

Again: Sec. 1 contains no negative words. It is declared that a deed in the form there prescribed shall be good and valid, but it is not declared that deeds in the ordinary form shall not be valid. These affirmative provisions are merely directory.—*French v. French*, 3 *N. H.* 234, 256, 263; *Stone v. Ashley*, 13 *N. H.* 38; *Dole v. Thurlow*, 12 *Metc.* 157; *People v. Cook*, 14 *Barb.* 259; *Long v. Ramsay*, 1 *S. & R.* 72; *Strong v. Smith*, 3 *McLean*, 362; *Milligan v. Dickson*, *Pet. C. C.* 438, 439; *Hammond v. Alexander*, 1 *Bibb*, 333; *Dougherty v. Randall*, 3 *Mich.* 581.

A conveyance, signed, sealed, and delivered as a deed, would be good, as between the parties, notwithstanding the statute, and it would be a monstrous distortion to construe the first section as excluding every other form, when a far more natural construction would give sec. 7 an exclusive operation as to foreign deeds.

Nor do secs. 2 and 4 help defendants. Sec. 2 opens with the words, "All such deeds"—referring, of course, to sec. 1; and it makes no allusion to sec. 7, or to deeds executed in other states. The officers in this section are, of course, none other than public officers of the territory of Michigan.

The first subdivision of sec. 4 refers expressly to deeds by married women residing in this territory; and the words, "taken in manner aforesaid," can refer only to the previous secs. 1 and 2. The seventh section has no such connecting links as these with the first section.

The second subdivision of sec. 4 refers expressly to deeds by married women, not residing in this territory; and these, therefore, come under sec. 7. It will be noted that the words "all such deeds," as found in sec. 2, and "taken in manner aforesaid," found in the first part of sec. 4, are carefully excluded from the last part of sec. 4. This fact will appear very significant when we come to compare the whole legislation of the state on the subject. It will be found far from accidental.—*Fowler v. Tuttle*, 4 *Fos.* 9.

Again: When we come to sec. 6 we find the same absence of all words having reference to sec. 1, or any other section; and all deeds entitled to be recorded by virtue of this act, are provided for. Deeds made pursuant to sec. 1, or pursuant to sec. 7, had the same equal right to record.

D., S. A. & D. Goodwin, and *A. D. Fraser*, for defendants:

There is no evidence in the case of any conveyances from Macy to either Dodd or Hoxie.

By the legislation of Michigan, at the time of the execution of these instruments, two witnesses were required to make them valid, as conveyances of real estate. All deeds were required to be attested by two witnesses by the original Ordinance of 1787.

By the act of the Legislative Council of the territory of Michigan, of April 12th, 1827, all conveyances of real estate lying in the territory must be signed and sealed by the grantors, and signed by two or more witnesses, and proved, and acknowledged, and recorded, to be valid. Sec. 2 provides how such deeds shall be proved or acknowledged within the state to entitle them to be recorded, and sec. 6 provides when such record shall be evidence.

Sec. 7 provides, as to deeds executed in another state, that they shall be acknowledged, proved, and certified in conformity with the laws of that state, and shall be as valid as if proved or acknowledged according to the laws of Michigan. This statute continued in force until the Revised Statutes of 1838, by which witnesses were dispensed with, but again required by the act of April 29th, 1839, and by all subsequent enactments.

The instruments purporting to be executed August 4th, 1835, by Macy to Dodd and Hoxie, are not, then, valid deeds — being signed by only one witness — for want of conformity to the statute requirements in the mode of execution under the act of April 12th, 1827.

It will also be seen by sec. 7 of the same act, that in the case of land lying in Michigan, deeds therefor "made and executed" in another state, "shall be acknowledged, and proved, and certified, according to, and in conformity with, the laws and usages" of the state in which they shall be acknowledged or proved.

The statute of New York in force at the time these deeds were executed, did not authorize the record of a deed in any county except that in which the officer resided, when the acknowledgment was taken before a commissioner, without its being "certified by the county clerk under his seal of office," "specifying" that the commissioner "was duly authorized to take the same," and that the signature to his certificate was genuine.—*R. S. of N. Y.* 1830, *vol.* 1, *p.* 746, *sec.* 4, *sub.* 1; *p.* 749, *sec.* 18.

The case of *Ives v. Kimball*, 1 *Mich.* 308, presented a different point. The objection there was not the absence of the certificate, but that the fact should be proved at the trial. The court, in that case, and in *Lacy v. Davis*, 4 *Mich.* 150, appear to have overlooked the fact that, by sec. 7 of the Michigan statute, the deed should be acknowledged and certified in conformity with the laws of New York, and that by sec. 18 of the New York statute, such a deed could not be recorded in any other county in the state, without

being "certified" by the county clerk, if taken by a commissioner, or a county judge not a counsellor.

The deeds being defective in the statute requirements as to execution, the record was wholly unauthorized and void, and is no evidence of the execution of such deeds, and no notice to Abbott or his grantees.

The same consequence will follow, if our position be correct, that these deeds were not so "acknowledged and certified" as to entitle them to be recorded.—*Wing v. McDowell*, *Walk. Ch.* 175; *Courcier v. Graham*, 1 *Ohio*, 330; *Patterson v. Pierce*, 5 *Ohio*, 190; *Marvin v. Camp*, 3 *Conn.* 35; *Carter v. Champion*, 8 *Conn.* 549; *Sumner v. Rhoades*, 14 *Conn.* 135; *Godfrey v. Disbrow*, *Walk. Ch.* 260; *Duphey v. Frenage*, 5 *Stew. & P.* 215; *Fenno v. Sayre*, 3 *Ala.* 458; *White v. Wheaton*, 16 *Conn.* 530; *Grimstone v. Carter*, 3 *Paige*, 438; *Clark v. Graham*, 6 *Wheat.* 577; *Shultz v. Moore*, 1 *McLean*, 520; 19 *Vt.* 230; *Choteau v. Jones*, 11 *Ill.* 300; *Pope v. Henry*, 24 *Vt.* 360; *John v. Scott*, 5 *Md.* 81; *Moore's executors v. Auditor*, 3 *Hen. & M.* 235.

S. T. Douglass, on same side:

The statute made three things requisite to the validity, even as between the parties, of all conveyances of lands in the territory; namely, signing and sealing by the grantor, and attestation by *two witnesses*. We say requisite, because, although there are no negative words in the first section, but it merely enacts that all conveyances executed in accordance with its provisions shall be valid, yet such statutes are construed, in effect, to declare that lands can not be conveyed in any other manner.—4 *Port. Ala.* 324; 6 *Wheat.* 557; 1 *Ohio*, 330; *Ibid.* 6; 5 *Ohio*, 190; 19 *Ohio*, 24; *Walk. Ch.* 265; 23 *Vt.* 600; 14 *N. H.* 395; 6 *O. S. R.* 585.

To make a deed valid as against subsequent purchasers or mortgagees for valuable consideration (without notice?), it was also requisite, 1st, That it should be acknowledged by the grantor, and the officer's certificate of that fact endorsed; or, 2d, That the execution and attestation thereof

should be *proved* and certified as provided by the statute; and 3d, That it should be recorded. The signing, sealing, attestation, and acknowledgment or proof, were each prerequisites to the recording.

The phraseology of sec. 1 of the act in question might seem, at first view, to indicate that the acknowledgment or proof, and the recording, as well as the signing, sealing and attestation, were essential to the validity of the conveyance for any purpose, but a different construction has always been given to this and similar statutes.—6 *Mass.* 24; 12 *Metc.* 162; 6 *Pet.* 135; *Walk. Ch.* 264.

Sec. 1, in plain terms, embraces and prescribes the requisites of all conveyances of lands in the territory, whether executed here or elsewhere, leaving the details as to how and before whom they should be acknowledged or proved, and when and where recorded, to be provided for in subsequent sections. There is nothing in any of the subsequent provisions to limit the generality of the language of this section, or in any way inconsistent with the construction we give it. Sec. 7 does not purport to prescribe how deeds shall be *executed* out of the territory, but merely how they shall be *acknowledged*, or *proved* and *certified*, as to which there was a necessity for some special provision. It does not declare such deeds as effectual and valid in law as though the *execution* thereof, or the *execution and acknowledgment* thereof had been in acccordance with the laws of the territory, but only that they shall be "as effectual and valid as though the same *acknowledgments* had been taken, or *proof* of execution made, within this territory, and in pursuance of the laws thereof." The construction, claimed on the other side, requires us to import into sec. 7 language not to be found there, and which would be inconsistent with sec. 1.*

*It was argued with much ability, by the counsel on each side of this case, that the prior, as well as subsequent, legislation on the subject of conveyances, threw light upon the particular point under discussion here, and justified the construction put by each upon the provision in question. A reference, in this place, to the prior legislation upon this subject, may possibly be of interest to the profession.

CHRISTIANCY J.:

The main question in this case is, whether the two deeds from Macy to Dodd and Hoxie respectively, dated August 4th, 1835, acknowledged the same day, and recorded in the office of the register of deeds in the city of Detroit, October 9th, 1835, were so executed, attested, and acknowledged, as to be entitled to record under the then existing laws of the territory. If entitled to be recorded, the record was notice to all the world of the title of Dodd and Hoxie, and they should have been made parties to the foreclosure suit; and not having been made parties, they were

The post of Detroit was surrendered to the British authorities in the capitulation of Montreal, September 8th, 1760. Formal possession was taken the twenty-ninth of November following, and jurisdiction ceded by the treaty of peace between Great Britain and France of February 10th, 1763.

By the Ordinance of 1787, real estate in the Northwest Territory might be "conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided" "such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after the proper magistrates, courts, and registers shall be appointed for that purpose."

In *Lessee of Lindsley v. Coats*, 1 *Ohio*, 243, it was held that the ancient common law conveyances, as such, had never been adopted in this territory, and that, by the Ordinance of 1787, it was not the intention of Congress merely to legalize those modes of conveyance which are mentioned in the Ordinance, leaving it at the option of owners of real estate within the territory, upon the sale of their lands, to convey the same either by the ancient common law mode of feoffment with livery of seizin, or by deed duly executed as provided by the Ordinance, but to provide that every conventional transfer of real estate, by vendor to vendee, should be by the latter mode only.

Section eight of "A law establishing the Recorder's Office," published by the Governor and Judges of the Northwest Territory, June 18th, 1795, to take effect August 1st, 1795 (1 *Chase's Statutes*, 167), provides that "All deeds and conveyances which shall be made and executed within this territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be in any way affected, in law or equity, shall be acknowledged by one of the grantors or bargainors, or proved by one or more of the subscribing witnesses to such deed, before one of the judges of the General Court, or before one of the justices of the Court of Common Pleas of the county where the lands conveyed do lie, and shall be recorded in the recorder's office of the county where such lands or hereditaments are lying and being, within twelve months after the execution of such deeds or conveyances; and every such deed and conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

Section nine of the same act provides for proving deeds when the grantors and

not bound by the decree, and they or their grantees would now be entitled to redeem. But if not entitled to record, then, though recorded in fact, the record is notice to no one, and Dodd and Hoxie, and their grantees, are barred of all rights of redemption by the foreclosure against Macy alone; all the mortgaged premises having been purchased by the other defendants from Abbott, and neither he nor his grantees having any notice of the titles in question, aside from the record.

These deeds purport to have been executed in the state of New York, and each has but a single witness, who is the same person before whom the acknowledgment was taken.

witnesses were dead, or could not be produced.

In *Abbott v. Godfroy's Heirs*, 1 *Mich.* 178; it is *said*, by the Supreme Court, that, as Michigan remained under British jurisdiction until 1796, the Ordinance of 1787 (and the rule would be the same as to the territorial enactments) was not in force here until that time. How far the laws before in force here ceased to have effect with this change of jurisdiction, or at what time thereafter any particular statute or custom was impliedly superseded by American legislation, will not be discussed here. There was no formal repeal of the former laws until September 16th, 1810, when, by an act of the Governor and Judges of Michigan, the acts of the Parliament of England, and of the Parliament of Great Britain, the Coutume de Paris, or ancient French Common Law, existing in this country, the laws, acts, ordinances, arrets, and decrees of the Governors and other authorities of the Province of Canada, and of the Province of Louisiana, under the ancient French Crown, and of the Governors, Parliaments, or other authorities of the Province of Canada, and of Upper Canada, under the British Crown, the laws adopted and made by the Governor and Judges of the Territory of the United States Northwest of the river Ohio, and the laws made by the General Assembly of the said territory, and the laws adopted and made by the Governor and Judges of the territory of Indiana — were repealed, with saving of rights accrued. — *Cass Code*, 119; *Code of* 1820, 460; *Code of* 1827, 499.

By "A Law rendering the Acknowledgment of Deeds more easy," adopted and published by the Governor and Judges of the Northwest Territory May 1st, 1798, "all grants and deeds made of houses and lands may be acknowledged before one of the judges of the territory, justice of the common pleas, or justice of the peace, any former law to the contrary notwithstanding." — 1 *Chase Stat.* 210.

The act of Congress to divide the Northwest Territory into two separate governments, approved May 7th, 1800 (2 *Stat. at Large*, 58), provided that "from and after the fourth day of July next, all that part of the Territory of the United States Northwest of the Ohio River, which lies to the westward of a line beginning at the Ohio opposite to the mouth of the Kentucky River, and running thence to Fort Recovery, and thence north until its hall intersect the territorial line between the United States and Canada, shall, for the purpose of temporary government, constitute a separate territory, and be called the Indiana Territory." By the second section it was provided that there should be established in the Indiana Territory a government in all respects similar to that provided by the Ordinance of 1787, "and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges, and advantages granted and secured to the people by the said Ordinance."

The defendants insist that these deeds were not entitled to record, *First*, Because not properly acknowledged and certified, according to the laws of the state of New York, and the seventh section of the territorial act of Michigan, of April 12th, 1827 (*Compilation of* 1833, *p.* 281, *&c.*); and, *Second*, If duly acknowledged and certified, they could not be legally recorded, because not attested by two witnesses.

The first ground of objection we think wholly untenable. It is fully met by the decision of this court in *Ives v. Kimball*, 1 *Mich.* 308, which arose under the same law. The only circumstance which might distinguish that case from the present (as relates to this point), is, that in that case

Fort Recovery was erected on the site of St. Clair's defeat by the Indians, near the north boundary of the present county of Darke, Ohio, and some two or three miles east of the present state line between Ohio and Indiana. It will be perceived that, by this act, the eastern boundary line of Indiana Territory passed north through the present State of Michigan, some twenty miles west of the principal meridian as subsequently established, leaving the eastern portion of the present state still included in what remained the Northwest Territory.

Chillicothe was made the capital of the Northwest Territory by this act, and Vincennes of Indiana Territory, until otherwise ordered by the territorial legislative authorities.

"An Act providing for the Acknowledgment and Recording of Deeds in certain cases" (1 *Chase Stat.* 342; *Laws of N. W. Territory*, 1802, *p.* 135), adopted by the Territorial Legislature of the Northwest Territory, at Chillicothe, January 20th, 1802 (at the same session at which the towns of Detroit and Cincinnati were incorporated), was so important, and, in some respects, so peculiar in its phraseology and provisions, that it is here copied in full:

"*An Act providing for the Acknowledgment and Recording of Deeds in certain cases.*

"Whereas it has been represented to this Legislature that, in many instances, deeds and conveyances of lands, tenements, and hereditaments, situate, lying and being within this territory, have been executed, acknowledged or proved in other states and countries, in pursuance to the laws or customs in such states and countries, and whereas doubts are entertained respecting the validity and legal effect of such acknowledgments and proofs, and of the propriety of admitting such deeds and conveyances, so acknowledged and proved, to be recorded within said territory: Therefore, to remove all doubts, and to render such acknowledgments and proofs equally valid and effectual, in law, with acknowledgments and proofs of deeds made within the territory, and in strict compliance with the acts and laws thereof:

"Sec. 1. *Be it enacted by the Legislative Council and House of Representatives in General Assembly*, and it is hereby enacted, by the authority of the same, that all deeds and conveyances of lands, tenements, and hereditaments, situate, lying and being within this territory, heretofore executed, and which said deeds and conveyances have been, or hereafter may be, acknowledged or proved, according to and in compliance with the laws and usages of the territory, state, or country in which such deeds and conveyances were acknowledged and proved, or in which they shall be acknowledged or proven, are hereby declared effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within this territory, and

the acknowledgment was taken before a judge of the Court of Common Pleas, while in the case before us it was before a commissioner. The provision of the New York Revised Statutes (*Edition of* 1836, *vol.* 1, *p.* 749, *section eighteen*), to which we are referred, and which requires a clerk's certificate to a commissioner's acknowledgment when the deed is to be recorded in another county, manifestly has no application to this case, as it only applies when the deed is to be recorded in some other county of *that state*. This clerk's certificate is no part of the acknowledgment, or of the certificate of acknowledgment. The latter is the only certificate required under section seven of the territorial act. The question

in pursuance to the acts and laws thereof; and such deeds, so acknowledged or proved as aforesaid, may be admitted to be recorded in the respective counties in which such lands, tenements, and hereditaments do or may lie, any thing in the acts and laws of the territory to the contrary thereof notwithstanding: *Provided*, That such deeds and conveyances, so executed, acknowledged or proven, or to be acknowledged and proven, be recorded within two years from the passing of this act. *And provided also*, That all deeds and conveyances of lands, tenements, and hereditaments situated within this territory, which have been acknowledged or proved in any other territory, state, or country, according to, and in compliance with, the laws and usages of such territory, state, or country, and which deeds and conveyances have been recorded within this territory, be, and the same are hereby confirmed, and declared effective and valid in law, to all intents and purposes, as though the said deeds or conveyances, so acknowledged or proven, and recorded, had, prior to being recorded, been acknowledged or proved within this territory.

"Sec. 2. And be it further enacted, that all deeds and conveyances of lands, tenements, and hereditaments, situate, lying, and being within this territory, which shall hereafter be made, executed, and acknowledged or proved in any other territory, state or country whatever, shall not be admitted to be recorded within this territory, unless such deed or conveyance shall be accompanied with a certificate annexed of some clerk or prothonotary of a court of record, or a notary public of the county, state, or country in which such acknowledgment was taken or proof made, under the seal of the court or office (as the case may be), stating that the acknowledgment was taken or proof made before a competent authority, according to the laws and usages of such state or country, which certificate so made and annexed shall be recorded, together with the deed or conveyance, and shall have like effect in law as though the same had been acknowledged or proven within this territory, and no other.

"Sec. 3. And be it further enacted, that all deeds and conveyances of lands, tenements, and hereditaments, situate, lying and being within this territory, which shall hereafter be made and executed in any other territory, state, or country, whereby such lands, tenements, and hereditaments shall be conveyed, in whole or in part, or otherwise affected or incumbered in law, shall be acknowledged, or proved, and certified as aforesaid, and recorded in the county in which such lands, tenements, or hereditaments so conveyed or affected shall be situate, within one year after the day on which such deed was executed. And all deeds and conveyances which shall be made and executed within the said territory, for the conveyance of any lands, tenements, or hereditaments situated within the

here is, whether the acknowledgment, and the *certificate of such acknowledgment*, were in accordance with the laws of New York. Upon this question we can not entertain a doubt. We think, therefore, the deeds were sufficiently acknowledged and certified to entitle them to record here, if they could be recorded with a single witness only.

But the question still remains, whether the deeds were entitled to record with but a single subscribing witness.

This question depends entirely upon the territorial statute originally adopted by the Governor and Judges, March 27th, 1820, from the laws of five of the original states (*Laws of* 1820, *p.* 156, *et seq.*), re-enacted without altera-

same, whereby such lands, tenements, and hereditaments shall be conveyed, affected, or incumbered, shall be acknowledged, or proven, and recorded within six months of the actual time of signing or executing such deeds; and if any deed or conveyance of lands, tenements, and hereditaments, made and executed, or to be made and executed, whereby the same shall be affected in law, or in any manner incumbered, shall not be acknowledged or proved, and recorded, within the respective terms allowed by this act, the same shall be deemed fraudulent against any subsequent *bona fide* purchaser or purchasers without knowledge of the existence of such former deed or conveyance.

"Sec. 4. And be it further enacted, that deeds for lands, tenements, or hereditaments lying within this territory, may be acknowledged before a justice of the common pleas, or of the peace, of any county in the territory, and be recorded in that county in which such lands, tenements, and hereditaments are situated; and such acknowledgment shall have like effect as though made in the same county in which such lands, tenements, and hereditaments do or shall lie.

"Sec. 5. And be it further enacted, that so much of the acts and laws of the territory as come within the purview of this act, be, and the same are hereby repealed."

This act is said, in *Lessee of Allen v. Parish*, 3 *Ohio*, 107, to have been passed on the application of the Governor of Connecticut, representing that many deeds and conveyances of land lying within the territory had been executed in that state, under an impression that its jurisdiction extended over the district commonly called the Connecticut Reserve. And it was held in that case, that where a deed was executed and acknowledged in New Hampshire, in 1801, according to the laws of that state, but not recorded within the time limited in the proviso to section one, its validity as against the grantor or his heirs was not affected by the failure so to record it.

By the act of Congress of April 30th, 1802 (2 *Stat. at Large*, 173), all that portion of the then Northwest Territory not included within the boundaries of the state of Ohio, thereby authorized to be formed, was thereby "attached to and made a part of the Indiana Territory, from and after the formation of the said state."

The Constitution of Ohio was adopted November 29th, 1802. It would seem, therefore, that the act of the Governor and Judges of January 20th, 1802, above given was in force in the eastern portion of the present state of Michigan from that date, until November 29th of the same year, when the whole of Michigan came under the jurisdiction of Indiana.

No acts on the subject of conveyances are believed to have been adopted by the legislative authority of Indiana Territory between November 29th, 1802, and the organization of Michigan Territory by the act of Congress of January 11th, 1805, which

tion (so far as this point is involved), April 12th, 1827 (*Laws of* 1827, *p.* 258; *and Laws of* 1833, *p.* 279), and in force at the time the deeds in question were made and recorded. We say the question depends entirely upon this statute, because it was the only statute in force upon the subject, and because, though statutes *in pari materia* often shed much light upon the true construction of a particular statute in a doubtful case, yet, in the present case, we think the legislative intent can be easily deduced from this statute itself, and if it could not, such is the peculiar nature of the case, that little light could be derived either from prior or subsequent legislation. Little from the for-

took effect July 1st of that year. This act contained a similar provision for the formation of a territorial government to that contained in the act organizing Indiana Territory; but neither in this, nor in the act of Congress of April 30th, 1802, above cited, was there any express provision continuing in force any laws.

As before stated, all the enactments of the legislative authorities of the Northwest and Indiana Territories were expressly repealed by the Governor and Judges of Michigan, September 16th, 1810.

"An Act concerning the Recording of Deeds and other Writings," adopted by the Governor and Judges August 29th, 1805 (*Woodward Code*, § 87), provides "That the clerk of every court shall record all deeds and writings acknowledged or proved before such court, or any judge thereof, or any justice of the peace, or any notary public, together with the acknowledgments of married women, and all endorsements and papers thereto annexed, by entering them, word for word, in proper books, to be carefully preserved, and shall afterwards re-deliver them to the parties entitled to them.

"That when husband and wife have sealed and delivered a writing, if the wife appear before such court, judge, or justice, or notary public, and being examined privily and apart from her husband, shall declare that she did freely and willingly seal and deliver the said writing, to be then shown and explained to her, and wishes not to retract it, and consenteth that it may be recorded, a certificate of such privy examination being returned and recorded with the writing, and the writing being acknowledged also by the husband, or proved by witnesses to be his act, in such case the said writing shall not only be sufficient to convey or release any right of dower, thereby intended to be released or conveyed, but be as effectual for every other purpose, as if she were an unmarried woman.

"That if the party reside not in Michigan, the acknowledgment by such party, or the proof by the number of witnesses requisite, of the sealing and delivery of the writing, before any court of law, or the mayor, or any chief magistrate of any city, town, or corporation, in which the party shall dwell, certified by such court, mayor, or magistrate, in the manner such acts are usually authenticated by them, together with any relinquishment of dower, shall be effectual."

"An Act concerning the Recording of Deeds and other Writings" of the date of February 21st, 1809, was, among other laws, declared void, as not properly adopted and signed, by the Supreme Court of the territory at its September term, 1809. These laws had been adopted in the absence of the Chief Justice, and were signed only by the Governor as presiding officer of the legislative body.

Section six of "An Act in addition to 'An Act to adjust the Estates and Affair-

mer, as this was the first act of the legislative power of the territory in reference to the material questions here involved. And whether the provision of the Ordinance requiring two witnesses (until other provisions should be made by the territorial laws) was, or was not, in force when this act was adopted, it ceased *upon its adoption*, and its prior existence can furnish no safe inference in itself, whether the policy of that Ordinance in this respect was intended to be *continued* or *changed* by the act. The one inference might be as probable as the other, and the question can only be settled by the provisions of the act itself. Quite as little light is to be derived from subsequent legislation;

of Deceased Persons, testate and intestate, and for other purposes,'" adopted November 4th, 1815, provides:

"That all deeds and conveyances which shall be made and executed within this territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be any way affected in law or equity, shall be recorded in the register's office of the district where such lands or hereditaments are lying and being, within six months after the execution of such deeds or conveyances; and every such deed and conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim."—*Cass Code, p.* 80.

Section one of "An Act concerning Deeds and Conveyances," adopted by the Governor and Judges March 27th, 1820 (*Code of* 1820, 156), was re-enacted as section one of the act of 1827.—*Code of* 1827, *p.* 258; *Revision of* 1833, *p.* 279.

Section two of the act of 1820, is as follows:

"And be it further enacted, that all such deeds, or other conveyances, of or concerning any lands, tenements, or hereditaments lying within this territory, or whereby the same may be in anywise affected, in law or equity, shall be acknowledged by the party or parties executing the same, or proved by one or more of the subscribing witnesses thereto, before one of the judges of the Supreme Court, or before one of the justices of any county court, a notary public, or any justice of the peace, in any county within this territory; and a certificate of such acknowledgment or proof being endorsed thereon, and signed by the person before whom the same was taken, such deed or conveyance shall be recorded in the office of register of probate for the county, or register for the city, where such lands, tenements, or hereditaments, respectively, are situated, lying and being, within six months after the execution of such deed or conveyance; and every such deed or conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be acknowledged or proved, and recorded, as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim. And all deeds and conveyances which have been heretofore executed, of or concerning any lands, tenements, or hereditaments within this territory, whereby the same may have been affected in

because, *First*, There was no subsequent act on the subject till after these deeds were executed and recorded, and a legislative construction could have little effect upon prior transactions; and, *Second*, The subsequent legislation so entirely changed and re-changed the law relative to witnesses, and deeds executed out of the state, that the principal inference to be drawn from this subsequent legislation as to the understanding or intention of the Legislature in reference to this act, is, that they were not satisfied with the law as it was, and therefore chose to alter it by making a different provision.

The question must, therefore, be settled by an analysis of the provisions of the act itself; and its solution will be found to depend mainly upon the first and seventh sections.

The first section provides "That all deeds or other conveyances of any lands, tenements, or hereditaments, lying in this territory, signed and sealed by the parties granting the same, having good and lawful right and authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors, or proved, and recorded, as hereinafter provided, shall be good and valid to pass

anywise in law or equity, and which have not been heretofore recorded according to law, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance shall be recorded in the office of the proper register of probate, or of the register of the city of Detroit, as the case may require, agreeably to the provisions of this act, on or before the first day of December, which will be in the year of our Lord one thousand eight hundred and twenty-one, or unless such deed or conveyance be recorded as aforesaid, before the acknowledging or proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee may claim."

Sections three, four, five, six, and eight were subsequently re-enacted as sections three, four, five, six, and seven of the act of 1827.

Section seven was as follows: "And be it further enacted, that it shall not be lawful for any register of any city or county in this territory, to record any deed, conveyance, or writing above mentioned, unless the same shall be acknowledged or proved as is directed by this act, and which acknowledgment or proof shall be recorded therewith."

March 16th, 1822, this section seven was repealed.—*Pamphlet Laws, pub. in* 1824, *p.* 18.

October 23d, 1822, "An Act respecting Seals" was adopted, which provided "That any instrument to which the person making the same shall affix any device by way of seal, shall be adjudged and holden to be of the same force and obligation as if it were actually sealed."—*Pamphlet Laws pub. in* 1824, *p.* 34.

With these two changes, the act of 1820 remained in force in 1827.

the same lands, tenements, or hereditaments, to the grantee or grantees, without any other act or ceremony in law whatever."

Whether a deed without two witnesses would be invalid to pass the title *inter partes*, under this section, is a question upon which we express no opinion, as it is not involved in the case. But whether it relates to the validity of the deed *inter partes*, or only to its validity for the purposes of registry, for which provision is made in the subsequent sections, can make little difference here: whether it relates to the one or the other, or to both, we are satisfied from the nature of the provision, and the whole scope of the act—the obvious design of which was to provide *a system* for the conveyance of lands and the registry of deeds, which should be complete in itself—that this section must be construed as exclusive in its operation, though there are no negative words; and this is abundantly shown by the following authorities, cited by the counsel of the defendants.— *Wiswall v. Ross*, 4 *Port. Ala.* 321; *Clark v. Graham*, 6 *Wheat.* 577; *Alston v. Thompson*, 1 *Cheves*, 271; *Gorham v. Daniels*, 23 *Vt.* 600.

But if this provision, touching the validity of the deed, relates only to its validity for the purpose of registry (and it certainly relates to *this*, whether it has any greater extent or not), no one can doubt that, in *this respect* at least, the provision is exclusive, and no deed included under this section could be recorded without two witnesses. There was no registry at common law; and so far as this provision relates to validity for the purpose of registry, it is an *enabling act.* The validity of the deed for the purpose of registry can extend no further than the affirmative provisions of the statute have extended it; the common law can not supply any omission or deficiency of the statute. The same reasoning will apply to, and the same conclusion result from, the provisions of section seven, touching the validity of deeds there mentioned. We can not, therefore,

resist the conclusion that to authorize the registry of a deed under this statute, it must be a valid deed under this statute, and that its validity must depend upon the *affirmative provisions* of the *statute itself;* unless, indeed, the statute has in some way recognized a common law deed as susceptible of record—a point which we shall consider in the proper place.

But do the provisions of this section, in reference to the execution and attestation of deeds, extend to the deeds mentioned in the seventh section? The language of the first section is general, and on its face purports to apply to all deeds affecting lands in the territory; and must therefore be applied to all the deeds mentioned in the act, unless clearly limited to a part only, by some subsequent provision. It is also apparent that while this section purports to prescribe rules for the execution and attestation of all deeds affecting lands in the territory, it has made no provision for the mode of acknowledgment, or proof (as a substitute for acknowledgment), or registry, of the deeds mentioned in it; but for provisions touching these subjects it *expressly refers* to the subsequent provisions of the act, by the clause "and acknowledged, or proved, and recorded, as *hereinafter provided.*"

This reference would seem to extend to all the subsequent provisions of the act on the subject of acknowledgment or proof and registry, and plainly to indicate that all the deeds and conveyances for the acknowledgment or proof and registry, of which provision is made in any subsequent section, were understood to be included among the deeds and conveyances mentioned in this section, unless this reference should be found to be limited by some subsequent provision.

The subsequent provisions relating to the acknowledgment or proof and registry are to be found in sections two, three, four, six, and seven.

Section two (which will be noticed more fully hereafter)

provides for the acknowledgment or proof of deeds *within* the territory *only*, requires them to be recorded, and prescribes the consequences of omitting to record them. It makes no provision for acknowledgment or proof out of the territory, nor does it prescribe the order or manner of recording.

Section three provides for a register of deeds in the city of Detroit.

Section four provides for the acknowledgment of deeds of married women: 1st, those *residing in* the territory; 2d, those *residing without* the territory; and authorizes the recording of deeds of the latter class.

Section six, provides that "*all* deeds," &c., entitled to be recorded "by virtue of *this act*," shall be recorded in the order and within the time therein prescribed; and makes the deed when recorded, with the register's certificate on the same, as well as the record, or a transcript thereof, evidence in any court, without further proof. This is the only section which provides for the order or mode of recording.

Section seven, upon which the questions in this cause mainly depend, is in the following words: "That all deeds and conveyances of lands, tenements, or hereditaments, situate lying and being within this territory, which shall hereafter be made and executed in any other territory, state, or country, whereby such lands, tenements, or hereditaments shall be conveyed, in whole or in part, or otherwise affected or incumbered in law, shall be acknowledged, and proved, and certified, according to, and in conformity with, the laws and usages of the territory, state, or country, in which such deeds or conveyances were acknowledged or proved, or in which they shall be acknowledged or proved; and all such deeds and conveyances are hereby declared effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within this territory, and in pursuance of the laws thereof; and such deeds and conveyances, so acknowledged

or proved as aforesaid, may be admitted to be, and shall be, recorded in the respective counties in which such lands, tenements, or hereditaments, do or may lie; and all deeds and conveyances of lands, tenements, and hereditaments, situate lying and being within this territory, which have been acknowledged or proved in any other territory, state, or country, according to, and in compliance with, the laws and usages of such territory, state, or country, and which deeds or conveyances have been recorded within this territory, be and the same are hereby, confirmed and declared effectual and valid in law, to all intents and purposes, as though the said deeds or conveyances, so acknowledged or proved and recorded, had, prior to being recorded, been acknowledged or proved within this territory."

It is contended by the complainant's counsel that the general provisions of section one are restrained by the language of section two, so as to include no other deeds than those which are required to be acknowledged under the provisions of section two, and that the reference contained in the language of section one in the clause "as hereinafter provided," &c., is thereby restrained in like manner; that section seven provides for a class of deeds not included in section one, and is to be treated as complete in itself, providing for the execution, acknowledgment, and registry of all deeds executed out of the territory; and in support of this view (and necessary to its support) it is further contended, that the execution of the deeds mentioned in section seven is sufficiently provided for by the section itself, either, 1st (as maintained by the counsel who opened the argument), by adopting a common law deed and a common law execution; or, 2d (as urged with much ability by the counsel who closed), that this section has adopted, for the purposes of execution, the law of the place of execution.

Let us see whether this construction will fairly harmonize the various provisions of the statute.

Is the first section limited by the second as contended?

It can not be denied that, on a first inspection, confining ourselves strictly to the particular words, "all such deeds," &c., in connection with the provision for acknowledgment within the territory, this view would appear plausible; but when we come to look at the leading idea and main object of the section, in connection with the various provisions which precede and follow it, we do not think this view can be maintained. The leading idea and chief purpose of this section were not to limit the preceding section, but to provide for the acknowledgment of deeds *within* the territory, and before officers within the territory; to require such deeds to be recorded, and to prescribe the consequences of a neglect to record. The apparent repugnancy between this section and the preceding, considered with reference to its main scope and professed object, is merely incidental; while to construe it only with reference to the particular words referred to, would create a direct conflict between this section and sections one, six, and seven. The same harmony of transition from one section or one provision to another is, perhaps, hardly to be expected in an act adopted, as this was, from the laws of five separate states, as would be expected in an act prepared and passed, as a whole, by the same legislature. But statutes should always be so construed as to produce the least conflict, and to harmonize, as far as possible, all their provisions.

The construction contended for by the complainant would confine the express general reference in section one (of which we have spoken) exclusively to the deeds mentioned in section two; while it is manifest, we think, that this reference extends also to those mentioned in section six, which latter section obviously includes those mentioned in section seven, as well as those in section two, — and it is admitted that those mentioned in section two are included in section one. Indeed, we think the reference is quite as clear to section six as to section two; as the sixth section is the only one which provides fully the

order and manner of recording, and prescribes the effect of the record. If, then, it extends to the deeds mentioned in the sixth section, how can it be claimed not to extend to those mentioned in the seventh, which are included in the sixth?

The same reference of section one just as evidently extends to the second class of deeds mentioned in section four, which, if executed out of the territory, might, as we think, and as complainant's counsel contend, be acknowledged or proved out of the territory, under the provisions of section seven. And it can not well be doubted that the same class of deeds might also be acknowledged *in* the territory under section *two*.

Section seven refers only to deeds executed out of the territory; and is entirely silent as to the manner of executing or attesting such deeds, but makes full and express provision for the mode of acknowledgment, or proof, and the certificate thereof, when taken in any other state or country—not by adopting the law of the *place* of *execution*, but of the *place where* such *acknowledgment* or *proof* may be *taken*.

We can not suppose that by the terms "deed or conveyance made and executed" (see section seven) the Legislature intended to adopt a common law deed merely, or the mode of execution at common law. We can see no foundation for such an inference in the language; and there is nothing in the context or general scope of the statute to warrant the inference that they intended to use the terms "deed or conveyance," in this section in any different sense from that in which the same terms are used in every other portion of the act. Nor can we suppose, especially in the absence of any language indicative of such an intent, that they intended to authorize the recording of deeds, not only without a witness, but without even the signature of the grantor, neither of which was essential at common law—sealing alone being sufficient.

It may, we think, be safely affirmed that this feature of the common law was never recognized in the territory of Michigan, if in any of the northwestern states; and the construction

which would allow such a deed to be recorded, would certainly violate the rule of construction contended for by the complainant's counsel, that the plain and obvious meaning should be taken, instead of one only discoverable by professional criticism, for which he cited 23 *Pa. St.* 242.

Again, as already intimated, a married woman residing out of the territory, might, by virtue of section four, either execute and acknowledge her deed out of the territory under section seven, or within it under section two; and the construction contended for by complainant would then make the *same word*, in the *same connection* and in the *same place*, mean a common law deed under section seven, or a statute deed under section one, as it might happen to be acknowledged within or without the territory.

But the construction claimed by one of the complainant's counsel, that this section has adopted, in reference to the *execution* of the deed, the law of the *place of execution*, is, if possible, still less tenable. The language of the section precludes any such construction. It has not adopted the law of the place of execution for *any* purpose; while it has adopted, in the most explicit terms, in reference to the acknowledgment or proof, the law of the place *where acknowledged* or *proved*. It is but reasonable to suppose that if it intended to adopt the law of the place of execution, that intention would also have been expressed. The expression of the one is the exclusion of the other.

Now, the execution of the deed, and the attestation by subscribing witnesses—whether it be a part of the execution (as we think it is, under this statute) or not, are distinct from the acknowledgment, and complete without it. And we see no good reason why a deed executed in the state of New York might not, under section seven, be acknowledged or proved in the state of Pennsylvania or Ohio. In such case, the law of the place of execution and the place of acknowledgment would be different, and the latter only would apply.

But again: Section seven after providing for the acknowl-

edgment out of the territory, declares that "all such deeds and conveyances" shall be "as effectual and valid in law, to all intents and purposes, as though the same acknowledgments had been taken, or proof of execution made, within this territory, and in pursuance of the laws thereof." This necessarily implies that the deed, though executed out of the territory, might have been acknowledged here, and, if so, it must have been under the provisions of section two, as this was the only law under which any acknowledgment could be taken here; and, in this case, beyond all controversy, the two witnesses would have been required; as it is admitted, on all hands, that all the deeds, for the acknowledgment of which provision is made in section two, are included in, and referred to by section one.

The conclusions, then, to be drawn from an analysis of the statute, are that the reference in section one extends to the deeds mentioned in section seven; that, consequently, the deeds mentioned in section seven are included among those for the execution and attestation of which provision is made in the first section; and that the seventh section, being silent on the subject of execution and attestation, and only providing for acknowledgment or proof, a deed with but a single witness would be of no greater validity for the purposes of registry, when acknowledged out of the territory under section seven, than if the same deed, so attested, had been acknowledged within the territory under section two.

Let us now see if this final conclusion is not expressed in plain and unmistakable terms in the language of section seven itself. After having made provision for the acknowledgment or proof of deeds out of the territory, it adopts the following language already quoted—"and all such deeds and conveyances are hereby declared effectual and valid in law, to all intents and purposes, *as though the same acknowledgments had been taken, or proof of execution made, within this territory, and in pursuance of the laws thereof.*"

We are compelled to regard this as a plain and direct statute enactment of the conclusion at which we have already arrived by analysis of the whole act.

It declares just how far such deeds shall be valid; not to all intents and purposes, but to the *same extent* as if the same deed had been acknowledged "in this territory, and in pursuance of the laws thereof." No reference could be more direct to the provisions of section two of this act, which was the only law under which the acknowledgment could be taken in the territory.

The test question then is, Had these deeds from Macy to Dodd and Hoxie, with but a single subscribing witness, been acknowledged in the territory under section two of this act, would they have been valid deeds, for the purpose of registry? Clearly they would not, since it is not, and can not be, denied that all the deeds for the acknowledgment or proof of which provision is made in the second section, are included in the first section, and must be executed according to the provisions of the latter to entitle them to record.

We think, therefore, that whatever doubt might be entertained whether the reference in section one extends to section seven, there can be little doubt that the language of section seven, above quoted, refers directly to section two, and, through that, to section one, for all that is essential to entitle a deed to record, except the acknowledgment or proof, and certificate, provided for in the seventh section. A similar limitation as to validity, and a similar reference to the first two sections of the act, are contained in the latter part of the seventh section, in reference to deeds previously acknowledged out of the territory.

The language referred to is too plain and explicit, and the whole provision too cautiously worded, especially when twice used in the same section, to have been the result of accident or mistake. At all events, if a mistake, it is one which this court can not correct.

We are, therefore, of opinion that the deeds from Macy to Dodd and Hoxie were not entitled to be recorded; that, though recorded in fact, the record was notice to no one; and, therefore, that Macy and his grantees were barred of the right of redemption by the foreclosure suit against Macy alone.

For these reasons the decree of the court below, dismissing the bill, must be affirmed.

MARTIN Ch. J. and MANNING J. concurred. CAMPBELL J. did not sit in this case, having been counsel for one of the parties.

Pierre Teller v. John P. Wetherell and Another.

The Supreme Court has jurisdiction of errors of fact as well as errors of law.

The Constitution, in granting to the Supreme Court the power to issue writs of error, and to hear and determine the same, impliedly gives all the common law means of executing that power. If necessary, a venire may be issued for a jury to try in this court the issue joined on assignment of error of fact, or it may be sent to the proper circuit for trial.

The circuit courts have no power, in any case, to issue writs of error.

Errors of fact may be assigned in the Supreme Court on the common writ of error.

Uncertainty and informality in the assignment of errors are no ground for quashing the assignment, or for dismissing the writ.

Heard October 28d. Decided November 16th.

Motion to quash assignment of errors, and to dismiss the writ of error.

D. B. Duffield, for the motion.

A. Russell, contra.

MANNING J.:

The defendant's motion is to quash the assignment of errors, and to dismiss the writ of error.

The error assigned is one of fact, viz., the death of John P. Wetherell before the suit was brought.

The motion is placed on several different grounds:

1st. A want of jurisdiction, in this court, of errors of fact;

2d. That errors of fact are cognizable only in the court

rendering the judgment, which in this case is the Wayne Circuit Court;

3d. That errors of fact can not be assigned on the writ of error in this case, which is a writ for errors of law, and not for errors of fact.

In support of the first ground, it is urged this court is a court of appellate jurisdiction, and therefore can not, on a writ of error, hear and determine any question that was not before the court below, and could not have been heard and determined by it. And we have been referred to adjudications in the state of New York on the jurisdiction of the late Court of Errors of that state, and to the English Exchequer Chamber, and House of Lords, in which it is said errors of fact can not be assigned on a writ of error. There would be much force in the argument if this court was an appellate court only. It has original, as well as appellate, jurisdiction given to it by the Constitution. Section three of article six is in these words: "The Supreme Court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, *and to hear and determine the same.* In all other cases it shall have appellate jurisdiction only."

It was further said on the argument, that the Legislature had made no provision for the trial in this court of issues of fact, except in cases of informations in the nature of a quo warranto, and that the court has no means of trying an issue of fact in error. The jurisdiction of writs of error is plenary as given by the Constitution; it extends to all errors — to errors of fact as well as of law — and stands in need of no legislative action to make it operative. The Legislature may regulate the proceedings and practice of the court, but this is in no way essential to the exercise of the power. In the absence of legislation, the Constitution, in giving the power unconditionally, impliedly

gives all the common law means of executing it. If necessary, a venire may be issued for a jury to try the issue of fact in this court, or it may be sent to the proper circuit for trial. The same objection was taken in this court, as organized under the old Constitution, on an information in the nature of a quo warranto against the Erie and Kalamazoo Railroad, and it was held that the court might issue a venire to try an issue of fact, if one should be formed in the case.

This was before the statute for the trial of issues of fact in cases of information, referred to, was passed. In 6 *Wend.* 327, the Court of Errors of the state of New York, refused to permit an assignment of errors in fact, on the ground of want of jurisdiction; and it is put on that ground in 10 *Wend.* 51, where the Chancellor says the plaintiff should have brought a writ *coram vobis* in the Supreme Court. A want of jurisdiction, we presume, is the true reason why errors of fact can not be assigned in the Exchequer Chamber or House of Lords, and not the one sometimes to be found in the books, viz. that they can not try an issue of fact. A release of errors may be pleaded in either of these courts, and there must be some way of trying it when the truth of the plea is put in issue.

2d. As to the jurisdiction of the circuit court. The Constitution and statutes defining and limiting its jurisdiction do not give it power in any case to issue a writ of error, and without this power, a writ of error *coram vobis*, issued by that court, would be void. — 20 *Johns.* 22; 14 *Ibid.* 422. And if it had the power, it would not oust this court of its jurisdiction.

3d. The next objection is that errors of fact can not be assigned on the writ of error in this case, because, it is said, the writ is one for errors of law, and not for errors of fact. This objection goes on the ground that errors of fact can not be assigned on the common writ

of error. We have no doubt they may be assigned on such writ, when the court has jurisdiction of this class of errors as well as of errors of law. *Binns v. Pratt*, 2 *Chit. R.* 369 (18 *Eng. C. L.* 109); and *Castledine v. Mundy*, 4 *B. & Adol.* 90 (24 *Eng. C. L.* 30), are writs of error in the King's Bench, on judgments of the Common Pleas, in which errors of fact were assigned, and sustained by the court. And *Maynard v. Downer*, 13 *Wend.* 575, *Camp v. Bennett*, 16 *Wend.* 48, and *Arnold v. Sandford*, 14 *Johns.* 417, are writs of error in the Supreme Court of the state of New York, on judgments of inferior courts, for errors of fact. If this class of errors could be corrected only on writs of error *coram nobis*, or *coram vobis*, the party in many cases would be remediless. The case before us is one of this description, if the error can not be corrected in this court; for the circuit court, as we have already shown, has not power to issue such a writ.

There appears to be much confusion and great want of discrimination in the books, as to the distinctive features and appropriate offices of a writ of error, a writ of error *coram nobis*, and a writ of error *coram vobis*. When the object of the writ is to remove a judgment from an inferior into a superior court, for review, and the correction of errors of law or fact, it is called a writ of error only —nothing more. But when the object of the writ is to correct an error of fact in the same court that rendered the judgment, it is called a writ of error *coram nobis* if it be in the King's Bench, and a writ of error *coram vobis* if it be in the Common Pleas.

A writ of error is an original writ, and in England issues out of the Court of Chancery, and runs in the name of the king. With us, it issues from this court, and under our present judicial organization can issue from no other. It is "in the nature, as well of a certiorari to remove a record from an inferior into a superior court, as of a commission to the judges of the superior court to examine the re-

cord, and to affirm or reverse it according to law."—2 *Saund.* 101 *a.* The writs *coram nobis* and *coram vobis* differ from a writ of error in two particulars: 1st. They contain no certiorari clause, for there is no record to be certified; 2d. They have no return day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact, and for errors in the process, or through the default of the clerks.—1 *Arch. Prac.* 234. They do not lie when the error is in the judgment of the court itself, and not in the process.—1 *Arch. Prac.* 235. The writ is called a writ of error *coram nobis* in the King's Bench, because the record and proceedings are stated in the writ to remain *before us* (*coram nobis*); that is, in the court of King's Bench. —1 *Arch. Prac.* 234; 2 *Saund.* 101 *a.* The king, by a fiction of law, is supposed to preside in person in that court. In the Common Pleas, where the king is not supposed to preside, it is called a writ of error *coram vobis*, because the record and proceedings are stated in the writ to remain *before you* (*coram vobis*); that is, the king's justices.—2 *Tidd Prac.* 1056, *note y.* See a writ of error *coram vobis* in the Common Pleas in *Arch. Forms*, 243; 2 *Dunlap's Prac.* 1125. In the King's Bench, the writ *coram nobis* also lies on the judgment of an inferior court, after the record has been removed into that court by a writ of error that has been quashed, or has abated—the writ in that court, in such case, answering all the purposes of a second writ of error. The reason of this is, that the record of the inferior court, and not a transcript of the record, is returned, or is supposed to be, although a transcript only is sent up. Saunders says, "The record itself is supposed to be removed, that it may remain as a precedent, and evidence of the law in similar cases."—2 *Saund.* 101 *m.* But a writ *coram vobis* will not lie in the Exchequer Chamber on the abatement of a writ of error there. "If a writ of error brought in the Exchequer Chamber upon a judgment in the King's Bench

abate by death or otherwise, no writ *coram nobis* (*vobis*) lies there, for the record itself is not removed there by the writ of error, but only a transcript; and therefore there must be a new writ of error."—2 *Saund.* 101 *b.* The judgment for plaintiff for an error of fact on a writ *coram nobis* or *coram vobis* is, that the judgment be *revoked;* on a writ of error, that it be *reversed.*— *Camp v. Bennett,* 16 *Wend.* 48.

Other objections were urged on the argument; as the uncertainty of the assignment of errors; that it does not conclude with a verification; that it prays the judgment may be reversed; and the like. Whether any or all of them be well or ill taken, it is not necessary for us now to decide, as they relate to the pleading, and not to the jurisdiction of the court, and are no ground for quashing the assignment of errors, or dismissing the writ.

Defendant's motion must be denied. Plaintiff having made a cross motion for leave to amend, ten days are given him to withdraw his assignment, and file and serve a new assignment of errors on defendant's attorney. All subsequent pleadings to be filed under the rules of court. Neither party to have costs.

The other Justices concurred.

Amos Chaffee v. Joseph Granger and Others.

Where labor was performed under a contract with the city of Detroit before the Revised Charter of 1851 was adopted, and the Common Council, after the Revised Charter took effect, passed a resolution for the settlement of the contractor's claim therefor, such resolution does not require the mayor's approval.

Under the charter of Detroit, claims for the construction of a sewer are to be paid only from a fund, specially voted and raised for that purpose. While a claim against a sewer fund (which the city disputes) is pending and unadjusted, the rights of the claimant can not be affected by a transfer to the sinking fund of the balance standing to the credit of such sewer fund.

Where a claim for extra work and alterations was made against the city of Detroit,

by a contractor for the construction of sewers, and suit was brought for the recovery thereof, and the Common Council directed the City Attorney to permit judgment to pass therefor, which he did, and there could be no serious doubt of the legality of the larger portion of the demand, and the question as to the remainder was, at most, one of doubtful construction of the agreement under which the work was done, and the action of the Council appeared to have been taken in good faith;—*Held*, That there was no just ground for the interference of a court of equity, in behalf of a tax payer, to restrain the collection of the judgment.

If courts of equity have jurisdiction to interfere, by injunction, to restrain the action of a municipal corporation, on a bill filed by a tax payer on behalf of himself and other tax payers, the circumstances to authorize such interference must be such as to show that the proposed action will be inequitable, and injurious to the public interest.

Heard November 10th and 11th. Decided November 23d.

Appeal from Wayne Circuit in Chancery.

The case is sufficiently stated in the opinion of the court.

G. V. N. Lothrop, for complainant:

1. A tax payer, in behalf of himself and all others in like interest, may bring his bill to restrain a municipality from the waste or unlawful expenditure of public money or property.—*Adriance v. Mayor, &c.* 1 *Barb.* 19; *Christopher v. Mayor, &c.* 13 *Barb.* 571; *Milhau v. Sharp*, 15 *Barb.* 193; *DeBaun v. Mayor, &c.* 16 *Barb.* 392; *Bromley v. Smith*, 1 *Sim. Ch.* 8; *New London v. Brainard*, 22 *Conn.* 556.

2. The claim of Granger was illegal under the city charter. All the work upon which it was founded was included within and paid for under his contracts.—*Laws of* 1851, *p.* 41; *Revised Charter of* 1857, *chap.* 8, §§11, 17, 18, 19, 20, 21. By the act of March 21st, 1851, no public work could be contracted for, or commenced, until a tax had been levied to pay the same; and no such work could be paid for, or contracted to be paid for, save out for the proceeds of said tax; *and all contracts made in contravention thereof were declared to be void.*

Sec. 18, chap. 8, of the Charter of 1857, provides that "no claim or demand against the corporation shall be allowed or paid, or warrant on the treasury issued therefor, if the same be contrary to, or not authorized by, law; *and no addi-*

tional allowance beyond the legal claim, under any contract with the corporation, or for any service on its account, or in its employments, shall be allowed." This language is unequivocal, and was designed to protect the treasury against those fraudulent claims which inevitably followed in the train of every contract, and which always achieved an entire or partial allowance.

If Granger's claim was of this character, the Common Council could not lawfully pay it directly, nor could they, by the clever device of suit and confession of judgment, do indirectly what they could not do directly. Equity may restrain municipal corporations from the exercise of powers which they do not possess.—*Oakley v. Trustees, &c.* 6 *Paige*, 264; *New London v. Brainard*, 22 *Conn.* 556.

3. The suit is not in the nature of ordinary bills for the staying of proceedings at law. Its true character is to restrain a municipal body from the exercise of powers expressly prohibited by law. But even if regarded strictly as a proceeding to restrain a judgment at law, the relief sought should be granted. It is a general doctrine of equity to restrain proceedings at law where one party has gained an inequitable advantage without fault of the other. Whenever it is against conscience to execute a judgment at law, and the party threatened with injury thereby had no opportunity for defense at law, he may be protected by the injunction of this court.—*Hendrickson v. Hinckley*, 17 *How.* 443; *Lansing v. Eddy*, 1 *Johns. Ch.* 51; *Simpson v. Hart*, *Ibid.* 98; *Powers v. Butler*, 3 *Green Ch.* 470; *Moore v. Gamble*, 1 *Stock. Ch.* 247. It is said complainant was bound by this judgment, because he was represented by the Common Council and its attorney, who, for this purpose, were complainant's agents. But when acting fraudulently; when acting not merely erroneously, but in entire excess of their authority; when doing that which they are positively forbidden to do,—they are not his agents. They are naked wrong-doers, without color of justification. A more just light is to regard

them as trustees. And then the rule of equity fairly applies. They will be held to perfect good faith, and to strict duty. And this court will always restrain the waste or conversion of property controlled by them in trust.—22 *Conn.* 556.

Howard, Bishop & Holbrook, for defendant Granger:

1. The complainant, as a mere tax payer of Detroit, has no right to maintain this suit. The injury, if any, is of a public nature, and the remedy should be by information of the Attorney General, or other proper public authority.—*Attorney General v. Liberford*, 1 *Myl. & Cr.* 171; *People v. Regents of University*, 4 *Mich.* 98. We submit that some of the cases have gone too far in allowing private persons to restrain municipal corporations by injunction, and that they ought not to be followed in this state. But this case is clearly distinguishable from those. It is not merely to control a municipal corporation, but assumes, in addition to that, the far more questionable object of controlling also a final judgment at law, where there can be no pretence of fraud, or other ground of equitable interference. There is no precedent for it in the books. A mere private person can not interfere with proceedings at law in any such collateral way.

Complainant was himself a party to the suit, as one of the *freemen* named in the writ. He was fully represented by the corporation, and by the city attorney, and is bound by their acts. It is certain that no other citizens would be bound by the decree in this case, as they are not parties to the record, and Chaffee has no authority to act for them.

2. The resolution of the Common Council, authorizing judgment on this claim, did not require the approval of the mayor—the liability having accrued before the Revised Charter took effect.—*Laws of* 1857, *p.* 92, §5.

3. The city authorities had no power to defeat this claim by transferring the sewer funds while this remained unadjusted. It was only such moneys as could be *saved* from any sources of revenue that could be thus transferred. How

saved? Of course only after all legal claims should be adjusted.

4. Granger's claim in this case was strictly of a legal character, and its determination belonged properly to the court of law. The law officers of the city, and other city officers, thought it just. It could not be settled, and went to litigation; it was compromised and settled by mutual concessions. In all this we look in vain for evidence of fraud. If the injunction is sustained, we shall be entitled to have the judgment opened, and a new trial — a thing which no one desires, and all have tried to avoid.

5. It is clear that this is not such a case as authorizes a court of equity to interfere and control a judgment at law. — *Adams' Equity*, 196, 197; 2 *Story Eq. Juris.* §§ 887, 888, 894 to 897; *Story Eq. Pl.* §§ 780 to 782; 1 *Sch. & Lef.* 201; 1 *Johns. Ch.* 91; 7 *Cranch*, 332.

CAMPBELL J.:

This case comes up on appeal from the decree of the Circuit Court for the County of Wayne, enjoining the collection of a judgment which the defendant Granger recovered against the City of Detroit. His co-defendant, Cicott, was made a party, as sheriff, holding the execution which had issued upon the judgment.

The bill was filed by Amos Chaffee, as a tax payer of the city of Detroit, on behalf of himself and the other tax payers, claiming that the judgment was rendered against the City by collusion and fraud, upon an illegal claim, in violation of the city charter. The case shows the following facts:

Granger, in 1855, took contracts to build certain sewers. Although all but one of his contracts were parol, they were made according to certain others which were in writing, and their terms thus made certain. When his work was completed, the city authorities declined paying certain items, on the ground that he was precluded by the terms of his contracts from making any charges for them. Those items con-

sisted of a charge of $212.54 for excavations for pools and pipes connected with the main sewers, to discharge surface water, and $94.12 for extra excavation rendered necessary by a change in the form of the sewers in certain places where quicksands made the change desirable. Upon an application to the Common Council, a resolution was passed, authorizing the controller to pay the first charge, if Granger could satisfy him that when the contracts were taken he expected to get pay for such work.

The controller refused to allow the claim, and Granger brought suit for the whole amount of his charges. The City pleaded to his declaration; and Granger having noticed the cause for trial, the Common Council authorized the city attorney, on his advice, to withdraw the plea, and allow judgment to be rendered for $306.66, the amount of the principal claimed, without interest. Granger accordingly obtained a judgment for that amount, and was proceeding to enforce the same by levy and sale of land, when enjoined in this suit.

There is nothing in the case in any way justifying the charge of fraud, and if complainant was entitled to any relief, it must depend upon the illegality of the acts in proof. We proceed, therefore, to examine the case upon this subject.

That the authority to confess judgment was, for the purposes of this suit, substantially equivalent to the allowance of a claim, is not unfairly assumed by the complainant, and the validity of such allowance is attacked, *first*, because the resolution was not approved by the mayor; *secondly*, because the balances left out of the sewer funds, specially voted for those sewers, had been transferred to the sinking fund, and therefore no moneys remained applicable to any such claim; and, *thirdly*, because the claim was illegal, and, therefore, the Council could not allow it under any circumstances, because absolutely forbidden by the city charter. It is unnecessary to consider the arguments upon the peculiar form of any of these transactions; for a court of equity can generally reach the substantial intent of any acts in question before it. In this case no

special difficulties of this kind arise, for the merits are very fully in evidence.

Whether the resolution required the approval of the mayor depends upon whether the claim was a debt or liability lawfully contracted before the adoption of the new charter. That it was a previous debt — if a debt at all — there is no doubt. It had been before the city authorities for more than a year. The suit at law was commenced in 1856, and the amended charter was passed in 1857. The approval of the mayor is, therefore, of no consequence here, because the legality of the claim would dispense with it, while its illegality would probably render such approval nugatory.

Neither is it material that the sewer balances had been transferred to the sinking fund. That transfer was made while Mr. Granger's claim was pending. The balances were ample to meet his claim. If his claim was lawful, those funds were liable to pay it, and could in no sense be considered as savings. Nothing can properly go into the sinking fund from any sum provided by law for specific public works, except a surplus over and above their cost. The contractors are by law compelled to look to the fund voted for specific improvements, and no transfer into the sinking fund can be permitted to deprive them of the right to receive their lawful pay out of the moneys raised for the works. When the contractors are fully paid, any balance may be called a surplus, and legitimately belongs to the sinking fund.

Was, then, the demand of Mr. Granger such that it could be lawfully allowed by the Common Council? Both items are set up as legitimate charges under the contracts, one being for excavations required to be made under the original agreement, and the other being for extra work required to carry out changes made by authority, and contemplated by the original agreement as payable for upon the same basis as the specified work. The prices for both sets of work are strictly in accordance with the prices paid for similar excavations under the express terms of the contracts. The only inquiry therefore

is, whether the Council could legally, in view of the terms of the agreements, make the arrangement complained of. Complainant claims that by the contracts, each set of pools and pipes was to be completed for a fixed sum, and that this covered the excavations as well as the iron and mason work. The terms of the written contract referred to are as follows: The contractor agrees to build a "*public sewer*" according to the plans and specifications, and that he will go on and steadily prosecute the "*excavating and building of said sewer*," &c. The contract goes on to provide for the quality of material, for the right of supervision and alteration, &c., and so far as it embraces any covenants on the part of the contractor, no reference is had to any particular parts of the work. The term "*sewer*" embraces every part of it. It is only when we reach the terms of payment, that any thing is found relating to the details of the work. The clause in controversy reads as follows:

"The parties of the first part hereby agree to pay, and the party of the second part to accept, in full payment for said work, labor, and materials, as follows, viz.: For excavating, digging, and filling back, the earth in said sewer, the sum of forty-two (42) cents per cubic yard; for furnishing materials and iron castings, and inserting cast iron openings, and building said sewer, the sum of eleven dollars per rod. For furnishing materials and iron castings, and constructing pools, the sum of forty dollars per set. For furnishing materials and iron castings, and constructing manholes, the sum of ten dollars per manhole."

This is quoted from the contract appended to the bill, made with Mr. Granger. The others, made with other parties, and upon the basis of which he made his parol contracts, are substantially like this.

Taking this contract as it reads, and apart from any circumstances which might show a practical construction of any of the phrases between the parties, we do not think the language of the instrument in any way violated by extending the right to charge for excavation to any part of the work. The terms used

in reference to the materials and construction of pools, are identical in meaning with those applied to the mere iron and mason work of the main body of the sewer, and if the one does not include excavation, we see no reason why the other should. The amount of excavation would vary in different pools and connecting pipes, with the depth of the main sewer, just as that in different parts of the main trunk would. If either party needs to resort to proof of surrounding circumstances, it would devolve upon the City to do so, in order to change what we deem to be the natural construction of the contract.

The facts in this case show that when Granger took the contracts in question, the usage had been in conformity with this construction, and therefore he would be equitably entitled to pay on this basis under any circumstances.

The other item in dispute is for extra work in changing the form of the sewers to put in plank bottoms. The evidence shows that the actual extra expense to Granger, in addition to the plank which was furnished by the City, is the amount he claims in his bill of items. But it is claimed that he agreed if the City would furnish the plank, that he would make no further extra charge. The committee on sewers authorized the change, which was deemed necessary by all parties. The testimony of Sheley is that he said to Granger that "all the extra we are to furnish is the plank," and Mr. Granger consented to it. This seems to have been about all that was said about it. There was undoubtedly room for misapprehension on both sides on this matter, but inasmuch as the expense of the change covered much more than the plank, and as the contract expressly provided that where authorized changes were made, additional compensation should be made for any additional work, upon the same terms provided for in the contract for similar work, we think Mr. Granger might very naturally suppose that the extra referred to applied merely to the body of the sewer in its changed form and dimensions. It could not be assumed, without clear proof, that he agreed to make changes at his own expense.

In the view we have taken of the facts, we think the claim of Mr. Granger was properly allowed by the Council. We are also of opinion that if the matter had been one of doubtful construction, and acted upon in good faith, as this seems to have been, by the Council, there would have been, upon the facts presented, no just ground for the interference of a court of equity. If courts of equity are called upon to interfere with the action of such municipal bodies, on behalf of the tax payers, the circumstances should be such as to show that the proposed action will be inequitable and injurious to the public interests. No serious doubt could have existed concerning the legality of the larger part of Mr. Granger's claim; and the cost of litigation, if he had been compelled to try his suit at law, would inevitably have exceeded the balance. Under such circumstances, the action of the Council was in no sense injurious to the tax payers, and their burdens could not have been increased by it.

The jurisdiction of Chancery to interfere by injunction to restrain a city corporation, on a bill filed by a private citizen on behalf of himself and others, was questioned on the argument, and the point fairly raised. We are not, however, prepared to express an opinion upon that subject; as this case is, in our judgment, entirely unsupported on the merits, we shall dispose of it upon the facts, and reserve the consideration of the jurisdictional question for future disposal.

The decree of the court below must be reversed, and the bill dismissed, with costs.

The other Justices concurred.

George Lord and Others v. H. Norton Strong and Others.

By a contract between plaintiffs and defendants, the latter bound themselves to convey, from Saginaw to Chicago, six vessel loads of lumber, at a specified price, as follows: One in August, two in September, two in October, and one in November. Defendants carried but five, as follows: One in August, one in September, one in October, and two in November. Freights rose slightly in October, and largely during November. In an action brought by plaintiffs for neglect to carry the sixth cargo, there being no evidence of any agreement of the parties, or election by defendants, to apply the extra cargo carried in November to the default in September or October,—*Held*, That defendants had a right to have the extra cargo carried in November, stand as a substituted performance for the cargo which they failed to carry in October, and that plaintiffs would be entitled to such damages only as they had sustained by the failure of defendants to carry one of the cargoes which they were bound to carry in September.

Heard October 22d. Decided November 28d.

Error to Wayne Circuit Court.

The action below was for the non-performance, by defendants in error, of an agreement in writing, made August 1st, 1855, of which the following are the material portions:

"*Memorandum of Agreement* between George Lord & Co., of the first part, and H. N. Strong & Co., of the second part, Witnesseth:

"Parties of the first part agree to deliver to vessels of parties of second part, six full loads of lumber, as follows, to wit: 1st. To give a load to the schooner T. Dyer, now on her way to Saginaw; 2d. To deliver two loads, in September, from one to two weeks apart; 3d. To deliver two loads, in October, about same time apart; 4th. To deliver one load in November, probably about the 1st; and pay for each thousand feet of lumber thus delivered by party of the first part on said vessels, and delivered by party of the second part in Chicago, the sum of four and one-half dollars."

"And the parties of the second part agree to carry, for said parties of the first part, six full loads of lumber, at the times aforesaid, from Lower Saginaw to Chicago, at the prices aforesaid."

On the trial, it appeared that the only cargoes taken by defendants under this agreement were, one in the month of

August, 1855, one September 29th, 1855, one October 3d, 1855, one November 17th, and one November 25th, 1855: That during the entire period covered by the contract, plaintiffs had lumber on hand, which they were ready and willing to ship under the contract: That the average of loads taken by vessels of defendants was 160,565 feet: That during the month of September the price of freights was $4 per thousand feet, during the month of October $5 per thousand feet, and during the month of November from $7 to $8 per thousand feet.

There was no evidence of any election by defendants to apply the extra cargo carried in November to the default in October or September.

The plaintiffs in error, at the trial, asked the Court to charge the jury,—"That the carrying of each cargo fulfilled the contract for the cargo then due under the contract; *i. e.* that the loads carried, one in September and one in October, fulfilled the contract for two loads in September, and the two loads carried in November fulfilled the contract for two loads in October, and were to be so applied, leaving a load still due in November; also to charge the jury that the plaintiffs were entitled to recover at the rate of freight in November."

The judge refused so to charge, and plaintiffs excepted.

The judge then charged: "That as it appeared that freights rose, and the difficulties and expense of transportation increased, with the advance of the season, the defendants had a right to have the extra cargo carried in November stand as a substituted performance for the cargo which the defendants failed to carry in October, and that, in this view of the case, the plaintiffs would be entitled to such damages only as they had sustained by the failure of the defendants to carry one of the loads which they were bound to carry in September."

The jury rendered a verdict for plaintiffs in error, estimating the damages in accordance with this charge.

Wm. Gray, and *S. Larned*, for plaintiffs in error:

The rule of damages is, that plaintiffs are entitled to the difference between the contract and the going rates up to the last moment when performance might be made.—*Ogden v. Marshall*, 4 *Sel.* 340; 2 *Pars. on Cont.* 460, *note T.*

The court below manifestly regarded the contract as, in effect, four separate and distinct contracts. We claim its true construction to be a contract for the carriage of six cargoes. If we are right in this construction, then, clearly, as in the case of a money bond payable in installments, the next payment or performance after default would apply upon the default. If the other construction be adopted, the same result follows; for the contract provided for two loads in October, and only one was carried. On the first of November there were two defaults, — one of September, and one of October. The extra load of November was doubtless meant in lieu of one or the other. Defendants did not designate which; it was therefore competent for plaintiffs to do so.— 1 *Spen.* 180; 13 *Conn.* 453.

When neither party makes the application, the intention is left to the jury, as a question of fact.—5 *W. & S.* 542; 3 *Ibid.* 550.

In the present case, the court did not leave it to the jury.

It will also be noticed that the load in October left on the 3d. The vessel must, therefore, have commenced loading in September, or by the 1st of October — so near that it may well be considered intended for the back load of September. In view of all the facts, time to a day could not be considered the essence of the contract; and if not, it would be disregarded.— 11 *Paige*, 352.

J. P. Whittemore, on same side, cited,

1st. To the point that *time* was not of the essence of the contract, and was not so treated by the parties: *Williams v. Champlin*, 6 *Ohio*, 171; *Flagg v. Dryden*, 7 *Pick.* 52;

Brown v. Dewey, 2 *Barb.* 28; *Edgerton v. Peckham*, 11 *Paige*, 352.

2d. As to the rule of damages: *Ogden v. Marshall*, 4 *Sel.* 340; 2 *Pars. on Cont.* 481.

G. V. N. Lothrop, for defendant in error:

1. It would have been wrong in the court to charge that the stipulated load for November had not been carried. For the agreement to carry this lumber is, in effect, a distinct contract, and an action would lie at once on a default to carry any particular load. The plaintiffs had, therefore, perfect rights of action for the September and October defaults.—2 *Pars. on Cont.* 29 *to* 32, *and cases cited.*

Now, when the defendants came to carry a load in November, in the absence of any new agreement it is to be presumed in law that they intended to carry it, and did carry it, under the contract, as they were bound to do. They were bound to carry a load in November, and they did carry a load in November. It is in fact a perfect and literal performance of their contract. In this respect the request of the plaintiffs can not be sustained.

2. By the September and October defaults of the defendants, perfect rights of action accrued to plaintiffs in each case. The plaintiffs had their election to stand on this, and call on defendants for damages, or to waive them, and accept a substituted performance. As to one load, they in fact did waive the default, and accepted the carriage of a load in November. One load remained not carried. On this the question arises, to which of the defaults should this substituted carriage be applied?

The defendants carried it when it was highly onerous for them to do so. On each default, defendants were liable in damages for any amount over the contract price that it would have cost the plaintiffs to have got the lumber carried at that time.—*Ogden v. Marshall*, 4 *Sel.* 342; *O'Connor v. Forster*, 1 *Watts*, 418. And as freights rose as the season

advanced, the latest default was attended with the largest damages. The defendants must, therefore, be presumed to have intended to have their substituted performance so applied. They were entitled to have it applied in the way most beneficial to themselves, especially when this would cause no loss or wrong to the other party.—See *Pattison v. Hull*, 9 *Cow.* 767, 770, 775 *note*; *Cremer v. Higginson*, 1 *Mason*, 333.

When it is doubtful what is the precise damage suffered, it is held that it is right to instruct the jury to give the lowest amount indicated by the evidence.—2 *Greenl. Ev.* §255.

The plaintiffs might, on default, employ another vessel, and have their lumber carried. They could not lie by until freights rose, and then charge the defendants with the increased rates.—*Miller v. Mariners' Church*, 7 *Greenl.* 57; *Loker v. Damon*, 17 *Pick.* 284.

3. The amount which the plaintiffs were entitled to recover is only such as would indemnify them for their *proximate and direct damages*.—2 *Greenl. Ev.* § 253; *Smith v. Griffith*, 3 *Hill*, 336; *Clark v. Mayor, &c.* 4 *Comst.* 342.

The law will not allow them to make a gain or speculation out of the defendants. Now, what was their legal loss and damage? It was two-fold: First, for the default in September; and, second, for the default in October. In each case the loss was measured by the difference between the contract price and the ruling rates of freight at the time of the particular default. Had the plaintiffs procured both of these cargoes to be carried at the time of default, they could charge us only with the damages indicated by the above rule. But we actually carried one cargo for them at the time when rates were the highest, and when it cost the most to make good our last default. How then can the plaintiffs claim to be injured by that default? We have stepped in and made it good at our own cost, in the very way, and at the very time, that they could have had it made good by another vessel. And they have accepted this performance by the very act of giving

us the lumber and allowing us to carry it. As to this default they are certainly indemnified.

MANNING J.:

The circuit judge was right in refusing to charge the jury as requested. If the contract had given defendants from the first of August to the last of November to carry the lumber in, it would have been immaterial at what time the several loads were carried, provided they were all carried before the close of November. Defendants were bound to carry one load in August, two in September, two in October, and one in November. There is but one contract, but it consists of separate and distinct parts, each complete in itself, and having a separate time fixed for its performance, and on each of which a right of action would accrue to plaintiffs if not performed within the time limited. In this respect the contract is analogous to a bond for the payment of money in installments. But here the analogy ceases, for the reason that the price for carrying lumber is fluctuating, which is not the case with money.

A dollar to day will be a dollar a year hence, and on every day through the year; and an installment of two hundred dollars due to day will be no more a year hence, save the interest that would be recovered by way of damages for its detention. But what we have said of money can not be said of prices for transporting lumber. If they were always the same, there would be no ground for controversy between the parties. It is this fluctuation in the prices of freight that furnished the bone of contention in the present suit. The contract required one load to be carried in August —this was done; two loads in September, one of which was carried, the other not; two loads in October, only one of which was carried; and one load in November.. Defendants carried two loads in November. They failed to carry one load in September, and one in October, and carried an extra load in November. On the first of October plaintiffs

had a right of action against defendants for not carrying one load in September, and the same on the first of November for the load not carried in October. The November part of the contract was performed, and an extra load was carried in that month which was intended to take the place of one of the loads not carried, and the parties not having agreed which it is for the law to make the application. We have no hesitation in saying, in a case like the one before us, it should be applied where it will be most beneficial for defendants, provided no injury is done thereby to plaintiffs.

By the contract, defendants were to have four dollars and a half per thousand. It appears from the testimony on the trial the price of freight was five dollars per thousand in October, and between seven dollars and eight dollars per thousand in November. Plaintiffs' damages, then, for not carrying the load in September, was fifty cents per thousand, and for not carrying the load in October two dollars and a half per thousand—these sums being the difference between the ruling freights and the contract price when the several causes of action accrued. Now the excess in the price of freight over the contract price, when the extra load was carried in November, was equal to the excess in the price of freight which the plaintiffs were entitled to recover of defendants for not carrying the load in October. The two being equal, one should be set off against the other—the difference, if any, being against defendants, as the price of freight was probably higher when the extra load was carried than it was on the first day of November; the testimony showing it was from seven dollars to eight dollars in that month—seven dollars most probably the first of the month, and eight dollars at its close.

It was admitted on the argument plaintiffs' damages for a breach of the contract were the difference between the contract price and the price of freight on the day their cause of action accrued. It can not therefore be said, in setting off one against the other, any injustice is done the plaintiffs. But if

the extra load is substituted for the one not carried in September, defendants would be made to pay two dollars and a half for every fifty cents damages plaintiffs sustained by reason of defendants' breach of the contract in September—the difference between the contract price and the ruling price of freight in one case being fifty cents, and in the other two dollars and a half. Suppose defendants had not carried the extra load in November, and plaintiffs had employed some one else to carry it—they would have claimed of defendants, for not carrying the October load, two dollars and a half per thousand, and at the same time have paid to the person who carried it seven dollars per thousand, or two dollars and a half per thousand more than they would have paid defendants had it been carried by them in October. While apparently paying more than the contract price, the carriage of the lumber would, in fact, have cost them but four dollars and a half per thousand—the contract price, after applying the damages they had received of defendants.

Two objections may be made to the result at which we have arrived:

1st. It may be said, under the contract plaintiffs would have had the lumber to be carried in October, in Chicago on the first of November, whereas it was not received until the last of that month, and that, in the mean time, they may have lost the sale of it. It is a sufficient reply to this to say, they have made no claim for any such damage, and they admit the true measure of damages to be the difference between the contract price and the price of freight on the first day of November.

2d. It may also be said, if plaintiffs had known they would have to pay seven dollars per thousand for the extra load carried in November, they would have waited till the following spring before shipping it. To this, the reply is, if they intended to hold defendants for the damages the law gave them, they should have agreed with defendants as to the application on the contract of the extra load before it was

carried. This they did not do, and defendants may have intended it should cancel the October default.

We think the court was right in charging as it did, as well as in refusing to charge as requested. The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

George D. Evans v. Mark Norris.

The Supreme Court has no power to look behind the record transmitted to it from the circuit court, to amend or alter it. If complaint is made that the transcript is incorrect, all this court can do is to require, upon a proper showing, that the court below make a full return according to the facts.

Where a copy bill of exceptions, instead of the original, was sent up from the circuit court, in return to the writ of error, and three terms have elapsed since the return of the writ, and issue in error has been joined without any notice being taken of the irregularity, and no explanation is made of the delay, the court will not interfere to require the original bill to be sent up.

Heard November 30th. Decided December 1st.

Error to Washtenaw Circuit.

L. D. Norris, for defendant in error.

H. T. Backus, for plaintiff in error.

CAMPBELL J.:

A motion is made for leave to file, and make part of the return in this cause, a corrected copy of the original bill of exceptions. The motion is opposed for several reasons, based on the insufficiency of the showing and the improper form of the application.

The writ of error was issued more than a year ago, and was returned at the January term in Lansing. This is the third term since the return was made, and error was assigned and joinder filed without any reference to the alleged imperfections of the return. No excuse or reason is shown for

the delay in making the application. Without some explanation, we should not feel disposed to interfere, if the power were unquestioned.

But we have repeatedly held that we have no power to look behind the record transmitted to this court from the circuit court, to amend or alter it.* If complaint is made that the transcript is incorrect, all that we can do is to require, upon a proper showing, that the court below make full return according to the facts. We can not regard any matter as part of the record which is not sent up to us in the proper manner from the court below. In this case, upon an application made in due season, we should have required the original bill of exceptions to have been returned; as that, and not a copy, should in all cases be returned with the record. But, inasmuch as no showing has been made explaining the delay, and the parties have thus far disregarded the error of the clerk, we are not disposed to interfere.

The motion must be denied.

MANNING and CHRISTIANCY JJ. concurred. MARTIN Ch. J. was absent.

* See *Sweetzer v. Mead*, 5 *Mich.* 33; *Scribner v. Gay*, *Ibid.* 511.

E. T. Throop Martin and Another v. Andrew T. McReynolds and Others.

Where one of several assignees of a mortgage dies, his interest in the mortgage, and in the mortgage debt, survives to the others, and his personal representative is not a necessary party to a bill for the foreclosure of the mortgage.

One holding the equitable title, only, to a mortgage, may foreclose it in chancery.

The assignment of a debt secured by mortgage, carries with it, in equity, the mortgage as an incident to the debt, and the assignee may proceed in equity to foreclose it.

Where one holding only the equitable title to a mortgage, files his bill to foreclose it, the person holding the legal title should be made a party.

MARTIN *v.* MCREYNOLDS.

An allegation in a bill for foreclosure, by the assignee of a bond and mortgage, that the bond and mortgage were "duly sold, assigned, and set over by the said mortgagees" to complainants, and that complainants are "the owners and holders thereof, and entitled to have and receive all moneys due thereon, as by reference to an instrument of assignment under the corporate seal of the said corporation [mortgagees], and now in possession of complainants," will appear—is an allegation of a legal assignment and transfer at law of all the rights of the mortgagees to the complainants.

Where complainant, in a foreclosure suit, dismissed his bill, as against one made a party under the general allegation that he claimed some interest in the premises, as subsequent incumbrancer, or otherwise, the mortgagor, appealing to this court from the decree in the case, can not complain of such dismissal, since it, in no respect, affects his rights.*

An allegation in a foreclosure bill that no part of the mortgage debt has been collected or paid, when the bill sets out fully the mortgage, and shows the amount of the several installments, and when they became due, sufficiently shows the amount due on the mortgage.

Where, after overruling a demurrer in a foreclosure suit, the bill was taken as confessed by defendant, and the case referred to a commissioner to compute the amount due, the case heard on the commissioner's report, and decree of foreclosure made without notice of hearing to the defendant, who had appeared, but all the other proceedings in the case were regular, and no exception was taken by the defendant to the commissioner's report, and no application made to the court below for relief;—*Held*, That the Supreme Court would not, on the ground of want of notice of hearing alone, reverse the decree of the court below.

Heard November 24th. Decided December 1st.

Appeal, by defendant O'Flynn, from the Wayne Circuit in Chancery.

The case is sufficiently stated in the opinion of the court.

C. O'Flynn, defendant, in person.

T. W. Lockwood, for complainants.

MANNING J.:

Martin & Townsend, and one Ten Eyck, since deceased, on the 30th October, 1852, filed a bill in the circuit court of Wayne county to foreclose a mortgage, executed to the Farmers' & Mechanics' Bank by McReynolds and O'Flynn, and assigned by the bank to complainants. On the 1st of June, 1855, a petition was presented to the court by Martin & Townsend, stating the death of Ten Eyck after the filing of the bill, and that the cause of action survived to them, and

*See *Warner v. Whittaker*, *post*.

praying an order allowing the suit to proceed in their names as survivors; which was granted by the court. Three days thereafter they filed an amended bill, in which Long, Campbell, McKinney, Halpin, Gray, and Probart, the other defendants, were made parties as subsequent purchasers or incumbrancers. On the 3d September following, an order was entered by complainants, dismissing the bill as to McKinney, and taking it as confessed against all of the other defendants, except O'Flynn who had appeared and filed a demurrer to the bill on the 3d August. The demurrer was brought to a hearing in October, 1857, when an order was made overruling the demurrer, and taking the bill as confessed by O'Flynn, and directing a reference to ascertain the amount due complainants on the bond and mortgage; and on the coming in and confirmation of the report of the circuit court commissioner, the usual decree was entered, from which O'Flynn appealed to this court, and now asks a reversal of the decree on several grounds:

1st, That the personal representative of Ten Eyck was not made a party. The interest of the assignees in the bond and mortgage was the interest the bank had. In other words, they stood in the position of mortgagees, and on the death of Ten Eyck, his interest in the mortgage, as well as in the debt, survived to complainants. Mortgages are, in express terms, excepted in the statute requiring grants to two or more persons to be construed to create estates in common.—*Comp. L.* §§ 2628, 2629. Hence in *Cote v. Dequindre*, *Walk Ch.* 64, it was held a bill might be filed by a surviving mortgagee to foreclose a mortgage without making the personal representative of a deceased co-mortgagee a party. In *Vickers v. Cowell*, 1 *Beav.* 529, the personal representative was held to be a necessary party, as he would, in equity, be entitled to the decedent's share of the debt, when collected. The reason given for the decision is true in point of fact, but the consequence deduced from it does not follow. When the object of the bill, as in that case and the one in *Walker*, and as in the case before

us, is to obtain possession of the trust property by the trustee, to enable him to execute the trust, and the rights of the *cestui que trust* are in no way to be affected by the suit, he need not be made a party.— *Sill v. Ketchum*, *Harr. Ch.* 423; *Cook v. Wheeler*, *Harr. Ch.* 443; *Morey v. Forsyth*, *Walk. Ch.* 465. *Sill v. Ketchum* was a bill filed by Sill to foreclose a mortgage assigned to him in trust for third persons, who, it was objected, should be made parties. Chancellor Farnsworth overruled the objection, and sustained the bill.

2d. That the assignment, as stated in the bill, does not show a legal title to the mortgage in the assignees; that is, does not show such an assignment as would authorize them to quit-claim the mortgaged premises, or discharge the mortgage of record. An assignment must be recorded before steps can be taken by an assignee to foreclose a mortgage at law, by advertisement, under a power of sale contained in the mortgage.— *Comp. L.* § 5178. But it is not necessary to a foreclosure in chancery. A bill may be filed to foreclose a mortgage by one having an equitable right to it only. A debt secured by a mortgage, when assigned, carries with it, in equity, the mortgage as an incident to the debt, and the assignee may file a bill to foreclose the mortgage.—*Green v. Hart*, 1 *Johns*, 586; *Patterson v. Hull*, 9 *Cow.* 747; *Cooper v. Ulman*, *Walk. Ch.* 251. In such, and the like cases, the mortgagee, or person holding the legal right to the mortgage, should be a party, that there may be some one before the court to release the mortgaged premises, or discharge the mortgage of record, on payment of the debt by the mortgagor. The amended bill states, that on the first of April, 1852, the bond and mortgage were "duly sold, assigned, and set over by the said mortgagees" to complainants, and Ten Eyck, who died after the filing of the original bill, &c., and that complainants are "the owners and holders thereof, and entitled to have and receive all moneys due thereon, as by reference to an instrument of assignment under the corporate seal of the said corporation, and now in the possession of your ora-

tors," will fully appear. In stating an assignment, it is sufficient to set it forth according to its legal import and effect, without reference to its form or phraseology. By the words, duly sold, assigned, and set over by an instrument of assignment under the corporate seal of the said corporation, we understand a legal assignment and transfer at law, of all the rights of the bank, to the assignees.

3d. That the bill should not have been dismissed as to McKinney. It does not appear McKinney, in fact, had any interest whatever in the mortgaged premises. He was not a party to the original bill, but, with a number of others, was made a party to the amended bill, as having, or claiming to have, some right in the mortgaged property as subsequent purchaser, incumbrancer, or otherwise. Complainants may have afterwards discovered he had no claim whatever, and for that reason dismissed the bill as to him. However that may be, we do not see how the appellant is to be injured by it, or what right he has to complain.

4th. That the bill does not state what amount was due when the suit was commenced. It is usual, after setting forth the mortgage, and bond or note, if there be one accompanying it, to state the mortgage money is due and unpaid, or, if the whole is not due, the part that is, and the payments that have been made, if any. A bill would be demurrable that did not state something was due, or unpaid, although it might appear from the bill the whole, or a part, of the mortgage money had become due; for the law presumes every man has done his duty, and on that raises a presumption of payment, unless the contrary is shown.—*Bailey v. Gould, Walk. Ch.* 478. The bill states, that "there is now due and unpaid on the said bond, and said indenture of mortgage, more than the sum of one hundred dollars." If this was all, we are inclined to think the demurrer should have been allowed for uncertainty in the averment. The amount claimed to be due and unpaid should be stated, that defendant, on reading the bill, may know whether it is necessary to appear and answer, to

protect himself against an unjust demand. That, however, is certain which is capable of being reduced to a certainty; and, a little lower down in the bill, it is stated "no proceedings at law have been had for the recovery or collection of the debt, or money secured to be paid by the said bond and indenture of mortgage, or for the collection of any part thereof; and that the said debt or moneys, and no part thereof, have been collected *or paid.*" Here is a clear and positive allegation that no part of the debt secured by the bond and mortgage has been collected or paid.

From previous statements in the bill, it appears the bond and mortgage were given on the 15th October, 1851, for the payment of $1912.75, one half in one year, and the other in two years, with interest payable semi-annually. The bill was filed 30th October, 1852. From these data, the amount due and unpaid when the suit was commenced can readily be ascertained.

5th. The next and last objection is that the case was heard on the commissioner's report, and a decree entered, without any notice of the hearing to appellant.*

This was clearly irregular, and on a proper application to the court below, appellant would have been entitled to have the decree set aside, on that ground alone; but it is not a sufficient reason for reversing the decree in this court. He should have made his application there before coming here for relief. The commissioner had made his report of the amount due, to which no exception had been taken; and we are at a loss to conceive any objection, going to the merits of the case, appellant could have made to the decree, had he been present.

In *Jenny v. O'Flynn*, 5 *Mich.* 215, there were a number of irregularities following each other in quick succession, and of such a character, and at that stage of the suit, that there was no difficulty in perceiving cases in which great injustice

* Appellant appeared on the argument of the demurrer, and was served with summons to appear on the reference before the Commissioner.

would be done, if they were not corrected by an appellate court.

The decree must be affirmed with costs.

CHRISTIANCY and CAMPBELL JJ. concurred. MARTIN Ch. J. did not hear the argument.

Edmund Quirk v. Almon Thomas and Others,
AND
John Greusel v. The Same.

Bills by purchasers from the grantee against the heirs and administrator of the grantor, to re-form a deed, by correcting the description of the lands, which, by reason of the omission of four out of fourteen courses and distances, embraced but a small portion of the lands intended to be conveyed. Defense (which was fully proved), that the deed was made without consideration, and for the purpose of defrauding the creditors of the grantor. There was no proof of debts existing against the estate of the grantor at the time the bills were filed, but the administrator was taking proceedings in the probate court for the sale of the lands—for what purpose, did not appear. The deeds to complainants described the respective parcels purchased by them correctly. Both parties to the fraudulent conveyance were dead before the mistake was discovered. A full consideration was recited in this deed; the grantee assumed possession and control of the premises under it; and the grantor, who died before complainants purchased, had always, after giving the deed, represented, and twice made oath, that the land belonged to the grantee.

By MANNING J.; CAMPBELL J. concurring.

That one is a purchaser for a valuable consideration without notice, is not of itself an equity on which a bill may be sustained for relief. It is a shield to protect a party, but can not be made a basis of attack.

The reason of this rule is, that the effect which the law gives to a purchase without notice, is not a perfect right in itself, and, therefore, will not sustain an action at law or a bill in equity, but may, in certain circumstances, be used by a defendant to stay the interposition of the court, on the ground that he is equally entitled with the plaintiff to its protection.

Complainants, as purchasers from the fraudulent grantee, have all his rights, at law and in equity, and no more. As the court could not have corrected the mistake in favor of the grantee, who was a party to the intended fraud of the grantor, neither can it in favor of complainants.

It is immaterial, in such case, whether there are or are not creditors of the fraudulent grantor now to be injured. It is the corrupt intention—the illegal object had in view—the wrong intended, and not the wrong done—that stays the hands of the court from giving effect to the illegal contract.

QUIRK *v.* THOMAS.

A court of equity will not decree the specific performance of a voluntary contract, nor will it correct a mistake in a defective execution of it, where there is no intervening equity. In this case, the most complainants can claim, is, that they are, in equity, the assignees of such voluntary contract. As such assignees, they would take it subject to all its vices, and to all equities existing between the parties to it.

The deed in question having been recorded before complainants bought, they are chargeable with notice of every thing that appears on the face of the record, and can not, in law, be said to have been ignorant of the mistake. And, independent of the registry laws, they are chargeable with notice of whatever is in the deeds through which they claim. They are not, therefore, in law, *bona fide* purchasers without notice.

What complainants were informed, by third persons, of the declarations of the grantor, that he had conveyed the whole premises to the grantee by this deed, was mere public rumor; and there is no equity growing out of it in their favor.

The Statute of Frauds, declaring a conveyance to defraud creditors void as against creditors only, is merely declaratory of the common law, by which all contracts, made in violation of law, or contrary to public policy, are illegal, and consequently void, and, when executory, will not be enforced, or relieved against when executed. Where such a contract has been executed in part, the law gives effect to it so far as executed, and holds it void so far as it remains unexecuted.

By CAMPBELL J.

If the grantee in the fraudulent deed had any rights outside of the land therein described, they arose from the equity to have a new deed, conforming to some right which was not perfectly assured by the deed as executed. The deeds to complainants would be operative to pass no more than their grantor possessed, which would be the legal estate in the lands actually covered by his deed, and any claim he might have to the lands not covered by it, and to which, consequently, he did not have the legal title.

The ground of relief in case of mistake is placed upon the same basis as that of specific performance, and the mistake is corrected by establishing the original right to a conveyance, or other instrument, under some agreement, which, by reason of the mistake, has not been fully carried out. To make out the mistake, it is necessary to make out the contract, that the court may see how far it has failed in the performance.

As a general rule, rights which exist against an ancestor, will equally exist against his heirs. But the ancestor having died before complainants acquired their interests, they could have no rights against him, and can, therefore, have none against his heirs, by reason of his acts or representations not made to complainants, or to any one through whom they claim.

By CHRISTIANCY J.; MARTIN Ch. J. concurring.

The heirs of a grantor stand precisely in the condition of their ancestor, and can avail themselves of no defense which would not have been equally available to him. And there being no evidence of debts against the estate, and nothing to show that the administrator is seeking the property at the instance of creditors, the administrator stands in no better position than the heirs.

Contracts are treated as void, at common law, on the ground of public policy only, and the rule *ex turpi causa non oritur actio* is subject to all the limitations and qualifications which sound public policy may dictate. Courts may sustain, or refuse to sustain, an action upon such contracts, as may be most consistent

with sound policy, and best calculated to discourage and suppress such violations of the law. The rule itself can not be made an engine of wrong and injustice in the hands of the wrong doer against innocent parties, nor set up to the prejudice of any party guiltless of all participation in the wrong, or whose rights have been acquired without notice of it.

Where, in case of a transaction merely illegal as against public policy, the party seeking relief is innocent of the fraud intended, the case is to be considered, in all respects, as if there had been no fraud, and the contract between the original parties, under one of whom complainant claims, had been made in good faith, and for good consideration.

To enable a party to such a transaction to show his own fraud in his own defense, the complainant must not only be *in delicto*, but *in pari delicto;* for though he may to some extent have participated in the illegal transaction, yet, if not equally guilty with the defendant, or, at least, if there be strong mitigating circumstances in his favor, the defendant will not be allowed to avail himself of this defense.

Where a consideration is expressed in a deed, and complainants have purchased from the grantee on the faith of it, the grantor, as against them, is estopped from denying such consideration.

On a bill to correct a mistake in a written instrument, no proof of any actual previous agreement need be given; but what was the understanding of the parties, and what the instrument was intended to be, may be inferred entirely from the instrument itself, the subject-matter, the surrounding circumstances, and the subsequent acts of the parties.

The reason of the rule that the assignee of a chose in action must be presumed to have notice of what the rights of the parties to it really were, substantially fails where the one party understands that he is selling, and the other that he is purchasing, *land*, and not a mere *contract* respecting land. The rights of the purchasers, in such case, should be governed, as to notice of every thing affecting the rights of prior parties, by the same rules which apply to conveyances of lands.

The purpose of the registry laws is not to give notice as between the grantor and his grantee, immediate or remote, for the protection of the grantor, but as between prior and subsequent purchasers and incumbrancers from the same grantor, and for the protection of purchasers.

The deed sought to be corrected, or the record thereof, was no more notice to complainants of the mistake, than to the grantee, at the time of taking it. And where the question arises without intervening equities, and the mistake is one eminently calculated to mislead, and the parties can not be charged with gross negligence, the rule that the purchaser is bound, at his peril, to take notice of the defects in the conveyances through which he claims, can not apply, since, otherwise, the very fact that such a mistake has occurred would be a bar to its correction.

The acts of the grantor in giving a deed, the description in which was calculated to mislead, and did mislead, in reciting in the deed a full consideration, and in putting and continuing the grantee in possession with all the *indicia* of ownership, were continuing representations which did not end with his death, and that event took nothing from their effect. They operate, as to those who have been deceived by them, as equitable estoppels upon his representatives.

The rule of equitable estoppel by representations, is not confined to such as are made directly to the parties acting upon them. Whether direct or indirect, in the presence or in the absence of the parties, is immaterial, so that they be calculated and intended to produce, and do produce, the end.

QUIRK *v.* THOMAS.

Where one has been induced to become a purchaser by the misrepresentation of another ignorant of his own right, but where he ought, as a prudent man, to have had notice of it, equity will grant relief to the purchaser. But the cases at bar are much stronger, and stand upon the ground of that class of cases where the party, knowing his rights, willfully conceals them, encourages another to purchase, and when the purchase has been made on the strength of the representation, seeks to take advantage of his own wrong, to the injury of the purchaser. The fraud of the party can not shield him where his ignorance would not. When others have been induced to purchase on the strength of his representations, he shall not be allowed to excuse himself on the plea that he only meant to defraud creditors, when the allowance of the excuse would defraud purchasers also.

A purchase for a valuable consideration is ground for affirmative relief in equity, where the equities of the complainant are superior to those of the defendant.

By MARTIN Ch. J.

As a general rule, courts of equity will not interpose to enforce a fraudulent contract, nor to assist the parties to it in any manner; but they will protect *bona fide* purchasers against all equities not superior, and assist them against all which are inferior.

The equities of these complainants are altogether independent of, and superior to, those of their grantor, and depend upon no contract between him and his grantor, but upon the facts of an attempted and supposed conveyance, possession under it, the purchase by complainants for value, and the inducements to such purchase held out by the acts and representations of the original grantor. In the case of a mere voluntary conveyance, accompanied by delivery of possession, a subsequent purchaser would be entitled to the remedy here sought, though no contract had ever existed.

The contract of conveyance, if any ever existed, must be held, in this case, to have been executed, so far as these complainants' interests are to be affected. In their behalf, the maxim of equity, that what was intended to be done will be considered as done, will have its full force.

Heard October 8th, 13th, and 14th. Decided December 9th.

Appeals by defendants from the Wayne Circuit in Chancery.

The facts in the two cases being substantially the same, and the testimony identical, they were heard and decided together.

The bill in the first entitled cause sets forth, That on the 14th day of February, A. D. 1848, Thomas Alanson Thomas (called hereinafter Alanson Thomas), claiming to own, and being possessed of and controlling, a tract of land containing fifty acres, in the bill particularly described, and situated in Dearborn, Wayne county, proposed to sell the same to complainant, and that complainant, believing the land to belong

to said Alanson, purchased the same of him for the consideration of $480 in hand paid; that said Alanson and his wife executed to complainant a conveyance thereof, of the date aforesaid: That complainant immediately went into possession of said premises, and has continued to occupy the same to this time: That at the time of said conveyance, said Alanson lived upon, and occupied and controlled, the farm of which said premises was a part, and so had ever since the year 1838: That Aaron Thomas, the father of said Alanson, lived on the said farm, near the residence of said Alanson, at the time of said purchase, and that, at that time and long previous thereto, and up to the time of his death, which occurred in May, 1847, said Aaron stated and gave out, that he held and owned no interest in said farm, but that he had sold and conveyed the same to Alanson, and said Alanson also claimed that he owned and held the same by title derived from his father. The bill further sets forth, That on the 18th day of June, 1838, said Aaron was the owner of said farm in fee simple, and proposed to sell the same to said Alanson for $5000, which proposition was accepted; and said Aaron, with the intent and design of conveying the whole of said farm to Alanson, executed and delivered to him a deed, expressing therein a consideration of $5000; which said deed was signed by Betsey Thomas, wife of said Aaron, now Betsey DeLong, with the design of relinquishing her right of dower in said farm: That the description in said deed, was taken from the original patent from the United States of the said farm, and that it was executed, delivered, and received, in the full belief by all the parties, that the whole land patented, except about 100 acres previously sold, was thereby conveyed: That the whole premises embraced in the patent (all of which, except the parcel before sold, was intended to be conveyed by said deed) included 437 6-100ths acres, but, by a mistake in drafting said deed, a number of courses and distances were wholly omitted, in consequence of which a small fraction only of the farm was

in fact conveyed: That Alanson Thomas caused said deed to be recorded, and continued in possession under it of the whole land, except the portions from time to time sold by him, until his death, which occurred October 1st, 1850; and that both he and Aaron Thomas died without any suspicion of the said mistake: That Aaron uniformly, in speaking of said premises, gave out and represented that he had conveyed the same to Alanson; and in a certain suit in the Wayne Circuit Court, wherein Ebenezer Hurd was plaintiff and said Aaron defendant, and also in a certain proceeding in the Court of Chancery, in favor of Philip Warren against Aaron and Alanson, said Aaron made oath that he had conveyed all his interest in the premises to Alanson: That complainant purchased that portion of said farm bought by him, and paid for the same, in good faith, and before said mistake was discovered: That in fact the discovery of the mistake was first made by Titus Dort, administrator on the estate of said Alanson, in the year 1851: That since the discovery of such mistake, the widow and heirs of said Aaron have procured the appointment of the defendant David McGibbon, by the Probate Court of Wayne county, as administrator on the estate of said Aaron, and that said administrator now claims that the premises so sold to complainant belong to the estate of said Aaron, and has applied to the said Probate Court for license to sell the same as the property of said estate: That said administrator has also brought, in the Wayne Circuit Court, an action of trover for wood and timber appropriated by complainant to his use, from said premises.

And complainant prays for a correction of said mistake, so far as it affects the premises so purchased by him; that the widow and heirs at law of said Aaron (who are made defendants) be restrained from disturbing complainant in the possession of said premises; that the said administrator be enjoined from further proceeding on his application for license to sell the said land, and from further prosecuting said action of trover; and for other and further relief.

The bill in the second case is substantially the same,—complainant's purchase being made September 7th, 1850, and including about forty acres.

Preliminary injunctions were issued as prayed, to restrain the legal proceedings being taken by McGibbon.

To these bills, Betsey DeLong filed a disclaimer, she having released to Alanson subsequent to the decease of Aaron, her former husband. Several of the heirs were infants, and filed, by their guardian *ad litem*, the usual general answer. Two were non-residents, and did not appear, and the others answered, denying many of the facts set up in the bill, and alleging that the deed of June 18th, 1838, was made to defraud the creditors of Aaron Thomas, and that complainants bought with notice of that fact, as well as of the mistake.

McGibbon defended by plea and answer. He alleged that the last mentioned deed was given by Aaron, and accepted by Alanson, for the sole and only purpose of hindering, delaying, and defrauding the creditors of Aaron, who was then largely indebted; that no consideration whatever was paid for the same, and that nothing was ever said, sworn, or done, by said Aaron or Alanson, tending to show a sale of said lands, except for the purpose of consummating the said fraud; of all which complainants had notice before their respective purchases.

The causes having been put at issue, testimony was taken therein, in substance, as follows:

Thomas A. Sweeney had a demand against Aaron Thomas, and called for payment. Aaron told him he had sold all his property to Alanson, who was to pay the debts. Witness then went to Alanson, who paid the demand. This was in 1841. He had another demand against Aaron, which originated in 1841, and was paid by Alanson in 1849. He frequently talked with both Aaron and Alanson about the property after 1838, and the story they always told was that Alanson owned it. He frequently bought farm produce

there, and was always directed by Aaron to Alanson as the owner. The common report in the neighborhood was that Alanson owned the property, and from that report he should not have hesitated in going to Alanson to buy the farm which Aaron had formerly owned. Aaron lived on the premises, in what was called the old homestead, until he died. Alanson lived in the family with his father until after he was married —in 1839 or 1840. Alanson had sore eyes for several years. It was whispered in the neighborhood that Aaron conveyed the property to Alanson to keep it beyond the reach of Dr. Hurd, who was a creditor of Aaron.

Josiah Dort had heard both Aaron and Alanson say, between 1838 and 1844, that the farm belonged to Alanson. Aaron frequently said in public places that he had sold his old farm to Alanson, and the farm was reputed to belong to Alanson after 1838. Alanson's eyes were at times so bad as to unfit him for business. Witness does not know that Alanson had any property previous to the farm being deeded to him. Some of the neighbors said the property was conveyed to Alanson to keep it away from creditors, and some denied it. Complainant Quirk moved into the neighborhood in 1831, and has lived there ever since.

John McVay worked more or less on the farm every year after 1825; after the farm was said to have been sold to Alanson, witness was paid for the labor by him. Alanson managed the farm after that, and Aaron frequently said he had conveyed to Alanson. If any one applied at the farm to purchase any thing, he was referred to Alanson. About a year before Aaron died, when the collector called for the taxes, Aaron told him he had nothing to do with it, and sent him to Alanson. Aaron told the witness he conveyed the farm to Alanson to keep it away from Dr. Hurd, who wanted to rob him. Does not know that Alanson had any property previous to the farm being conveyed to him.

Titus Dort knew Aaron and Alanson Thomas. The former died in February, 1847, and the latter in October, 1850. All

the public transactions after June, 1838, were in the name of Alanson, and Aaron always said Alanson owned the farm, and had the management of it. When Aaron did business, he represented himself as agent of Alanson. From 1838 to the death of Aaron, it was common public report that Alanson owned the place. Witness was supervisor of Dearborn in 1844, and assessed the property to Alanson, by direction of Aaron, except a span of horses and a wagon, which Aaron claimed as his own. In 1839, Isaac Sherman commenced an action of trespass, before the witness as justice, against one Lawrence, alleging that the latter had trespassed upon his land adjoining a part of the Thomas farm, which Lawrence had leased of Alanson. Aaron was sworn as a witness in this suit, and testified that Alanson had leased a part of the farm to Sherman, and that he (Aaron) had no interest in the matter. Witness was appointed administrator on the estate of Alanson in the fall of 1850, and then discovered the error in the deed from Aaron to Alanson, and notified complainants of it, who expressed their astonishment at the mistake. Communicated it, also, to Betsey DeLong, who stated that she had never heard of it before. Aaron Thomas told witness he did not intend to be forced to pay Dr. Hurd, but that he would pay him all he owed him. The farm, agricultural implements, &c., were worth $2000 or $2500. It was the general impression in the neighborhood that the farm was conveyed to Alanson to keep it beyond the reach of Aaron's creditors. From 1838 to 1847 witness would not have been willing to have bought of Alanson without full examination as to the title. From 1837 to the latter part of 1838, Alanson's eyes were so bad as to incapacitate him from doing business. Witness found among the papers of Aaron Thomas, after his decease, another deed of the farm from Aaron to Alanson, dated in 1836, and conditioned for the support of Aaron and his family. Alanson told witness that Quirk had paid up for the land bought by him, and Greusel paid witness, as administrator, all but $100.

Nelson Klumph talked with Aaron in 1841 about buying a piece of the farm, and was informed that Alanson owned it and could give a good title to it. In the summer of 1844 or 1845, witness went to the farm to buy cattle. Alanson was away from home, and Aaron said the cattle were Alanson's, and witness must come again. Witness did go again, and bought them of Alanson. Witness frequently bought cattle and produce at the farm, and was always informed by Aaron that the property belonged to Alanson, and that Alanson had the selling of it. From 1840, Alanson appeared to have the control and management of the farm until his death, and witness believed him the owner. He was reputed in the neighborhood to be the owner.

Daniel D. Tompkins was a constable, and, as such, in 1843, or before, went with an execution against Aaron Thomas, to search for property. Aaron told him every thing belonged to Alanson. Alanson claimed all the property, and witness returned the execution unsatisfied. There were reports in the neighborhood that Aaron had conveyed the property to Alanson to keep it away from creditors.

John F. Monroe exhibits a plat of the farm, and shows that but a small triangular piece of it is covered by the description contained in the deed from Aaron to Alanson. The third, fourth, sixth, and seventh courses, of the fourteen contained in the patent, are omitted in this deed.

Christopher Markie came with Greusel to Michigan, in 1848, and heard some portion of the talk between him and Alanson about the purchase made by Greusel in 1850.

Joseph Lorrain often heard Aaron say the farm belonged to Alanson; this was from 1838 to 1844.

Gilbert Lognyan was frequently told by Aaron, that the farm belonged to Alanson. It was the talk among the neighbors that Aaron had put his property out of his hands to defraud his creditors.

Denison Miller leased part of the farm from Alanson, in

1845, for two years. Aaron afterwards wanted to buy the lease of him, but they did not agree upon the price.

James Nowlin drew the deed from Aaron to Alanson; Alanson was not present. Aaron told witness he thought he would deed over his farm to his poor blind boy. He directed a deed to be drawn, and a bond and mortgage back for the same consideration stated in the deed, and said he would take the bond and mortgage home for Alanson to execute. Witness supposed the description contained in the deed to cover the Aaron Thomas farm, though he does not recollect what he had to draw it from. He never heard, or supposed, it did not cover the farm until after the death of Alanson. Aaron often spoke of the farm as Alanson's. When Aaron gave directions about the deed, he commenced speaking of his difficulty with Dr. Hurd, but witness checked him, as a matter of policy for Aaron. It was commonly talked in the neighborhood, that Aaron conveyed the farm to Alanson to keep it away from his creditors.

Henry T. Backus became professional adviser for Aaron and Alanson as early as 1838 or '39. The deed from Aaron to Alanson, as well as the patent, was frequently in the possession of witness, but he was never aware of the discrepancy in the descriptions until after the death of Alanson, when his attention was called to it by Titus Dort. Both Aaron and Alanson frequently spoke to witness of Alanson being owner of the property under this deed from his father. Both Quirk and Greusel, prior to their respective purchases, inquired of witness whether they could get good titles from Alanson Thomas, and was told that they could. Witness has no recollection that any thing was ever said to him by Aaron or Alanson about the farm being deeded to the latter to keep it beyond the reach of Aaron's creditors. In the transaction of all business relating to the farm, so far as witness observed, it was done in the name of Alanson.

Betsey DeLong was married to Aaron Thomas in 1830. Alanson was then about twenty years old. He had no home, except with his father, until after 1838. He was not able to support himself, and was supported by his father. He paid no consideration for the deed. It was made to keep Dr. Hurd from taking the place on execution. It was understood Aaron was to have it back again when he had settled with Hurd. Before Quirk bought, witness told Mrs. Quirk all about the object of the conveyance to Alanson. Witness was opposed to signing the deed, but Aaron said he would have the farm back within a year. Aaron managed the farm the same after the deed as before, and when Alanson wanted any thing on the farm, he either borrowed or bought it. After settling the Hurd matter, Aaron did not take back the property, on account of another claim for which he was liable. Alanson got married, and went to live in a house on another part of the farm about 1840. Witness threatened Alanson with litigation about the farm after her husband's death, and he compromised with her. Aaron, during his lifetime, furnished the money to pay the taxes on the premises.

James Condon heard a conversation between Greusel and one Irwin, in 1848, in which Greusel said he had been to look at the premises subsequently bought by him, and thought he should buy them. Irwin told him he should be afraid of difficulty with the title, as the land was understood to have been conveyed to Alanson to keep it away from creditors. Greusel said he thought things looked fair, and he should risk it.

Besides the evidence of this witness, there was some further testimony which defendants claimed had a tendency to show that Greusel must have had doubts of his acquiring a perfect title by his purchase.

Jesse A. Hicks heard both Aaron and Alanson say the object of this conveyance was to prevent Hurd collecting a judgment against Aaron. Witness occasionally worked for Aaron on the farm, down to 1850.

James Gall was asked by Quirk to loan him $100 to make a payment on his purchase. Witness told him he had better inquire into the title before he paid his money. Quirk told him he had done so, and thought he could get a good title by getting a quit-claim from the Warren and Stacy heirs. Quirk told witness that he had already bought. It was rumored in the neighborhood that the land was conveyed to Alanson to keep it away from Aaron's creditors, but witness did not mention these rumors to Quirk.

George Throop received from Aaron Thomas and his wife the taxes on the farm for 1844 and 1846. They were assessed to Alanson.

Considerable other testimony was adduced to show the fraudulent character of the conveyance from Aaron to Alanson, and the rumors and talk in the neighborhood on the subject. Proofs were made also, of improvements by complainants on their purchases respectively. The proceedings in the two suits mentioned in the bill were also given in evidence as follows:

Hurd v. Aaron Thomas. Suit brought in 1833, to recover the amount of a physician's bill. Judgment January 12th, 1834, for $468. October 8th, 1845, execution levied upon the premises in question, to satisfy a balance claimed due on the judgment. February 24th, 1846, affidavit made by Aaron Thomas that a levy had been made on the premises of Alanson, as the property of Aaron, and that the judgment had been paid by the delivery to Hurd of farm produce from time to time. Alanson also made affidavit to the delivery of the produce, and the court ordered the execution returned satisfied.

Warren v. Aaron and Alanson Thomas. Bill in chancery to quiet in complainant the title to a certain portion of the farm, claimed by him. In January, 1845, defendants answered under oath, claiming adverse possession in Aaron until he conveyed to Alanson, and in the latter since. Aaron disclaimed title, and Alanson claimed to be owner.

QUIRK *v.* THOMAS.

The causes being brought to a hearing in the court below, in January, 1857, decrees were made in accordance with the prayer of the respective bills, and defendants appealed.

The following opinion was delivered in the court below:

DOUGLASS, Circuit Judge:

After having gone over the voluminous testimony in these two cases, I feel no doubt as to how they should be decided. The facts appear to be these:

In 1838, Aaron Thomas, who was seized and possessed of a certain tract of land on the river Rouge, known as the Thomas Farm, executed a deed to his son Alanson, which was intended by both parties to be a conveyance of the farm; but the description in this deed, in consequence of the omission of certain courses and distances, embraced but a small portion of it. This deed was executed without consideration, and for the sole purpose of defrauding the creditors of the grantor. From that time until the death of Aaron Thomas, in 1847, both parties gave out to the world that Alanson was the owner of the property. Both Aaron and Alanson lived upon the farm, the latter being generally held out to be the proprietor and manager thereof. On the death of his father, Alanson set up title to the whole farm as against the widow and other heirs, and held undisturbed possession until his death.

In February, 1848, Alanson conveyed forty acres off from the rear part of the farm to the complainant Quirk. On the 9th of September, 1850, he conveyed another forty acres, lying on the river Rouge, to the complainant Greusel. Each of these conveyances was founded upon a valuable consideration.

In October, 1850, Alanson Thomas died. Titus Dort was appointed his administrator. In the performance of his duties as administrator, Dort discovered the defect in the deed from Aaron to Alanson, which, up to this time, had

been wholly unknown to Aaron Thomas, his widow, and heirs, and also to both Quirk and Greusel. Dort, thereupon, filed a bill to have the description in this deed corrected, but the decree asked for was denied on the ground that the conveyance was fraudulent.

Quirk and Greusel have filed the present bills to obtain similar relief, so far as may be necessary to perfect the title of the respective portions, purchased by each of Alanson Thomas. They claim that, conceding the fraudulent purpose of the deed from Aaron to Alanson, they are entitled to relief as purchasers in good faith from Alanson, without knowledge either of the mistake in that deed, or of the fraud.

That each purchased in ignorance of the mistake in that deed, there can be no doubt: they certainly would not have purchased if they had known it. It is true the deed was on record, and by careful examination they might have discovered the error, but when I consider the number of the courses and distances in the correct description of the Thomas farm, the fact that the error had escaped the vigilance of Aaron Thomas's creditors for upwards of twelve years, and had not been discovered by his widow and heirs, whose interests and feelings strongly proposed scrutiny, and the fact that Alanson had been so long in possession and apparent ownership of the property, I can not say that there was any such want of care and vigilance on the part of the complainants as ought to deprive them of relief, if otherwise entitled to it.

It is again claimed in defense, that each of the complainants is chargeable with constructive notice that the conveyance from Aaron to Alanson was without consideration and for the purpose of defrauding Aaron's creditors. What is sufficient to constitute such notice, it is impossible, from the nature of the case, to define with much precision. But it is well settled that the mere want of caution is not notice; that though willful abstinence from inquiry, or any other act of gross negligence, may be treated by the court as evidence of fraud, it is not the same thing as fraud; that the

party may have acted *bona fide*, and if he has done so, there is no equity against him. And it seems that the mere notice of a fact which may or may not, according to circumstances, be held in a court of equity to amount to fraud, will not affect a purchaser for value denying actual notice of the fraud.—*Adams Eq.* 158, 159; *Champ v. Poupard*, and *Doyle v. Stephens & Field, decided in this Circuit.*

There is another view in respect to notice which it is material to consider in examining the present cases, and that is, that a parol notice, in order to be binding, must proceed from some person interested in the property—that a purchaser is not bound to attend to vague rumors, or to statements of mere strangers.—*Bernhardt v. Greenshield*, 28 *Eng. L. & Eq.* 77.

No doubt from the time of the execution of the deed from Aaron to Alanson, in 1838, suspicions were very generally entertained and expressed in the neighborhood of the real nature and objects of that conveyance. Alanson's age (he was then but about twenty-one), his poverty and his blindness, and the fact of Aaron's indebtedness, which were probably pretty well known, were well calculated to excite such suspicions. Quirk lived in the neighborhood from that time until his purchase from Alanson in 1848, and probably knew some or all of these circumstances, and had heard them talked about. Gall says he advised Quirk at the time the latter purchased, to inquire into it, and see if he could get a good title, before he paid his money. Mrs Thomas, the widow of Aaron, tesifies that before Quirk purchased, she told Mrs. Quirk all about the objects and purposes of the conveyance from Aaron to Alanson. Upon the principles before laid down, the evidence, independent of the testimony of Mrs. Thomas, would be altogether insufficient to show notice to Quirk. With only such knowledge as he may be supposed to have had from other sources, I think no man of common prudence would have hesitated to purchase from Alanson Thomas, after he had been in undisturbed possession and apparent ownership for about

twelve years. He would naturally have presumed that his own and other people's suspicions were not well founded.

I have great doubts as to Mrs. Thomas's credibility in respect to her statements to Mrs. Quirk; but conceding this portion of her testimony to be true, I think the information she communicated to Mrs. Quirk is not sufficiently brought home to Quirk to charge him with notice, in the face of the positive denials of his answer.

As to Greusel, he did not come into the neighborhood until 1848—after Alanson had been in the possession and apparent ownership of the property for ten years. His purchase was not made until 1850, three years after the death of Aaron Thomas, during which time Alanson had occupied and enjoyed the property as his own. He is not shown to have received any information in respect to the fraudulent nature of the deed of Aaron Thomas, from any person having any interest in the property. Most clearly, I think, he is not chargeable with notice.

I am, therefore, of opinion that both complainants are entitled to the relief prayed.

Backus & Harbaugh, for complainants:

1. Mistake is a proper subject of equity jurisdiction, when satisfactorily proved.—*Walk. Ch.* 102; *Willard's Eq.* 73; 1 *Paige*, 278; 9 *Cow.* 747.

2. The burden of proof is on defendants, to show the conveyance to Alanson Thomas fraudulent, and notice of the fact, as well as of the mistake, to complainants. Without proof of such notice, complainants would not be affected by the fraud, either at common law or by the statute.—*R. S.* 1838, *p.* 332; *R. S.* 1846, *p.* 328; *Walk. Ch.* 465; *Willard's Eq.* 246; 1 *Johns. Ch.* 328; *Story Eq. Juris.* 375; 2 *Mason*, 252.

3. Fraud, or notice of fraud, will not be presumed, but must be proved.—*Story Eq. Juris.* § 190; *Willard's Eq.* 148. The notice must be something more than vague rumor,

— *Willard Eq.* 251; 2 *Lead. Cas. in Eq.* 111; 28 *Eng. L. & Eq.* 77.

There is here no pretence that complainants had any notice of the mistake. As to the fraud, the question is, Had they such notice of it as will charge them with fraud in the purchase? The testimony brings this within none of the cases to be found in the books on the subject of notice. Notice to Quirk's wife was not notice to him.—1 *Hill*, 567.

Levi Bishop, for defendants:

1. Fraud vitiates all compacts and agreements, and even the most solemn adjudications. All contracts and conveyances of real property, to delay, hinder, and defeat creditors, are void on the ground of fraud. And as all parties, privies, and purchasers with notice, are *in pari delicto*, the courts will not relieve them, but will leave them in the same position where their own acts have left them. In other words, the courts will not lend themselves to carry into effect fraudulent and illegal transactions.—8 *T. R.* 575; *Cowp.* 790; 1 *East*, 96; 3 *B. & P.* 35; 7 *East*, 449; 12 *East*, 396, 404; 8 *Johns.* 113; 10 *Mass.* 274; 11 *Mass.* 368 *to* 379; 1 *Bro. Ch.* 543; 5 *Ves.* 173; 10 *Ves.* 360; 11 *Ves.* 168, 535; 1 *Doug. Mich.* 401; 2 *Doug. Mich.* 155, 344.

But it is enough to defeat this suit, that the conveyance of 1838 was voluntary, and without valuable or meritorious consideration. Courts of equity will not interfere to *carry into effect*, or *correct*, or *improve the informalities* of such a transaction.—2 *Story Eq. Juris.* §§ 786, 793 *a*; 1 *Cow.* 711, 773; 9 *Peters*, 204; 3 *Bro. Ch.* 12; 1 *Ves.* 50; 6 *Ves.* 662; 12 *Ves.* 37; 18 *Ves.* 149; 1 *Johns. Ch.* 329, 336; 4 *Johns. Ch.* 498.

It is settled, therefore, that if these complainants had notice, in law or in fact, that the conveyance of 1838 was *fraudulent* or voluntary, or that it was in any way defective, so that it would require the assistance of a court, they can have no relief.

2. These complainants had notice, as a matter of law, through the registry acts, that the title they were about to purchase was defective.

A party must use *reasonable diligence*, or equity will not relieve him.—1 *Story Eq. Juris.* § 146.

Any thing which is calculated to put a party on inquiry is enough.—*Ibid.* § 400. There can certainly be no doubt but this rule extends to registered title deeds, through which title must be derived, and especially the deed of the immediate vendor. The registry of deeds is taken in the United States as full and complete *notice to all the world* of the condition, and all infirmities, of title.—15 *Johns.* 568; 15 *Wend.* 594, 595; 3 *Sandf. Ch.* 592; 6 *W. & S.* 469, 474; 10 *Ohio*, 405; 6 *B. Monr.* 67; *Adams' Eq.* 151 *to* 155, *and notes*; 1 *Mich.* 202, 205. The same cases hold that a purchaser has notice of whatever appears in his title papers.

Certainly such a deed is notice as to the amount of land claimed by the vendor.—2 *Lead. Cas. in Eq. pt.* 1, *p.* 120, *and cases cited.*

The presumption of notice of the contents of a registered deed is so strong that equity will not allow it to be explained away or rebutted; and such deed overrules an express denial of such notice.

No attempt has been made to explain away or rebut such notice in these cases, but the attempt is made to ignore the rule itself, as clearly fatal to the relief prayed for by the complainants. The rule, however, is too well established to be shaken.—*Rogers v. Jones*, 8 *N. H.* 264; *Farnsworth v. Childs*, 4 *Mass.* 637; *Sigourney v. Munn*, 7 *Conn.* 324; *Jackson v. Neely*, 10 *Johns.* 374; *Griffith v. Griffith*, 1 *Hoff. Ch.* 153; *Sterry v. Arden*, 1 *Johns. Ch.* 267; *Green v. Slayter*, 4 *Johns. Ch.* 38; *Bellas v. Lloyd*, 2 *Watts*, 401; *McAteer v. McMullen*, 2 *Barr*, 32; *Diehl v. Page*, 2 *Green Ch.* 143; *Oliver v. Piatt*, 3 *How. U. S.* 333; *Graves v. Graves*, 1 *A. K. Marsh.* 165; *Honore v. Blackwell*, 6 *B. Monr.* 67, 73; *Hackwith v. Damron*, 1 *T. B. Monr.* 235, 237; *Christmas v.*

Mitchell, 3 *Ired. Eq.* 535; *Nelson v. Allen*, 1 *Yerg.* 360; *Mason v. Payne*, *Walk. Ch.* 459.

The defective deed being therefore fraudulent and void, it passed no title to the lands to Alanson; and there being *none in him of record* (except to the fraction), when the complainants purchased, they acquired none. As a consequence, the complainants are seeking *to create* an original legal conveyance, not to *correct a legal one* which has been found defective. The registry showed no title in their vendor, and they had notice of that fact. It is, therefore, incumbent on them to establish a valid title in him, which they fail to do, and the case shows that none existed. The conclusion from these circumstances, both of law and fact, is irresistible, that the complainants are not *bona fide* purchasers, and are not entitled to relief.

3. Complainants are chargeable with notice *in fact*, that the real title was not in Alanson. They had knowledge of such facts as were calculated to put them on inquiry; which is sufficient.

MANNING J.:

I agree with the learned judge who decided the cases in the court below, that the deed from Aaron Thomas to his son Alanson, which complainants ask to have re-formed, was made to defraud the creditors of Aaron. The evidence is conclusive on that point; and admitting complainants are purchasers in good faith, for a valuable consideration, and without notice of the fraud, or of the mistake in the deed from Aaron to Alanson, their grantor, they still have failed to make a case entitling them to relief in a court of equity. On the ground of purchasers for a valuable consideration, without notice, they asked and obtained relief in the court below, where it seems to have been taken for granted that that, of itself, is an equity on which a bill may be sustained for relief. It can be used as a defense only. It is a shield to protect a party, but can not be made a basis of

attack. It was so held in *Beekman v. Frost*, 18 *Johns.* 544, on appeal from Chancellor Kent—the Court of Errors reversing the decree of the Chancellor. In that case, as in the cases before us, the question was not raised in the court below. Spencer Ch. J. in delivering the opinion of the court, says: "In *Patterson v. Slaughter*, *Amb.* 293, Lord Hardwicke laid down the rule to be, that the title of a purchaser for a valuable consideration is not ground for relief, though it is a good defense." The Chief Justice then says: "No book of precedents, no treatise on equity, furnishes a case of a bill filed on the ground that there has been purchase without notice, and for valuable consideration." The principle is also recognized in *Jackson v. Cadwell*, 1 *Cow.* 622. Hare & Wallace, in their notes on *Leading Cases in Equity*, vol. 2, pt. 1, p. 55, say: "There can be no doubt that a defense resting on the ground of a purchase for valuable consideration, as technically made by plea, which does not allege the existence of a good title in the vendor, and which, as remarked by Lord Eldon, implies a want of title in the vendee, can not, in itself, furnish a ground for a suit or action, either in a court of equity or of law. Such a defense shows matter sufficient to exonerate the conscience of the purchaser, and entitle him to retain what he has purchased, but does not, necessarily or usually, show enough to bind the conscience of others, and become the foundation of equitable proceedings against them."

The reason of the rule has been said to be, that the party to be affected by it is entitled to the oath of the party seeking to avail himself of it. I do not think this the true reason; for a defendant may obtain the oath of complainant on a bill of discovery. The rule rests on a more solid foundation; which is, that the effect the law gives to a purchase without notice, is not a perfect right in itself, and, therefore, will not sustain an action at law or bill in equity, but may, in certain circumstances, be used by a defendant to stay the interposition of the court, on the ground that he is equally entitled with the plain-

tiff to its protection. If the right was in itself a perfect right — one that would sustain an action at law or bill in equity — no man's property would be safe. B having a horse belonging to A in his possession, sells it to C, who purchases in good faith, believing it to be the property of B, and pays him what the horse is worth. A sues C in trover for the horse. C is a bona fide purchaser for a valuable consideration, without notice, and has all the rights of such a purchaser; and yet it is no defense. But if A, instead of having a legal right to the horse, had an equitable right only that was good against B's legal right, and to enforce it was under the necessity of going into a court of equity, the court would give him relief against B, and also against C, if he purchased of B with a knowledge of A's equitable title; but it would not give him relief against C if he had purchased of B without notice of A's equity. Why would the court give relief against C in the one case and not in the other? Because, in the first case, C would have the legal title without any equity—he would have B's title, and nothing more—and A's equity would prevail against his legal title. In the other case, C would have the equity of a bona fide purchaser in conjunction with the legal title, and for that reason the court would refuse to divest him of his legal title in favor of A's equity. Or, in other words, it would leave complainant his legal remedy. This is what I understand by the equity of a bona fide purchaser without notice.

When defendant has the legal title, and plaintiff is seeking to divest him of it by reason of some equity that was a good ground for relief against his grantor, he may turn on his adversary, and say: "I purchased the estate you claim of me in good faith; I paid a valuable consideration for it, and I had no notice of your claim when I parted with my money."

In the cases before us, complainants admit Alanson Thomas, their grantor, had no legal title when he conveyed to

them, and they file their several bills to re-form the deed from Aaron to Alanson, so as to vest the legal title in him, and, through him, in themselves respectively, to the part of the premises severally purchased by them of Alanson. They stand in the precise position mentioned by Hare & Wallace in the note to which I have referred, of "purchasers for valuable consideration as technically made by plea, which does not allege the existence of a good title in the vendor" (Alanson Thomas, their grantor), "and which, as remarked by Lord Eldon, implies a want of title in the vendee." In the present cases, the want of title in complainants is admitted, not implied; and they come into a court of equity to get a title.

As no relief can be given solely on the ground that complainants purchased in good faith without notice, is there any other ground on which the relief asked may be granted? As purchasers from Alanson Thomas, they have all of his right at law and in equity, and nothing more. But this court would not correct the mistake in favor of Alanson, on a bill filed by him, for he was a party to the intended fraud of the father. Neither can it in favor of complainants, his grantees, without conceding to them greater rights than Alanson had, and making itself a party to the intended fraud. It matters not there are no creditors, even if such be the case, now to be injured. It is the corrupt intention, the illegal object the Thomases had in view — the wrong intended, and not the wrong done — that stays the hands of the court. If the court would not have corrected the mistake the instant it occurred, it will not now; for, by correcting it now, it would give effect to the deed from its execution. To give effect to it on any day subsequent to the time the parties intended it should take effect, would not be enforcing the original contract, but making a new contract for the parties.

A court of equity will not decree a specific performance of an illegal contract. On what principle, then, can it correct a mistake in such a contract?

There is another ground, it seems to me, aside from the intended fraud, why the relief asked should not be granted. It is the want of a consideration for the deed from Aaron to Alanson. The deed was intended to be the execution of a voluntary contract. And as a court of equity will not decree the performance of such a contract (*Colman v. Sarrell*, 1 *Ves.* 50; *Antrobus v. Smith*, 12 *Ves.* 39; *Edwards v. Jones*, 1 *Myl. & Cr.* 226; *Ellison v. Ellison*, 6 *Ves.* 656; 2 *Spence Eq. Juris.* 285, *notes b and c*), I can not well conceive of a case, where there is no intervening equity, in which it would correct a mistake in a defective execution of it. The most complainants can claim, even in a court of equity, under their deeds from Alanson, is, that they are in equity the assignees of such contract. And, as assignees, they would take it subject to all its vices, and to all equities existing between the parties to it.

Complainants are not bona fide purchasers without notice. In law, they could not be said to be ignorant of the mistake when they purchased. The deed from Aaron to Alanson was recorded, and they are chargeable with notice of every thing that appears on the face of the record. If they purchased without examining the record, or seeing whether it described the land they were about to purchase, it is their misfortune, and, unhappily for them, one that this court can not correct. If it be said the registry is notice only to subsequent purchasers from the same grantor, there is still another principle of law which charges them with notice. It is, that a vendee is deemed to have notice of what appears on the face of a conveyance through which he claims title, whether it be in a conveyance to his grantor, or other prior conveyance in the chain of his title.

Aaron Thomas, in his lifetime, frequently said he had conveyed the farm to his son, and made the same statement under oath in a court of justice. Such declarations were evidence to prove the mistake in the deed from him to Alanson, but not to disprove the fraud with which the

deed was tainted. They were consistent with the fraud, and were doubtless made with intent to conceal it. Nor can it be said they liken complainant's case to a purchase of a third person, in the presence of the real owner, under an impression such person was the owner, and the cotemporaneous declaration of the owner to the same effect. For it does not appear the declarations of Aaron Thomas, referred to, were ever made to, or in the presence of, complainants, or either of them. Aaron Thomas was not present, nor could such declarations have been made by him, when complainants purchased. He died in 1847; and it was on the 14th of February, 1848, Alanson deeded to Quirk, and on the 9th of September, 1850, he deeded to Greusel. I am therefore unable to see any equity in favor of complainants growing out of the declarations of Aaron Thomas. If there be any, in what does it consist, and where is it to be found? Certainly not in what Aaron Thomas said or did in the presence of complainants, but in what they may have understood from others he had said and done. This is public rumor — nothing more; and if public rumor can create an equity on one side, I know no reason why it may not on the other. Complainants forget, while calling in public rumor to assist them, that her testimony, like a two-edged sword, cuts both ways — that while she testifies in favor of a conveyance, she at the same time states it was made to defraud creditors. On what principle can one part of her story be received, and the other rejected? The truth is, there is no equity growing out of the declarations of Aaron Thomas, one way or the other, and I can not see that they have any thing to do with the case, except for the purpose I have already stated.

The Statute of Frauds, it is said, declares the deed void as against creditors only, leaving it good between the parties to it. The statute, in this particular, is declaratory of the common law only, by which all contracts made in violation of law, or contrary to public policy, are

illegal, and consequently void; and when executory, will not be enforced, or relieved against when executed — the law treating the whole transaction as void and of no effect, in the former case, and giving full force and effect to it between the parties in the latter — when it has been executed in part, giving it effect so far as it has been executed, and holding it void so far as it remains executory. —*Nellis v. Clark*, 20 *Wend.* 24, and 4 *Hill*, 424. In that case the Statute of Frauds, the common law, and the validity and effect of such contracts, were fully considered, and all the cases bearing on them referred to and commented on by Cowen J., in the Supreme Court, and by Chancellor Walworth, in the Court of Errors. Cowen, J., in delivering the opinion of the Supreme Court, says: "It" (the statute) "declares all contracts, both executory and executed, to defraud creditors, *void only as against the latter*. It was wanted for nothing else. It was but declaratory; and were it not for the fourth section, giving additional sanctions, the common law would have reached every purpose. Now, had the statute stopped with declaring the contract simply void, it would have changed the common law, avoiding one class, viz., executed contracts, which that law would not interfere with. Therefore, the statute withdraws itself entirely from any interference between the parties, with the intent to let the common law take its own course." Chancellor Walworth, in his opinion, says: "A sale or assignment for the purpose of delaying, hindering, or defrauding a creditor in the collection of his debt, was illegal at the common law, and is, in itself, immoral, and against public policy. And the statutes declaring such transactions void as against creditors, are only in affirmance of the common law on that subject. The word *only*, as used in the statute of Elizabeth, and in our revised statute of 1787, on this subject, was not intended to render executory contracts of that character legal and valid between the parties thereto. But it was inserted to prevent the

general provisions of the statute from changing the common law rule, as between the parties themselves, in relation to executed contracts."

The decrees of the court below, I think, should be reversed, and the bills be dismissed.

CAMPBELL J.:

As I concur entirely in the views expressed by my brother Manning in these causes, I do not propose to enter into any extended argument on the legal questions involved.

It is very manifest that Alanson Thomas had no title to any land not covered by his deed. If he had any rights outside of the land there described, they arose not from the deed, but from circumstances which entitle him to relief independent of it—or, in other words, from the equity to have a new deed conforming to some right which was not perfectly assured by the deed as drawn and executed.

The complainants undertook to purchase from Alanson, and they, in like manner, could only obtain a *legal* title to what was covered by the deed under which he claimed. They took a conveyance from him of lands not embraced in that deed, and, so far as depends on any right obtained merely from him, that conveyance would be operative to pass no more than he possessed, which would be the legal estate in the lands he owned, and any claim he might have to the lands he did not legally own.

It certainly requires no great amount of reasoning to show that Alanson Thomas had no rights which would be enforced by any court of law or equity. The ground of relief against mistakes is placed upon the same basis with that for specific performance, and the mistake is corrected by establishing the original right to a conveyance, or other instrument, under some agreement which, by reason of the mistake, has not been fully carried out. To make out the mistake, it is necessary to make out the contract, in order that the court may see how far it has failed in the per-

formance. In this case, not only is the deed shown to have been made for the express purpose of defrauding creditors, but there is not the slightest evidence of any previous bargain, or even conversation, between Aaron and Alanson Thomas, on the subject of making such a deed at all. Nor have we any evidence whatever of when it was delivered, or what took place on the delivery. While the case shows thus clearly the fraudulent character of the transaction, and while it shows as clearly that no consideration passed, or existed even, for the imperfect deed, there is an entire absence of testimony from which we may gather any of the facts attending the iniquitous arrangement. All of the testimony on the subject is of subsequent acts and declarations, made with the plain design of blinding creditors, and from which it is as easy to infer that the description was made intentionally erroneous, in order to deceive creditors, as that Aaron Thomas designed putting himself entirely in his son's power, and leaving no provision for his other heirs. But were the actual understanding, and a mistake, plainly proven, it would not avail any more to entitle Alanson to relief. He would not have the shadow of an equity.

The equities upon which the complainants rely, are not Alanson's equities, but entirely outside matters. They depend really upon acts said to have been done by Aaron Thomas, which, it is claimed, should operate as equitable estoppels upon him and his heirs. And here, I think, a little confusion has arisen in assuming that the case stands as it would have stood had he lived. Whatever rights exist against an ancestor, will undoubtedly, as a general rule, exist against his heir. But here, Aaron died before either of the complainants acquired any rights. He never made any representations to them whatever. And I have been unable to find any rule of law which authorizes a person to hold another liable for acts or representations not made to himself, or to some one under whom he derives

title, who has innocently acted on, and been deceived by, them. The complainants had no rights against Aaron Thomas by reason of any such representations or acts, and their grantor had none. They can, therefore, in my opinion, have none against his heirs.

CHRISTIANCY J.:

After a most careful consideration of these cases, I am unable to agree in the opinion which has been given by my brothers Manning and Campbell.

I think we are all substantially agreed upon the following facts,—at all events, I think they are sufficiently established by the evidence:

First, That the deed from Aaron Thomas to Alanson Thomas was fraudulent as to creditors:

Second, That there is no sufficient evidence that complainants had any actual notice of the fraud at the time of their respective purchases:

Third, That complainants are purchasers for a valuable consideration:

Fourth, That there was a mistake in the deed from Aaron to Alanson Thomas—both parties understanding and treating it, during their respective lives, as a deed of the whole farm, including the lands claimed by complainants—and that they both died in ignorance of the mistake; that from the date of the deed in 1838 till the death of Aaron in 1847, both he and Alanson Thomas represented the latter to be the owner of the farm under said deed; that though both remained in possession, Aaron, for the greater portion of the time, had actual possession of but a small part, where he resided, and the business was carried on chiefly, if not entirely, in the name of Alanson, to whom Aaron directed persons wishing to transact business in respect to the farm or farm produce, and persons wishing to lease or purchase any parts of the farm, as well as those who applied to assess or collect taxes thereon, declaring to such persons that the

farm belonged to Alanson; that Alanson leased out portions of the farm in his own name, with the full knowledge of Aaron, and without objection from him; that Aaron, in fact, took especial pains to induce the public to understand and believe that Alanson was the owner; that he twice directly testified, in a court of justice, that the farm belonged to Alanson,—once in his affidavit in the suit with Hurd, in February, 1846, and once in his answer to a bill in chancery by Warren, in January, 1845; and that, in this suit, Aaron disclaims all title, saying (under oath) that he had conveyed to Alanson, and that the latter had been in possession from the date of the deed; that in 1839, in an action of trespass before Dort, justice, he disclaimed any interest in the lands leased by Alanson to Lawrence and Sherman, respectively, which he testified had been so leased by Alanson to them:

Fifth, That complainants had no notice of the mistake in the deed at the time of their respective purchases from Alanson, in 1848 and 1850, except such constructive notice as is by law to be implied from what appeared on the face of the deed and record, by reason of their claiming through the deed in question:

Sixth, That Mr. Backus, who was the counsel and professional adviser of both Aaron and Alanson, from 1838 or 1839, till the time of their deaths, frequently had both the patent and the deed in question in his possession, and never discovered or knew of the mistake,—both parties always speaking of the farm as Alanson's, and never having intimated to him that the deed had been made to defraud creditors; that both complainants, before purchasing from Alanson Thomas, applied to, and inquired of, him, whether they could get a good title; that he informed them a conveyance from Alanson would be good, and that he so believed:

Seventh, That Alanson continued in the open and peaceable possession of the land in question after the death of

Aaron, and up to, and at the time of, the respective conveyances to complainants:

Eighth, That the mistake in the description was first discovered by Titus Dort, administrator of Alanson, after the death of the latter, and some time after the respective conveyances to the complainants—the latter being then in possession, improving and using the land as their own.

If the creditors of Aaron Thomas, or subsequent bona fide purchasers from him, were to be affected by the correction asked by the bills, and such creditors or purchasers were opposing the relief, a very different question would be presented, and, in such case, perhaps no relief could be given. But the relief is asked only against the heirs of Alanson Thomas and the administrator on his estate, and is opposed only by them. Heirs have none of the equitable rights of purchasers who have paid their money for the land, but, upon principle and authority, stand precisely in the condition of their ancestor—having no greater rights—and can avail themselves of no defense which would not have been equally available to him (*Jackson v. Garnsey*, 16 *Johns.* 191); and there being no legal evidence in the case of any debts against the estate—nothing from which debts to any definite amount could be inferred, if any mere inference were permissible, nor any thing to show that the administrator is seeking the property at the instance of creditors—the administrator stands in no better position than the heirs.—*Osborne v. Moss*, 7 *Johns.* 163. Both the above were cases of fraudulent conveyances by deceased, in one of which the heir, and in the other the administrator, sought to set up the fraud in defense; but in both it was held incompetent.

I shall therefore consider the cases before us as if these bills had been brought against Aaron Thomas himself. And looking at the facts of the case in the light of plain common sense, and applying those principles of honesty and fair dealing universally recognized as governing the ordinary business transac-

tions of men, the case would certainly seem to present a very strong and clear equitable right in the complainants as against Aaron Thomas, and, upon every principle of justice, to entitle them to a correction of the mistake. And if a court of equity can not grant relief in such a case, it must be deplorably infirm in the administration of remedial justice. Just reasoning should lead to just results; and any course of reasoning which leads to a result opposed to the just rights of the parties, should, at least, be carefully scrutinized before it is admitted as established law.

I propose to examine the objections urged to the relief in these cases, and to show, also, the ground upon which I think it should be granted.

One principal ground upon which my brethren feel bound to deny relief is, that the contract or transaction between Aaron Thomas and his son, Alanson, was fraudulent as to creditors, and therefore illegal between the parties at common law, as opposed to public policy; and that courts will not enforce an illegal contract.

Whether the contract, as between the immediate parties, was illegal in that sense which would prevent Alanson Thomas from sustaining an action upon it against Aaron Thomas, is by no means well settled by the cases; for, though we admit that the statute 13th Elizabeth, and our own statute in reference to fraudulent conveyances, are only in affirmance of the common law; it does not follow that the common law went further than the statute, and made such contracts, even when executory, void or illegal as between the parties, so as to enable one of the parties to set up his own fraud in his own defense. It is true it was so held in *Smith v. Hubbs*, 1 *Fairf.* 71; in *Norris v. Norris' adm'rs*, 9 *Dana*, 317, and by Cowen and Bronson, judges, against the opinion of Nelson, chief justice, in *Clark v. Nellis*, 20 *Wend.* 24; and this decision was sustained in the Court of Errors (4 *Hill*, 424), by a vote of ten to nine—the Chancellor, who voted for reversal, concurring with the Supreme

Court in their view of the law, but thinking it inapplicable to that case. While, on the other hand, directly the opposite view of this question has been held by the Supreme Court of Indiana, in *Findley v. Cooley*, 1 *Blackf.* 262, and the Supreme Court of Massachusetts in *Fairbanks v. Blackington*, 9 *Pick.* 93, and, as I think (notwithstanding the criticisms to the contrary), by the Court of King's Bench, in *Hawes v. Leader*, *Cro. Jac.* 271. And in the last case, and all the following cases, among many others, the contract has been expressly declared to be good between the parties, and void only as to creditors, without any reference by the court to any distinction between the case of an executed and executory contract.—*Jackson v. Garnsey*, 16 *Johns.* 191; *Drinkwater v. Drinkwater's adm'r*, 4 *Mass.* 354; *Cushwa v. Cushwa's lessee*, 5 *Md.* 45; *Broughton v. Broughton*, 4 *Rich.* (*S. C.*) 492.

It is true those who claim such contracts to be illegal as between the parties, undertake to base these decisions on the ground that the contracts in question were executed, and not executory. But while this distinction is well founded in principle, when applied to cases where the contract has been fully *performed*, so as to place the party claiming under it, without the aid of the court, in full possession of the thing illegally contracted for, yet, when applied to the class of cases last cited, where, though the contract is completed, the party has obtained nothing by it, and never can obtain any thing without the aid of the court, the distinction alluded to becomes merely verbal and technical, without any foundation in principle. The rule which forbids the maintenance of a suit upon an illegal contract while executory, is based upon the ground of public policy; that courts, to discourage fraud, should refuse all aid to parties seeking to derive advantage from their own illegal acts; yet, without the aid of the court, the personal property in *Hawes v. Leader*, the land in *Jackson v. Garnsey*, the only substantial benefit, the illegal end and object of the contracts, could

never have been attained, and the contracts would have been mere waste paper. If, therefore, the contracts were illegal, the court in these, and all other cases of this class, directly aided the guilty party in violating the law of the land; and the merely verbal distinction between executed and executory contracts can not alter the fact. I am well satisfied, therefore, from these considerations, as well as from the fact that the courts expressly declared the contracts to be valid between the parties, and placed the decisions on the broad ground that a defendant shall not set up his own fraud in defense, that the courts did not consider them illegal contracts in any sense; and that subsequent judges, in carrying out a favorite theory of their own, have given reasons for these decisions never thought of by the courts who made them, and by no means flattering to their good sense. In every substantial sense, within the principle of the rule which refuses to carry into effect illegal contracts, all the deeds and contracts referred to in this class of cases remained executory. To hold otherwise would be to hold that parties to an illegal contract might, by formal ceremonies always in their power, by the necromancy of ink and paper, or by the enchantment growing out of the delivery of a pewter dish (as in *Hawes v. Leader*), get entire control of the courts, and compel them to aid in giving effect to illegal transactions.

But suppose it be admitted that the contract, as between Aaron and Alanson Thomas, was illegal, so that the latter could maintain no action upon it: it can not prejudice the complainants here. It is true that where a statute declares a contract absolutely illegal and void, to all intents and purposes, as has sometimes been done in reference to notes and contracts given for a usurious or gambling consideration, they have been held void in the hands of a bona fide holder. But contracts are treated as void at common law on the ground of public policy only; and the rule, *ex turpi causa non oritur actio*, is subject to all the limitations and

qualifications which sound public policy may dictate; and courts will sustain, or refuse to sustain, an action upon such contracts, as may be most consistent with sound policy, and best calculated to discourage and suppress such violations of the law.—*Story Eq. Juris.* §§ 298 *to* 300, *and cases there cited; Starke's ex'rs v. Littlepage*, 4 *Rand.* 368, *per Green J.*; *Cushwa v. Cushwa's lessee*, 5 *Md.* 52 *and* 53; *Sedgwick v. Sedgwick*, 6 *Gill*, 29.

One qualification of the rule is, that the rule itself shall not be made an engine of wrong and injustice, in the hands of the wrong-doer against innocent parties. It can never be good policy to punish the innocent for the crimes of the guilty. Hence, the rule can not be set up to the prejudice of any party innocent of all participation in the wrong, or whose rights have been acquired without notice of it. I am not aware of any case, at law or in equity, where a contrary doctrine has been held, unless the illegality or fraud occurred directly in the course of judicial administration; and if there be any such, I can not esteem it as good law or good sense. In some of the cases, general language has been used, which, abstractly considered, might be supposed to extend the rule to innocent parties; but when considered with reference to the cases before the courts, it will be found to apply only to the parties in fault. The rule is laid down, with its proper limitations, by Lord Brougham, in *Armstrong v. Armstrong*, 3 *Myl. & K.* 64; and see *Fivaz v. Nicholas*, 2 *M., G. & S.* 512 *to* 514; and Cowen J. admits this in *Clark v. Nellis*, 20 *Wend.*; and the Chancellor in the same case (4 *Hill*). The rule in question is the same which declares that a party "must come into court with clean hands"—"that no polluted hand shall touch the pure fountain of justice"—that the court will not aid a party seeking the reward of his iniquity. And in *Holman v. Johnson*, *Cowp.* 343, a leading case on the subject, Lord Mansfield says, in speaking of the ground on which the defense of illegality is allowed, "It is not for the sake of the defend-

ant, but because they will not lend their aid *to such a plaintiff*."

And, as against an innocent party, "no man shall set up his own iniquity as a defense, any more than as a cause of action"; per Lord Mansfield in *Montefiori v. Montefiori*, 1 *W. Bl.* 363; see also per Abbott Ch. J. 2 *B. & Ald.* 368; and see argument 4 *Bing.* 639; and in *Doe v. Roberts*, 2 *B. & Ald.* it was held that a party could not set up his own fraud in defense against his own deed, though the fraud amounted to illegality, and the plaintiff was a party to it.—See *Cushwa v. Cushwa's lessee*, 5 *Md.* 45, 54; *Broughton v. Broughton*, 4 *Rich.* 492.

Not only is it incompetent to set up such a defense against an innocent party, but the law will discriminate as to the degrees of guilt, as between the immediate parties; and it is well settled, both at law and in equity, that to enable a party to a transaction merely illegal as against public policy, to show his own fraud in his own defense, the plaintiff must not only be *in delicto* but *in pari delicto*. And it is in this class of cases that the rule *in pari delicto* especially applies; and though the plaintiff may, to some extent, have participated in the illegal transaction, yet, if not equally guilty with the defendant (or at least if there be strong mitigating circumstances in his favor) the latter will not be allowed to avail himself of the defense.—*Skaife v. Jackson*, 3 *B. & C.* 421; *Smith v. Cuff*, 6 *M. & S.* 160; *Alsager v. Spalding*, 4 *Bing. N. S.* 407; *Horton v. Riley*, 11 *M. & W.* 492; *Turner v. Hoole*, *Dow. & Ry. N. P. C.* 27; *Smith v. Bromley*, *Doug.* 696; *Osborne v. Williams*, 18 *Ves.* 379; *Whaley v. Norton*, 1 *Vern.* 483; *Bainham v. Manning*, 2 *Vern.* 242; *Anandale v. Harris*, 2 *P. Wms.* 432; *James v. Bird's adm'r* 8 *Leigh*, 510 (referring to case of *Austin v. Winston*, 1 *Hen. & M.* 33); *Story Eq. Juris.* § 300; *Adams v. Barrett*, 5 *Ga.* 404.

To apply these well settled rules to the cases before us —are the complainants *in pari delicto* with Aaron Thomas in this fraud? In what violation of law have they participa-

ted? What stain is discoverable upon their hands, more than upon the hands of this court? I can see none, and my brethren do not claim to have discovered any. To apply the rule *ex turpi causa* to these complainants, or to allow them in any way to be prejudiced by the iniquity of Aaron Thomas, and especially to allow him to set up his own iniquity against these complainants, who are innocent of all participation in it, would, it seems to me, be extending the rule far beyond the policy which dictates, and should always control, it—converting a broad principle of public policy into an arbitrary technicality, blind alike both to policy and justice; confounding all ideas of right and wrong, and punishing the innocent for the faults of the guilty—thus making the letter of the rule defeat its spirit and its object, and the rule itself an efficient engine for the perpetration of the fraud and injustice it was intended to prevent.

There is nothing arbitrary or technical in the rule in question in a court of law; and I am not willing to close my eyes to the just rights of parties, for the sake of erecting a new, arbitrary barrier to those rights in a court of equity.

The law, I think, need not fear defilement from coming in contact with fraud, for the purpose of suppressing it, or protecting the innocent. I can not resist the conclusion, that it will tend much more to the suppression of fraudulent contracts of this kind, and is therefore more in accordance with sound public policy, to enforce them against the fraudulent party himself, than to allow him, not only to escape the evil consequences, but actually to reap an advantage from his own fraud as against innocent parties. No one, in such case, can suffer any detriment from the enforcement of the contract but the guilty party himself, and he has no right to complain: as he sought the advantage, let him bear the burden of his iniquity.

I think, therefore, this defense is wholly incompetent for these defendants, as against these complainants; that the court have no right to listen to it as against the latter, and

that the case is to be considered in all respects as if there had been no fraud, and the contract between the Thomases had been in good faith and for a good consideration.

As to the objection of a want of consideration between Aaron Thomas and his son, I am at a loss to perceive how that can be raised by Aaron Thomas, any more than the fraud; or how he can raise it at all. The transaction was single and entire, and for the purpose of defrauding creditors. It was without consideration, simply because it was fraudulent; and Aaron Thomas is not entitled to have this single transaction divided up into two parts, one fraudulent and the other innocent, so as to allow him to claim the protection due to an innocent voluntary vendor: besides, he has said to all the world by his deed, and to these complainants in particular, who have bought upon the strength of it, that he had received the consideration of "five thousand dollars, good and lawful money of the United States"; and as they had no notice to the contrary, and bought in good faith (beyond all question as to this point), he would be estopped to deny the consideration as against complainants, had there been no fraud, and the conveyance had been merely voluntary. In *Frazer v. Western*, 1 *Barb. Ch.* 220, it was decided that even where a purchaser has notice that the deed to his grantor was voluntary and without consideration, this does not make it his duty to inquire, at his peril, whether it was fraudulent as to creditors; and that the legal presumption is that such conveyance is valid where a relationship of blood or marriage exists between the parties; and see *Wyche v. Greene*, 11 *Ga.* 159, where a mistake was corrected in a voluntary conveyance.

But it is further objected that, as to so much of the land as is not actually included in the deed of Aaron to Alanson, owing to the mistake, the transaction must be put upon the ground of a contract to convey; that this is a mere chose in action, and complainants, being merely assignees, can stand in no better position than Alanson Thomas himself. No proof

of any actual previous agreement in such case need be given; but what was the understanding of the parties, and what was intended to be conveyed, may be inferred entirely from the deed itself, the subject-matter, the surrounding circumstances, and especially the subsequent acts of the parties. — *Story Eq. Juris.* §162; *Farley v. Bryant*, 32 *Me.* 474; *Wyche v. Greene*, 11 *Ga.* 159; and see *Showman v. Miller*, 6 *Md.* 479, where the agreement was inferred wholly from the deed and the surrounding circumstances, against direct evidence of a different agreement, and the mistake corrected.

That, as a general rule, an assignee of a chose in action takes it subject to all equities existing between the original parties, cannot be doubted. But if this rule were applicable to such cases as the present, as I think it is not, it may well be doubted whether the fraud of Aaron Thomas can constitute an equity in his own favor, as against complainants, who have not participated in the fraud; especially as such a defense is never allowed to a defendant on his own account. But it is said a purchaser of a chose in action must be presumed to have notice of what the rights of the parties to it really were. This is doubtless true, as a general rule (so far, at least, as respects any defense allowed on the defendant's own account), and when the vendor *understands* that he is selling, and the purchaser that he is buying, a chose in action; because, in such case, every purchaser knows he is getting nothing except the right of action existing between the original parties; and hence it becomes his duty to inquire into those rights, and it is his own folly if he does not. But where, as in this case, both the vendor (Alanson Thomas) and the vendees (complainants), understood that the one was selling, and the others that they were purchasing, the *land* itself, *instead* of a mere *contract* respecting it; and especially where such was the understanding of the original transaction by the parties to it, and by all parties throughout, and the purchasers have paid their money for the land itself, and only failed to obtain the title in consequence of

a mistake in the deed of the first grantor, alike unknown to all the parties—in such a case, it seems to me, the reason of the rule in question substantially fails; and that, to hold the parties to the ordinary rule applicable to a chose in action, would be to bind them by a contract which none of the parties ever assented to, or intended to make. *Non videntur qui errant consentire;* and the rights and obligations of the parties should be put upon the basis of the contract they intended to make, and believed they had made,—the basis of a conveyance of the land itself.

And the rights of the complainants should be governed, as to notice of every thing affecting the rights of prior parties, by the same rules which apply to conveyances of land. As such bona fide purchasers, the rules applicable to a chose in action are no way applicable to them (see *Leading Cases in Eq. vol* 2, *pt.* 1, *pp.* 51 *and* 52); and they stand upon grounds equally as strong as those which protect the bona fide holder of negotiable paper; and are no more bound to inquire into the consideration or the secret motives of the parties to any of the prior conveyances, especially where their immediate grantor is in open and peaceable possession, and no want of consideration, and no illegality or unfairness, appears on the conveyance.

A bona fide purchaser is a peculiar favorite of courts of equity, and those courts have gone, perhaps, further in protecting such purchase than in protecting any other right cognizable in equity.—See *Leading Cases in Eq. ed. above cited, pp.* 37 *and* 48; *Sugden V. and P.* 11*th ed.* 924 *to* 1013. And though the statute expressly declare a fraudulent conveyance *void as against creditors*, and make no exception in favor of bona fide purchasers, yet such purchasers will hold even against *creditors.*—*Anderson v. Roberts*, 18 *Johns.* 516; *Jackson, v. Terry*, 13 *Johns.* 471; *Boyce v. Waller*, 2 *B. Monr.* 91; *Frazer v. Western*, 1 *Barb. Ch. R.* 220; *Lee v. Abbe*, 2 *Root*, 359 (and such is the rule expressly enacted by our own statute, *Comp. L. vol.*

2, *p.* 948, § 3202, in force when the conveyances to complainants were made). But if a statute declare negotiable paper absolutely void, it is void in the hands of a bona fide holder.

But it is objected that complainants can not claim to be bona fide purchasers, because the deed was recorded, and they were bound to take notice of any defect of title appearing on the record. I am at a loss to perceive how the record of the deed can have any bearing upon this question. The purpose of the registry law, as I understand it, is not to give notice, as between a grantor and his grantee, immediate or remote, for the protection of the grantor, but as between prior and subsequent purchasers and incumbrancers from the same grantor, and for the protection of purchasers. As between Aaron and Alanson Thomas, or as between the former and the grantees of the latter, the question would be precisely the same if the deed had never been recorded.

I admit the general rule, that a purchaser is bound to notice such defects of title, and such incumbrances, as appear on the face of any deed through which he derives title, whether it appear directly or by reference to some other paper mentioned in it. This was the rule at common law, and does not depend upon the registry. But it will not, I presume, be contended, that under this rule, the deed itself could give the complainants notice of the fraud or illegality, as this does not appear on the deed, expressly or by reference; much less that complainants could thereby be made *particeps criminis* in the original illegality. Constructive notice, implied by this rule, is purely a fiction of law, adopted for wise purposes, and wholesome in its operation when confined within its proper limits: but *in fictione juris, semper equitas existit;* and to extend it so far as to make an innocent man *particeps criminis* in a past transaction of which he is actually ignorant, would make it an engine of oppression.

But it is contended, that under this rule, the deed of Aaron is notice to complainants of the mistake in the deed itself;

and that, therefore, they are not bona fide purchasers, in respect to this mistake. I frankly admit I was at first deceived by the plausibility of this position, but further reflection, and a most careful investigation, have satisfied me that I was in error, and that the position is unsound; that the deed can not, as between these parties, be held to be notice of a mistake like this, without leading to gross absurdity. If the question had arisen between these complainants and subsequent purchasers from Aaron Thomas, the rule contended for might apply. But this point, being in no way dependent upon, or affected by, the fraud, can be no stronger against complainants than it would have been against Alanson Thomas, had he purchased of Aaron Thomas in perfect good faith, and the same mistake had occurred. If the deed itself was notice of this mistake to complainants, then, much more, or, at least, equally, was it notice to Alanson Thomas, who took the deed, kept it in his own possession, got it recorded, and held under it till the day of his death (twelve years after) without any suspicion of the mistake. I can see no ground for holding, in such a case, that the second purchaser is bound to notice such a mistake in the deed, more than the first, who takes it directly and holds under it. And the result will be, if the deed itself is held to be conclusive evidence of notice of the mistake in the deed, and the purchaser taking under it is to be held to have taken it with knowledge of the mistake, then the very fact that such a mistake has occurred in the deed, will be a bar to its correction; and the whole jurisdiction of chancery, on this subject, is at an end. I can not, therefore, admit that a mistake of this kind, when the question arises, as in this case, without intervening equities, is one of those defects of title of which a purchaser is bound, at his peril, to take notice. It is simply and purely a mistake; and a subsequent purchaser can no more be bound to notice it, or, as between these parties, to suffer from its non-discovery, than the party to whom it is directly made and delivered. Gross negligence

might possibly be a bar to such correction in either case. But the mistake in this case was eminently calculated to mislead. In the description, as contained in the patent, there are fourteen courses (and as many distances). The mistake in the deed consists in omitting four of these courses and distances. This is precisely the kind of mistake which would be most likely to be overlooked by any one but a surveyor; few men, not familiar with surveying, would be able to carry these various courses and distances in the mind through the entire description, so as to discover any discrepancy between the description and the shape of the tract upon the ground. The quantity mentioned in the deed agrees, to a fraction, with that mentioned in the patent,—437 6-100ths acres. The mistake therefore could only be discovered, by ordinary men, by a careful comparison with the patent; and it is not too much to say that a large majority of business men, and even those who are in the habit of examining titles, would be liable to be deceived by the mistake. And it can hardly lie in the mouth of Aaron Thomas to allege gross carelessness in these complainants, in not discovering it, when he himself, who caused it to be prepared, and executed it, lived and died in ignorance of the mistake, and twice, at least, testified to facts which must have been willful perjury, if he was aware of the error.

But there are also other reasons why Aaron Thomas can not insist upon holding these complainants bound by this mistake, and why he should not be at liberty to object to them the want of consideration, or his own intended fraud upon creditors. His own acts tended to lead them into the error, and to disarm them of any suspicion of fraud. I do not allude to any merely verbal statements of Aaron Thomas made to persons not shown to have communicated with complainants, and who did not, under the influence and belief of such statements, in any way advise or mislead the complainants in respect to the title. Nor are complainants to be affected by rumors and neighborhood reports or surmises.

If, without proof, they are presumed to have known these, then equally must they be presumed to have known the testimony of Aaron on the public records of the courts. But I refer especially to the matters stated in the four following points as tending directly to mislead complainants:

1st. The description in the deed, as I have shown, was in its nature calculated to deceive, and did deceive them, as it had deceived him, as well as Alanson and the widow and heirs. And if the error in the deed was intentional on his part, to defraud creditors, and to induce the belief that the whole had been conveyed, when he knew the contrary, the case is still the worse for him and his heirs; as it not only admits that the error was such as he supposed likely to deceive, but that he actually intended it should deceive. He must be presumed to have intended the natural consequences of his acts. The trap, though set for creditors, was so set and baited as to be equally dangerous to purchasers; and when the latter have been caught, shall he come into court and seek to avoid the consequences of his acts, on the ground that he only intended to entrap creditors? When courts become more solicitous for the protection of the avowed swindler (as this suggestion would make him) than of his innocent victim, it will be time enough to listen to the plea. But this suggestion is wholly inadmissible, as it is against his own oath, twice repeated, and there is nothing in the case to warrant it.

2d. He represents on the face of the deed that he had received five thousand dollars in cash, in payment for the land; and no man can believe that, but for this deed, complainants would ever have purchased the lands from Alanson Thomas.

3d. The fact that he put Alanson in possession, with all the apparent *indicia* of ownership, recognized him as the owner nine years during his life, and left him in peaceable possession at his death, and that this possession continued, open and visible to all the world, up to the time of the purchase by these complainants.

All these are continuing representations of Aaron Thomas, which did not end with his death, but tended as directly and as strongly to induce complainants to act upon them as any representations he could have made, during his life, to complainants in person. His death took nothing from the effect of these acts and representations; and to hold that his heirs are not to be bound by them, because the purchases were not made till after his death, would, in my view, be little less unreasonable than to hold that a grant by deed could not bind his heirs. It is doubtless true, that if the heirs had discovered the mistake after the death of Aaron, and had taken possession of the land omitted by the mistake, or had instituted proceedings for its recovery from Alanson, before complainants purchased, they might not have been estopped by these acts and representations of their ancestor; because complainants would not then have been deceived; the possession by the heirs, or the pendency of the suit for its recovery, would have been notice to them of the claim of the heirs, and consequently of the mistake.

I can not admit that there is any principle of law which limits the effect of such acts and representations to the period of a man's own life, or which prevents his heirs being bound by them after his death, wherever he would be bound by them if living. Nor that there is any principle which confines the rule of equitable estoppel to such representations as are made directly, and in person, to the parties acting upon them. Whether direct or indirect, in the presence or in the absence of the parties, is immaterial, so that they are calculated and intended to produce, and do produce, the end.

But, 4th, it is also in evidence that Mr. Backus, the counsel and adviser of Aaron and Alanson during their lives, and who frequently had both the deed and the patent in his possession; who had alway heard both speak ofs the farm as Alanson's, and never heard from either any fraudulent purpose connected with the deed, nor ever discovered the mistake,—was inquired of by these complainants as to the title

before they purchased, and he informed them that a deed from Alanson would be good.

It is true that, on the death of Aaron Thomas, the powers of Mr. Backus, as his attorney, ceased. But his death did not obliterate the impression, nor take back the information he had imparted; and Mr. Backus doubtless acted upon that information in perfect good faith, and was entitled to act upon it, when he advised these complainants that the title of Alanson Thomas was good. If Mr. Backus, and, through him, the complainants were misled, the acts and representations of Aaron Thomas tended to mislead them.

I think, therefore, that Aaron Thomas can be no more at liberty to insist upon his fraud, the want of consideration or the mistake in the deed, as against these complainants, than if he had been present at the sale by Alanson to them, advising it, and giving the strongest assurances of Alanson's title. The case is even stronger against him than any verbal representations could have made it, because no one would be so likely to rely upon any verbal assurances, as upon a solemn deed of conveyance, duly executed, acknowledging full consideration, and followed by many years of peaceable possession under it.

It is well settled at law, that where goods are obtained by fraud, under circumstances which would render the sale void between vendor and vendee, and the vendor has furnished, however innocently, to the vendee any of the evidences of ownership, calculated to mislead a purchaser, and the goods are purchased *bona fide* from the fraudulent vendee, relying upon such evidences of ownership, such purchaser will hold against the innocent vendor.—*Ash v. Putnam*, 1 *Hill*, 307; and see *Rowley v. Bigelow*, 12 *Pick.* 307 (which perhaps goes too far); *Peabody v. Fenton*, 3 *Barb. Ch. R.* 451, and *Lupin v. Marie*, 2 *Paige*, 169.

In the case of *Teasdale v. Teasdale*, *Sel. Ca. Ch.* 59, it was decided that, even where a person has been induced to become a purchaser by the misrepresentation of another

ignorant of his own right, but where he ought, as a prudent man, to have had notice of it, equity will grant relief to the purchaser.

But the cases before us are much stronger, and it seems to me, stand upon the ground of that numerous class of cases, where the party, knowing his rights, willfully conceals them, encourages another person to purchase, and, when the purchase has been made on the strength of the representations, seeks to take advantage of his own wrong to the injury of the purchaser; as in *Savage v. Foster*, 9 *Mod.* 35, *Ibbottson v. Rhodes*, 2 *Vern.* 554. Shall the fraud of a party shield him when his ignorance would not? When others have been induced to purchase property on the strength of his representations, shall he be allowed to excuse himself on the plea that he only meant to defraud creditors, when the allowance of the excuse would defraud purchasers also?

In every view I have been able to take of this case, I am compelled to look upon these complainants as bona fide purchasers, without notice of the fraud, want of consideration, or mistake; and this is simply giving effect to the purchase according to the actual understanding and intent of the parties.

But here the broad ground is taken (though no such objection was urged on the argument), that a purchase in good faith and for a valuable consideration, is no ground to sustain a bill for relief in a court of equity, though it is a good defense; and for this my brethren have cited *Beekman v. Frost*, 18 *Johns.* 544 (in which the Court of Errors reversed the opinion of Chancellor Kent by a vote of 15 to 10); and *Jackson v. Cadwell*, 1 *Cow.* 622. The latter case decided nothing of the kind, and could not, as it was an action of ejectment; but it contains a mere *dictum* to that effect by Woodworth J. But in the case of *Beekman v. Frost*, the broad unqualified language used by the court would carry the rule nearly to the extent claimed by my brethren, though the case before the court by no means

warranted such an extent of application. But if the rule be admitted to the unqualified extent there stated, as I understand the language of the court, it would not apply to the cases before us; as I think the language of the decision applies only where the bill basis the claim for relief on that ground. My brethren seem to have taken it for granted that such is the case with the bills in the cases before us.

But these bills do not claim relief on this ground, as respects the fraud between the Thomases. This is no part of the case made by the bills, nor do they in any manner allude to the fraud. The defendants have undertaken to set up this fraud in their defense. As to this they are the assailing party; and if admissible at all (as I think it is not), they have the affirmative of the issue, and must prove notice to complainants of the fraud, instead of requiring the complainants to prove the negative.

The present cases are not, then, within the reason given for the rule in *Beekman v. Frost*, if that reason be the true one. It is true these bills claim that complainants purchased bona fide, without notice or knowledge of the mistake; but so much would have been necessary had they purchased directly from Aaron Thomas, and the mistake had occurred in his deed to them.

But, relying upon the general language of the court in *Beekman v. Frost*, my brethren have laid down the rule as one of universal application to all complainants who may happen to be bona fide purchasers, without exception or limitation. But the language of judicial decisions must not be taken abstractly, without reference to the facts of the case to which it is applied; and where general language is used, it can not be taken as authority further than justified by the case; and construing the decision in *Beekman v. Frost, secundum subjectam materiam*, it only justifies the application of the rule there laid down, to bona fide purchasers who do not show an equity superior to that of the defendant.

That there are cases, and a great variety of them, in which a bona fide purchase might be a good defense, and yet no ground for relief, I do not deny; because a court of equity will not grant affirmative relief to a complainant who does not show a right superior to that of the defendant—in other words, superior equity (I here use the terms in the broad sense, including cases of equal equity prior in time, or coupled with the legal estate). If the equities are equal, *potior est conditio defendentis.*

But so strong is the position of a bona fide purchaser in a court of equity, that the court will sometimes protect him as defendant, even where the complainant shows a superior right; as, for instance, where complainant shows an equal equity coupled with the legal estate—*Joyce v. De Moleyns*, 2 *J. & L.*; *and Bowen v. Evans*, 1 *Ibid.* 264 (*cited Lead. Ca. in Eq. note to Basset v. Nosworthy*); and even though complainant be in possession under his legal title.—*Wallwyn v. Lee*, 9 *Ves.* 24. This would seem to depend mainly, if not entirely, upon considerations connected with discovery—the court refusing to appeal to the conscience of a party to make discovery when he has in good faith parted with his money in ignorance of the conflicting right.

In all such cases, and in all others where such purchaser can not show a superior equity (in the sense in which I have used these terms), he could not, certainly, obtain relief as complainant. But that there is any established rule in a court of equity which denies relief to a bona fide purchaser who shows equities superior to those of the defendant, I can not admit. I can discover no principle on which such a rule can be justified; and the decisions cited, when considered with reference to the subject-matter, will justify no such conclusion. And after a careful examination, and much reflection, I must declare my conviction that the rule, as broadly stated in *Beekman v. Frost*, and by my brethren in this case, has no existence—that it exists, in fact, *only* as it is based upon, and forms an instance in illustra-

tion of, the more general rule, that complainant must show equities superior to those of the defendant. If the bona fide purchaser show such superior equity, is it sufficient reason for denying relief, to say to him "This court does not grant relief to a bona fide purchaser"? He is surely entitled to ask the reason why; and it seems to me it would be exceedingly difficult to give one which could be appreciated by a man of plain common sense. What right have the court to erect an arbitrary barrier of this kind against the rights and equities of parties, and to shield themselves under the plea of infirmity self-imposed? It is as great a wrong to deny relief in such a case, as to grant it where it is not due. Either is an abuse of power. The pressure of these considerations has been felt by those who feel bound to acknowledge the existence of the rule as one of universal application too firmly established to be shaken. And great pains have been taken, and much ingenuity exercised, to discover a reason. Such was the course of the court in *Beekman v. Frost;* and yet my brethren agree with me that the reason there given (the oath of the party) is not sufficient for a case like these before us; and my brethren seem to think it is not the true reason of the rule, and they give a new, but what they deem the true, reason, viz., "That the right of a bona fide purchaser is an imperfect right."

I am not sure that I comprehend this reason. It does not convey to my mind any clear or definite idea. If by an "imperfect right" is intended a mere equitable, as distinguished from a legal, right, then it is too broad, and would materially narrow the limits of recognized equity jurisdiction. If it be intended to declare that the right is imperfect only in the sense that, though recognized as a good defense, it is not recognized as sufficient ground for equitable relief, then it is simply giving in *another form* of *words* the *rule itself*, as the *reason* of the rule. There is no difficulty, it seems to me, in discovering the reason

of the rule in all cases to which it is applicable, viz., where the complainant does not show a superior equity. And it is not a little remarkable that the court in *Beekman v. Frost* should have taken so much pains to find a reason for the universality of the rule, when they have actually (though it would seem almost unconsciously, if they understood it to be universal) given the true reason for its application to the case before them. Thus, Judge Spencer after broadly stating the rule, says (p. 562), "If the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to assert his right, the court will not interfere on either side." And though my brethren have given a new, and, as I think, an unsound reason for the rule, yet when they come to illustrate the rule by the example of a bona fide purchaser of a horse, the true reason appears in the illustration; viz., that complainant must have the superior equity. It is evident to me that the court in *Beekman v. Frost*, notwithstanding the broad, general language used, did not understand the rule as applicable to a case where the complainant showed superior equities; and the only case upon which that opinion purports to rest is *Patterson v. Slaughter*, *Amb.* 293. Little reliance can be placed upon the accuracy of this reporter (see *Preface to Eden's R. and* 1 *Kent*, 460). It was merely a motion to take an answer off the files, and to file a new one setting up a bona fide purchase by defendant's grantor. It had been claimed, in opposition to the motion, that defendant might file a cross bill; and against this suggestion Lord Hardwicke is made to use the general language cited in *Beekman v. Frost*, without giving any reason whatever. Other grounds are stated sufficient for granting the motion, as it was granted. If Lord Hardwicke used the general language attributed to him, it was doubtless perfectly correct as applied to that case, which (though the case is imperfectly stated) I think was a case in which the defendant could not have shown superior equities. The case, I think, has never been under-

stood, in England, to carry the rule to the extent now claimed for it; and I do not find that it has ever been cited there for such a purpose; and, both before and since, the rule has been otherwise understood in England. In the leading case of *Basset v. Nosworthy* (*Rep. temp. Finch*, 102), Lord Keeper Finch, speaking of a *bona fide* purchaser, declares, "equity will not disarm a purchaser, but *assist him*." And the cases are numerous in which relief has been given to a bona fide purchaser as complainant. See the cases collected in note to case last cited (*Lead Ca. in Eq.* 46 *to* 50); and see *Shine v. Gough*, 1 *Ball & Be.* 436, where affirmative relief was given on this ground as against the holder of the legal title who had recovered in ejectment.

In the great majority of cases where the rights of a bona fide purchaser have come in question, it is doubtless true that such purchase would only be good as a defense, because the question has generally arisen between two purchasers from the same grantor, immediate or remote, or upon analogous principles; and this is what is generally understood by the terms bona fide purchaser, as mentioned in the books; and few *such* cases can arise, where, if the defendant were complainant, the opposite party would not have an equal equity. It is also true that such bona fide purchase is most frequently set up by a defendant, because he is generally the party in possession, and therefore the party attacked. The cases before us are, I think, the first in which the rule in question was ever sought to be applied as between the purchaser and his grantor, mediate or immediate, especially where the equities of the purchaser were superior to those of the grantor. It is easy to see that, in cases between a bona fide purchaser and his vendor, such purchaser is quite as likely to have the superior equities as the grantor. The cases before us are an example in which all the equities are on the side of the purchaser, and none are even claimed to exist on the part of the vendor, Aaron Thomas, or his heirs. Mr. Hare, in his note (*Leading Ca. in Eq. vol.* 2, *part* 1, 54 *to* 56), condemns

the generality of the rule in *Beekman v. Frost*, but uses the following language, which my brethren have quoted: "There can be no doubt that a defense resting on the ground of a purchase for a valuable consideration as technically made by plea, which does not allege the existence of a good title in the vendor, and which, as remarked by Lord Eldon, implies a want of title in the vendee, can not, in itself, furnish a ground for a suit or action in a court of equity or of law." If this language be claimed to apply to the present cases, I have only to remark that, within the meaning of the language above quoted, Aaron Thomas, who had the legal estate, is the vendor of these complainants; and the reference by the author to the language of Lord Eldon, in the case of *Wallwyn v. Lee*, shows that it applies to that class of cases only where the purchaser could not show a superior equity. But the want of the legal estate in complainants can be no objection to the relief asked for in the cases before us, where the very object of the bill is to obtain the legal estate. To hold that a defendant who has undertaken to convey the legal estate, but has failed to do so by mistake in the conveyance, can insist upon the absence of the legal estate in complainants, as a bar to the correction of the error, would neither be sound logic nor sound law. Such a proposition, when reduced to plain English, would assert that complainant should be denied the relief simply because he has not already obtained it. Equity will place the legal estate, in such case, where, in equity and good conscience, it ought to be; it looks upon that as done which is agreed to be done, and, if not done, will put the parties in the same position as if it had been done as agreed.

I think the complainants clearly entitled to the relief asked by their bill, and my only apology for so extended a discussion, is my unwillingness to sanction the establishment of rules which will not only result in the consummation of a gross fraud upon innocent parties in the cases before us, but which, I think, will operate as an encouragement of fraud in other

cases. Concurring fully in the opinion of the judge who tried these causes in the court below, I think the decrees in the court below should be affirmed.

MARTIN Ch. J.:

I fully concur in the views expressed by my brother Christiancy, and, under ordinary circumstances, I should content myself with this declaration. But the extraordinary nature of the defense set up, and the fact that the court is divided in opinion, impels me to give some of the reasons for such concurrence.

The simple narration of the facts set out in the pleadings, and established by the proofs, suggests the equity of these complainants' claim to relief. This claim, however, is met by the allegation of fraud on the part of Aaron and Alanson Thomas in the transaction between them, which resulted in the deed alleged to be defective—not fraud *inter sese*, but fraud as to creditors; and upon this defense, the heirs and the personal representative of Aaron Thomas rely to defeat such claim. A more unconscionable, and, to my mind, inequitable defense, was never set up in a court of equity That Quirk and Greusel are bona fide purchasers, for valuable consideration, from Alanson Thomas, I can not doubt. As a general proposition, it will be conceded that such purchasers will not only be protected, in equity, in the enjoyment of their purchase, but they will be aided against the claims of those having inferior equities. It seems to be thought, however, that these complainants are not within this rule, but that the fraudulent design of Aaron Thomas inducing the conveyance to Alanson, so far vitiates that conveyance that no equities can arise upon it in behalf of any one. And it was urged at the bar that, as Alanson could not ask the interposition of a court of equity to correct the mistake in the deed to him, so as to perfect his title, his grantees can not, to perfect theirs—in other words, that his grantees stand in no better condition than himself, having acquired

only his equities. This is certainly extending the doctrine that courts will not interfere in support of fraudulent grants, or meddle with a fraudulent transaction, in behalf of either actor, to a very great length; and if it be true, makes the fraud of the ancestor an instrument of robbery in the hands of the heir. But this is not the correct rule. A bona fide purchaser has often superior equities to those which his grantor might assert, and can often invoke the aid of a court of equity, when the latter would be remediless. Especially is this the case where conveyances of property have been made for the purpose of hindering or delaying creditors. In such case, the title of the purchaser in good faith will be protected against every one, even creditors, although that of his grantor, while the property remained in him, would not be; and this upon the well established principle that the fraud can only be set up by the creditors against the parties to it, or those who purchased with knowledge of it, while none but those affected by the fraud can impeach the title. Now, in these cases, the complainants come into court as bona fide purchasers, and ask that the title which they purchased, and which was intended to be conveyed to them, and which they, and all parties, supposed, until after the death of their grantor, was conveyed to them, shall be assured to them; and for protection against the suits brought by the heirs and administrator of Aaron Thomas, founded upon the lately discovered mistake in the deed from Aaron to Alanson. I say lately discovered mistake, for I can not for a moment suppose, in the face of the evidence, that Aaron Thomas ever knew that his deed granted no land, and that he twice deliberately perjured himself in swearing that the premises were Alanson's, and that he had no title remaining in himself.

Had the deed from Aaron to Alanson perfectly described the lands intended to be conveyed by it, the latter would have held a perfect title as against all the world, except creditors thereby defrauded. Neither Aaron nor his heirs would be per-

mitted to allege any thing against it: Aaron, because, he would not be permitted to set up his own fraud to impeach the title—his heirs, because they succeed to no greater rights or equities than their ancestor had. While it is true, as a general, and as to parties an universal, proposition, that courts of equity will not interfere to enforce a fraudulent contract, nor to assist the parties to it in any manner, it is equally true that they will protect bona fide purchasers against all equities not superior, and assist them against all which are inferior. The equity of a party directly participating in a fraudulent transaction, or of his heirs or personal representative, whose claims can only be co-extensive with those of the ancestor, are most certainly inferior to those of one who has purchased in good faith, and paid thereupon a valuable consideration. Under such circumstances, the abhorrence of equity towards fraud yields to its care for the rights of the bona fide purchaser, and the superior equity of the latter overrides the inferior equity of the former. When the equities are all on one side, without the shadow of an opposing equity, such is most certainly the rule.

Now, as already suggested, were Aaron living, he could not be heard to allege his own fraud in opposition to the relief sought by these complainants. By parting with their money upon the faith of the transaction between him and Alanson, and in the supposition, by all parties, of a good title in Alanson, they acquired the superior equities, and the perfect right to have the mistake corrected, so far as their own purchases are concerned; and Aaron would be compelled to protect their titles thus innocently acquired. If the heirs have no greater rights than the ancestor, then the relief is equally attainable as against them.

It appears to be supposed that the relief sought, if granted, will be the enforcement in fact of the contract between Aaron and Alanson, and it is urged that such a contract, if proven, would be void, and consequently the relief is impossible. I think these grounds to be wholly untenable. In case a bill was filed by Alanson to correct the mistake, it would doubt-

less be incumbent upon him to show the contract, according to the terms of which he seeks to have the correction made; and this upon the ground that he is seeking to enforce the contract of conveyance which has been imperfectly executed. But the error in the present case consists in holding that the relief, if given, will operate as the enforcement of the contract as between them. It is upon no such foundation that these complainants stand in court. Their equities are altogether independent of, and superior to, those of Alanson, and depend upon no contract between him and Aaron, but upon the facts of an attempted and supposed conveyance from Aaron to Alanson, the surrender of possession by Aaron under it, the occupancy by Alanson, their purchase from him, and giving value, and the inducements to such purchase held out to them through the uniform recognition by Aaron of Alanson's title and right to convey, and the former's repeated oaths and asseverations to that effect. Even in case of a voluntary conveyance, accompanied by surrender of possession, a second or subsequent grantee would have a right to the remedy here sought, although no contract had ever existed. The equity is that of protection of a title innocently acquired—not, as would be the case if Alanson brought the bill, of enforcement of an agreement improvidently executed. If this be not so, the doctrine of protection to bona fide purchasers is an idle boast.

But if such contract were proven, would it be void so that no relief could be granted in this case? So long as the contract was *in fieri* it could not be enforced by the parties to it, if made with a fraudulent intent; but when executed, it is valid as to all the world, except those creditors it was designed to defraud, and void as to them only upon their taking legal steps to annul it. In the present case, the contract, if any existed, must be held to have been executed, so far as these complainants' interests are to be affected. In their behalf, the maxim of equity, that "What is intended to be done, will be presumed to have been done," will have its full force

in order to enable them to correct the mistake in its performance.

The fraud, then, set up in this case being one which is only available to creditors, the heirs of Aaron Thomas can not be permitted to allege it in protection of their claims against the title of these complainants, nor to defeat any relief which may be necessary to perfect the evidences of that title. Nor can they avail themselves of it as an instrument of oppression to deprive these complainants of their honestly acquired property. If it can be made available to them for these purposes, it will only be on the ground that courts of equity hold fraud in such abhorrence that, rather than sustain any transaction however remotely tainted with it, they will refuse to interfere respecting it, but, standing by, will suffer a grosser fraud to be perpetrated upon innocent parties who may have the misfortune to acquire rights growing out of such transaction.

The decrees of the court below must be affirmed, with costs.

The court being thus equally divided in opinion, the decrees of the court below were *affirmed.*

William E. Warner, Adm'r, &c., v. Samuel Whittaker and Others.

To constitute a *bona fide* purchaser, there must be want of notice both at the time of the purchase and at the payment of the purchase money.

Where land was purchased upon which was an unrecorded mortgage, of which the purchaser had no notice, but of which he was notified before a mortgage given by him for purchase money was paid;—*Held*, That any payment made by him on his mortgage after such notice, was made in his own wrong, and he was not protected, as to such payment, against the unrecorded mortgage.

The assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should have existed at the inception of the debt or contract—it is sufficient that they exist prior

to the assignment, as the assignee has it in his power to protect himself against them, by inquiry of the debtor, before the assignment.

Facts shown by the evidence, but not put in issue by the pleadings, can not be regarded at the hearing.

One of several defendants appealing from a decree in chancery, can not ask a reversal of the decree for error in a part of it in no way affecting the rights of the appellant.*

Heard November 17th and 18th. Decided December 9th.

Appeal by defendants Lucas Vogel and Merrill H. Shaw from the Wayne Circuit in Chancery, where decree of foreclosure and sale was made as prayed in the bill.

The case is sufficiently stated in the opinion.

C. O'Flynn, for complainant.

Howard, Bishop & Holbrook, for defendants.

MANNING J.:

The view we have taken of this case renders it unnecessary, in deciding it, to go fully into the pleadings and proofs, which are more voluminous than satisfactory, and throw little light on several questions discussed on the argument, but which it is not necessary for us to investigate in disposing of the case.

The bill, which is to foreclose a mortgage, is filed by Warner as administrator on the estate of Sarah Whittaker deceased, who, in her lifetime, and on or about the 3d of May, 1849, sold the mortgaged premises to her son Samuel Whittaker, and received from him the mortgage in question for a part of the purchase money. The mortgage was never recorded, and the bill alleges it is lost or destroyed. The sale to Whittaker, the giving of the mortgage, and the loss or destruction of it, are fully proved. The answer of Whittaker, if it is to be credited, shows he destroyed the mortgage under the pretext his mother had not complied with certain conditions of the sale of the premises to him, and that she had, for that reason, surrendered it to him, and

*See *Martin v. McReynolds*, *ante p.* 70.

authorized its destruction. It is sufficient to say he has produced no evidence to sustain this part of his answer.

On the 10th of March, 1850, Whittaker sold the premises to Vogel for $800, and took from him a bond for $550 of the purchase money, payable $100 on the 1st of December, 1851, $200 on the 1st of May, 1852, and $250 on the 1st of October, 1852, with interest. In August, 1852, complainant informed Vogel, by a written notice served on him, of the mortgage given by Whittaker to his mother when he purchased, and of its non-payment, and that Vogel must not make any further payment on his bond and mortgage to Whittaker. There was then due and to become due on the bond and mortgage about $530. On this state of facts, Vogel claims to be a bona fide purchaser without notice; and there is no evidence he had notice of the Whittaker mortgage when he purchased. To constitute a bona fide purchaser there must be want of notice, both at the making of the purchase, and the payment of the purchase money. It is not sufficient Vogel had no notice when he purchased. Notice was given him before he had paid over all the purchase money. So far as he had paid, he was a bona fide purchaser, and to be protected as such; but not as to the $530 still in his hands, unless the person to whom it then belonged was not affected by complainant's equity.—*Thomas v. Graham, Walk. Ch.* 117, *and cases there cited.*

Vogel states he paid $260 on the bond and mortgage, between the notice to him and the filing of the bill. If so, he paid it in his own wrong, as he might have protected himself against such payment by a bill of interpleader.

On the 7th of September, 1852, subsequent to the notice to Vogel, Whittaker assigned the bond and mortgage to Shaw, who, on the 30th of October, 1852, assigned them to Richmond, to indemnify him as surety for Shaw, and Shaw having subsequently paid the debt for which Richmond was surety, the latter re-assigned them to Shaw. The bona fides of the assignment from Whittaker to Shaw

is involved in so much obscurity by their own statements in their several answers under oath, and the testimony of witnesses examined by them to sustain the assignment, that we should hesitate long before pronouncing it free from the taint of fraud, if it was necessary to pass upon that question in deciding the case; which it is not.

No rule is better settled than that the assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should exist at the inception of the debt or contract. It is sufficient they exist prior to the assignment; for the reason of the rule is as applicable to one case as to the other; which is, that the assignee has it in his power to protect himself against them by inquiry of the debtor before the assignment. Chancellor Kent, in *Murray v. Sylburn*, 2 *Johns. Ch.* 441, says: "The assignee can always go to the debtor and ascertain what claims he may have against the bond, or other chose in action, which he is about purchasing from the obligee."

There is some evidence in the case going to prove notes were given by Whittaker with the mortgage, and that they, or some of them, are in possession of some one or more of the heirs; and a reversal of the decree is asked on that account. We do not think it sufficient cause for disturbing the decree, for the following reasons:

No mention is made of them in the pleadings, and consequently they are not put in issue by them.

Whittaker, the only person who can be called on to pay the notes if they, in fact, are in existence, and do not belong to the estate of Mrs. Whittaker, has not appealed; and neither Vogel nor Shaw, the appellants, can be harmed by them. As appellants, they have no right to ask a reversal of the decree for error in a part of it that in no way affects their rights.

The decree below must be affirmed, with costs.

The other Justices concurred.

In the Matter of the Estate of William H. Robinson, Deceased.

An affidavit of the regular service of notice of hearing, and of the filing of proof thereof with the clerk, is sufficient evidence of those facts until denied by affidavit, though the proof so filed can not now be found in the clerk's office.

An order of the probate court, requiring an administrator to account, having been brought into the circuit court by appeal, and there reversed, and the proceedings in the circuit court (where no issue of fact was joined) being then removed to this court by certiorari, and no motion having been made to dismiss the case for want of jurisdiction, the court will not consider an objection that this is not a proper case for certiorari, made, for the first time, in a brief submitted by defendant in error, by leave of the court, after the hearing.

An application to a probate court to call an administrator to account, averring that the applicant is heir of the deceased, and showing the proper facts entitling her to an account if she is such heir, is sufficient to justify action by the probate court thereon, though verified only by the oath of the attorney of the applicant, who swears to the facts averred on information and belief, and without giving any reason why the oath is not made by the applicant herself.

Though the probate judge may properly require an absolute verification of any thing whereon his action is required upon the merits, yet when the party complained of is cited to appear, and has an opportunity to controvert the facts, there is no rule which renders it imperative on the probate court to decline receiving an unsworn petition.

Where, in such case, the respondent opposes the relief asked on the ground that the petition is not properly verified, and makes no issue of fact, there is nothing for the court to pass upon but the sufficiency of the allegations in the petition.

Heard November 26th. Decided December 9th.

Certiorari to the Wayne Circuit Court.

On the 6th day of March, 1857, Alfred Russell, as attorney for and on behalf of Emiliette Moyer, presented to the Probate Court for the county of Wayne a petition, of which the following is a copy:

"*County of Wayne, Probate Court:*

"To the Hon. E. Hawley, Jr. Judge of Probate of the county of Wayne:

"The petition of Emiliette Moyer, of said county, respectfully showeth: That your petitioner is sole surviving daughter, and sole heir-at-law, of William H. Robinson, late of said county, deceased, intestate; that on the 29th day of March, A. D. 1851, letters of administration were duly granted and

issued to Joseph H. Bagg, by this Honorable Court, and that said administrator, upon his election to the office of judge of probate, resigned his appointment as administrator, and that thereupon, and on the 2d day of February, A. D. 1853, Cornelius O'Flynn received letters from the court empowering him further to administer.

"Your petitioner further shows, that said William H. Robinson left of personal estate some $300 in gold in bank, and other chattels to amount of about $200, and certain real estate sold by said Bagg, at administrator's sale, for $771, and that said moneys and property and other assets, together with $50 rent of said real estate before sale, passed into the hands of said Bagg.

"Your petitioner further shows, that on the 6th day of June, A. D. 1851, the said Bagg filed an inventory, showing the amount of said intestate's estate to be large, as appears by the said inventory on file, and on the 29th day of November, A. D. 1852, filed his account, purporting to be final, showing a balance in his hands of $33.79.

"And your petitioner further shows, that the said balance, with divers other sums of money and property, shortly subsequent to said date, and during the subsequent interval, came into the hands of said O'Flynn, amounting, as your petitioner is informed and believes, to nearly $1000.

"And your petitioner further shows, that she has frequently, and in a friendly manner, applied to said O'Flynn for an account of his proceedings in the discharge of said trust, and for payment to her of her inheritance, less his legal costs and charges, but that the said Cornelius O'Flynn hath wholly refused to render any such account, or to make any such payment, although more than a year has elapsed since his appointment.

"In consideration of the premises, and to the end that said Cornelius O'Flynn, administrator as aforesaid, may be required to pay to your petitioner the amount of the said claim, your petitioner prays that an order may be granted, requiring said

Cornelius O'Flynn, at a certain short day, therein to be specified, personally to appear in this court, and render an account of his receipts and proceedings as such administrator, and that such further proceedings, according to law and the practice of this court, may be had, as may be required to enforce the filing of such account, and the payment of such claim, and as to your Honor shall seem meet. And your petitioner will ever pray, &c." "EMILIETTE MOYER,"

"By WALKER & RUSSELL, *Proctors.*"

"Dated Detroit, March 5th, 1857."

"*State of Michigan, County of Wayne, ss.* On this 5th day of March, A. D. 1857, personally appeared before me, a notary public in and for said county, Alfred Russell, and made oath that he is one of the proctors for the petitioner in the foregoing petition named, and that the contents of said petition are true to the best of his knowledge, information, and belief, based upon statements of petitioner and her friends, and upon the record of said court." "ALFRED RUSSELL."

"Sworn before me, this 6th day of March, A. D. 1857."

"WM. H. WELLS, *Notary Public, Wayne Co. Mich.*"

The Probate Court assigned the 24th day of April, 1857, for the hearing upon said petition, and directed notice to be given to the administrator. On the day so assigned, the petitioner appeared by her counsel, and the administrator in person, and the following order was made by the court:

"At a session of the Probate Court, for the county of Wayne, holden at the probate office, in the city of Detroit, on Friday, the 24th day of April, in the year one thousand eight hundred and fifty-seven—Present, E. Hawley, Jr. Judge of Probate.

"*In the Matter of the Estate of William H. Robinson, dec'd.*

"The hearing of the petition of Emiliette Moyer, praying, among other things, that Cornelius O'Flynn, the administrator *de bonis non* of said estate, may be required, by an order of the court, to file his administration account in this court, coming on this day to be heard, and it appearing that the

citation issued upon said petition has been personally served on said O'Flynn, and the parties being in court, the said petitioner, by Walker & Russell, her attorneys, and the said O'Flynn in person; thereupon the said O'Flynn not filing his account, alleged for cause for not accounting, that it does not sufficiently appear from said petition, or otherwise, that the said petitioner is heir to said deceased, and interested in said estate, as is alleged in said petition, and therefore she can not move this court for the order prayed for in said petition; which showing having been duly considered, it is adjudged by this court insufficient for cause. Now, it further appearing to the court that said O'Flynn was appointed as aforesaid, on the 31st day of February, 1853, and that he has never rendered any account of his administration, it is therefore ordered that said Cornelius O'Flynn, administrator as aforesaid, do, on or before the 15th day of May next, render and file in this court, full and just account of his administration of said estate."

The administrator appealed from this order to the circuit court, where, on a review of the record of the probate court, the order so made was reversed, and the petitioner brought the case to this court by certiorari. On the case being called for argument, defendant in error failed to appear, and, on examination of the files, no proof was found of the service of notice of argument, as required by the rules. The counsel for plaintiff in error thereupon produced an affidavit, showing due service of notice of argument, and that proof of such service had been regularly filed with the clerk, in whose office it appeared to have been mislaid. On filing this affidavit, the court ordered the case to proceed *ex parte*. Before the conclusion of the argument, defendant in error appeared, and leave was given him to present a brief at a subsequent day; which he did.

Walker & Russell, for plaintiff in error:

1. The order to account was grantable by the court, *of its own motion*, without application on the part of any

one.—*Comp. L.* § 2985; *Dayton's Surrogate*, 1*st ed.* 200; 1 *Barb. Ch. R.* 485; *Ibid.* 476; 2 *Lee Eccl. R.* 399; 11 *Paige*, 211; 1 *Paige*, 537; 1 *Bradf. S. R.* 27.

2. The petition, if *requisite*, was sufficiently verified. The *mere appearance* of an interest is enough in the first instance. But if it appear affirmatively that the party calling for the account is a mere volunteer, or if his interest be traversed by proper pleadings, and be shown to be unfounded, the order will be refused.—*Dayton Surrogate*, 1*st ed.* 196; *Ed. of* 1855, 456; *Wms. on Ex'rs*, 837; 1 *Bradf. S. R.* 27; 2 *Adams. Eccl. R.* 234. Upon an application like this, the order may be granted in the first instance, without issuing any citation to show cause.—*Comp. L.* § 2998; *Dayton Surrogate, Ed.* 1855, 459.

C. O'Flynn, in person:

1. There should be proof on file that the writ of certiorari was properly allowed, sued out, and notice thereof given to defendant; and proof of notice of hearing, as required by the rules.

2. The court has no jurisdiction to review this case by certiorari or otherwise—the order in question being interlocutory merely.—*Holbrook v. Cook*, 5 *Mich.* 225.

3. No excuse is given for the failure to have the petition verified by the petitioner herself.

The petition should fully set forth the right of the party, and the *degree* of relationship must be averred.—*Dayton*, 1*st Ed.* 196. But the averment would be futile, unless properly verified. Under our system, the probate court can act only upon the application of a party interested; and if the administrator, on being cited, neglects to render his account, he may be liable for damages.—*Comp. L.* § 2988. In New York, by statute, the surrogate may, of his own motion, order an account.—*Dayton*, 1*st Ed.* 189; 1 *Bradf. S. R.* 27. But the surrogate, before granting the application of a party interested, must have *proof* of the requisite interest; and the

administrator, on the hearing, may object to the sufficiency of the proof.—*Dayton*, 196. And if the petition be insufficient, it should be rejected.—*Dayton*, 189; 1 *Paige*, 540. And see 1 *Bradf. S. R.* 27.

CAMPBELL J.:

Emiliette Moyer, claiming to be heir-at-law of the decedent, filed a petition in the Probate Court of Wayne county, to compel an account from the administrator. He opposed the order on the ground that the petition was not properly verified; and no issue having been made upon any fact, but the administrator claiming that no sufficient showing was made of an interest in the claimant, the probate court granted the application. The administrator appealed to the circuit court, where the cause was heard upon the papers, without any issue having been framed or tendered, and the decree of the probate court was reversed. The case is brought here by certiorari.

An objection is made to hearing the cause at this term, because no sufficient proof of notice of argument appears. The plaintiff in error has produced an affidavit of Mr. Rexford, who swears that he served notice regularly, and filed proof of such service with the clerk of this court, in whose office it appears to have been mislaid. This is certainly proof enough until denied by affidavit. The case is properly before us.

It is also objected that certiorari will not lie in the case. No motion having been made to dismiss, and the objection having been made for the first time in the brief submitted by leave since the hearing, we are not inclined now to consider the objection. We are strongly inclined to the opinion that the case is a proper one for that writ, and shall therefore sustain it for the reasons mentioned. The question may, however, be considered as open for argument hereafter in a proper case, if one should arise.

I the probate court, the decree was granted upon the

petition alone, so far as appears; and the question to be considered first is, whether that is, in form, sufficient. We have no hesitation in saying that its allegations are ample. It avers the heirship of the claimant; and the facts entitling her to an account, if she is such heir, are fully set forth. There is no rule or statute requiring such petition to be verified in any particular manner, or at all. A probate judge is not required to act upon a petition which he has not some reason to believe is presented in good faith, and in a real interest; and he may properly require an absolute verification of any thing whereon his action is required upon the merits; but where the party complained of is cited to appear, and has an opportunity of controverting the facts, there is no rule, of which we are aware, which renders it imperative on the probate judge to decline receiving an unsworn petition. The affidavit attached to the petition is upon information and belief, but is sufficient to show the good faith of the application; and the citation was entirely proper.

The fact of heirship was material; and had the respondent put it in issue, so that evidence could have been taken on it, the petitioner would have been compelled to establish her case by proofs. But, without the tender of an issue upon it, no proofs could be taken, and the case must stand upon the sufficiency of the allegations of the petition.—*Foster v. Wilber*, 1 *Paige*, 537; *Thomson v. Thomson*, 1 *Bradf. S. R.* 27. In the latter case it is held that, even if put in issue, the petition will entitle the claimant to relief, if absolutely verified, and met by no counter-proof. The form of the issue is not required to be technical, but it must be raised in some way. And as the case stood, the probate court appears very properly to have treated the objection as going to the sufficiency of the allegations.

In the circuit court, no issue having been certified up, and no new issue of fact having been framed, there was nothing to pass upon but the sufficiency of the case made by the petition; and, as we have already remarked, we think

that case properly framed to entitle the claimant to the relief prayed.

The decision of the circuit court must be reversed, and that of the probate court affirmed.

MANNING and CHRISTIANCY JJ. concurred. MARTIN Ch. J. did not hear the argument.

The People for the use, &c., v. George Rix and Others.

Though the law presumes a ministerial officer to *know the law*, it makes no such presumption, in ordinary cases, as to matters of *fact*, of which the *law* gives *no information*, and which are not disclosed by the process or order which he is commanded to obey. And where the jurisdiction of the subject-matter, in the tribunal issuing process, depends upon matter of fact, the existence of which can not be determined from the law, and which is not of public notoriety, the ministerial officer will not be held bound to ascertain it at his peril, unless the law has clearly given him the right to demand the information, and to determine the fact.

Where, therefore, the statute conferred jurisdiction of certain proceedings only, as was claimed, upon the circuit court commissioner of the county holding the senior commission, and did not provide a period when the term of either should commence, or what should be the date of the respective commissions, but the governor might appoint, and issue commissions, at any time; and no provision was made for making public the fact of the priority of either, or by which it could be ascertained in any county office, and no power given to the sheriff to demand inspection of the commissions, or to require the information from the proper state office; — *Held*, That the sheriff who had obeyed process issued in such proceedings by the commissioner who, *in fact*, held the junior commission (though the sheriff was not shown to have known that fact), and delivered up, in pursuance of such process, property which he had attached, was not liable on his official bond for so doing.

Heard November 19th and 20th. Decided December 9th.

Case reserved from Kalamazoo Circuit.

The action was debt, brought upon the official bond of Rix, as sheriff of Kalamazoo county, for the use and benefit of the President, Directors, and Company of the Michigan State Bank. Upon the trial, the following facts were agreed upon between the parties.

That defendant Rix was, at the times mentioned in the declaration, sheriff of said county, and, as such, with the other

defendants as his sureties, executed and delivered the bond declared upon, conditioned that he should well and faithfully in all things perform the duties, and execute the office, of sheriff aforesaid.

That on the 13th day of February, A. D. 1852, a writ of attachment was issued out of the Circuit Court for Kalamazoo county, at the suit of the President, Directors and Company of the Michigan State Bank, against one Mumford Eldred, Jr. directed to said Rix, then sheriff; that by virtue of said writ, said sheriff seized goods and chattels to the value of $5177.80; that the defendant not being found, so that personal service could be made of said writ, notice of the attachment was published as required by statute, and judgment taken by default on such publication April 9th, 1856, for $3970.19 damages and costs; that on the 30th of April, 1856, execution was issued on said judgment to the then sheriff of said county, commanding him, under the statute, to make the amount of said judgment from the goods and chattels so taken under said attachment; to which the then sheriff returned that the said goods and chattels were not then, and never had been, in his possession, and had never been delivered to him, and that he was unable to find the same or any part thereof in his county; that he had demanded the same of said Rix, whose next successor in office he was, and said Rix had refused, denying possession thereof; whereupon said execution was returned wholly unsatisfied.

It was further agreed that on the 26th day of February, 1852, proceedings were instituted before N. A. Balch, then a circuit court commissioner for the county of Kalamazoo, by said Eldred, for a dissolution of said attachment, and a summons issued by said commissioner, but not served on the plaintiffs; that the parties respectively, by their respective attorneys, appeared before said commissioner March 4th, 1852, and plaintiffs' attorneys obtained a continuance of the proceedings to the 10th of the same month, when they again appeared, and the plaintiffs, by their attorneys, verbally objecting to the

jurisdiction, the defendant proceeded with his proofs; upon closing which, the plaintiffs in attachment introduced George D. Rice, who testified that he was then an acting circuit court commissioner for said county, and produced his commission, which was objected to by defendant, and the objection sustained; whereupon said Balch made an order that such attachment be dissolved, and that the sheriff restore to the defendant the goods and chattels taken by virtue thereof; which order the sheriff obeyed.

It was further agreed that said Rice was, during all the said proceedings before Balch, the circuit court commissioner for said county who held the oldest commission, and that Balch was the junior commissioner; that the defendant Rix, then sheriff as aforesaid, was notified and warned by the said plaintiffs not to deliver up said goods and chattels under said order, and that Balch had no jurisdiction to make the same; and indemnity was tendered him to retain the said goods and chattels.

Upon the facts so agreed upon, the circuit judge reserved, for the opinion of this court, the following questions:

First, Whether said Balch, as circuit commissioner (there being another commissioner holding an older commission) had any authority to hear, try, and determine the said application to dissolve said attachment, and whether his judgment and determination was valid, or null and void.

Second, Whether, though said Balch had no jurisdiction, the sheriff was not protected by the order of said Balch in restoring and delivering the property attached, to the defendant in the attachment.

Third, Whether all proceedings in such attachment suit subsequent to the order of Balch, were not irregular and void until such order was legally set aside and vacated.

S. D. Miller, and *C. I. Walker*, for plaintiffs:

1. The power to dissolve attachments, under the law of 1851, accrued to, and could only be exercised by, the com-

missioner who held the older commission.—*Chandler v. Eldred, decided January term* 1853 (*not reported*).

The proceeding before Balch was without authority, also, because the writ of attachment had not been "served under the provisions of law" when the application was made to him. The service upon defendant was an essential part of the service of the writ.—*Peck v. Warren*, 8 *Pick.* 163; *Wright v. Oakley*, 5 *Metc.* 400; *Sanford v. Dick*, 17 *Conn.* 213; *Hodge v. Swasey*, 30 *Me.* 162; *Blanchard v. Day*, 31 *Me.* 494.

2. Where an officer is vested with a power which he is authorized to exercise only on the happening of some contingency, or the performance of some condition, both he, and all claiming under his acts, must show the facts which authorize him to act.—*Brodhead v. McConnell*, 3 *Barb.* 175; *Smith v. Shaw*, 12 *Johns.* 257; *Cable v. Cooper*, 15 *Johns.* 152; *Wise v. Withers*, 3 *Cranch*, 331; *Paine v. Ely*, 1 *Chip.* 37; *Allen v. Gray*, 11 *Conn.* 96; *Grumon v. Raymond*, 1 *Conn.* 40; *Ford v. Babcock*, 1 *Denio*, 158. And where a *quasi* judicial officer, of limited and inferior power, has not jurisdiction of the subject-matter upon which he assumes to act, and it does not fall within the general scope of his office, his order can not protect a ministerial officer, warned and notified of the want of jurisdiction. Nor will the order protect if that jurisdiction can only be gained upon the happening of a certain contingency, which, in the particular instance, has not occurred.

The act of 1850, instead of granting to both commissioners equally the exercise of the same authority, provided that in certain cases the commissioner who held the oldest commission should alone have power to act. The junior commissioner was rendered a *subordinate officer;* his authority was limited to a particular class of duties, while the senior commissioner was vested with the general power previously attached to the office. The office of commissioner has no authority strictly judicial, except where directly conferred by statute. The junior commissioner was, therefore, at most, only a *quasi* judicial

officer, of limited and inferior jurisdiction. The subject-matter upon which he acted in this case was not within the general scope of his office.

A broad distinction ought, in reason and equity, to exist between those cases where an officer innocently and ignorantly, in good faith, obeys a command given with apparent sanction, and those in which he, after full warning of want of power, deliberately carries out the precept. The question of liability has been made to turn, in some cases, upon this distinction. —*Barnes v. Barber*, 1 *Gilm.* 401; *McDonald v. Wilkie*, 13 *Ill.* 25; *Tefft v. Ashbaugh*, *Ibid.* 603.

It is "process regular on its face" that protects the officer; that is to say, a judicial writ issued under the seal of a court, and bearing upon its face the *indicia* of judicial authority. — *Boal's lessee v. King*, 6 *Ohio*, 2. And a bare order from a person clothed with functions partly ministerial and partly judicial — the latter only to be exercised under certain circumstances, and upon certain conditions — is not "process" upon which the person to whom it is directed may rely without question. If it were so, there would be no end to ministerial protection.

S. T. Douglass, for defendants:

1. Balch, as circuit court commissioner, had jurisdiction to dissolve the attachment, though Rice had the older commission.

2. But even if he had not, the sheriff was justified in obeying his order.

Where the want of jurisdiction in the particular case arises from some fact or circumstance which the officer is not bound to know, because the law has provided no means for bringing it to his knowledge before being called upon to act, he is not responsible. — *Pike v. Carter*, 3 *Bing.* 78; *Calder v. Halkett*, 3 *Moore P. C.* 77; *Clarke v. May*, 2 *Gray*, 412, *per Bigelow J.*

A ministerial officer is not liable for any act done in

the proper execution of process issued by any court or magistrate without jurisdiction, except where the want of jurisdiction appears upon the face of the process; that is, where, looking alone at the law, which he is bound to know, and at the process, which he is required to execute, the want of jurisdiction is apparent. — 1 *Smith Lead. Ca.* (*last ed.*) 845, 846; 1 *Q. B.* 2, 16, 18, 29; 3 *M. & W.* 418; 7 *Eng. L. & Eq.* 470, 472, 473; 5 *Wend.* 170; 16 *Wend.* 514 *to* 519; 5 *Hill*, 440; 1 *Sel.* 380 *to* 382; 13 *Mass.* 288; 1 *Gray*, 71; 2 *Gray*, 410, 413; 10 *Fos.* 318; 12 *Vt.* 661, 666; 1 *Gilm.* 406; 13 *Ill.* 25; 3 *Ill.* 602; 7 *Blackf.* 270; 2 *Fla.* 171; 12 *S. & M.* 533; 1 *Fos.* 279; 4 *Mich.* 291.

It is submitted that this case, and all others of like nature, fall clearly within the reason of the cases above referred to, and also of those in which even a magistrate is not liable for excess of jurisdiction. — See also 4 *B. Monr.* 230; 2 *J. J. Marsh.* 44; 9 *B. Monr.* 390; 1 *Rawle*, 143; 7 *Johns.* 549; 20 *Wend.* 236; 16 *Me.* 132, 135; 13 *Me.* 363.

It is of no consequence that the sheriff was notified by the plaintiffs that Balch had no jurisdiction. — 16 *Me.* 132; 1 *Mo. & R.* 531; 1 *Fos.* 279; 20 *Wend.* 236; 5 *Hill*, 440; 7 *Blackf.* 270.

CHRISTIANCY J.:

The view we have taken of the second question reserved for our opinion, renders it unnecessary to determine the first.

Whether Balch being the junior commissioner of the county, had or had not power to make the order for the dissolution of the attachment, we are all of opinion the sheriff can not be made liable, under the circumstances presented by the case, for obeying the order — he having acted in good faith.

It is true, as a general rule, that a sheriff or other ministerial officer can not justify under process issued by a

court or officer having no jurisdiction of the subject-matter. But this rule, we think, is based upon the ground that every man is bound to know the law; and the subject-matter in reference to which the question of jurisdiction arises, can generally be decided by reference to the statute or other public law, itself, without an inquiry into matters of fact which the law does not disclose.

Thus, if a justice of the peace issued a writ of restitution in forcible entry, or of possession in ejectment, or a warrant of commitment to the state prison on a conviction for murder, such writ or warrant would be no protection to the officer, however regular upon its face, because he is presumed to know, and can easily ascertain from the law itself, that the justice has no jurisdiction of the subject-matter, viz., the forcible entry, the ejectment, or the conviction for murder. No fact beyond that which the law itself discloses is necessary to decide the question, because no fact extrinsic the law could give the jurisdiction.

Thus far the principle is clear; and, in ordinary cases, as just as it is clear. But it may well be doubted (though upon this we give no opinion) whether even this principle has not sometimes been carried too far. Thus, it not unfrequently happens when the question is purely one of law, that it is a question of the greatest doubt and difficulty, upon which the ablest lawyers and the highest courts may differ — where, in fact, the law can not be known until decided by the court of last resort. In such cases, the presumption that the ministerial officer knows the law is an extremely violent one; and the rule which requires him to decide at once, and at his own peril, compelling him to respond in ruinous damages, whichever way he may decide, if his decision happen to be wrong, is certainly a rule of great harshness, and difficult to be reconciled with any principle of justice or common sense. And it may well be suggested whether it would not be more consonant to sound

public policy, in such cases, to hold the officer justified in obeying the process when acting in good faith, and let the party injured seek his remedy against the party procuring the process, and (in proper cases) the officer issuing it. The case before us, if the facts were all well known to the officer, would still present the question as one of great difficulty; and whatever may be the presumption of law, neither the sheriff nor the learned counsel in this case, with a full knowledge of the facts, could, until judicially determined, have decided with any certainty whether this commissioner had or had not jurisdiction. But the present case does not fall within the rule above discussed; for though the law presumes the officer to *know* the *law*, it makes no such presumption in ordinary cases as to *matters* of *fact*, of which the *law* gives *no information*, and which are not disclosed by the process or order which he is commanded to obey. And where the jurisdiction of the subject-matter depends upon matter of fact, the existence or non-existence of which can not be determined from the law, and which is not of public notoriety, the ministerial officer ought not, we think, to be bound to ascertain it at his peril, unless the law has clearly given him the right to demand the information, and to determine the fact.

The statute under which the commissioner in this case purported to act (2 *Comp. L. pp.* 1275 and 1276) gave the circuit court commissioner of the county jurisdiction of the proceeding for the dissolution of the attachment, and to make the order in question. There were two circuit court commissioners; and, giving to the law of 1850 the construction claimed by the plaintiffs; viz., that only the commissioner holding the older commission could take jurisdiction of the matter in question; still the law did not determine which commissioner held the elder commission. Nor did it provide a period when the official term of either should commence, or what should be the date of the re-

spective commissions. The governor had the power to appoint; and though the length of the official term was fixed at four years from the time of appointment, the date of the commissions might vary a day, a month, or a year; or they might be of the same date. It was not, therefore, a fact of public notoriety. No provision was made for rendering it public, nor by which it could be ascertained in the county clerk's, or any other county, office. No power is given to the sheriff to demand inspection of the commissions in the hands of the commissioners, nor to require it from the secretary of state. We think, therefore, as the law has given the sheriff no jurisdiction to determine the question of fact, no power to demand the authentic information, he can not be bound to determine the fact at his peril; while, if none but the elder commissioner could act, the sheriff could not have refused obedience to the order in this case, except at the peril of being able to show that this commissioner held the junior commission.

Balch was a circuit court commissioner *de facto* and *de jure*. He had taken jurisdiction of these proceedings *colore officii;* and as to this, the sheriff might well recognize him as the commissioner *de facto*, at least. He was an officer of the court from which the attachment issued; and though his right, so far as regarded his own protection, might depend upon the prior date of his commission, we can not think this was a fact of which the sheriff was bound to take notice, or which he could assume to decide except at his own peril. Knowing him to be a commissioner, and an officer of the court, he had a right to rely upon the presumption that he had not violated his official duty in this proceeding.

We can see little better reason for holding the sheriff bound to know this fact or to determine it, than to know or determine the question, whether the judge of the circuit court, whose process he executes, was duly elected or qualified, or whether the certificate of his election is in due form.

As a question of public policy, it might be mischievous in the extreme to allow, and much more to require, a ministerial officer to sit in judgment upon the rights of judicial officers *de facto*, whose process or orders he is called upon to obey, and to determine the validity of the title by which they assume to act. The law has provided other tribunals for the determination of such questions. It is therefore very questionable whether the sheriff would have been justified in disobeying the order in this case, if the commissions of the respective commissioners had been laid before him. But upon this we give no opinion, as it is not involved in the case. It does not appear that the sheriff had ever seen, or knew the date of, either commission, nor even that he had received any notice who held the older commission.

It would be difficult, if not impossible, to reconcile all the various decisions that have been made upon this class of questions. Many of them have been carefully examined. But we have thought it best to place the decision in this cause upon a plain and intelligible principle, which, we think, lies at the basis, and constitutes the reason, of most of them, and perhaps all of them which rest upon any sound principle.

As the view we have taken of the second point exonerates the sheriff and his bail from all liability upon the facts as presented in the case, the third question upon which our opinion is asked becomes entirely abstract, and, like the first, unnecessary to the decision of the case: we therefore express no opinion upon it.

It must be certified to the Circuit Court for the county of Kalamazoo, as the opinion of this court, that the sheriff is not liable for having obeyed the order dissolving the attachment, and that he was protected by that order in delivering the property attached to the defendant.

MARTIN Ch. J. and MANNING J. concurred. CAMPBELL J. did not sit in this case, having been counsel for one of the parties.

Darius C. Jackson and Others v. The People, for the use, &c.

By statute, the party for whose use a sheriff's bond is sued, is to be deemed the plaintiff in the action. Where one of two persons jointly entitled to prosecute died, and action was brought in the name of the People, for the use of the survivor, and of the administrator of the one deceased, and judgment taken against defendants, by default,—*Held*, That, on the death of one of the parties, the cause of action survived to the other, who alone could enforce it by suit; and that, as the declaration showed no joint right of action in the plaintiffs, the judgment must be reversed on error.

Submitted December 3d. Decided December 9th.

Error to Lenawee Circuit.

The case, so far as passed upon by the court, is fully stated in the opinion.

A. L. Millerd, for plaintiffs in error.

P. Morey, for defendants in error:

If the suit should have been brought in the name of Arthur Hughes, survivor, &c., it is too late now for the plaintiffs in error to take advantage of it. They should have demurred to the declaration, or pleaded the misjoinder in abatement. They can not lie still, without entering their appearance or taking any steps in the cause, until after final judgment is rendered against them, and then bring error to reverse what they should have objected to at the first opportunity.

But the alleged error is not against the right and justice of the matter of the suit, nor does it change the issue or the trial.—*R. S.* 472, § 6 (*Comp. L.* 4420). Therefore the case is within the statute, and the court, instead of reversing the judgment, will amend it.

CAMPBELL J.:

Suit was brought in the court below upon a sheriff's bond, in the name of the People for the use of Arthur

Hughes, and Daniel G. Quackenboss as administrator of John T. Brown, against Darius C. Jackson as sheriff, and Addison J. Comstock and Ezekiel Webb as sureties, and Addison J. Comstock as executor of Darius Comstock, a deceased surety, and Mary E. Hicks, administratrix of Daniel Hicks Jr. also a deceased surety. Quackenboss having died, his death was suggested, and Daniel Williams substituted as a new administrator of John T. Brown as a plaintiff. Judgment was rendered against all the defendants except Mrs. Hicks as administratrix. The record does not show her death, or any discontinuance against her.

The cause of action, as set forth in the declaration, is as follows: It avers the execution by Jackson as sheriff of Lenawee county, and by Addison J. Comstock, Daniel Hicks Junior, Ezekiel Webb, and Darius Comstock, of an official bond in 1842: That in July, 1843, John T. Brown and Arthur Hughes commenced an attachment suit in the Circuit Court for Lenawee county against Otho Hinton, upon which Jackson, as sheriff, attached personal property: That Hinton appeared; and, on the 12th of October, 1847, Brown and Hughes obtained judgment against him in the attachment suit, for $1300 damages, and $136.35 costs: That during the same year two executions were successively issued on the judgment, to the sheriff of Lenawee county, both of which were returned unsatisfied: That in May, 1849, a third execution was issued to the same county, and put in the hands of James Wheeler, deputy sheriff; who, before the return day, made return on the writ that he had made diligent search in said county for property of the defendant, and could find neither the goods attached, nor any other property of the defendant. The breach alleged is that Jackson did not retain the attached property, or take a bond. Damages were laid at $2500. The judgment was for a larger sum.

The party for whose use the sheriff's bond is sued is, by law, deemed to be the plaintiff in the action.—*R. S. of*

1846, *p.* 531, § 1 (*Comp. L.* § 4918.) Brown having died before action brought, the judgment survived to Hughes, who was alone entitled in law to collect it.—*Martin v. McReynolds*, *ante p.* 70. There was no joint right of prosecution, either in Quackenboss and Hughes, or in Williams and Hughes. As all this is apparent on the face of the declaration, it showed no joint cause of action in the plaintiffs, and no recovery could be had under it.

As this disposes of the whole case, it is unnecessary to look into the other errors alleged.

The judgment below must be reversed, with costs.

The other Justices concurred.

Thomas W. Snook v. Robert W. Davis and Another.

In replevin, the defense that the property was taken under legal proceedings against a third person claimed to be the owner thereof, is admissible under the general issue without notice.

By a written contract between plaintiff and one R., R. agreed to work for plaintiff in the sale of merchandise, in the store in which R. formerly carried on the same business; to take charge of said store, and do or cause to be done all the work necessary to the profitably conducting said business; to sell such goods as should be placed there by plaintiff, keep books, be always ready to render an account; to contract no debts against plaintiff without special permission; to be liable personally to plaintiff for all bad debts he might contract in said business; to give up possession of the goods and store whenever required, and pay over the avails of sales; and plaintiff agreed to pay to R. all the profits on the sales of goods over and above ten per cent.; or, in other words, the plaintiff to receive from R. the cost and transportation, and all expenses that should accrue in placing the goods in the store, and, in addition, ten per cent. on the cost of the goods and expense of placing them in the store, and at any time when plaintiff should wish to close the business, it should be at his option to take any remaining goods out of the store, or hold R. personally liable for the cost thereof and transportation; and the goods, and all sales, and credits given in the sale, were to be at the risk of R., and plaintiff was to be at no trouble or expense in any way growing out of the business, except the purchase of the goods; and should receive back in money from R., if he should require it, the cost and expense of transportation, and ten per cent. thereon. In an action of replevin by plaintiff for goods taken from the store under an execution against R., the circuit judge charged the jury that, by the terms of this contract, all the goods purchased by plaintiff under the same became the property of R. as soon as they were delivered into his possession, and that the legal effect of the contract was to constitute a sale from plain-

tiff to R. of the goods purchased by plaintiff and delivered to R. pursuant to the contract, and rendered the goods subject to the claims of R.'s creditors. *Held*, That this charge was erroneous, and that, independent of any question of fraud, the contract did not have the effect to vest in R. the goods purchased and placed in the store by plaintiff.

The court can not say that this contract was fraudulent upon its face against the creditors of R., or conclusive evidence of fraud. Whether it was made in good faith, or intended to defraud, and whether any thing done or claimed to have been done under it was fraudulent or not, were questions of fact for the jury, depending upon the evidence outside of the instrument itself.

Heard November 12th. Decided December 9th.

Error to Macomb Circuit.

The action was replevin, brought by Snook against Robert W. Davis and Thomas Golby, for a quantity of merchandise. The defendants pleaded the general issue.

On the trial, the taking of the goods by defendants was admitted. To prove his right to the goods, plaintiff gave in evidence the following agreement:

"*This Agreement*, made the 8th day of April, in the year of our Lord one thousand eight hundred and fifty-three, between Benjamin Robertson, of the village of Mt. Clemens, Macomb county, Michigan, of the one part, and Thomas W. Snook, of said village aforesaid, of the other part, witnesseth as follows:

"The said party of the first part, for and in consideration of the compensation hereinafter specified, hereby agrees to work and labor for the said party of the second part, for and during the term and time that the said Snook may see fit or desire him to work in or about the said Snook's store in the village of Mt. Clemens, in which he is about to commence the sale of stoves, hollow-ware, tin and copper ware, &c., and in the same building where the said Robertson has heretofore carried on that business.

"The said Robertson hereby agrees to take charge of said store, and to do, or cause to be done, all the work necessary to the profitably conducting said business. He further agrees to sell the goods, wares, and merchandise, that shall from time to time be placed there by the said

Snook, in a prudent and faithful manner, and at a reasonable and fair profit; to keep all the books necessary in said business in a proper manner, posted as promptly as is usual for merchants; to be at all times ready and willing to make a full exhibit of the condition of the stock and business of said store, and to contract no debts against said Snook, without his express permission first obtained.

"The said Robertson hereby further agrees to keep said store, at all reasonable times, open and ready for customers; and to be liable personally to the said Snook for all bad debts that he may contract in the prosecution of said business, and to leave the possession of the said goods and premises whenever the said Snook may see fit to have him do so. The said Robertson further agrees to pay over to the said Snook the avails of all sales from said store, whenever he may be called on by the said Snook so to do; and to deliver to the said Snook all promissory notes and choses in action that may be received in the prosecution of said business.

"And the said Benjamin Robertson hereby further agrees, that, in case he fails faithfully to perform all the said agreements as hereinbefore specified, to forfeit all claims for compensation from and of the said Snook, for his said labor that he may bestow in and about said business as aforesaid.

"And the said Thomas W. Snook hereby agrees to pay the said Benjamin Robertson for his services, to be rendered as hereinbefore set forth, all the profits on the sale of said goods, over and above ten per cent.; or, in other words, the said Snook shall receive from the said Robertson the cost and transportation, and all expenses that shall accrue in placing the goods in said store, and, in addition to said costs and expenses, ten per cent. on the gross amount of cost of goods and expense of placing the same in said store; and at any time when the said Snook shall wish to close his said business, it shall be at his option to take any remaining goods out of said store, or hold the said Robertson person-

ally liable for the price of said goods, reckoned at cost and transportation.

"And it is mutually understood and agreed by the parties hereto, that the said goods, wares, and merchandise shall, at all times from the time they leave the place where they may have been purchased, be at the risk of the said Benjamin Robertson; and all sales and credits given in the sale of any of the said goods, wares, and merchandise shall be at the risk of the said Robertson; and that the said Snook shall be at no trouble or expense in any way growing out of said business, save the purchase of said goods; and that he shall receive back, in money, from the said Robertson, if he (the said Snook) requires it, the cost and transportation of said goods to the place where they are to be sold, and, in addition to that amount, ten per cent., as hereinbefore set forth.

"In witness whereof, we have hereunto set our hands, the day and year first above written."

"BENJ'N ROBERTSON."

"T. W. SNOOK."

The plaintiff also gave evidence tending to prove that, soon after this agreement was executed, the business therein contemplated was commenced, and from that time until the taking by the defendants, was carried on in the store designated, in Mt. Clemens, in accordance with the provisions of said agreement, and that the goods in question were a part of the stock purchased by plaintiff personally, or through Robertson as his agent, and on hand, for sale in said business.

The defense gave in evidence, under exception, a judgment in the United States District Court for Michigan, in favor of Messrs. Peckhams, against Robertson, in the year 1852, by virtue of an execution upon which the defendant Golby, as special deputy of Davis, who was United States marshall, took the goods as the property of Robertson.

Defendants also gave evidence tending to show, as they claimed, that the agreement before recited was fraudulent *in*

fact, as against the creditors of Robertson, and was intended as a mere cover to protect the property of Robertson from legal process in favor of his creditors.

The circuit judge charged the jury that, by the terms of said agreement, all the goods purchased by the plaintiff under the same, became and were the property of Robertson, as soon as the same were delivered into his possession, and that the legal effect of the agreement was to constitute, and it did constitute, a sale from plaintiff to Robertson of the goods purchased by plaintiff, and delivered to Robertson pursuant to the contract, and rendered the goods subject to the claims of said Robertson's creditors. The plaintiff excepted to this charge; and, the jury having found for defendants, brought the case to this court for review on the exceptions.

Eldredge & Hubbard, and *S. T. Douglass*, for plaintiff in error:

1. The evidence on the part of the defendants, of the judgment and execution against Robertson, and the levy by virtue of the execution, &c., was inadmissible under the general issue, without a special notice.—2 *Greenl. Ev.* § 560, 563, 564; *Pierce v. Vandyke*, 6 *Hill*, 613; *Ely v. Ehle*, 3 *Comst.* 510, 511; *Demick v. Chapman*, 11 *Johns.* 132; *Comp. L.* §§ 5005, 5028, 5030, 5034.

2. The court erred in the instruction to the jury, as to the legal effect of the contract between Snook and Robertson.

If the court assume the parties to have intended what is expressed on the face of the contract, as they must do, the transaction is clearly not within the purview of any of the statutes respecting fraudulent conveyances and contracts, nor within any rule of the common law which makes one man's property liable for the debts of another.—*Forbes v. Marsh*, 15 *Conn.* 384; *Howard v. Sheldon*, 11 *Paige*, 560, 561; *Calkins v. Lockwood*, 16 *Conn.* 276; *McOmber v. Parker*, 14 *Pick.* 497; *Patton v. Clark*, 5 *Pick.* 4; 11 *Pick.* 473.

The charge of the court can not be sustained as even substantially correct, unless the court were authorised to say, as matter of law, looking at the contract alone, that the goods purchased by Snook, under it, were Robertson's goods, and that the provision between them, that Snook should remain the owner, was intended to hinder, delay, or defraud Robertson's creditors.

No such intent can be deduced from the face of the contract. Its provisions are perfectly consistent with the honesty and good faith of both parties.

It is true that this arrangement might have been resorted to for the real purpose of protecting Robertson's property from his creditors; but whether it was resorted to for that purpose or not, must, of necessity, depend upon extraneous evidence, and would be a question of fact for the jury.—*Comp. L.* § 3201; 1 *Smith Lead. Ca.* 41, 68 *to* 72, *et seq.*; 1 *Am. Lead. Ca.* 37, 39; *Jackson v. Dean*, 1 *Doug. Mich.* 519.

If adjudged fraudulent as giving Robertson a fictitious credit, it would only be so as to subsequent creditors, because they alone could be defrauded by it.—1 *Am. Lead. Ca.* 36, 40.

Walkers & Russell, for defendants in error:

1. At common law, replevin could only be brought for the tortious taking of property—not for its mere detention; and the general issue was the narrow one of *non cepit*—which admitted the property of the plaintiff, and merely put in issue the taking. The property of the plaintiff could only be questioned by an avowry or special plea.—*Ham. N. P.* 463, 465; 1 *Chit. on Pl.* 499.

The first statute alteration of this rule of pleading was in 1839—which provides that the general issue shall be joined on a plea of not guilty.—*S. L.* 1839, *p.* 230.

In 1841, it was farther provided that, if either party had a lien or special property in the articles replevied, that fact could be proved under the general issue.—*S. L.* 1841, *p.* 54.

Under those statutes, it has been decided by this court that, on the plea of not guilty, every fact stated in the plaintiff's declaration, necessary to sustain the action, was put in issue, and not the detention of the property merely.—*Loomis v. Foster*, 1 *Mich.* 165.

The present statute is still more clear and definite, and provides that the general issue puts in issue not only the detention of the property, but the property of the plaintiff therein, and his right to the possession thereof at the commencement of the suit.—*Comp. L.* § 5030.

Under this provision, we submit there can be no question of defendant's right to put in any evidence proving that he rightfully detained the property; for, if he *rightfully* detained it, then the plaintiff had no right to the possession at the commencement of the action; and this fact is expressly put in issue by the pleadings.

2. Possession is *prima facie* evidence of ownership; and when the owner of goods and chattels parts with their possession and control, the presumption is that the title also has passed. There are cases, however, under a contract in the nature of a sale, where possession is given, that the title does not pass.

1st. There are conditional sales, where, by the clear provisions of the contract itself, the title is not to pass until some contingency happens which is made a condition precedent. But a sale where the vendee is clothed with the power to sell to others at discretion, can not, from its very nature, belong to this class; nor is there here any such condition.—1 *Pars. on Cont.* 450; *Chit. on Cont.* 391; *Coghill v. H. & N. H. R. R. Co.* 3 *Gray*, 545; *Heath v. Randall*, 4 *Cush.* 196; *Brewster v. Baker*, 20 *Barb.* 364.

2d. There is a class of sales known as contracts for "sale and return," where the vendee has a right to sell the goods, and if not sold, to return the same within a reasonable time.—2 *Kent*, 642 (497); *Story on Sales*, § 249; *Moss v. Sweet*, 3 *Eng. L. & Eq.* 311 *note*; *Meldrum v. Snow*,

9 *Pick.* 441; *Morss v. Stone*, 5 *Barb.* 516; *Eldridge v. Benson*, 7 *Cush.* 483.

Here, clearly, no such right existed in Robertson. The sale was unconditional and complete.

Robertson is clothed with every right and power of owner —he could sell the goods in his own name, to whom he chose, and upon what terms he chose; and the risk was all his own. He, and he alone, has the charge and possession of them. He had no right to return a dollar's worth of them to Snook. They were entirely at his risk.—2 *Kent*, 634 (472); *Buffum v. Merry*, 3 *Mason*, 478; *Wing v. Clark*, 24 *Me.* 392; *Pleasants v. Pendleton*, 6 *Rand.* 483; *Broyles v. Lowry*, 2 *Sneed*, 22; *Willis v. Willis*, 6 *Dana*, 49; *Crawford v. Smith*, 7 *Dana*, 59; *Tarling v. Baxter*, 6 *B. & C.* 360; *Story on Bail.* §§ 438, 439; *Chit. on Cont.* 375 *a*; 1 *Pars. on Cont.* 440.

It is undoubtedly true, that, by a special contract for a proper consideration, one may assume the risk of another's property, as is done in the contract of insurance; but here there is no such pretence. The risk of Robertson simply illustrates and proves his ownership. Snook carefully relieved himself from all liability as owner.

That provision in the contract, that Snook might, at his option, close the business and take the goods on hand into his possession, or treat Robertson as his debtor, in no way militates against the position that Robertson was the owner of the goods.

This right to take the goods is a mere executory and personal agreement, which might operate by way of an estoppel, as a license on the part of Robertson, *if executed while the goods were in his hands;* but it was not a condition (if we may so speak) *running with the goods*, and binding them. No lien whatever is given upon the goods. Over the goods, Robertson's power was perfect and unlimited.

Then, too, the true construction of the provision is, that

the power can only be exercised in case Robertson has not paid for the goods, and that such payment he had a right to make any time before its exercise. It is settled law, that, when the owner of a chattel delivers it to another, under a promise that he will return the property *or* pay for it, *or* return other property, it is a sale, and the title passes.— 2 *Kent*, 754 (589); *Story on Bail.* § 439; *Holbrook v. Armstrong*, 10 *Me.* 30; *Dearborn v. Turner*, 16 *Me.* 17; *Buswell v. Bicknell*, 17 *Me.* 344; *Perkins v. Douglass*, 20 *Me.* 318; *Hurd v. West*, 7 *Cow.* 752; *Buffum v. Merry*, 3 *Mason*, 478; *Marsh v. Wickham*, 14 *Johns.* 167; *Smith v. Clark*, 21 *Wend.* 83; *Foster v. Pettibone*, 3 *Sel.* 433; *Depew v. Keyser*, 3 *Duer*, 335.

CHRISTIANCY J.:

The first error assigned raises the question, whether the justification by the defendants under the judgment and execution against Robertson, was admissible under the general issue without notice. For myself, I am strongly inclined to the opinion that it was not, and that notice of the defense should have been given. But my brethren all hold this defense admissible without notice; and as we all agree in the result upon another branch of the case, I yield to their opinion on this point, and abstain from discussing it. The result is, that there is no error in the ruling of the court below upon this point.

The other assignment of error raises the question, whether the judge erred in charging the jury that, "By the terms of the written contract between the plaintiff and Robertson, all the goods purchased by the plaintiff under the same became and were the property of Robertson as soon as the same were delivered into his possession, and that the legal effect of the contract was to constitute, and that it did constitute, a sale from plaintiff to Robertson of the goods purchased by the plaintiff and delivered to Robertson pursuant to the contract, and rendered the goods subject to the claims of Robertson's creditors," &c.

This charge relates *only to goods purchased by the plaintiff*, and delivered to Robertson under the agreement; it is entirely distinct from, and independent of, any question which might have been raised whether any of the goods so purchased by the plaintiff were fraudulently purchased with the money or capital of Robertson, to shield them from the creditors of the latter; or whether any of the property claimed by plaintiff had been purchased by Robertson independent of the agreement, and fraudulently cloaked under it; and this charge rendered the question of fraud between plaintiff and Robertson, as depending upon the parol evidence given in the cause, wholly immaterial; and no such question of fraud appears to have been submitted to the jury. If, therefore, the legal effect of the contract, independent of any extrinsic evidence, was not such as to vest the property in Robertson, as stated by the charge, the judgment must be reversed.

Independent of any question of fraud raised by extrinsic evidence, did this contract have the effect to vest in Robertson the property in the goods purchased and placed in the store by the plaintiff in pursuance of its terms, and did the contract constitute a sale of such goods, as stated by the charge? We think it did not; but that, construing it with reference only to what appears upon its face, it was substantially a contract by which the plaintiff undertook to furnish goods to Robertson, the latter to sell them, and to carry on the business for plaintiff, and in his store, so long as the plaintiff chose to employ him in that capacity, and that Robertson was to receive for his compensation all that could be made from the business over ten per cent., after paying cost and transportation; that Robertson was to be responsible for any bad debts he should make in the business, as in the case of a *del credere* commission, plaintiff having the right to close the business at any time, and to take all the goods, or such of them as he should see fit, with the undertaking on the part of Robertson to purchase the goods on hand, or any part of them, as the plaintiff should elect, at cost and transportation; and that

the goods, during the continuance of the business, and while in the course of transportation, should be at the risk of Robertson.

It is contended that the risk is an incident of ownership, and therefore conclusive of the ownership of the goods by Robertson; but though a usual, it is by no means an inseparable incident—it is only so in the absence of contract to the contrary. It is perfectly competent for a clerk, bailee, or any other person dealing in any way with the property of another, by contract to take the risk upon himself, as Robertson did in this case.

It is very possible if the question had arisen between the vendors of these goods on the one hand, and Snook and Robertson on the other, in an action to recover against the two latter the purchase price of the goods, Robertson might have been held liable to such creditors as a partner. But no such question is involved here. The question here presented on the construction of the contract, is, whether by the provisions of the contract itself, as between the parties to it, the property vested in Robertson. We think the legal effect of the contract, without reference to extrinsic evidence, was not a sale, though it might become such at the option of plaintiff, at any time when he saw fit to close the business.

But here the question may arise, whether the contract, upon its face, is such that the court can say, as matter of law, without evidence *aliunde*, that it was a fraud upon creditors, or conclusive evidence of fraud.

Neither the contract as a whole, nor any stipulation of it, is in any manner inconsistent, with entire honesty of purpose and fair dealing. It might easily be carried into full effect, in letter and spirit, without any fraud upon creditors or other persons; and, in fact, if carried into full effect according to the fair and natural import of its terms it could not well operate as a fraud upon creditors; as the goods were to be purchased and paid for, not with the money or capital of Robertson, but of the plaintiff. There is not then any

thing upon the face of the contract, which can enable the court to treat it as fraudulent towards creditors, or as any evidence that property of Robertson was shielded by it to their injury.

It is, however, easy to see that such a contract might be made a very convenient cloak of fraud upon creditors; but this would not be in pursuance, but only under pretence of the contract. Thus, by concert between them, the plaintiff might have purchased goods with money furnished by Robertson, or Robertson might purchase himself, place them in the store, and seek to hold them under pretence of the contract; and in a great variety of ways the contract (like most other contracts, and perhaps more than most others), was capable of being perverted to a fraudulent purpose. But whether it was so perverted or not—whether the contract was in good faith, or intended to defraud—whether any thing done, or claimed to be done, under it was fraudulent or not—were questions of fact for the jury, depending upon evidence outside of the instrument itself, the facts and circumstances leading to the contract, the situation and conduct of the parties in reference to the subject-matter, and all other circumstances from which the intent might be inferred, and the nature of the whole transaction ascertained.

There was evidence of this character in the present case, as appears by the bill of exceptions, and from which the jury might or might not have found a fraudulent intent, and from which they might have determined the question of ownership of the property. But the effect of the charge was to withdraw all such evidence from the consideration of the jury, and to make the whole controversy turn upon the construction of the contract as a question of law. For these reasons, the judgment must be reversed and a new trial granted.

The other Justices concurred.

Thomas W. Lockwood v. Henry W. Beckwith and Another.

If one member of a copartnership enter into a transaction on his own behalf which is within the scope of the partnership business, his copartners may insist that it is a fraud upon them, and claim the benefits resulting from it. But this is a right which partners alone can assert, and is not available to third persons, for the purpose of fixing a liability upon the partnership, when such claim has not been asserted.

The acts and declarations of a partner actually engaged in an adventure in his own name, can not be proved for the purpose of fixing a liability upon the partnership in respect to such adventure.

A party seeking to make a set-off in equity beyond that given by the statute, must affirmatively show the existence of all those facts necessary to raise the equity.

A court of equity will not allow a set-off in a case where the law would not, unless there be special equities, growing out of the transaction itself, requiring it.

Where a partnership became insolvent, and made a general assignment for the benefit of creditors, including therein a note past due, and the maker of the note held the acceptance of the partnership not then due,—*Held*, That the insolvency of the acceptors was not, of itself, sufficient to authorize a set-off in equity of the acceptance against the note in the hands of the assignee, in the absence of evidence that the acceptance was based upon the note, or that the maker of the note trusted to it, at the time, as a means of discharging his obligation.

Heard October 6th and 7th. Decided December 9th.

Appeal by defendant Beckwith from the Wayne Circuit in Chancery.

The defendant Thomas having deposited with Barstow & Lockwood, as attorneys, certain notes, mortgages, and other claims for collection, subsequently, on the 12th of May, 1849, executed and delivered to the firm of W. C. & A. A. Hunter a note for $2000, and two months thereafter, by an assignment under seal, transferred all the claims in the hands of Barstow & Lockwood to the Hunters, as collateral security for said note, stating in the assignment that the note was given for borrowed money. This assignment was deposited by the Hunters with Barstow & Lockwood; and they having collected some $800 on the claims, Thomas notified them not to pay the same to the Hunters, nor to deliver to them the claims, as he had paid the note, and the purposes of the assignment were accomplished.

On the 24th of August, 1850, the Hunters made a general assignment to Beckwith, for the benefit of their creditors. The $2000 note was passed to Beckwith among their assets; and he claimed the moneys so collected by Barstow & Lockwood to apply upon it.

Barstow & Lockwood thereupon filed their bill of interpleader to determine to whom they should pay the money and account for the proceeds of the claims in their hands.

Barstow having died pending the suit, it was revived and brought to a hearing in the name of Lockwood, as survivor.

Beckwith and Thomas answered, setting up the facts upon which their respective claims were founded, the important portions of which are substantially as follows:

On the 25th of October, 1848, Thomas entered into an agreement with a firm by the name of Enos & Co., to furnish them a quantity of wheat, which they were to manufacture into flour, and sell on his account. The performance of this agreement on the part of Thomas was guaranteed by A. A. Hunter, one of the firm of W. C. & A. A. Hunter, by a writing attached thereto.

On the 15th of November, 1848, Thomas gave Enos & Co. a note for $850, which was also guaranteed by A. A Hunter. On the 16th of the same month, A. A. Hunter delivered to Thomas a paper, of which the following is a copy:

"I take half int. [interest] 3000 barrels of flour, more or less, proceeds of wheat in Enos's hands, grinding for E. Thomas." "A. A. HUNTER." "Buffalo, Nov. 16, 1848."

Thomas insists that this whole business was a joint operation between himself and the firm of W. C. & A. A. Hunter, and not the individual undertaking of A. A. Hunter, and he having met with a loss of some $4000 under the Enos contract, for which judgment was recovered against him subsequent to the assignment by the Hunters to Beckwith, he contends that the half of this sum should be applied in satisfaction of the $2000 note.

On the 25th of July, 1850, Thomas made his draft on the firm of W. C. & A. A. Hunter, for $1000, payable sixty days after date, which was accepted by the drawees, but remained in his hands unpaid, and not due, at the time the Hunters assigned. Thomas claims that this, also, should be set off against the $2000 note.

In his answer, Thomas alleges that this $2000 note was given for the balance of an account of W. C. & A. A. Hunter against him, while Beckwith insists that it was given for borrowed money; but no testimony was taken on this point.

The firm of W. C. & A. A. Hunter had, in 1848, two offices — one in New York, under the charge of W. C. Hunter, and one at Buffalo, conducted by A. A. Hunter; and they were principally engaged in the produce and commission business. The sign over the office in Buffalo was that of the firm.

There was evidence in the case that A. A. Hunter stated that the firm were interested in the Enos contract, and that he several times made purchases of produce, &c., in his own name, making the payments in the checks of the firm, or in drafts drawn upon the firm, and that he represented these purchases to be made on behalf of the firm.

D. C. Holbrook, and *R. P. Toms*, for Beckwith:

1. Where a party deals with a partner in his individual name, and not in the name of the firm, such name being known to the party, the firm, is not liable. — *Story on Part.* §§ 102, 134, 136. Even if the firm was interested in the Enos contract, Thomas having contracted with A. A. Hunter individually, he can only look to him for indemnity. — *Story on Part.* § 140, *and cases cited.*

2. If, as Thomas swears in his answer, the $2000 note was given in settlement of accounts between him and the Hunters, the presumption is that the Hunters were not at that time indebted to him. — 5 *Denio*, 304; 16 *Johns.* 226.

3. As the $1000 acceptance was not due or payable at the time of the assignment by the Hunters, it could not have been then set off against the note, had it been brought. And as the demands were wholly unconnected, and no credit existed by which one was to pay the other, a set-off can not be now allowed in chancery. — 2 *Story Eq. Juris.* §§1434, 1435; *Shermerhorn v. Anderson*, 2 *Barb.* 584; *Keef v. Lord*, 2 *Duer*, 78; *Hicks v. McGrouty*, *Ibid.* 295. The insolvency of the Hunters has nothing to do with the case — the right of set-off by reason of insolvency is denied and repudiated. — *Howe v. Shepard*, 2 *Sumn.* 409; *Gordon v. Lewis*, *Ibid.* 628; *Greene v. Darling*, 5 *Mason*, 201; *Story Eq. Juris.* §1436, *and cases cited in note.*

H. K. Clarke, for Thomas:

1. "Mutual credit" is the ground of a set-off in equity, especially where there are equitable circumstances which support its application. For what is understood by "mutual credit," see 2 *Story Eq. Juris.* §1425; 1 *Atk.* 230; 37 *T. R.* 507; 5 *Paige*, 595. As to the equitable doctrine: 5 *Ves.* 108; 1 *P. Wms.* 326; 3 *Hare*, 568; 4 *Y. & C.* 351; 8 *Ala.* 206; 6 *Dana*, 31; 4 *Day*, 472. Insolvency is one of the circumstances which courts of equity regard as justifying an equitable set-off. — 5 *Cush.* 194; 20 *Mo.* 298; 2 *Paige*, 581; 4 *Edw.* 537; 2 *Barb.* 258.

2. A general assignee for the benefit of creditors is not a purchaser for value. He can claim no other rights than those which his assignor might assert, if acting in his place. A debt not due at the time of the assignment may be set off against the assigned claim. — 10 *B. & C.* 777; 3 *T. R.* 435; 13 *Ves.* 67.

3. A partnership may be bound by a transaction in the name of one partner, as well as by the joint name, if it be within the scope of the partnership business. — 12 *Pick.* 430; 5 *Pet.* 529; 1 *B. & C.* 146.

4. One member of the firm can not lawfully carry on the

business in which the firm is engaged on his separate account. —*Story on Part.* §§ 174, 177, 178; *Coll. on Part.* §§ 179, 184, 185, 186, 212.

5. The partnership being established, the acts and declarations of one partner in matters relating to the affairs of the partnership will be evidence against the firm. —*Coll. on Part.* § 779; *Story on Part.* § 107; 16 *Wend.* 505; 1 *Greenl. Ev.* § 112; 4 *D. & R.* 7; 1 *Taunt.* 104.

6. Special circumstances will sometimes create an equity which will justify the set-off of a joint against a separate debt. — 3 *Meriv.* 617; *Story Eq. Juris.* § 1437; 11 *Ves.* 24; 12 *Ves.* 346; 1 *Gallis.* 630. The special circumstances in this case are found in the series of transactions between Thomas and the Hunters, from which Thomas might reasonably infer that he had the obligation of both in all his dealings with A. A. Hunter.

MARTIN Ch. J.:

Two questions are raised by the parties interpleading, for our determination: 1st, Whether Thomas is entitled to set off the one-half of the judgment obtained on what is called the Enos contract, being about two thousand dollars, against the note for two thousand dollars, in Beckwith's hands; and, 2d, Whether he is entitled to set off the one thousand dollar acceptance of the Hunters against such note.

The claim to set off the one-half of the judgment obtained on the Enos contract, is based upon the proposition that the firm of W. C. & A. A. Hunter was interested in the contract, and was of course bound by the judgment, and liable to contribute towards its satisfaction. An examination of the testimony satisfies us that no such liability exists. W. C. Hunter never had any interest in that contract, was never a party to it, and is of course not bound by the judgment. A. A. Hunter was individually interested in the contract, and it was his private adventure; there is no evidence that W. C. Hunter ever had any knowledge

of, or participation in, it, or that he was regarded by any one as connected with it, until this claim of set-off was made. While it is true that a partnership may be bound by a transaction in the name of one partner, as well as by the joint name, if it be within the scope of the partnership business, yet this is only true when the transaction is one in behalf of the partnership, and not of a member. If a member enter into a transaction in his own behalf, which is within the scope of the partnership business, his co-partner may insist that it is a fraud upon him, and claim the benefit resulting from it; yet this is a right which the partner can alone assert, and is not available to third parties for the purpose of fixing a liability upon the partnership, when such claim has not been asserted. Nor, under such circumstances, will the acts and declarations of the partner actually engaged in the transaction in his own name, bind the partnership so as to affix a liability upon it. As the transaction is ostensibly and primarily his own, and in fraud of his co-partner, if he chooses so to regard it, A. A. Hunter can not add to this fraud the further one of making the partnership liable upon his individual adventures, by his voluntary acts and declarations.

It is further insisted that Thomas is entitled to have the amount of the one thousand dollar acceptance set off against this note.

There is no evidence in the case tending to show for what purpose, or under what circumstances, the acceptance was given. All we know is the simple fact that Thomas, on the 25th of July, 1850, drew upon the Hunters for one thousand dollars, at sixty days, and that the draft was accepted by them. We are not even informed in whose favor the draft was drawn—in fact, the presumption is that it was in his own favor, as he alleges that he held the acceptance at the time of the assignment by the Hunters to Beckwith, and it had then some thirty days to run. It may have been made as accommodation paper, and, this failing, the accept-

ance remained in Thomas's hands. Whatever may have been the fact, the Court will infer nothing in favor of this claim; for the relief being purely equitable, and beyond that given by the statutes of set-off, the party asking it must affirmatively show the existence of those facts necessary to raise the equity. Although at law the acceptance is *prima facie* evidence of funds in the hands of the acceptor, yet equity requires something more than a *prima facie* case upon which to act, in cases requiring a departure from the statute in affording the remedy. Thomas, it must be remembered, is, as to this claim of set-off, in the position of one seeking relief; for there is no pretence that he has actually paid the two thousand dollar note, or any part of it. He asks the Court to appropriate the amount of that acceptance upon the note; and the *onus* is cast upon him to establish his equitable title to such relief.

Now, at law, he had, at the time of the assignment by the Hunters to Beckwith, no right to set off the amount of this acceptance against the note, as it was not due; and it is upon their rights, as they then existed, that we are asked to adjudicate. Has he any such equitable right? As the case is presented to us, we have only evidence, at the most, of the existence of cross demands between them, one only of which was due. It appears that in May, 1849, the note for two thousand dollars was given by Thomas to the Hunters, and that, in July of that year, he assigned to them the securities out of which this controversy arises. This note is certainly not evidence of any prior dealings, nor of the existence of any mutual credits between the parties. Upon this point of their dealings, there is again no testimony. Thomas alleges that the note was given for the security of a balance of his account with the Hunters; but we have no evidence that any such account ever existed, and in his assignment of the securities, he alleges that it was given for borrowed money; and so Beckwith insists the fact to be. Nor is there testimony of

any subsequent dealings or credits between Thomas and the Hunters. The evidence is altogether silent upon this point also. The only thing which clearly appears, is the fact that Thomas assigned certain demands to secure this two thousand dollar note; but what is their amount and value, is not shown nor stated. Whether they amounted to two thousand dollars, or exceeded that sum, we can not ascertain — all we know, is, that only eight hundred dollars has yet been collected out of them. From this fact, certainly, no presumption of equity can arise in favor of this claim of set-off. The existence of mere cross demands is no ground for this relief.

Nor does the fact of the Hunters' insolvency and assignment before the acceptance fell due, of itself, raise an equity of set-off, although it is a circumstance which, in connection with the fact of the existence of a mutual credit, will justify such set-off. Although there is much doubt thrown over this branch of the law, and conflict of authorities, yet we think the true rule to be, that the debt must have existed as a mutual credit, at the time of the assignment to Beckwith, to authorize the set-off. The equity must attach to the demand, and not to the person of the debtor. Judge Story, in 2 *Eq. Juris.* §1435, says, that "independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debt due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge, on both sides, of an existing debt due to one party, and a credit by the other party, founded on, and trusting to, such debt, as a means of discharging it." It has been repeatedly said that, in the matter of set-off, courts of equity follow the law, and will not allow set-off in cases where the law will not, unless there

be special equities growing out of the transaction itself, requiring it; and in this case we discover none.

The decree of the court below must be reversed, and a decree entered for Beckwith, in accordance herewith, with costs.

MANNING and CHRISTIANCY JJ. concurred. CAMPBELL J. did not sit in this case, having been counsel for one of the parties.

The People v. Catharine H. Jones.

If the owner of land do such acts as show, unequivocally, an intent to dedicate his land to the public for a highway, such dedication, if properly accepted, will make the land dedicated a public highway, without reference to any particular period of time.

In determining whether there has been a dedication, all the acts of the owner bearing upon the question are to be considered together. One act may be explained or qualified by another.

A dedication can not be made without an intent to dedicate, clearly manifested.

It is essential to a dedication that it be accepted by the public. In the case of city streets, the acceptance should be manifested by some act of the authorities, either formally confirming the dedication and ordering their opening, or exercising authority over them in some of the ordinary ways of improvement or regulation.

The adoption, by the Governor and Judges of the territory of Michigan, of the plan of the city of Detroit, in 1807, did not, of itself, make public highway of that portion of the projected streets which was covered by private claims, and occupied as private property.

The power of the Governor and Judges to convey lots in the town of Detroit, was not confined to a conveyance of lots in such forms and dimensions, as they should delineate them upon their plan. Under the acts of Congress empowering them to adjust claims to lots therein, and give deeds for the same, the claims to be adjusted were such as any person might have, legal or equitable. When satisfactory proof had been made, they had no right whatever to deprive a claimant of any portion of the land actually belonging to him under the acts of Congress, passed to protect ancient titles and settlements, whether it interfered with any projected plan or not. And no court has a right to go behind their conveyances, so long as they acted within the jurisdiction vested in them by Congress.

The adoption by the Governor and Judges of the plan of Detroit was not intended by them to be a final and absolute act, which could not be reviewed or explained. It was liable to modification by interfering claims and reserves; and, when circumstances might render it necessary to adapt the plan to these contingencies, they had the power to do so.

THE PEOPLE *v.* JONES.

That portion of Shelby street between Jefferson Avenue and Woodbridge street, as projected on the plan, being at the time of the adoption of the plan claimed and occupied as private property, and so continuing to be claimed and occupied thereafter; and the corporate authorities of Detroit having, many years after the adoption of the plan, under their authority to lay out streets through private property, caused a street to be opened along it, but of less width than the street as originally projected, paying the occupants of the land for the strip so taken; —*Held*, That this was a waiver of any rights of the corporate authorities, if any they had under the plan, to that portion of the projected street outside the lines of the street so opened.

Heard November 23d and 24th. Decided December 9th.

Case reserved from Wayne Circuit.

The facts are sufficiently stated in the opinion.

J. M. Howard, Attorney General, for the People:

1. The legal effect of the adoption by the Governor and Judges of the plan of Detroit of 1807, was an actual and present dedication of the ground as streets delineated as such on the map.

The United States were, at the time, the actual owners of the lands embraced within the limits of Detroit, and had an undisputed right to grant or dedicate it, as they should see fit. They saw fit, by the act of 1806, to authorize the Governor and Judges, or any three of them, *to lay out a town*, to include the whole of the old town of Detroit. This was a special authority conferred upon the Governor and Judges, wholly distinct from, and independent of, their legislative authority. In its exercise they were merely the agents of the Government. Their acts were its acts. Their streets and alleys were the streets and alleys of the United States. The act did not authorize them to change any dedication they had made; nor could they do so in their legislative capacity, for the act of dedication not being their own, but that of the United States, it was, when done, necessarily beyond their reach. Indeed, the law does not allow the party making it to revoke a dedication. — 5 *Sandf.* 587.

The resolution of the Governor and Judges, adopting the plan, made this a highway for ever. — *People v. Carpenter*, 1

Mich. 278; *Brig Empire State*, 1 *Newb.* 541; *Barclay v. Howell's lessee*, 6 *Pet.* 498; *Cincinnati v. White's lessee*, *Ibid.* 440; *People v. Beaubien*, 2 *Doug. Mich.* 283.

Detroit was, at this time, a town-corporate. Its trustees had power, by the charter, to cause the streets, lanes, &c., to be kept open and in repair, and free from nuisances; and the dedication was, of course, made in view of the fact that they might, at any time, enter upon the ground for the purpose of repairing and improving it as a street.

2. Actual *user* as a highway was not necessary to complete the dedication. — 6 *Pet.* 498; 2 *Doug. Mich.* 283; *Commonwealth v. Rush*, 14 *Pa. S. R.* 186; *Matter of Thirty-second Street*, 19 *Wend.* 130; *Rowan's ex'rs v. Portland*, 8 *B. Monr.* 232.

3. The deed to Beard was, so far at least as this street was concerned, entirely ineffectual. The act of 1806 authorized the Governor and Judges to sell, not streets, but *lots*, — *i. e.* parcels of land which they should, in laying out the town, designate as such. This is plainly the extent of their statutory power to sell. Besides, the act of dedication was, in its nature, irrevocable. — *Pitcher v. N. Y. & E. R. R. Co.* 5 *Sandf.* 587; *Adams v. S. & W. R. R. Co.* 11 *Barb.* 414; *State v. Woodward*, 23 *Vt.* 92.

4. No presumption of an abandonment of their right by the public arises from the omission to open and work the street. No length of time can legalize a public nuisance. — 1 *Chit. Cr. L.* 160; 1 *Russ. on Cr.* 305; *Weld v. Hornby*, 7 *East.* 199; *Mills v. Hall*, 9 *Wend.* 315. If it could, and thereby give the offender, or his successor, a prescriptive right against the public, the principle would be inapplicable to a case like the one at bar, where streets were laid out for the *future*, not for the present — and with full knowledge that generations must pass away before all these streets would be actually used.

G. V. N. Lothrop, for defendant:

1. The platting, by the Governor and Judges, no more *ipso facto* established public highways than does the act of an individual who plats a piece of private property into lots, streets, and alleys. Such platting is not necessarily nor usually a dedication. *It simply contemplates a future dedication*, and this plat is but the first step towards it. He intends afterwards to open it, and sell lots along the proposed street. And when this is done, and not before, it can be said that there is a dedication.

The object of the plan in question was to lay out the city into lots, with a view of adjusting titles, and, by deed, conveying the lots as provided in the act of Congress. It was the adoption of a general plan which should furnish the groundwork for shaping into some system the work of these magistrates in adjusting and making titles. It was nothing more nor less than a proposed chart for the guidance of their future action. It was the plan of the city as they *proposed* it *should be*. So far as they could carry it out in their subsequent action, it became the *actual* plan of the city. When they should adjust titles, and sell and convey lots according to the proposed plan, they would thereby recognize and establish that part of the proposed plan—thereby recognize, establish, and *dedicate* the streets and alleys which were adjacent to such lots, and contemplated as adjacent to the same.—*May v. Tillman*, 1 *Mich.* 263; *U. S. v. Chicago*, 7 *How.* 185; *Oswego v. Oswego Canal Co.* 2 *Sel.* 257; *Badeau v. Mead*, 14 *Barb.* 329; *Clements v. West Troy*, 16 *Barb.* 251; *Bailey v. Copeland, Wright*, 150; *Matter of Twenty-ninth Street*, 1 *Hill*, 189.

2. But, conceding that the plan of the Governor and Judges had the effect claimed, we say that the premises in question ceased to be a highway long ago. After this long period of non-user and exclusive private occupancy, it will be presumed that the right is extinguished or

abandoned.—*Beardslee v. French*, 7 *Conn.* 125; *Fox v. Hart*, 11 *Ohio*, 414. Especially should this be so when the only ground for assuming that a highway ever existed is a naked laying-out on paper.

3. By the laws of 1833 (*p.* 110), if any highway already laid out should not be opened and marked in six years, and by the statutes of 1838 (*p.* 127) in four years, it ceased to be a highway for any purpose. These statutes seem to us decisive of this question, if the proposed street was ever a highway. They would also settle the period within which the Court might presume an abandonment of a highway, in a case where the statute did not, in terms, apply.

CAMPBELL J.:

The defendant was indicted for obstructing an alleged highway, described in the indictment as leading from Jefferson Avenue to the Detroit River, in the city of Detroit, and known as Shelby street. A special verdict was found, and the liability of the defendant to judgment upon that verdict, is the question reserved for our opinion.

From this it appears that in the year 1807 the Governor and Judges adopted a plan of twelve sections, in separate parts — section 3, embracing the land in controversy, having been adopted April 27th, 1807; and on the same day a resolution was adopted that the plan of this section, and of sections 1, 2, 4, 6, and 8, "be confirmed, and be a record, and that they be signed by the President of the Board, and be attested by the Secretary in identification; and that no alteration be suffered therein without an order of the Governor and Judges to that effect." The section in question is bounded north by Jefferson Avenue, and east by Woodward Avenue. A street parallel with Jefferson Avenue has long been, and is now, open according to the plan, as far as the street below the land in controversy. The plan calls for its continuation a considerable distance further, to the west boundary of the plan. The jury find that the street and alley spaces on this section have never

been, except in part, opened, used, and recognized in fact as streets and alleys: That what is claimed as Shelby street in the indictment is represented on the plan by a space of sixty feet in width, reaching from Jefferson Avenue to the river: That on January 16th, 1811, upon the application of Aaron Greeley and David Beard, to purchase the lands in front of their respective lots in the old town of Detroit, between the Merchants' and Public Wharf, an order was made to sell to them, at a certain rate per square foot, subject to the new plan of Detroit, and all intervening claims; and a deed was accordingly made to David Beard of a tract embracing the premises in controversy, for a consideration embracing payment for the whole of it. This lot extended to the street parallel with Jefferson Avenue, now known as Woodbridge street. In the *habendum* clause of the deed, it was made subject to the new plan of Detroit, and all interfering claims At the date of the deed, the water came nearly or quite up to Woodbridge street at the intersection of Shelby street, and nearly all the premises conveyed were under water. Since that date, Beard and his grantees (the defendant being such) have continuously claimed and occupied the whole premises as private property; and the land was reclaimed from the river, and buildings erected upon the alleged street, as early as 1816, and continued there ever since. In 1819, the building now complained of was erected in the alleged street space, and has been maintained there to this time. So much of the alleged Shelby street as lies between Woodbridge street and Jefferson Avenue was never actually opened as a street, according to the plan. The ground over which it was projected was known as the Dodemead lot, and remained enclosed and used as private property, until 1828, when the corporate authorities of Detroit caused a street forty-four feet wide to be opened through the Dodemead lot, and paid the owners of the land for the strip so taken. The premises in question have always been claimed, reputed, and occupied as private property. The building in question has been used as a ware-

house, and a passage has been kept up from Woodbridge street to it, and used by all persons having business at the warehouse and dock. No part has been claimed, or used, or worked by the public; and the whole has been regularly taxed for all various public purposes since 1834. The passage referred to is about thirty feet wide, bounded by buildings on either side, which are in the space claimed as the street in question. The Governor and Judges sold no part of the lands adjacent to the alleged street, by lots numbered according to the plan, and never referred to it as a street subsequently, and never sold property bounding upon it as an actual or supposed street.

The question for our determination, therefore, is whether the land in controversy was a public highway when the building complained of was erected in 1819, and whether it was so at the date of the indictment, which is for maintaining an existing nuisance.

It is claimed by the People that the action of the Governor and Judges, in adopting the plan of section 3, constituted the space marked there as a street, a public highway, operating as a complete and irrevocable dedication of it, in which the public became at once, and perpetually, interested. It therefore becomes necessary to inquire into the nature and effect of their action.

No law has ever declared this strip of land to be a public highway, and there is no statute declaring the effect of making such a map or plan. Our statute relating to town plats requires certain formalities which are not found here. We are therefore left to decide the case upon such principles of law as can be found applicable.

Where the provisions of the statutes for opening streets and roads have not been followed, the common law recognizes the existence of ways by dedication. If the owner of the fee does such acts as show, unequivocally, an intent to dedicate his land to the public for a highway, such dedication, if properly accepted, will make the land dedicated a public

highway, without reference to any particular period of time. But to make out a dedication, it is not only necessary that the act be done by the owner of the land, but all of the acts of the owner bearing upon the question are to be considered together. One act may be explained or qualified by another. This subject was very ably investigated in the case of the *People v. Beaubien*, 2 *Doug. Mich.* 256; and we deem it unnecessary to add any thing to the reasoning of that case. No dedication can be made out without an intent clearly manifested. And it is also necessary that the dedication be accepted. No question can arise as to the necessity of both of these things where the land dedicated is individual property. But the peculiar situation of the property, and the character of the actors, in the case before us, render it necessary to determine whether, under the circumstances presented, these rules are in any way modified; or whether the public capacity of the Land Board does not invest them with a two-fold relation of land-owner and representative of the public, and whether they have not assumed to act in both positions.

The precise point, as to the effect of the adoption of the plan of this section, has not been passed upon. We were referred to the case of the *People v. Carpenter*, 1 *Mich.* 273, as decisive of this controversy. We are, however, unable to perceive how the facts involved there were at all analogous to those in this case. That was an indictment for obstructing Woodward Avenue, which was found by the special verdict to have been opened and used as a highway before the adoption of any portion of the city plan. As a matter of fact, that street, as well as Jefferson Avenue, was made a highway by express statute in 1805, before any authority existed to make a general plan. No question, therefore, arose upon the authority of the Governor and Judges to create highways, or upon the effect of the adoption of the plan in creating them. The act there complained of had never been authorized by any one. The case is therefore no authority, one way or another, upon any point in issue here.

THE PEOPLE *v.* JONES.

It was decided in the case of the *People v. Beaubien*, that an individual, by making a plan, and selling lots in accordance with it, did not necessarily create the streets upon it highways—although he might thereby become liable to his vendees. The rights of the public would depend upon the intent to dedicate on his part, and an acceptance of the dedication by the public. Until, by the union of both of these requisites, the public easement had become perfectly established, no criminal prosecution could be maintained. As to the method whereby acceptance may be manifested, the authorities are not uniform. Where there has been no public *user*, there must, undoubtedly, be some act of the lawful authorities. The courts of several states have held that, inasmuch as the local authorities are required to determine what highways are needed for public convenience, and as existing highways always entail more or less expense in repairs, it is contrary to public policy to permit them to be established without the action of these authorities, unless the user be so long that the law raises a presumption in their favor.—*Hobbs v. Lowell*, 19 *Pick.* 405; *Bowers v. Suffolk Manf. Co.* 4 *Cush.* 332; *Wright v. Tukey*, 3 *Cush.* 290; *Page v. Weathersfield*, 13 *Vt.* 424; *Blodgett v. Royalton*, 14 *Vt.* 288; *City of Oswego v. Oswego Canal Co.* 2 *Sel.* 257; *Badeau v. Mead*, 14 *Barb.* 328; *Clements v. West Troy*, 16 *Barb.* 251; *Kelley's case*, 8 *Gratt.* 632; *Indianapolis v. McClure*, 2 *Ind.* 147. The case of *Underwood v. Stuyvesant*, 19 *Johns.* 181, lays down this doctrine in regard to city streets in very strong terms. And in all the cases which have arisen in New York, upon town or city ways, this principle has been adhered to. It would certainly lead to strange consequences, if the plan of a city could be placed beyond the reach of its corporate authorities, and varied without their assent. The same mischiefs would not occur in opening rural ways, and there may be no special reason for holding such a rule in regard to them. Our statutes, however, have always made provision that roads not worked within a specified period

shall be discontinued, and therefore the question at common law becomes, as to them, unimportant. Without expressing an opinion whether these statutes apply to city streets, we think that an acceptance of such streets should be manifested by some act of the authorities, either formally confirming the dedication, and ordering their opening, or exercising authority over them in some of the ordinary ways of improvement or regulation. In the case of the city of Oswego, the plan had been made by the public agents of the state, yet the rule was held to apply.

We now proceed to examine into the circumstances of the case before us.

It appears that the Governor and Judges made a plan, adopting different portions of it at different times, embracing all lands, whether public or private, within its bounds. It was a symmetrical paper plan, as the facts show, made, as is apparent from the face of it, without any actual survey upon the ground. Portions of it were in the water, and portions of it, as subsequent public legislation shows, covered reserved lands and private farms. By the act of the Northwest Territory incorporating the town of Detroit, passed in 1802, its corporate limits embraced at least two farms—the Askin, or what is now known as the Brush farm, and the Macomb, now known as the Cass farm. A fort was at the time existing by authority of law, and military reservations, recognized and defined by subsequent acts of Congress and of the territory, were scattered over portions of the town. The plan covered all these lands indiscriminately; and, on paper, the streets, alleys, and other open grounds extended over much territory which the Governor and Judges had no power to dispose of—without reference to private claims. It is claimed, however, on behalf of the People, that we are bound to take judicial notice that no valid titles existed here, and that the whole domain was subject to the absolute disposal of the United States, who delegated, intentionally, to the Governor and Judges, complete power over it; and that, in making the

plan, they were but carrying out this power. The jury, certainly, find no such facts. A review of the facts appearing from the public acts of the country will show whether the position taken is correct or not.

Detroit formed originally a part of the French possessions which were ceded to Great Britain by the Treaty of Paris of 1763, in which provision was made for the full protection of private rights and possessions. By the treaty of peace between the United States and Great Britain, made in 1783, it became a part of the possessions of the United States, and was included, by the Ordinances of 1787 and 1789, within the Northwest Territory. But it was, with the other posts in the northwest, retained by the British authorities until 1796, when it was formally delivered up under Jay's Treaty of 1794. By the latter treaty more full and specific protection was granted to the settlers in their rights to land, legal and possessory. By a technical interpretation, our Government might have avoided sustaining any but perfect titles; but the manifest injustice of such a course led to a more generous and humane interpretation. In 1802, an inquiry was set on foot by the United States, and Mr. Jouett, the Indian Agent, reported to the Government upon the subject. His report was not based upon an actual and authorized investigation into each case, upon the documents, but it was the foundation of the subsequent action of Congress. We do not here refer to its facts (although they were surprisingly accurate, considering the circumstances), for they could not be properly regarded in this controversy. In March, 1804 (2 *St. U. S.* 277), an act was passed requiring all persons claiming lands within the districts attached to the Land Offices at Detroit, Vincennes, and Kaskaskias, to exhibit their claims by virtue of any legal grant made by the French Government prior to the Treaty of Paris of 1763, or of any legal grant made by the British Government subsequently to that, and before the Treaty of 1783, or of any act or resolution of Congress after the Treaty of 1783. The Register and Receiver, as commissioners, were

to record the evidence in each case, and to make separate reports—one of affirmed and another of rejected claims—with the evidence, and with any remarks thereon which they might deem proper. In March, 1805 (2 *St. U. S.* 344), the time for exhibiting claims was extended, and all persons were authorized to exhibit to the commissioners any claims, whether based on legal grants, actual possession and improvement, *or for any account whatever*. Similar reports were to be made of confirmed and rejected claims; and in all cases of rejected claims based on possession and improvement, they were particularly required to state the date and extent of the improvement, and the extent of land claimed, with its situation and boundaries. All lands so claimed, whether the claims were confirmed or rejected, were to be reserved from any disposition until the further action of Congress. In June, 1805, Detroit was burned. On the 21st of April, 1806, before Congress had acted on any of these claims, an act was passed, the first section of which is as follows:

"*Be it enacted, &c.*, That the Governor and the Judges of the Territory of Michigan shall be, and they, or any three of them, are hereby authorized to lay out a town, including the whole of the old town of Detroit, and ten thousand acres adjacent, excepting such parts as the President of the United States shall direct to be reserved for the use of the Military Department, and shall hear, examine, and finally adjust all claims to lots therein, and give deeds for the same. And to every person, or the legal representative or representatives of every person who, not owning or professing allegiance to any foreign power, and being above the age of seventeen years, did, on the eleventh day of June, one thousand eight hundred and five, when the old town of Detroit was burnt, own or inhabit a house in the same, there shall be granted by the Governor and Judges aforesaid, or any three of them, and where they shall judge most proper, a lot not exceeding the quantity of five thousand square feet."

The second section directed the residue, after satisfying

such claims, to be sold, and the proceeds appropriated to build a court house and jail in Detroit; and the Governor and Judges were to report their doings to Congress.

On March 3d, 1807 (2 *St. U. S.* 437), an act was passed confirming all the claims allowed by the commissioners. The act further provided that all possessory claims, originating previous to July 1st, 1796, should be confirmed by a new board, appointed by the act, as estates in fee simple, if not exceeding six hundred and forty acres; and patents were to issue upon certificates granted by the commissioners. The same act declared "That the powers vested by this act in the commissioners above mentioned *shall not extend to lots in the town of Detroit, the claims to which shall be ascertained and decided upon in the manner provided by the act entitled "An Act to provide for the Adjustment of Titles of Land in the Town of Detroit, and Territory of Michigan, and for other purposes.*"

Some subsequent acts were passed, all aiming at securing the claims and equities of settlers, but which are not material to this inquiry.

It was claimed, on behalf of the People, that the only power given to the Governor and Judges was to convey "lots" in such forms and dimensions as they should delineate them upon their plan, and with reference to the details of the plan. But the acts referred to, and the construction put upon them by the Supreme Court of the United States, as well as by this Court, will show that this ground is entirely untenable.

In the case of *Forsyth v. Reynolds*, 15 *How.* 358, Robert Forsyth claimed title to a lot in Peoria, under an act of Congress which confined the right to such lots to settlers who "had not heretofore received a confirmation of claim or donation of any tract of land, or village lot, from the United States." It was shown that he had received confirmations of two claims in this county, above Detroit, under the act of March 3d, 1807, above referred to. The court held that

while that act pointed out the only means whereby he could obtain title, yet the grants under it were not mere gratuities, but were made to carry out, in good faith, the equitable intentions of Jay's Treaty; and that the benefits obtained by the United States from that treaty were the consideration upon which they were assured to the settlers. The court therefore decided that Forsyth was not cut off from the right to a lot in Peoria. This court, in the case of *May v. Specht*, 1 *Mich.* 187, took a similar view of the act of 1807. See also, *May v. Tillman*, 1 *Mich.* 262.

The Governor and Judges had the same authority over every class of claims within the city of Detroit which the commissioners had on outside claims, with the additional right and obligation to decide thereon finally, and execute deeds without waiting for the action of Congress, or the Departments. We have not, nor has any other court, the power to go behind their conveyances, so long as they acted within the jurisdiction vested in them by Congress. It is claimed, however, that the lots they were empowered to adjust and confirm the titles to, were to be such lots only as they should lay out on their plan. We think this is not a correct view of the act.

The act does indeed provide that certain persons should receive lots not exceeding five thousand square feet each; but these lots are mere donations, confined to actual residents, and citizens of the United States, who were burnt out by the fire, and were intended in some measure as an indemnity for their losses and inconveniences. But the *claims* to be adjusted were such as any person, citizen or alien, had a legal title or equitable claim to, under the acts of Congress passed to protect ancient titles and settlements. Upon satisfactory proof, the Governor and Judges had no right whatever to deprive a claimant of any portion of the land actually belonging to him under those acts of Congress, whether it interfered with any projected plan or not. As we have already seen, Jefferson and Woodward Avenues had become legal highways

by statute; and so far the claims might perhaps be interfered with, upon payment of damages, if required; but no power existed, without consent, to curtail the full rights of any one to his ancient possession. It may have been in the power of the board arbitrarily to refuse to confirm just claims, but such an act would have been a gross abuse; and the facts found in this case show that no such tyrannical expedient was resorted to.

Instead, therefore, of assuming that the lands in Detroit were vacant parts of the public domain, entirely subject to the control of the Governor and Judges, we are forced to take notice that rights existed, both individual and public, which they were legally bound to respect. And this fact, in our judgment, is entirely inconsistent with the idea that the adoption of the plan was intended by them to be a final and absolute act which could not be reviewed or explained. The very terms of the resolution adopting it, leave the door open to future modification. And any attempt on their part, by such action, to cut off or diminish the rights of claimants, would have been a clear infraction of duty. It was desirable, undoubtedly, for them to have some plan at once, in order to lay out lots for donations to the sufferers by the fire, and who might not have claims under the general acts of Congress; and so far as claimants could be induced to accept new lots in exchange for their old ones, to adjust the claims in that way; but, until such claims were settled in one way or the other, and until the military reserves were all defined, it would be impossible to tell whether the lines of the plan could be adhered to or not. The northern and eastern lines of this section were established already, but its interior arrangement was liable to modification by interfering claims and reserves. It would be going very far to hold that when circumstances might render it necessary, on these accounts, to accommodate the plan to such contingencies, a board of plenary powers, under an act of Congress, should be hampered by any narrow rule applicable between individuals in

the execution of common law powers, which might destroy the usefulness of their whole action. The act of Congress gives them a very broad discretion; and so long as their subsequent action should not interfere with vested rights of individuals, or of the municipality, we do not perceive how an original act, never intended as a finality, and which, if so intended, would, in great part, conflict with private estates as well as public reserves, can be properly regarded as unchangeable. The powers of the board must be so construed as to harmonize them, and not to make them conflict with each other.

The street in question, as laid down on the map, ran from Jefferson Avenue to the river, crossing Woodbridge street in the way. The plan does not show the supposed water line, not having been made by survey, but being a paper plan merely. In fact, the jury find that the water came nearly or quite up to Woodbridge street. The case shows that all of the dry land embraced in the projected street, was private property. The Dodemead lot occupied the space between Jefferson Avenue and Woodbridge street, while the Beard and Greeley claims appear to have been in that street, and to have reached its southern line, where the grant of 1811 commences. We can not suppose that the board intended or imagined that the platted street was to be then, or at any other time, a highway, until the land should be lawfully taken and paid for. The whole case negatives any such idea. And the land was not theirs to dedicate.

But it appears that the city authorities have not been passive. In 1828, they disregarded the plan by opening a new street of forty-four feet in width, covering to that extent, and no further, the street projected; and did so under their authority to lay out streets through private property on payment of damages. This was a clear waiver of any rights in the premises under the plan, if such existed. This point was decided, under similar circumstances, in the case of *Seaman v. Hicks*, 8 *Paige*, 655.

And it is further to be observed that, by the City Charter of 1827, the corporation was expressly prohibited from opening any street under the plan, without previous notice, and was required when any claim of damage was set up by any person through or adjacent to whose premises such street would pass, to have his damages assessed and tendered, before any further step could be taken.—*Laws of* 1827, p. 578, §§ 18, 19. This law forbids the idea that any unopened street could be regarded as a highway, whether so intended in the first place or not.

Many other considerations worthy of attention were submitted to us, but as we were informed upon the argument that controversies have arisen concerning portions of the public grounds differently situated, we reserve any other points for examination when they may arise hereafter.

We are clearly of opinion that the defendant, upon the finding of the jury, is not guilty of any infringement of public right, and that judgment should be rendered in her favor upon the verdict.

The other Justices concurred.

JANUARY TERM, 1859, AT LANSING.

Matter of Henry Selby. Daniel S. Cash and Another, Appellants.

The act of Congress "for the Relief of Citizens of Towns upon the Lands of the United States, under certain circumstances," approved May 23d, 1844, was intended to apply exclusively to actual and existing towns, and not to such lands as may have been selected by non-resident claimants as the site for a city or town.

Said act was intended for the protection of citizens of villages and cities that had grown, or might grow, up on government lands, for commercial and mechanical purposes, and to secure to them severally, at the minimum price, all lands actually occupied by them respectively for village or city purposes; and to them, collectively, for the use of the village or city, such other lands as might be embraced in the government subdivisions included within the limits of the village or city.

In providing that the trust under said act should be "conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory," said act intended to leave it with the local legislature to define and fix the limits and objects of the trust internally, and to carry out in detail what Congress had only given an outline of. Such rules and regulations are to relate to the determination of claims to possession, and the extent of possession that may fairly be considered as falling within an occupancy for town purposes, as well as to the disposition of the part of the land not actually occupied for town purposes by individuals.

The act of the Legislature of Michigan, approved February 20th, 1853, which authorized the district judge of the Upper Peninsula, after entering the lands embracing the town site of Ontonagon, to give "first to James K. Paul a deed of such lots as he holds, or may hold, free from the claim of any other person, by virtue of an equitable pre-emption claim thereto, and to all other occupants, deeds to each severally of the lots held by them by virtue of contracts made with said James K. Paul,"—thus undertaking to dispose of the whole trust to the person named and his grantees, and authorizing no one else to be considered or receive any relief—is in direct violation of said act of Congress, and therefore void.

Said legislative act is inoperative and void also, because not prescribing any such rules and regulations for the execution of the trust as the act of Congress contemplates.

A claimant under said act of Congress, whose petition shows that the land claimed had not been actually occupied at the time the state legislation designed to carry out said act, was adopted, and that it was afterwards occupied only as a farm, does not come within the provisions of said act, and is entitled to no relief under the trust.

CASH AND SPALDING, APPELLANTS.

Where land has been entered by the county judge under said act of Congress, and the trustee is proceeding to adjudicate upon a claim made to a portion thereof, a person who sets up a right to such portion as a pre-emptioner for agricultural purposes, and claims that the same was never occupied for town purposes, and was not legitimately entered by the trustee, has a right to appear before the trustee, and be heard in opposition to such claim.

On the hearing by the county judge of a claim under said act of Congress, a citizen and tax-payer of the town, who objects that the claimant is not entitled to the land claimed, but that it is a part of the common fund to be disposed of for the benefit of the town, is entitled to appear and oppose such claim.

Heard November 27th and 30th, and December 1st, 1858.
Decided January 11th, 1859.

Appeals from the decision of the Honorable Daniel Goodwin, District Judge of the Upper Peninsula.

On the 20th day of June, A. D. 1857, Henry Selby presented his petition to said district judge, representing that he was equitably and legally entitled to the undivided one-half of lot six in section twenty-five within the limits of the town-site of Ontonagon, of which he was then in the actual occupancy and possession, as tenant in common with James K. Paul; that he acquired his right thereto by a quit-claim deed from said Paul, dated November 1st, 1856; that there was no other claimant or person in possession, claiming adverse to petitioner and said Paul; and he therefore asked that the said judge, as trustee under the act of the Legislature of Michigan, entitled "An Act to authorize the District Judge of the Upper Peninsula to hold in trust and convey Lands included in the Town-Site of the Village of Ontonagon, in the county of Ontonagon," approved January 29th, 1853, might examine into and allow his claim, and execute a deed of said premises to petitioner.

On a subsequent day to which the hearing of said petition had been continued, Daniel S. Cash appeared by attorney, and excepted to the jurisdiction of the district judge to proceed to adjudicate upon claims to lots, or other execution of the trust under the act of Congress of May 23d, 1844, on the ground that the Legislature had enacted no such rules and regulations for the execution of said trust as are contemplated by said act. This exception was overruled. He

also demurred to said petition on the ground that it did not show any such occupation and improvement, either by Paul or by Selby, as would give Selby any claim to said lot.

Selby thereupon filed an amended petition, setting forth, in addition to the facts before recited, that said lot contained 17 60-100ths acres; that petitioner took possession of the same in April, 1855, and built a house thereon, and cleared and fenced a portion thereof, and that he occupied the same, either actually with his family, or by having men in his employ cultivating and improving the same, until the autumn of 1856; that James K. Paul then claimed that said lot was part and parcel of the town-site of Ontonagon, and that he, said Paul, was entitled thereto, but offered to and did, in consideration of the occupation and improvements made by petitioner, and the equitable interest he had therein, deed to him the undivided half thereof; that since then petitioner and Paul have occupied said lot, and caused the same to be surveyed and laid out into lots for further improvement and sale; that, as petitioner believes, said lot had before then been surveyed and partially laid out into lots, and that it forms a part of the town-site of Ontonagon; that said subsequent survey alters the plan, and increases the number, of the lots in the subdivision simply for the purpose of having a correct survey thereof; that there is not, and never has been, any person occupying said lot but petitioner and said Paul, and no one claiming any adverse interest in, or to have occupied, said lot, except Daniel S. Cash, who claims an interest therein; and praying the allowance of his claim, and that a deed be made to him.

Cash answered the amended petition, denying that either Selby or Paul was ever an occupant of said lot within the meaning and intent of said act of Congress or of said act of the Legislature of Michigan; averring that said lot was never occupied by any person for the purposes of trade and not agriculture, or as any part of the town-site of Ontonagon, and setting forth facts to show that Selby had never

actually occupied said lot, and that Cash had a valid claim thereto as pre-emptioner.

Selby excepted to this answer: 1st, That it showed no right in Cash to appear as a contestant; 2d, That it presented no claim as a party in possession, occupant, or claimant, as applied to the town-site of Ontonagon; and taking also exceptions in matters of form. The first and second exceptions so taken were sustained, and Cash had leave to file an amended answer, but did not do so.

July 23d, 1857, Isaac C. Spalding appeared and filed his answer to the amended petition, excepting, as Cash had, to the jurisdiction; and, if the exception should be overruled, averring, to show his right to appear, that he was an occupant of the town-site of Ontonagon, and a tax-payer in the village of Ontonagon, and had had a claim awarded to him by said trustee, under said act of the Legislature; that a considerable portion of the lands described in said trust, and, among the rest, said lot six, were not, and never had been, occupied as any portion of said town-site by occupants within the meaning of the act of Congress; and claiming that under the trust such lands should be sold or otherwise disposed of for the benefit of all the occupants of said town-site. This answer, on motion of the claimant, the court set aside, the claimant was permitted to proceed *ex parte*, and on the 25th of July, 1857, a conveyance was awarded to him in accordance with the prayer of his petition.

Cash and Spalding appealed to this court.

A. Pond, *H. H. Emmons*, and *C. I. Walker*, for claimant:

1. The claim of Cash as pre-emptioner, is adverse not only to Selby, but also *to the title of the trustee himself*. If he had a pre-emption right to the premises, Goodwin should not, and, if the proper showing had been made, would not, have been permitted to enter the same.

The proper place for Cash to have preferred such a claim was to the Register and Receiver of the Land Office, and in

case they decided against him, to have appealed to the Secretary of the Interior.—5 *Stat. at Large*, 455. If he did so prefer his claim, and a decision was given against him, that decision was final and conclusive, and, in the absence of fraud, or other causes such as would give jurisdiction to a court of equity, beyond review by this or any other court.—*Mitchell v. Cobb*, 13 *Ala.* 136; *Lewis v. Lewis*, 5 *Mo.* 183; *Jackson v. Wilcox*, 1 *Scam.* 344; *Wilcox v. Jackson*, 13 *Pet.* 511; *Strother v. Lucas*, 12 *Ibid.* 454. The presumption is that Cash did present his claim to the forum provided by Congress. If he did not present and prove it within the time allowed by the act, he lost all rights which he might otherwise have had under it.

But it is immaterial whether Cash did or did not have a valid claim as pre-emptioner. It is sufficient that the claim set up by him was beyond the jurisdiction of the trustee to act or adjudicate upon.

2. As to Spalding's claim of right to appear, we say: The act of Congress expressly provides, 1st, That the entry made by the trustee shall include only such land as is *actually occupied* by the town; 2d, That the trustee shall hold the land so settled and occupied, for the *several* use and benefit of the *occupants* thereof, according to their *respective* interests. And we submit that the word *occupied* must, necessarily, be given the same construction in both these provisions; that the words "several" and "respective" definitely fix its meaning in the latter; and, hence, that the proper forum, in permitting the trustee to enter the premises in controversy, has conclusively decided that the said premises are "actually occupied," as a part of the town-site, within the meaning of said act, and that the language of the act itself thus expressly excludes the idea of the trustee's holding any portion of the land for the *general benefit* of the community. He holds for the "*several* use and benefit of the occupants, according to their respective interests." Again: Spalding, by his petition, recognizes and relies upon the

validity of the act of the Legislature of January 29th, 1853 (having, as he shows, applied for and received from the trustee under said act a conveyance of certain premises included in said trust); and we insist that, by the terms of said act, his present claim is excluded.

3. The appellants being mere volunteers in these proceedings, and having no rights which the act of the Legislature complained of, whether valid or invalid, can in any wise affect, the question of the validity of said act can not properly arise or be considered here.

But we contend that that act is not in conflict with the act of Congress, and that it does prescribe rules and regulations for the execution of the trust, within the meaning of the act of Congress. We submit that the act of Congress clearly confers, and was intended to confer, upon the Legislature just the power it has assumed to exercise in the act in question. The language used—viz., "as to the disposal of the lots in such town, and of the proceeds of the sale thereof"—can have no other construction than the one given it by the Legislature.

It is admitted that the act of Congress does give the Legislature power of appropriation over the proceeds of sales of lots; that is, power to determine when, for what purposes, and in what manner, said proceeds shall be used. Now the same words which grant this power, grant also the power as to the disposal of the lots themselves. How, then, can it be construed to give them power of appropriation in the one case and not in the other?

The intention was to give, and the act of Congress does give, the Legislature power to determine generally the classes of persons entitled under the act, and to leave to the trustee the determining the several individuals belonging to such class, and the particular premises to which each individual might be entitled.

The Court can not presume that the Legislature have wrongfully or improperly exercised, or attempted to exercise,

the power thus given them;—in fact, the presumption is strongly the contrary. The history of the settlement of the town-site of Ontonagon, and the facts and circumstances relating thereto, which were undoubtedly before the Legislature at the time of the passage of the act in question, are not a part of the record in this cause. But we submit that, if facts and circumstances which would justify the act can be conceived as possible to exist, the Court are bound to presume that they did exist, and were before the Legislature at the time of the passage of this act. Such facts and circumstances are conceivable, and did actually exist, and were before the Legislature; and the validity of the act must be sustained.

S. T. Douglass, for appellants:

Under the act of Congress, so much of the lands conveyed as was occupied for town, and not for agricultural, purposes —that is, for the purposes of commerce, manufactures, residences, &c.—is held in trust "for the several use and benefit of the occupants thereof, according to their respective interests"; that is, according to their respective equitable claims, founded upon such actual occupation, use, and improvement. The act contemplates that the portion of the town-site to which each occupant shall be so equitably entitled, shall be ascertained, and, when ascertained, shall be conveyed to the occupant in fee.

As to so much of the land as was not actually occupied for town purposes, under this act, Judge Goodwin holds it in trust for the occupants of said town-site, as a community, for purposes analogous to those for which property is held by municipal corporations. The act contemplates that this portion of the lands will be eventually conveyed or appropriated for the benefit of that community.

The act does not give to the state Legislature any power whatever to change or modify the nature and objects of these trusts, or to provide for any disposition of the property dif-

ferent from that which the act contemplates. It only gives to the Legislature power to provide rules and regulations for the *execution* of the trust; that is, to provide by what tribunal, at what time, and in what manner of proceeding, the several rights of the occupants should be determined, &c., and how, when, &c., the unoccupied portions of the land should be disposed of, for the benefit of the occupants as a community.

The act of the Legislature contains no such rules and regulations as are contemplated by the act of Congress. Its material provisions (§ 2) are clearly designed for, and, if executed, they would accomplish the purpose, not of *executing*, but of *defeating*, the objects of the trust, and are therefore merely null and void.

Consequently, Judge Goodwin had no jurisdiction to proceed in the execution of the trust.

2. Cash and Spaulding were both improperly denied the right to appear and contest Selby's claim.

Cash had a right to defend, in virtue of his possession and claim of a right of pre-emption. The issuance of the patent to Goodwin determined nothing as to his right.—*Garland v. Wynn*, 20 *How.* 60. Cash's possession and claim of pre-emption gave him a right as against all the world, except the Government, or some person claiming a valid title under the Government; and he was entitled in virtue of that possession, &c., to resist the establishment of any claim under the Government. If Selby had no claim to the land, as an occupant within the true intent of the act of Congress, he was entitled to show it, and prevent an adjudication in Selby's favor, which would greatly embarrass the assertion of his pre-emption claim.

Spalding, though not individually a claimant of the land, in a strict sense of the word, as an occupant of the town-site, had, under our construction of the act of Congress, an interest in preventing any one from acquiring title as an occupant who was not entitled to it, because the unoccupied

portions of the land conveyed to Judge Goodwin would be held in trust for all the occupants as a community. He was one of the *cestuis que trust* for whom Judge Goodwin held the legal title.

3. Either Cash or Spaulding, if entitled to appear and contest Selby's claim, had of course a right to take this appeal, and is within the purview of sec. 3 of the act of the Legislature.

The proceedings before Judge Goodwin have but a remote analogy to a suit, either at law or in equity; and any attempt rigidly to apply to them rules applicable to such suits, can only lead to error.

CAMPBELL J.:

The district judge of the Upper Peninsula, on the 28th day of November, 1856, received a patent for lots 1, 2, 3, 4, 5, and 6, of section 25, and lot 1 in section 36, in township 52 north, of range 40 west, in Ontonagon county, in trust for the several use and benefit of the occupants thereof, according to their respective interests. This purported to be granted under the provisions of an act of Congress, approved May 23d, 1844, entitled "An Act for the Relief of Citizens of Towns upon the Lands of the United States, under certain circumstances." Lots 1, 2, and 3, in section 25, lie on the east side of Ontonagon River, and extend from its mouth to section 36. Lot 4, in section 25, is an island in the river, near its mouth. Lots 5 and 6, in section 25, are west of the river. Lot 1, in section 36, is on the east side of the river.

In pursuance of an act of the Legislature of this state, entitled "An Act to authorize the District Judge of the Upper Peninsula to hold in trust and convey Lands included in the Town-Site of the village of Ontonagon, in the county of Ontonagon," approved January 29th, 1853, the district judge, having obtained this patent, proceeded to act, and awarded lot 6, in section 25, to Henry Selby. Daniel S. Cash and

Isaac C. Spalding severally opposed Selby's claim, and severally appealed from its allowance.

An objection is made against the right of either Cash or Spalding to appeal from the decision of the trustee, based upon an alleged want of interest.

The consideration of this question renders it necessary to look into the legislation on this subject, to ascertain what rights are provided for and protected under the laws applicable to the case.

By the pre-emption law of 1841, no pre-emption could be made, by any individual, of any sections, or fractions of section, sincluded within the limits of any incorporated town, or which had been selected as the site for a city or town, or any parcel or lot of land actually settled and occupied for the purposes of trade and not agriculture. And by the act of 1844, above referred to, it is provided as follows:

"Whenever any portion of the surveyed public lands has been, or shall be, settled upon and occupied as a town-site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated: *Provided*, That the entry of the land intended by this act, be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity to the legal subdivisions of the

public lands authorized by the act of 24th April, 1820, and shall not in the whole exceed three hundred and twenty acres; and *Provided, also*, That any act of said trustees not made in conformity to the rules and regulations herein alluded to, shall be void and of none effect."

As the Indian title to the lands in question was not extinguished until 1842, none of the previous retrospective acts are applicable. The authority of the district judge to act as trustee, was not brought in question on the argument, and we shall not, therefore, inquire into it for the purposes of this investigation.

In order to understand fully the meaning of the act of 1844, it becomes necessary to examine, for a moment, into the rights in land as existing before that.

Agricultural pre-emptions were permitted, under very stringent provisions, confining the settlers to a *bona fide* occupation for agriculture alone. The lands in the excepted list were, for reasons of public policy, taken from the power of the agricultural settler; but no one else was, by the law of 1841, authorized to enter them; and under that law they still remained public property, subject to the action of Congress.

Individual rights were not recognized. The only authority in any one to enter such property existed in counties; which were authorized, by an act of 1824, to select one hundred and sixty acres for a county-site.—4 *Stat. U. S.* 50.

Inasmuch as, until the law of 1844 was passed, no other rights could intervene, it is necessary to see how an agricultural pre-emptioner could ascertain whether the property was subject to his entry or not; for, if not otherwise appropriated, he would clearly have a right to select it and improve it as agricultural land. If covered by an incorporated town, he would have notice of that; for no town ever becomes incorporated without inhabitants; and, if such a thing were imaginable, he would still have notice, for no town could become incorporated unless by proceedings under the

public laws. If actually occupied for trading purposes, there would be the same visible notice. But if any selection could exist not based on occupancy, no such notice could easily be obtained; for, inasmuch as the law does not provide how or by whom such selection may be made, and gave no rights to any one under it, the agricultural pre-emptioner would not know where to look for information. But there are very serious difficulties in the way of allowing any *selection* by individuals, beyond their actual occupancy. The pre-emption law requires, whether the pre-emption be by one, or by two jointly, that the applicants shall make oath that the lands were settled upon and improved in good faith, to be appropriated to the exclusive use or benefit of the applicants, and not for purposes of speculation; and that no contract exists, directly or indirectly, with any other person, for a beneficial interest in it. It would be a singular construction to hold that an agricultural or other settler could evade these plain provisions, and claim a better right where he professedly enters land for speculation, and with the intention of selling it out to others, than where he in good faith observes the law. To hold that an agriculturist can be displaced for another individual, who may hold the entire tract for private purposes, would be to defeat the plain language of the statute. And until the law of 1844 was passed, there could be no pretense whatever in favor of any private claimant of an exclusive right. The law gave rights to no one.

The language of the act of 1844 is confined to lands actually settled and occupied. It has no reference to "selected" lands, unless the selection is included in the other language. The words "settle" and "occupy" do not first occur in this act — they are to be found in all the previous pre-emption acts. — See *Brightly's Dig.* 469, *et seq.*, where the various acts are collected. They are inapplicable to any other state of things than a *bona fide* use and improvement of the land. And not only is the land

to be entered by the county judges, required to be "*settled upon and occupied as a town-site*," but the specific trust is confined to the use and benefit of the occupants. It is claimed for the appellee, in this case, that one person may select one hundred and sixty acres, or two persons three hundred and twenty acres, as a town-site, and so appropriate the whole against all comers, and that the law protects them in such selection, and that the entry by the judges will enure to their benefit. But, if this is so, the language of the act is not well chosen to convey the idea. "Settlement" and "occupancy" are not such terms as convey this meaning; and the term "occupants," which embraces naturally all of a class, can not be confined to mean a small number, or an individual who may not be an occupant, in fact, at all. But a fatal objection to such a theory is to be found in the fact that the law does not compel the county judges to enter the lands at all; and not only provides no means of securing the property, if they refuse to act, but removes the right of pre-emption entirely, unless exercised before the public land sales.

It is impossible to harmonize such a law with any such rights as are set up, beyond rights of occupancy. The decision of Secretary Thompson, upon the application of the county judge to enter certain lands laid out at Superior City, contains so clear an exposition of the law, that we refer to this part of his opinion at length. He says:

"The act of 23d May, 1844, entitled 'An Act for the relief of Citizens of Towns upon the Lands of the United States, under certain circumstances,' provides for the entry of any portion of the surveyed public lands, which has been, or may be, settled upon and occupied as a town-site.

"The title, as well as the words employed in the body of the act, clearly demonstrates that the same was intended to apply exclusively to actual and existing towns. It refers to, and recognizes, only such surveyed public lands as are settled upon and occupied as a town-site—not such as have been selected by non-resident proprietors or claimants, as the

site for a city or town, as exempt from entry under existing pre-emption laws. There is no provision made for filing notice of selection, and the act does not specify or contemplate any proceedings, whereby lands which have merely been so selected, shall be excluded from the operation of other pre-emption laws.

"Prior to the passage of this act of 23d May, 1844, it was the policy and settled practice of the Government to prohibit the sale or acquisition, by pre-emption, of lands which were occupied as town-sites or trading-places; the object of such prohibition being to secure the interests of the Government by the sale of the lands at their enhanced value, in such a manner as might be deemed best to effect that object.

"That clause in the act of 1841, which provides that no portions of the public lands which have been selected, as the site for a town, shall be liable to entry under and by virtue of its provisions, can not, therefore, be construed to recognize the right of selection, by individuals, of portions of the public lands for town-sites, for their own use and benefit, *since, at that time, the system of granting rights of pre-emption on lands of that character, had not only not been adopted, but was directly at variance with the established practice and policy. It was manifestly not the object of the law to withhold from pre-emption such lands as individuals might designate or select, without authority, as the site for a probable or prospective city or town. If so, it would have been within the power of any person or persons to defeat the pre-emption claims of those whom they were interested in opposing, by alleging that the particular land upon which such claimant had settled, had hitherto been so selected.*

"It was, then, not intended by said clause of the act of 1841 to withhold lands which might be regarded as eligible or adapted for town purposes, from pre-emption, until claimants should have an opportunity to make settlements and im-

provements, since, at that time, it was not to protect the interests or supposed rights of citizens of cities or towns that such lands were withheld and excluded from pre-emption; and therefore the supposition that said clause would recognize and protect, from the claims of others, such selections, is erroneous.

"The act of 23d May, 1844, further provides that the lands so settled upon and occupied shall be entered in trust for the several use and benefit of the occupants thereof. Referring to the title of the act, 'For the relief of Citizens of Towns,' &c., it may easily be determined that by the term 'occupants' is meant those who are settlers or residents, and that it only embraces the citizens thereof."

Although this decision conflicts with the opinion of Attorney-General Cushing, it conforms to the views of the land officers; and although none of these opinions are binding on the courts, yet we regard the views quoted as more in accordance with the plain language of the statutes than those expressed by Mr. Cushing. The law of 1844 was, we think, very clearly designed to protect *bona fide* town settlers, and did not recognize any paramount individual claims over them.

While the entry is only allowed to cover such land as is actually occupied by the settlers, it must nevertheless be made according to the government subdivisions, as the law does not permit these to be broken in upon. Thus, in most cases, some land would be found in each subdivision not actually built upon, or otherwise occupied for town purposes. These lands, the act clearly contemplates shall be sold; and the proceeds are to be disposed of under regulations to be adopted by the state legislatures, who are to establish rules and regulations for the whole execution of the trust.

Prior to any entry of the Ontonagon land in controversy, the Legislature of Michigan passed an act, approved January 29th, 1853, whereby the district judge was authorized to enter the several lots in section 25, including only so much

thereof as was actually within the town-site; and the trustee was directed to convey the lots, first, by granting to James K. Paul such lots as he might hold free from the claims of any other person, by virtue of an equitable pre-emption claim thereto, and to all other occupants such lots as they held by virtue of contracts with Paul. No other rules or regulations were made on the subject by the Legislature. On the 28th of November, 1856, a patent issued to Judge Goodwin.

The respondent, Henry Selby, at a session held by the trustee for that purpose, presented a claim to the undivided half of lot 6 in section 25, being an original government subdivision west of the river, containing 17 60-100ths acres. From Selby's petition it appears that he claimed to have entered upon this tract in April, 1855, and commenced cultivating and improving it; and that, in 1856, Paul claimed that it was a part of the town-site of Ontonagon, and that he, Paul, was entitled to it, having previously made a plan which covered this, as well as the land east of the river; and that he settled with Paul by taking a deed of an undivided half, on the 21st day of November, 1856, and that they had since jointly occupied it, and caused it to be laid out into lots for improvement and sale, and that no one else ever occupied any portion of the fraction, and that no one else but Daniel S. Cash claimed to have occupied it, or to have an interest in it.

Cash appeared to oppose this claim, alleging himself to be entitled to the lot as an agricultural pre-emptioner, and claiming that it never was occupied for purposes of trade, and never formed part of the town-site.

Spalding appeared, not as a claimant of this particular lot, but as an occupant of other property, within the act of Congress, and also of the act of the state Legislature, whose right had been confirmed by the trustee to such other property. He claims the right to appear on this account, and, as a tax-payer, to protect the property as legitimately belonging to the surplus fund.

Both objected to the right of the judge to proceed until the Legislature should have adopted proper rules and regulations, and both objected to Selby's claim as not within the law of Congress, and also denied its truth.

The district judge denied their right to oppose Selby's claim on the footing in which they appeared; and proceeded to adjudicate upon it, and allowed it.

It is claimed, on behalf of Mr. Selby, that neither of these contestants has any standing in court. Mr. Cash does not claim to have occupied the land as a trader, or as the inhabitant of a town; and his occupancy would not, therefore, come within the act of Congress. And if any portion of the subdivision had been occupied legitimately for town purposes in advance of him, he certainly could not prevail in an agricultural pre-emption.

But the law did not authorize the judge to enter any subdivision not settled and occupied as a town; and if this was not thus occupied, it was not withdrawn from private pre-emption. Any person claiming such pre-emption must have the right to oppose conflicting claimants. And if an unauthorized grant has been made of land to which he sets up a claim, we think it is his right to appear before any special tribunal undertaking to deal with the lands, to oppose any disposition of them calculated to create new rights, and increase the difficulties of defending himself. If the land was not legitimately entered by the trustee, it should not be disposed of to the prejudice of any just claimant. We express no opinion upon the validity of Mr. Cash's claim, but we think the nature of it sufficient to give him a standing in court.

The views we have already expressed, are decisive of the right of Spalding. While the act of Congress leaves the details of the use of the proceeds of the surplus fund to be regulated by the Legislature, it is very clear that the law designed that they should be used for the common benefit in some way. Many ways exist by which this end might be

attained. In the absence of any legal representative at least, we think any one interested had a perfect right to appear and protect the common fund.

Having a right to appear, are the objections raised such as to entitle them to a reversal of the action of the trustee?

It was never intended that the trustee should act, until provision had been made for such rules and regulations as would guide him in all his actions, and enable him to do full and complete justice. The views contained in the opinion of Judge Manning, render it unnecessary for us to go into more detail here. We agree entirely in all the main points of the case, and differ only as regards the right in court of Mr. Cash; and we adopt his reasons fully.

The first and most essential thing required, was the establishment of some tribunal where the rights of every one in the land in question could be investigated fairly. The Legislature, by the act of 1853, created the trustee a tribunal, but instead of empowering him to do impartial justice, undertook, by the act itself, to dispose substantially of the whole matter.

The whole tract is given to James K. Paul and his grantees. No one else was authorized to be considered, or to receive any relief. Instead of being calculated to carry out the design of the act of Congress, this extraordinary statute is in direct violation of it. The trust can not be legally carried out under such a law.

From the case made by Mr. Selby's petition, it appears that he has no rights except under this law. His petition shows that the land had not been actually occupied at all, until more than two years after the passage of the act of 1853, and was never occupied in fact, except by himself, and that only as a farm. If so, it formed no part of the town, and therefore could not enter into the trust. The deed from Paul was the only thing which could have given him any claim under the act of 1853. There is no evidence before us that he proved any thing beyond this deed. But

nothing which conformed to the allegations in his petition, could entitle him to any relief under the trust.

The decision of the district judge must be reversed, and the claim disallowed, and the proceedings annulled for want of jurisdiction in the judge to act.

CHRISTIANCY J. concurred.

MANNING J.:

Judge Goodwin held the land entered by him in pursuance of the act of the Legislature of 1853, and for which he afterwards obtained a patent, under the act of Congress of the 23d of May, 1844, "in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory," &c. Such is the language of the act of Congress under which the patent issued.

Whether the patent includes more land than would seem to be warranted by the act of Congress for the purpose contemplated; or whether the entry was "made in conformity to the legal subdivisions of the public lands authorized by the act," and the consequence of such variations from the act, if there be any, on the rights of third persons to any part of the land,—are questions not now before us, and on which I do not wish to be understood as having formed an opinion, one way or the other. For the purpose of the appeals to this court, I shall take it for granted the act of Congress has not been departed from.

Who are to be regarded as the beneficiaries of the trust, and what are their respective rights under it in the land taken for the town, and how are such rights to be determined, are questions difficult of solution. Within certain limits they are, I think, to be determined by the rules and

regulations to be prescribed by the local legislature mentioned in the trust.

The act of Congress, on which every thing that is to be done in the execution of the trust rests, and which must furnish a warrant for every thing that is done, it must be confessed, is vague and indefinite in most of its provisions, and particularly so, in regard to the details of the trust. Its language is, "for the several use and benefit of the occupants thereof [that is, of the town] according to their respective interests." If the act stopped here, it might with much plausibility be said, that every part of the town is to be deemed to be occupied by some one for town purposes, although parts of it, in fact, might be occupied for agricultural purposes only; and that such parts would, under the trust, belong to the several persons so occupying them. The fallacy of such a construction of this part of the trust is made manifest by the language that immediately follows: "The execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory." It is evident from this, a sale or other disposition of portions of the town is to be made by the trustee. But how could this be, if the whole town is to be deemed in the occupancy of individuals? There would not, most certainly, in that case, be any lots for the trustee to sell or dispose of. By the word "*disposal*" I understand something else is meant than conveying to an occupant what he is entitled to under the preceding clause. It extends to the proceeds of the sale of lots as well as to the lots. And it is to be observed that, in this connection, nothing is said of occupants, or of their several or other interests in the lots, or in the proceeds of the sale of them. The word "*lots*" is not in the preceding clause, and as used here would seem to imply a previous platting or laying out of the town; it occurring here for the first and only time in the act. The

two clauses clearly have reference to different trusts. The first, a trust for the occupants of the town as individuals; the other a trust for them collectively as a community — as a corporation when the town is incorporated, or as a *quasi* corporation when it is not incorporated;—the act authorizing the corporate authorities to enter the land in the first case, and making them the trustees; and the judges of the county court to enter the land, and become the trustees, in the other.

The word "occupied" — "the land so settled and occupied, in trust," &c. — means here what is meant by the same word in the preceding part of the act; "occupied as a town-site." In both cases it is used in connection with the public, and means public occupancy, or an occupancy by the community, as such. And the word "occupants," immediately following "in trust for the several use and benefit of the occupants thereof," refers to individuals as such, and means individual occupancy. In the first sense, occupancy includes the whole town; in the other, it includes such part of the town only as is actually occupied by individuals for town purposes. At this point, the power of the Legislature commences, and is to be found in the words "to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory." By "rules and regulations," as here used, I understand something more than a mere mode of procedure, to be observed by the trustee in executing the trust. Congress may have intended this, but it seems to me the main, if not only, object Congress had in view was, to leave it with the state or territorial Legislature to define and fix the limits and objects of the trust internally, and to carry out in detail what Congress had only given an outline of.

My reasons for coming to this conclusion are:

1st. That the act of Congress does not define or mark out the line of demarcation between the two distinct trusts, already referred to — that is, to what extent individual

occupancy shall be permitted to displace public occupancy, or the occupancy of the community, as such. One of two things is certain: As this, as well as certain other things I shall advert to, is not done by the act of Congress, it must be done by local legislation, or be left to the discretion of the trustee; and there is nothing in the act from which such a power in the trustee can be inferred, and much to repel such an inference.

2d. That the act leaves it altogether to the local legislature (if the power be not in the trustee) to determine what disposition shall be made, within the objects of the trust, of town lots belonging to the community at large, and of the proceeds of such of them as may be sold. This part of the trust most clearly can not be executed without the intervention of local legislation. The trustee can not sell under the act, because it does not authorize him to sell any part of the trust property, or to make any disposition whatever of moneys that might come into his possession on such sale.

3d. Because the act provides that any act of the trustees, not made in conformity to such "rules and regulations," shall be void, and of no effect. And,

4th. Because it may reasonably be inferred from the whole act, that Congress intended, as the exigencies of different towns might and would greatly vary, to leave it with the local legislature to adapt the trust to such exigencies, for the reason that it could be better done by the local authorities, with the exigencies of the towns to guide and direct their action, than by any rules and regulations made by Congress, in advance, and before such exigencies had arisen. Most clearly, this was one object of the rules and regulations mentioned in the act.

It is not to be supposed that Congress intended, by the act of 1844, to encourage speculation in public lands, or to aid a few individuals in making a fortune out of them; but, on the contrary, as settlers on the public lands for agricul-

ture, had been, and were protected against speculators by pre-emption laws, that Congress intended, by this act, to extend the same protection to the citizens of villages and cities, that had grown, or might grow, up on government lands, for commercial and mechanical purposes, and to secure to them severally, at the minimum price, all the land actually occupied by them respectively, for city or village purposes, and to them collectively, for the use of the village or city, such other lands as might be included within the limits of the city or village. But suppose an individual should be in possession of ten or twenty acres of land, in connection with his residence, or place of business; is he to have the whole of it? Would the possession of so large a tract fairly come within an occupancy for town purposes? Again, a much larger piece of ground might fairly be considered as falling within an occupancy for town purposes, in a village with few inhabitants, than in a city with many. I think the rules and regulations to be made by the local legislature, are to have reference to the settlement of such questions, as well as to the disposition of the part of the town not actually occupied for town purposes by individuals. Shall the part not occupied be platted into lots, and be sold? Shall any of it be reserved for public buildings? For what public purpose shall the proceeds of sale be approriated? These, and the like, questions, are to be answered by local legislation.

The appeal of Cash should be dismissed, as he claims nothing under the trust. He says the land which Selby claims does not belong to the trustee, but to him, Cash. If this be so, he must establish his right to it before a proper tribunal. The trustee can not decide the question, or refuse, in consequence of such claim, to execute the trust.

Spalding's appeal rests on a different ground. He makes no individual claim to the land, but insists Selby has no right to it, under the trust, and that he, Spalding, as a member of the community, has a right to appear and oppose its allowance. The community of which the appellant is a

member, and which is interested in the trust, has no separate political existence, or legal organization, through which it can act, or assert its rights; and this, of itself, it appears to me, is a sufficient reason for permitting one of its members to appear on its behalf. It is necessary, to prevent a failure of justice. When the law recognizes a right, it will provide a remedy to enforce it.

By the act of January 29th, 1853, the Legislature, I think, failed to do what it should have done under the act of Congress, and did what it had no right to do. The act prescribes no rules or regulations, defining the extent of occupants' claims, or what land, occupancy for town purposes should include; and omits to make any disposition, by sale or otherwise, of the land not included in such claims. The Legislature also did what it had no right to do, in recognizing individual claims, not founded on occupancy for town purposes; as a right in James K. Paul to "a deed of such lots as he held, or might hold, free from the claim of any other person, by virtue of an equitable pre-emption claim thereto, and to all other occupants, deeds to each, severally, of the lots held by them, by virtue of contracts with said James K. Paul." In this, the Legislature acted outside of the trust, instead of confining itself to its details.

Selby's claim, as appears from his original and amended petition, is not based on occupancy for town purposes. It includes the one undivided half of seventeen and one-half acres of land, and is made under a deed from Paul, who claims the other half. And it is not made to secure to him his residence, or place of business, but for purposes of speculation; as is evident from that part of the amended petition which states that he and Paul "have caused the same to be surveyed, and laid out into lots, for further improvement and sale."

I think the allowance of Selby's claim by the trustee should be reversed, and held for naught.

MARTIN Ch. J. did not sit in this case.

Sam'l Chandler and Others v. Vandalia P. M. McKinney.

A mortgage given by an infant *feme covert*, to secure the debt of her husband, is absolutely void, and not merely voidable.

Where an infant *feme covert* gave a mortgage to secure the payment of a note against her husband, and a bill in chancery was filed to foreclose it, and a guardian *ad litem* was appointed for the mortgagor in the foreclosure suit, who accepted the appointment, but neglected to answer, and was defaulted, and decree of foreclosure and sale made on such default, giving the infant no day in court after coming of age, and the infant did not come of age until after the time for appealing from the decree had expired;—*Held*, That the decree, as against the mortgagor, was absolutely void, and she might recover possession of the premises in ejectment against persons who derived title through the sale made under the decree.

Submitted November 26th, 1858. *Decided January 11th*, 1859.

Error to Hillsdale Circuit.

The facts are sufficiently stated in the opinion of the Court.

G. A. Knickerbocker, and *T. M. Cooley*, for plaintiffs in error:

Jurisdiction of the person of the infant defendant was acquired, in the foreclosure suit, by service of process; and however irregular may have been the subsequent proceedings, the decree is binding on the infant until reversed, and can not be attacked collaterally.—*Huson v. Wallace*, 1 *Rich. Eq.* 6; *Barber v. Graves*, 18 *Vt.* 292; *Dewitt v. Post*, 11 *Johns.* 460. A failure to appoint a guardian *ad litem* does not affect the proceedings when attacked collaterally.—*Austin v. The Charlestown Female Seminary*, 8 *Metc.* 202; *Porter's heirs v. Robinson*, 3 *A. K. Marsh.* 253; *Doe v. Bradley*, 6 *Sm. & Mar.* 485; *White v. Albertson*, 3 *Dev. Law*, 241; *Marshall v. Fisher*, 1 *Jones Law*, 116. But when a guardian is once appointed, and has accepted the appointment, the court does not further look after the interest of the infant—her recourse being against the guardian for injuries occasioned by his neglect or mismanagement.—*Young v. Whittaker*, 1 *Marsh.* 398, 400; *Sheldon v. Newton*, 3 *O. S. R.* 505, 507; *Newport v. Mildmay*, *Cro. Char.* 307; *Note* 2 *to Hesketh v. Lee*, 2 *Atk.* 96.

P. Morey, and *S. T. Douglass*, for defendant in error:

1. The plaintiff being an infant *feme covert*, the mortgage was void.—*Rogers v. Cruger*, 7 *Johns.* 557; *Evelyn v. Evelyn*, 2 *P. Wms.* 671; *Sandford v. McLean*, 3 *Paige*, 117; *Hearl v. Greenbank*, 1 *Ves. Sr.* 298; *Halsey v. Halsey*, 9 *Ves.* 472; *Johnson v. Bayfield*, 1 *Ves.* 314; *Capes v. Hutton*, 2 *Russ.* 357; *Stamper v. Barker*, 5 *Madd.* 100.

2. The decree of foreclosure was void for the reason that the court did not obtain jurisdiction of the infant *feme covert*, and even if it did, no valid decree could be made against her.—*Harris v. Youman*, 1 *Hoff. Ch. R.* 178; *Thayer v. Lane*, *Walk. Ch.* 202; *Eyre v. Countess of Shaftsbury*, 2 *P. Wms.* 102; *Stephenson v. Stephenson*, 6 *Paige*, 353; *Bulkley v. Van Wyck*, 5 *Paige*, 536; *James v. James*, 4 *Paige*, 115; *Booth v. Rich*, 1 *Vern.* 275; *Price v. Carver*, 3 *Myl. & Cr.* 162.

CAMPBELL J.:

Vandalia McKinney, a married woman, brought ejectment in the court below, to recover possession of certain premises inherited by her.

The defendants set up title under a foreclosure in chancery of a mortgage made by her during her coverture, and while yet an infant. They showed proceedings in chancery, wherein she and her husband were defendants, from which it appears that a bill was filed by the mortgagees, setting up that this mortgage was made to secure a debt of the husband, and that the property belonged to the wife. A guardian *ad litem* was appointed for her, and his default, for want of answer, was taken, and the court refused, on a subsequent motion, to set it aside. A final decree was made June 29th, 1852, for a sale. Plaintiff came of age August 15th, 1852. The property was sold under the decree to some of the defendants in the chancery suit, and the present defendants (plaintiffs in error) claim through that purchase.

The court below held that the proceedings in chancery were entirely inoperative to divest the title of the plaintiff below, and this decision is alleged as error.

We regret that the cause was submitted chiefly on briefs, without a full oral argument, as the questions presented are important, and in some respects novel. We have therefore been compelled to examine them for ourselves, without the aid of a criticism, by counsel, of the cases bearing upon the subject. The proceedings in the chancery suit are of an extraordinary character. The bill showing that the mortgage was made for the debt of another, the invalidity of such an act by an infant was so obvious that a guardian *ad litem* should have had no difficulty in suggesting the defect to the court. But his failure to do so should not have prejudiced the infant; for the practice has always been perfectly well settled that a court of chancery can not grant a decree even upon his admissions. As against an infant, the case must always be made out by proof. — *Thayer v. Lane*, *Walk. Ch.* 200. The whole proceeding is suggestive of the strongest suspicion of improper dealing; for we can not believe that the able judge who granted the decree could have had the actual state of the case presented to him. The decree can not be sustained upon any principle whatever. If appealed from, it must necessarily have been reversed. The question before us is, however, whether it can be attacked as invalid. And this is a question of the gravest consequence, involving, on the one side, the sanctity of the decrees of courts, and on the other, the question whether the invalid contracts of infants can, by proceedings during infancy, be placed beyond their power of disaffirmance.

The rule has always prevailed in England and in this country, of giving infants a day in court after their majority. But where a mortgage is in question, and the court, instead of a strict foreclosure, decrees a sale, it has been held in many cases that the infant is bound by such sale. The court of chancery of New York, in *Mills v. Dennis*, 3 *Johns. Ch*

367, held this doctrine. It was there decided in connection with the other doctrine referred to, that no decree could be made against an infant without full proof of the case, and that a sale was permitted because the court might deem a sale better for the infant than a strict foreclosure. By reference to the cases there cited, and others since decided, it will be found that the course was adopted of ordering sales, chiefly to prevent sacrifices of the infant's property where the land was worth more than the mortgage; and upon the principle that the court of chancery had power to convert the estate of infants from realty to personalty, under its general guardianship over them. This authority does not exist now in New York, and the court can not order a sale of infant's lands for any purpose not authorized by statute.—*Rogers v. Dill*, 6 *Hill*, 415. The statutes of New York and of Michigan now expressly authorize sales in mortgage cases; and it is to the statutes we must look for the authority, and for the effect of such sales. But under the English decisions no case can be found where an attempt was made to charge or affect an infant's estate by any mortgage or lien created by the infant; and the whole reasoning of the cases is opposed to the idea that such a thing would have been sanctioned for a moment. There is good sense in the rule as they apply it; for if the property is liable, a sale is the only method of realizing its full value, and a defeasible sale would be almost sure to entail a great sacrifice. The action of the courts is not based upon the idea that an infant is in all cases liable to be bound by a decree.

The contract sought to be enforced, in this case, was not merely voidable, but actually void. It was a contract to secure the debt of another, and could not be beneficial to the infant. It was also made during coverture. It was held in *Thornton v. Illingworth*, 2 *B. & C.* 826, that a contract of this description could not be affirmed, and that, if ratified, the action could only lie on the mere promise, and did not relate back. It was held in *Sandford v. McLean*, 3 *Paige*,

117, and in *Cronise v. Clark*, 4 *Md. Ch. Dec.* 403, that a mortgage by an infant *feme covert*, for the debt of another, was an absolute nullity, incapable of confirmation. A married woman can not bind her lands by any method not authorized by statute, and an infant married woman could not make a statutory conveyance. All of these proceedings took place before the law of 1855, enlarging the powers of married women.

In order to sustain the sale under the decree before us, it is necessary to hold that a contract which is a nullity, and which can not be confirmed by an infant under age, at all, and can only be made valid by a new act, after all disabilities have been removed, is made absolutely and irrevocably binding by the action of a court, while the infant was still under age, and where the only right of appeal given by statute expired before her majority. If such be the law, it is a very singular state of things, and reflects no credit on our judiciary system.

We are not, however, without light upon this subject; and while cases like the present can seldom arise, we have decisions on those which are analogous in principle.

In *Holford v. Pratt*, *Cro. Jac.* 464, it was held that where writ of error lies, an infant can avoid a judgment against him in no other way; but where no writ of error can be had the judgment may be attacked collaterally. The correctness of this doctrine is recognized in *Austin v. Charlestown Female Seminary*, 8 *Metc.* 196. And that infants can not be regarded as in laches, for not appealing, is decided in *Vallier v. Hart*, 11 *Mass.* 300.

In *Cronise v. Clark*, 4 *Md. Dec. Ch.* 403, already referred to, it was held that a married woman, whose mortgage made in infancy was foreclosed in chancery by a special proceeding, was not obliged to appeal from, or move in, that proceeding, but might treat it as a mere nullity. And in England, the decisions in bankruptcy are important in throwing light on this matter. It has been decided in many cases that a minor can not be made a bankrupt, because his trading contracts are

not for his benefit, and are void. — *O'Brien v. Currie*, 3 *C. & P.* 283; *Ex parte Adam*, 1 *Ves. & B.* 494; *Ex parte Henderson*, 4 *Ves.* 163; *Ex parte Barwis*, 6 *Ves.* 601; *Ex parte Lees*, 38 *Eng. C. L.* 816. In some cases, where deception or other misconduct has taken place, the court has refused to supersede the commission, and left the party to his legal remedy, not questioning the existence of such remedy. In *Belton v. Hodges*, 9 *Bing.* 365, where the infant bankrupt, coming of age, sued the assignee to recover against him for the property which came into his hands, it was objected that the proper course was to move for a *supersedeas*. But it was held that, inasmuch as the fiat was granted against an infant, it was a mere nullity, and might be so treated any where.

We think that in the absence of any right of appeal reserved to infants after they come of age, we can not hold a decree valid against them which is made during infancy, upon the basis of their unauthorized contracts, and in which their inheritance is sought to be charged for liens created by them, and not by their ancestors, or other adult parties. In the case before us, the whole defects of the proceedings are patent on the record, and every purchaser must know that the decree was made against an infant, on an infant's mortgage, for her husband's debt. To sustain a title under such a decree, would be to destroy all the safeguards which the law has devised for the protection of minors against their improvident agreements. While no case can be found which has maintained the validity of such proceedings, we think the principles underlying the authorities we have referred to, fully sustain us in our views. We deem it proper, in this connection, to express our regret at the unsatisfactory condition of the law upon chancery appeals. While the limitation on writs of error and certiorari does not begin to run until after majority, and then runs two years, the law gives but forty days in which to appeal from a decree in chancery, and contains no saving clause for infants at all. We have had occasion to perceive great hardships under

this narrow rule, and believe that justice requires an amendment of the law.

We think there was no error in the ruling of the circuit judge, and the judgment must be affirmed.

The other Justices concurred.

Mary Ann Durfee v. James McClurg.

Where complainant, a married woman, made an unconditional assignment of a mortgage to defendant, and delivered it to her husband, who delivered it over to defendant, and the latter gave the husband a receipt, stating that the mortgage was received of the husband as collateral security for a debt owing by him to defendant, and there was no evidence of any negotiations between complainant and defendant, or of any understanding on her part that the transfer of the mortgage was to be upon any condition, or of any instructions by her in reference to it;—*Held*, That the Court could not say from these facts that the assignment was intended by complainant as security only, and not to be passed absolutely to defendant.

Complainant's husband having made an arrangement of the debt secured by the assignment, and agreed with defendant that the latter should have and retain an absolute title to the mortgage,—*Held*, That this arrangement was binding upon complainant, and that she could not require defendant to re-assign to her the mortgage.

Under the present statutes of Michigan, contracts of sale by a married woman are to be treated as if made by a *feme sole*.

Where an answer on oath is waived, complainant may use the answer as an admission by defendant of any facts stated in it necessary to establish his case. But he can not use one part and exclude other parts relating to the same subject that would be responsive to the bill had the answer been under oath.

Heard December 2d, 1858. *Decided January 12th*, 1859.

Appeal from Wayne Circuit in Chancery.

The bill alleges that complainant is the wife of Benjamin C. Durfee: That on the 14th day of November, 1855, said Benjamin was in partnership in the drug and grocery business, in Detroit, with one Edward J. Moore, under the firm and style of Moore & Durfee; that on that day Moore & Durfee were indebted to defendant as follows: $500 on a promissory note for that amount, dated August 15th, 1855, payable seven months from date, with ten per

cent. interest; $500 on a note, dated September 10th, 1855, payable six months from date, with ten per cent. interest; $500 on a note dated September 29th, 1855, payable six months from date, with ten per cent. interest; $1800 on three promissory notes of $600 each, dated respectively November 14th, 1855, and payable at six, nine, and twelve months from date, with ten per cent. interest; that said Benjamin was also indebted to defendant in $1400, on a note dated November 14th, 1855, and payable one year from date, with ten per cent. interest payable semi-annually: That on the said 14th day of November, 1855, at the request of said Benjamin, the complainant made an assignment to defendant of a mortgage given by Langford G. Berry to her for $1800, and dated April 1st, 1854, upon which mortgage was endorsed, April 1st, 1855, $576; and which assignment was made as collateral security for the payment to defendant of the notes so held by him against Moore & Durfee and said Benjamin, and was on condition that if the said notes should not be paid, the said mortgage should be collected at the expense of complainant, and the money applied on said notes; that on the 30th day of May, 1856, defendant purchased all the right, title, and interest of said Benjamin in the firm of Moore & Durfee, and that in said sale, said Benjamin actually paid all the said notes of Moore & Durfee and of said Benjamin.

The bill further states that said defendant, previous to the payment of said notes by said Benjamin, had collected $500 on said mortgage, but had not applied the same on the notes; that since the payment of said notes, complainant has requested defendant to re-assign the mortgage to her, and pay her the moneys collected thereon; which he refuses to do. And she prays for decree for the re-assignment of said mortgage, an account of the moneys paid thereon, and the payment of the same to her.

Defendant, by his answer, admits substantially the facts

alleged in the bill; but says that whether the assignment of the Berry mortgage to him was made at the request of said Benjamin, he does not know; that he never saw complainant, and never transacted any business with her; that he loaned moneys to said Benjamin, and to Moore & Durfee, on receiving security therefor; that said Benjamin assigned to him another mortgage made by said Berry as security for some of the same indebtedness; that said Benjamin wanted to obtain a further loan from defendant, and offered to procure, as security therefor, an assignment of complainant's said mortgage; that defendant loaned money accordingly on the security of said assignment, and was entirely regardless from whom the assignment came, provided it properly conveyed the mortgage; that he had no privity of contract with complainant, and did not then, and does not now, know whether said Benjamin bought or borrowed of her the mortgage; but he alleges, on information and belief, that Moore & Durfee bought the mortgage of complainant for the purpose of using the same to borrow money with, and gave her their notes therefor, secured by chattel mortgage on their stock of goods; and he says the assignment of the mortgage to him was absolute in its terms, and the understanding that it was to be held as collateral was by parol; and he denies that complainant was to be at the expense of its collection.

As to the purchase of said Benjamin's interest in said firm, defendant says that said Benjamin agreed to sell out his interest at $1035, in the assets of Moore & Durfee, to be selected by him, and the defendant purchased at that rate, agreeing to pay complainant's chattel mortgage on the goods, and to take the two Berry mortgages in full payment of the indebtedness from the firm and from said Benjamin to defendant, and further to pay and assume all the existing liabilities of Moore & Durfee, and indemnify said Benjamin against the same; that it was

further agreed, as a part of the same transaction, that, instead of paying complainant in money, she should be paid by a transfer of one of the Berry mortgages; said Benjamin asserting that she was willing to receive such assignment in lieu of money; and that said agreement was carried out in all its particulars: That said Benjamin procured from complainant a release of said chattel mortgage, which was delivered to defendant on his assigning to complainant the mortgage assigned by said Benjamin to defendant; which mortgage was so assigned to her instead of the other, because the one made to her had been in part paid to defendant, and the other was of the same amount as her chattel mortgage, and therefore more convenient to use in paying such chattel mortgage. And defendant avers that complainant was fully aware of all the terms of this arrangement, and has since collected, in whole or in part, the mortgage so assigned to her, and appropriated the proceeds.

A general replication having been filed, and the several papers referred to in the bill and answer put in evidence, the evidence of E. C. Walker was taken for complainant, as follows: "I was retained as one of defendant's attorneys May 30th, 1856. At that time there had been an inventory taken of the assets and liabilities of Moore & Durfee. From a statement made at that date, I have no doubt that defendant held the notes of Moore & Durfee and B. C. Durfee to the amount of $4700. He held the three $600 notes mentioned in the bill — as to the other notes, I do not recollect their amount." "I think a payment had been received by defendant on the mortgage in question, of that date. I can not tell its amount. I do not know whether it had been endorsed on any of the notes or not." "I do not know where the $1400 note of B. C. Durfee is — whether he ever took it up or not. Defendant still holds the three $600 notes."

Being examined for defendant, the same witness stated:

"In May, 1856, Moore & Durfee were indebted to defendant as shown in the receipt" [a copy of which is given below]. "Moore & Durfee did not entirely agree in business matters. Defendant was Moore's father-in-law. He directed me, as Moore's counsel, to procure a dissolution of the firm of Moore & Durfee, in some way, at all events. I examined into their affairs, and spent several days in negotiating the matter between defendant and Moore & Durfee, who were all in Detroit, and all present at the termination of the negotiations. A settlement of all matters between them was finally agreed upon as follows: The defendant took the two mortgages as payment on the indebtedness to him, as far as they went. He bought all the assets, notes, and accounts of Moore & Durfee. For Mr. Durfee's interest, he was to pay as follows: He was to pay to Mr. Durfee the amount of the mortgage which he (Durfee) had procured his wife to assign to defendant, for which Durfee had given to complainant, his wife, a chattel mortgage on the stock in trade of Moore & Durfee. In consideration of such payment, the chattel mortgage held by complainant was to be discharged. Defendant was to indemnify and hold harmless Mr. Durfee from all debts of Moore & Durfee. It was agreed that the sums paid to Mr. Durfee should he paid as follows: In part by the re-transfer of the mortgage which he had originally assigned to defendant, and the balance was to be paid in certain bills receivable of Moore & Durfee, which were to be transferred to his individual use. Payment was made as above stated, and the papers drawn, and all ready to be delivered except the release of complainant's chattel mortgage. I drew such a release, and went with Mr. Durfee to his house, in his buggy, to get complainant to execute it. I did not get out of the buggy. He took the release into the house, and, after the lapse of about half an hour, returned with it signed. When the re-assignment above mentioned was about to be made out, Mr. Durfee

requested that it might be made to complainant. The papers were all delivered, and the arrangement carried out as above set forth. The defendant has since then paid most of the debts of Moore & Durfee."

On his cross-examination, the witness stated: "The complainant was not present at all during any of the negotiations. I do not know that she knew any thing of them, except from her signing the release. The whole of the transaction between defendant and Moore & Durfee was closed by the single arrangement disclosed in my direct-examination. The different parts of the settlement were all closed at once as one thing. To get at the settlement, I myself made an examination of all the books of Moore & Durfee, and got a full statement of the sums due to and by them. For the value of the goods, I took, as a basis, an inventory then lately made by Moore & Durfee. I made out an estimate of the value of all their assets, and of the amount of their liabilities, and thus came at the amount of Mr. Durfee's interest in the concern." Being asked, "Were the mortgages referred to, and the notes to which they were collateral, figured, in general, among the other matters of account on the final settlement referred to?"—the witness replied, "I do not recollect how they were figured in, exactly. Many different estimates and statements were made during the negotiations. In some of them, I know the indebtedness to the defendant was included among bills payable, and the mortgages reckoned among the assets. Upon the final settlement, Mr. Durfee was to receive $2496.34. I saw the chattel mortgage of which I have spoken, on the files. In that way I knew of its existence. The indebtedness of the firm of Moore & Durfee was quite large — several thousand dollars. The consideration which defendant got for assuming to pay the debts, was all the goods of the firm, and the bills payable and accounts. I can not state whether Mr. Durfee gave any particular reason why he wished to have the mortgage as-

signed to his wife. It may have been because he wished to put it in her name to prevent his responsibility for this indebtedness, which the defendant had assumed to pay. I know nothing about the chattel mortgage, except from seeing it on the files, and from hearsay."

The following is a copy of the receipt given by defendant on receiving the assignment of the mortgages: "Received November 14th, 1855, from Benjamin C. Durfee, an assignment bearing even date herewith, of a certain mortgage made by Langford G. Berry to Mary Ann Durfee for the sum of $1800 and interest, dated April 1st, 1854, upon which is endorsed, April 1st, 1855, $576. Also the assignment of another certain mortgage made by said Berry to said B. C. Durfee, dated April 1st, 1854, for the sum of $1966.03, and interest, upon which are the following endorsements, viz.: June 3d, 1854, $155; April 1st, 1855, $107.90; April 1st, 1855, $357.22;—which said mortgages are assigned to me as collateral security for the payment of the following described promissory notes, viz.: Moore & Durfee's note, dated August 15th, 1855, for $500, at seven months, with interest at ten per cent.; Moore & Durfee's note, dated September 10th, 1855, at six months, for $500, with interest at ten per cent.; Moore & Durfee's note, dated September 29th, 1855, at six months, for $500, with interest at ten per cent.; Moore & Durfee's three several notes, each for $600, dated November 14th, 1855, at six, nine and twelve months respectively, with interest at ten per cent. semi-annually; and Benjamin C. Durfee's note, dated November 14th 1855, at one year, for $1400, with interest at the rate of ten per cent. payable semi-annually. In case any of said notes should not be paid, said mortgages to be collected at the expense of assignors, and applied."

"JAMES MCCLURG."

The assignment to defendant of the mortgage in question, by complainant jointly with her husband, was also put in evidence.

On the hearing in the court below, a decree was rendered dismissing the bill, and complainant appealed.

DURFEE *v.* MCCLURG.

J. E. Bigelow, and *H. T. Backus*, for complainant.

E. C. Walker, for defendant.

MANNING J.:

On the 14th November, 1855, and previous thereto, Benjamin C. Durfee, complainant's husband, and one Moore, were partners in trade under the name of Moore & Durfee, and the firm was indebted to defendant in the sum of fifteen hundred dollars, for which amount he held the notes of the firm. He also held three other promissory notes of the firm, given on that day, for six hundred dollars each, payable in six, nine, and twelve months, with interest at ten per cent. On the same day, two mortgages were assigned to defendant, both given by one Berry—one to complainant for eighteen hundred dollars, and assigned by her and her husband to defendant; and the other to her husband for nineteen hundred dollars and odd, and assigned by him to defendant. The mortgages bore even date, and one or more payments had been made on each. Both assignments were absolute on their face. The mortgages and assignments were delivered to defendant by complainant's husband, and defendant at the same time gave to him a receipt describing the mortgages, and stating defendant had received them of Benjamin C. Durfee, as collateral security for the payment of the aforesaid notes of Moore & Durfee, and of an individual debt Durfee was owing defendant. By a subsequent agreement, made in May or June, 1856, between Moore, Durfee, and defendant, the latter purchased Durfee's interest in the co-partnership; and in the settlement then made between the three, the notes of the firm and the individual debt of Durfee were paid, and the mortgages were transferred to defendant.

Complainant files her bill for a re-assignment to her of the eighteen hundred dollar mortgage, and for all payments made on it to defendant, stating in her bill that the mortgage was assigned by her to defendant as collateral security for the

payment of the aforesaid notes of Moore & Durfee, and the individual debt of her husband, and that the notes and debt had been paid.

There is nothing on the face of the mortgage, assignment, or receipt, nor is there any parol testimony, showing complainant was a party or actor in any of the transactions between defendant, and Moore, and her husband, Benjamin C. Durfee, unless the assignment of the mortgage by her and her husband to defendant is to be regarded in that light. The assignment, it is to be observed, is absolute on its face; and the receipt given by defendant is to her husband, and not to her, and does not mention her name, except in describing the mortgage and assignment in the body of it. If the receipt had been made to her, or to her and her husband, the case would be altogether different. It would show she was a party to the delivery of the mortgage and assignment to defendant, and that she had not parted with her interest in the mortgage to her husband, and at his request assigned it to defendant.

If she did not intend he should have the absolute disposal of the mortgage, she should have made the assignment conditional, or had the receipt taken in her own name. From the facts before us, we can not say the assignment was intended by her as security only, and that there was no intention to part with her interest in the mortgage, to her husband, unless it be a legal inference to be drawn from the circumstance of the mortgage having belonged to her before the assignment. The law draws no such inference.

She was not present when the mortgage and assignment were delivered, nor does it appear there was any negotiation between her and defendant as to the mortgage or its assignment, or that her husband was acting in her behalf, or as her attorney, or not solely for himself. As her agent, the assignment would be equivalent to a power of attorney authorizing him to sell the mortgage to defendant; and any instructions given him to the contrary, unless brought home to the knowledge of defendant, would not affect him. The

great difficulty is, there is no evidence the assignment was intended by the wife to be conditional.

Real and personal property belonging to a married woman may be "contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her, in the same manner and with the like effect as if she were unmarried." —*Comp. L. p.* 966, § 3292.

The reason why complainant's husband joined in the assignment, probably, was that the statute (*Comp. L. p.* 965, § 3289), before it was amended, in February, 1855, required the husband to give his consent to all transfers made by the wife of her individual property, and the parties, most likely, were not aware, at the time, of the alteration in the law. Since the amendment, we think, we should treat all contracts of sale by married women as we would were they made by a *feme sole*. If complainant had been unmarried, there would be nothing in the case showing she did not intend, by assigning the mortgage, and delivering it and the assignment to Durfee, to give him the absolute control and disposition of it, and we see no reason why her rights should be placed on any different footing on account of her coverture.

We should not, without some evidence at least, presume her husband has deceived her; and even if he has (we *suppose* the case, for there is no charge of the kind), inasmuch as she has, by her own act, enabled him, not only to deceive her but defendant, she, instead of defendant, should be the sufferer.

It was said on the argument, the answer admits the assigment was made by complainant as security.

The bill waived an answer on oath, and a replication was filed. When no replication is filed, the answer is received as true, and is evidence. When a replication is filed, it is not evidence, but complainant may use it as an admission by defendant of a fact necessary to establish his case. He can not, however, use a part of the answer, and exclude other parts relating to the same subject that would be responsive to the bill had the answer been under oath.

In the answer, defendant admits "complainant, jointly with her husband, did make, execute, and *deliver* to him an assignment of the mortgage as "collateral security." Here is an admission that the assignment was *delivered* to defendant, by *complainant* and her husband, as security. Defendant means nothing of the kind, as is evident from other parts of his answer. A few lines lower down, after describing the mortgage, and debts to be secured by it, the answer says: "But whether said assignment was made by complainant at the request of said Benjamin C. Durfee, or not, the defendant has no knowledge, and can not state. But he avers he never saw said complainant, or ever transacted any business with her." A little lower down still, the answer says: "That he had no privity of contract, of any kind, with complainant, and knew not then, and knows not now, what were her rights or interests in said mortgage, or what induced her to join her husband (the said Benjamin) in assigning the same to him."

The decree of the court below must be affirmed, with costs.

MARTIN Ch. J. concurred.

CHRISTIANCY J.:

I am unable to agree in the opinion of my brethren in this case. I do not, however, propose to discuss the case at large, but to state the points on which I differ, and briefly to indicate the grounds of that difference.

I agree with my brethren in holding that, under the statute of 1855 (*Comp. L.* §§ 3292 *to* 3296), we are to treat the transactions disclosed by the case, and the rights of complainant growing out of them, as if she were a *feme sole;* with this qualification, that I am not prepared to admit the competency of the wife to contract directly with her husband, or to sell her mortgage to him.—See *Graham v. Van Wyck*, 14 *Barb.* 531. I agree with them, also, in supposing that the

reason why the husband joined in the assignment of the wife's mortgage, was either that the parties were not aware of the recent alteration of the law, which rendered it unnecessary, or that they were doubtful of the effect of the alteration. In either case, however, I think the fact of his having joined in the assignment, wholly immaterial, neither adding to, nor detracting from, the effect of the assignment; and that the rights of the parties stand exactly upon the same footing as if the assignment had been executed by her alone.

But, though the assignment was absolute on its face, yet the bill, answer, and proof all show it to have been made only as security for the payment of certain notes of Durfee, and Moore & Durfee; and there is not a pretence or suggestion on the part of the defendant that the assignment was made or delivered to him for any other purpose. The answer not only clearly and distinctly admits this, but shows that it was in pursuance of a previously proposed arrangement between defendant and Durfee, and that the latter "offered to procure the assignment for his (defendant's) *security*." The answer and the proof clearly showing that this assignment was so made and delivered, as and for the security of the notes mentioned, I am at a loss to perceive how, in a court of equity, as between complainant and defendant (assignor and assignee), it can be supposed to give to the latter any greater rights in or over the mortgage, than if it had distinctly declared, upon its face, that it was given as such security only. The effect between them, as to all beneficial or substantial interest in the mortgage, is, I think, precisely the same as if so expressed.

The defendant had full notice by the mortgage itself, as well as by the assignment, that the mortgage was the property of complainant, and not of her husband. There was nothing on the face of the papers, or in the nature of the transaction, to warrant any inference on his part that she had sold the mortgage to her husband (if it were compe-

tent for her to do so), or given him power to sell it. It was not assigned to the husband, nor was the title in any way vested in him. The assignment was directly to the defendant himself. Had it been assigned to her husband, so as to vest him with the title, or had it been a certificate of stock, or negotiable paper, endorsed in blank, the possession of the husband would have been *prima facie* evidence of ownership, and the defendant would have been justified in dealing with him as the owner. It was claimed, on the argument, that the case might be placed upon this ground, as the mortgage discloses the fact that it was given to secure a note. But the answer to this suggestion is, that it does not appear whether the note was negotiable; and the answer of defendant sets up no such claim, but claims the mortgage under the assignment only, and the subsequent arrangement with the husband. My brethren seem to me to view this case as if complainant had vested her husband with the *indicia* of ownership, so as to authorize the defendant to deal with him as the owner. If I could so understand the fact, I should agree in their conclusions. But the mere placing the mortgage in the hands of the husband, with an assignment of it to the defendant, and for the purpose of delivery to the defendant, was not, it seems to me, vesting her husband with any *indicia* of ownership, especially when it was distinctly understood, by defendant, that he was receiving it only as security—a purpose entirely consistent with her continued general ownership. The *indicia* of ownership were given to the defendant, not to the husband, as security only, and not as a sale. It is fair to presume, and the defendant had a right to infer, that complainant had been informed of the proposed arrangement between himself and the husband, by which the husband undertook to procure the assignment as security; and had that arrangement or understanding been for the sale of the mortgage, doubtless the production, and delivery by the husband to him, of the assignment in this absolute form, would have given him the

right to infer that she had been informed that the purpose of the assignment was a sale. But when the proposed arrangement between him and the husband was for a transfer only to secure the payment of certain notes, and he received it only as such security, he had no right to infer, and no court, I think, can infer, that she had assented to an absolute sale, as she could not have been informed that such was its purpose, unless the information was false. She assented to the arrangement actually proposed, and not to one which was not proposed, and had not been thought of. This assignment created, of itself, a privity of contract between complainant and defendant, as much as if she had been present and transacted the business in person. The denial of such privity of contract in the answer, is merely a denial of the legal effect, or of an inference of law.

The legal effect of the transaction by which this mortgage was assigned and delivered to the defendant, and received by him, is, I think, in a court of equity, a contract between him and complainant, that he might hold the mortgage as a security for the notes (which it was assigned to secure); that if those notes were not paid by the parties liable on them, as they became due, he might collect and apply the mortgage money for that purpose, so far as it would extend, and so far as necessary; but if the notes should be paid, or extinguished, by the parties liable on them, the mortgage should revert to her; that he, in that event, would re-assign it to her; and that after payment, and until such re-assignment, he would hold it as a mere naked trustee for her, and that if he had, in the mean time, received any payments upon it, he should account to her for the amount.

But it seems to be supposed that the receipt given by defendant for the mortgage and assignment, being given to complainant's husband and not to herself, alters the effect of the transaction, and prevents its enuring to her benefit. I think it entirely immaterial to whom the receipt was given, or whether any receipt had been given; and if given to any

other person, it could not have the effect to prejudice complainant's rights as between her and defendant.—*Vartie v. Underwood*, 18 *Barb.* 561. The mortgage was hers; she assigned it to defendant as security; he knew and acknowledged the fact; he can not claim it as a sale. Subject only to his right or special property in it, as a security, the general property and beneficial interest in it, in equity, still belonged to her.—*Henry v. Davis*, 7 *Johns. Ch.* 40; *Slee v. Manhattan Co.* 1 *Paige*, 48; *Hoyt v. Martense*, 16 *N. Y.* 231; *Norton v. Warner*, 3 *Edw.* 106. He was not the general owner, and could not transfer to another person, having notice, any greater right than he possessed.—*Sweet v. Van Wyck*, 3 *Barb. Ch.* 647; nor, as between himself and her, could he make any transfer of it to the prejudice of her rights, or which should prevent her from obtaining the full benefit of the mortgage when his debt should be paid; nor could he, by this receipt, or any other arrangement with the husband, transfer to the husband *her* right. When the mortgage and assignment were delivered to, and accepted by, defendant as security, the transaction, so far as complainant was concerned, was complete, and the respective rights of the parties became fixed. There was nothing left to be done by the husband, except to see to the payment of his and Moore & Durfee's notes, and nothing from which to infer any authority in the husband, at some future period, to make a new and entirely different arrangement, or to alter the effect of that already made, so as to prejudice her interests;—in short, to make an absolute sale of the mortgage which she had only consented to transfer as a security. The same unequivocal evidence of her assent was necessary to give validity to the new arrangement, as was required to perfect the first. She stood, in fact, so far as this mortgage was concerned, in the relation of a surety for the notes of her husband and of those of Moore & Durfee.—*VanHorne v. Everson*, 13 *Barb.* 526; *Vartie v. Underwood*, 18 *Barb.* 561.

By the sale to defendant of Durfee's interest in the firm

of Moore & Durfee, in May, 1856, the notes of Durfee and Moore & Durfee, secured by the assignment, were, as between complainant and defendant, paid or extinguished, and every purpose of the assignment had been fulfilled. From that moment all interest of defendant in the mortgage ceased, and it belonged, in equity, to complainant as fully and completely as if the assignment had never been executed.

The assignment was not a power of attorney to the husband, but, so far as it was in the nature of a power, it was a special power given to the defendant, to secure the payment of the notes in question; and when these notes were paid, that power was extinguished by the extinguishment of the debt secured by it.

I can see no evidence in this case to warrant the inference of complainant's assent to the new arrangement, by which defendant claims to own the mortgage, unless, to every disposition a husband may choose to make of his wife's property, her assent is to be inferred from the marital relation alone. But this, so far from treating the wife as a *feme sole* in respect to her separate property, according to the plain intent of the statute, would practically nullify the statute, and place the property of the wife under the unrestrained control of the husband.

It is unnecessary to discuss the question, what would have been the effect, if the answer, as respects the chattel mortgage, had been fully supported by the proof, so as to show it to have been given for the specific purpose of securing the wife for having assigned her mortgage as security; since the evidence does not support the answer in this respect. The answer alleges it to have been a mortgage of Moore & Durfee, of the same date and for the same amount of the mortgage assigned. The evidence, so far as it shows any thing upon the point, would make it a mortgage of Durfee alone, and does not show either its date or amount, or the purpose for which it was executed, or, if intended to show either, it leaves it to the loosest possible inference; and even

this inference, so far at least as to the purposes of its execution, is entirely destroyed by the statement of the witness, on his cross-examination, that he "knew nothing about the chattel mortgage, except from seeing it on the files and from hearsay. This evidence is entirely too vague and uncertain to affect the rights of the complainant, or to furnish any safe ground of decision. Neither the mortgage itself nor its contents are proved. Better evidence must have been in the defendant's power. Why was not Moore called as a witness, who must have known by whom and for what purpose it was executed, if the facts were such as stated in the answer.

The answer alleges the agreement of the defendant, on the purchase of the stock, to have been to pay to the *complainant* the amount of this *chattel mortgage;* the proof is that he was to pay to *Durfee* the amount of the *mortgage* he had procured his *wife to assign.* If the chattel mortgage is properly in evidence at all, there is nothing in the evidence from which we can safely infer it was given to secure her for the assignment of her mortgage. We may as well infer that it was given for some other debt.

There is not a word of testimony to show that complainant ever received or assented to the assignment, from the defendant to her, of the mortgage from Berry to her husband.

I think the decree of the court below should be reversed, and a decree entered in favor of complainant according to the prayer of the bill.

CAMPBELL J. did not sit in this case.

Decree affirmed.

Nathan Reeve and Others v. George W. Pack.

As against the maker of a promissory note payable at a particular place, the plaintiff is not required to allege or prove presentment or demand of payment at the place specified.

Submitted January 8th. Decided January 12th.

Error to St. Clair Circuit.

The declaration was upon the common counts, with notice attached that, under the same, plaintiff would give in evidence two certain promissory notes, both of which were payable at N. Reeve's office in Detroit.

On the trial, the notes being offered in evidence, defendants objected that evidence should be given that the notes had been presented for payment at the place specified, and payment demanded. The court overruled the objection, and rendered judgment upon the notes. Defendants brought error.

Mitchell & McAlpine, for plaintiff in error.

Conger & Harris, for defendant in error.

CHRISTIANCY J.:

This case presents the single question, whether, as against the maker of a promissory note, payable at a particular place, the plaintiff is required to allege or prove presentment or demand of payment at the place.

This question is answered in the negative by the almost uniform current of decisions in the several states of the Union where the question has arisen. The states of Indiana and Louisiana are believed to be the only exceptions. In the correctness of the rule thus established by the great majority of the American cases, we fully concur.

That the question has not before been brought directly before the Supreme Court of this state, must be attributed to the fact that the correctness of this general American doctrine has never been seriously doubted by the profession,

nor its effect become the subject of complaint by the business men of the state.

In a matter of so much general practical importance to the commercial interests of the country, uniformity of decision is a public benefit; while a want of such uniformity would introduce confusion and uncertainty, impair confidence, and tend to check the commercial relations of our citizens with those of other states, and may therefore be justly deprecated as a public evil.

But, independent of these considerations, we think the rule is just in principle, and beneficial in its operation. It is the rule long since adopted in England by the Court of King's Bench, and adhered to by that court, against the opposite rule in the Court of the Common Pleas, until the decision of the House of Lords, in *Rowe v. Young*, 2 *Brod. & Bing.* 180, which, contrary to the opinion of a majority of all the judges, repudiated the doctrine of the King's Bench, and adopted that of the Common Pleas. But so unsatisfactory was that decision to the commercial interests of that country, that Parliament immediately interfered, and, by statute 1 and 2 *Geo. IV. ch.* 78, restored substantially the rule adopted by the King's Bench. See *Wallace v. McConnell*, 13 *Pet.* 136; *Story on Pr. Notes*, § 228.

While this rule dispenses with the allegation and proof of presentment and demand in such cases, it secures to the maker all his substantial rights and equities, by allowing him to show in defense that he was ready to pay at the place, and thus to avoid all special damages, and the costs of the suit. And if any special loss has occurred to the maker by the neglect of presentment and demand, his rights will be fully protected.

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

The other Justices concurred.

Charles B. Fessenden v. Samuel W. Hill.

The affidavit for attachment under chapter 140 of the Compiled Laws must be made on the day on which the writ issues.

Where, on writ of error, an objection is taken which goes to the jurisdiction of the court below, and is fatal to the judgment brought up for review, the Court will not pass upon the other questions made upon the record.

Heard and Decided January 12th.

Error to the District Court for the Upper Peninsula.

Hill commenced suit against Fessenden in the District Court of the Upper Peninsula, for the county of Houghton, by attachment. The affidavit for attachment, based upon the non-residence of a defendant, was made February 23d, 1857, and the writ issued thereon bore date two days thereafter. Property was attached by virtue of this writ, but Fessenden was not personally served, and did not appear in the cause. Judgment having passed against him by default, he brought the case to this Court by writ of error, alleging several grounds of error.

C. I. Walker, for plaintiff in error, stated that there were several questions of importance presented by the record, which it was desirable to have settled, if the Court would hear and pass upon them.

THE CHIEF JUSTICE:

The affidavit in this case having been made two days before the writ issued, the judgment can not be supported. — *Wilson v. Arnold*, 5 *Mich.* 98. This point being decisive of the case, we do not think it proper for us to hear an argument upon the other questions raised, and give opinions upon them.

Judgment reversed.

MANNING J. did not sit in this case.

There was no appearance for defendant in error.

The Michigan Central Railroad Company v. Lorenzo D. Hale and Others.

Section fifteen of the charter of the Michigan Central Railroad Company provides that "it shall and may be lawful for the said Company, from time to time, to fix, regulate, and receive tolls and charges taken for transportation of property and persons on said railroad as aforesaid, and for the storage of property remaining in the depots of said Company, if not taken away as hereinafter provided," &c.; and the sixteenth section provides that "the said Company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them, upon delivery thereof at any of their depots, and which shall have remained in any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified *if known, either personally, or by notice left at his place of business or residence*, or by notice sent by mail, of the receipt of such property, at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged; but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away: *Provided*, That in all cases the said Company shall be responsible for goods in deposit in any of their depots, awaiting delivery, as warehousemen, and not as common carriers. And if said Company shall charge or take any renumeration for storage of goods otherwise than aforesaid," a penalty is imposed therefor. Under this last proviso of the sixteenth section, property in deposit in the depots is to be considered as "awaiting delivery" as soon as it is in condition to be delivered over to the consignee when demanded, and not merely from the time when the right to charge for storage has accrued.

The office of the notice contemplated by the sixteenth section is only to fix the right to charge for storage, and not to continue the liability of the Company as common carriers. If the necessity of notice to terminate the carrier's liability did not exist without, it was not created by, this section; while, if it did exist, it is removed by the limitation of liability to that of warehousemen where goods are in deposit and in situation to be delivered, whether such notice be or be not given.

A common carrier can not limit his common law liability by a mere notice endorsed upon the receipt given the consignor, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence *aliunde*—it can not be presumed from the terms of the receipt alone, or be implied from the posting of notices or the delivery thereof to the consignor.

A common carrier has no power to *restrict*, in any manner, his common law liability, but it bound to transport the property intrusted to him under this liability, if it be not waived, or changed by contract. But he may make any contract with an individual relative to the transportation of his property which the latter may deem conducive to his interest, and enter into upon a consideration satisfactory to himself, though a diminution of the carrier's common law liability results therefrom.

The law does not compel persons dealing with common carriers to rely and insist upon the liability which, in the absence of special contract, it imposes in their favor, but recognizes their competency to manage their own affairs, and to make such contracts with respect thereto, as they may deem most conducive to their interests.

MICHIGAN CENTRAL RAILROAD CO. *v.* HALE.

A corporation which is made a common carrier by its charter, and required to "transport merchandise and property without showing partiality or favor," has the same power to contract for a limitation of its liability as any other carrier, and no consideration of public policy is contravened by the exercise of such power.

The case of *The Michigan Central Railroad Company v. Ward*, 2 *Mich.* 538, overruled.

Heard November 13th, 16th, and 17th, 1858. *Decided January 13th*, 1859.

Error to Jackson Circuit.

Hale and Smith brought assumpsit against the Michigan Central Railroad Company, for the value of certain wheat delivered to the Company as common carriers, to be carried by them from Grass Lake to the city of Detroit. Upon the trial, the following facts appeared in evidence:

In and prior to November, 1850, defendants (below) were common carriers, incorporated by an act of the Legislature of the State of Michigan, approved March 28th, 1846. As such common carriers, prior to the night of November 18th, 1850, they received from plaintiffs 7803 and 34-60ths bushels of wheat at Grass Lake, consigned to plaintiffs themselves, and to be delivered at the depot of defendants in the city of Detroit. This wheat was carried by defendants to Detroit, and there deposited in their warehouse, with the exception of the last car load of 404 and 43-100ths bushels, which was not unloaded. On the night of November 18th, 1850, the said warehouse was destroyed by fire, and all the wheat then remaining deposited therein burned and destroyed, except a small portion subsequently sold as damaged wheat. The wheat had been delivered to defendants in different amounts, and at different times, from October 26th to November 18th. On the 7th of the last month, plaintiffs contracted to sell 7000 bushels of wheat to Charles Howard, and gave him an order on defendants, directing them to deliver to Howard that amount. This order was subsequently presented, and a portion of the wheat received upon it.

Receipts, similar in form, were given by defendants for the wheat as it was delivered to them. The following is a copy of one of these receipts:

"MICHIGAN CENTRAL RAILROAD COMPANY.

"*Grass Lake*, Oct. 26, 1850.

"*Recd. from Hale, Smith & Co., as consignors, the articles marked, numbered, and weighing as follows:*

ARTICLE.	MARKS AND NUMBERED.	WEIGHT.
One car of wheat in bulk.		
Car No. 4966.		24,206.

To be transported over the said Railroad to the depot in Detroit, and there delivered to Hale, Smith & Co., or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the Company, of which notice is given on the back hereof."

WM. H. PEASE, Freight Agent, M. C. R. R. Co."

(Endorsed on the back):

"ABSTRACT FROM THE RULES AND REGULATIONS AS PER PUBLISHED FREIGHT TARIFF.

"The Company will not be responsible for damages occasioned by delays, from storms, accidents or other causes, as by decay of perishable articles, by heat or frost to such as are affected thereby, or for damages to the hidden contents of packages, or by leakage or bursting, or by reason of improper packing when received at their depot; nor will it be responsible for any merchandise, unless receipted for by a duly authorised agent; nor for a greater amount than $200 on any one package, except by special agreement, and upon payment of extra rates; and all goods and merchandises will be at the risk of the owners thereof while in the Company's warehouses, except such loss or injury as may arise from the negligence of the agents of the Company. Goods consigned to irregular stations (those not in capitals on the Freight Tariff), will be delivered at the nearest regular station unless the owner gives a written order to deliver them at the irregular station at his risk."

It further appeared in evidence that plaintiffs were large shippers of wheat over defendants' road in 1849 and 1850.

Of the wheat received by defendants from plaintiffs, that portion not included in the Howard order remained undelivered at the time of the fire.

The defendants requested the circuit judge to charge the jury:

1st. That if the jury find that defendants received the property in question, to transport to their depot in Detroit, that they did so transport it, and there deposited it according to the usual course of business, in their warehouse at Detroit, their liability from the time of so depositing it, would be that of warehousemen, not common carriers.

2d. That section 16 of defendants' charter only controls their right of charging after the notice therein provided for, and does not continue their liability as common carriers after the property is delivered in their warehouse, and until after the giving of such notice.

3d. That even if the notice mentioned in said section 16 was necessary in ordinary cases to discharge the liability of defendants as common carriers, yet if the jury find that the wheat in question was delivered by plaintiffs to defendants, and consigned to themselves at Detroit, no special notice by defendants to plaintiffs of the arrival of the wheat was necessary, as it will be presumed plaintiffs had knowledge of the time it would arrive at Detroit.

4th. That defendants had a right, by contract with plaintiffs, to limit their common law liability; and if the jury shall find by the terms of the receipt given by defendants to plaintiffs in this case it was stipulated between them that all goods and merchandises would be at the risk of the owners thereof while in the defendants' warehouses, except as to such loss or injury as might arise from the negligence of defendants' agents, such stipulation will define and limit the liability of defendants in this case.

The circuit judge declined to charge as requested on all the points, and defendants excepted. Judgment having been rendered for plaintiffs for the value of that portion of the

wheat not included in the order to Howard, defendants brought error.

G. V. N. Lothrop, and *Wilcox & Gray*, for plaintiffs in error:

1. A common carrier may limit his common law liability by express contract.—4 *Burr.* 2301; 5 *East*, 513; 16 *East*, 244; 3 *Taunt.* 264; 8 *Taunt.* 144; 2 *M. & S.* 1; 4 *B. & Ald.* 39; 2 *B. & Ald.* 356; 3 *B. & C.* 601; 5 *B. & C.* 222; 1 *Stark.* 186; 1 *H. Bl.* 298; 4 *Bing.* 218; 5 *Bing.* 217; 8 *M. & W.* 443; 7 *Eng. L. & Eq.* 395; 11 *Ibid.* 506; 22 *Ibid.* 315; 25 *Ibid.* 396; 13 *Barb.* 353; 14 *Barb.* 524; 4 *Sandf.* 136; 5 *Sandf.* 180; 1 *Kern.* 491; 16 *Penn.* 67; 5 *Rawle*, 179; 6 *W. & S.* 495; 9 *Watts.* 87; 8 *Penn.* 479; 4 *Harr. & J.* 317; 23 *Vt.* 186; 26 *Vt.* 247; 2 *O. S. R.* 132; 11 *Cush.* 97; 12 *B. Monr.* 63; 2 *Rich.* 286; 31 *Maine*, 228; 3 *Fairf.* 422; 6 *How.* 344.

It makes no difference that the carrier is a corporation. The Company is empowered to carry goods by their charter. In the exercise of this right, except so far as they are limited or restrained by their charter, they may do what an individual might do, and they are subject to the same liabilities and responsibilities as an individual in the same circumstances. Where a general capacity is conferred, it is to be exercised precisely as an individual would exercise it.—12 *Barb.* 53; 1 *Sandf. Ch.* 380; 15 *N. Y.* 63, 64.

2. No notice of the arrival and deposit of the goods in the Company's warehouse was necessary. The liability of the Company as a carrier ceases, either at once upon placing the goods in the warehouse, or at most upon the lapse of a reasonable time thereafter for their removal by the consignee. —*Redf. on Railw.*, § 130; 10 *Metc.* 472; 1 *Gray*, 263; 32 *N. H.* 523; 3 *Dana*, 92. This is the general rule deduced from the authorities. The same rule is prescribed for this Company by sec. 16 of their charter, which provides that the "Company shall be responsible for goods in deposit in any of their depots, *awaiting delivery*, as warehousemen, and not as com-

mon carriers." There are only two classes of goods in their depots — one *awaiting carriage*, and the other *awaiting delivery*. The notice provided for in the preceding part of the section relates to charging storage, and to that only.

3. When, as in this case, the consignor is himself the consignee, we claim that he is not entitled to notice of the arrival of goods, even if consignees usually are. The consignor is bound to know, and to take notice, of the regular course of business of the Company. He knows, therefore, of the time of arrival of the goods at their destination. — *Redf. on Railw.* §139; 32 *N. H.* 523.

The consignors live at Grass Lake. Notice, if any, must be sent to them there, and time must be allowed them to receive the notice, and then to come to Detroit to receive the goods. Now, can it be said that the consignor contemplates that this shall be done? It seems to us clear that he expects and intends that the property shall go to Detroit by due course of business, and there remain in warehouse till the consignee shall go there, or send an order for it. And so the Railroad Company understands it.

Johnson & Higby, for defendants in error:

1. The Company are liable as common carriers until notice to the consignee, and until a reasonable time for the removal of the property should thereafter elapse. —*Mich. C. R. R. Co. v. Ward*, 2 *Mich.* 538.

The positive provisions of section 16 of their charter are that the Company may collect reasonable storage upon all property transported by them, and which shall have remained in their depot more than four days. This was an essential enlargement of their powers, without which no storage could be collected, because it did not come within the general scope and design of the corporation. Then follows the first proviso which is partly in the nature of a limitation, and partly in the nature of a grant or covenant. For all depots except Detroit, it limits the right to collect this storage to those

cases where four days' notice has been given; but in regulating the exercise of that right in reference to goods in the depot at Detroit, it amounts to a grant, because it authorizes the collection of storage in twenty-four hours after notice, although four days, as previously provided, had not elapsed. Then follows the second proviso, which is also in the nature of a contract, having strict reference to what had preceded, regulating and defining the rights of the Company. It declares the Company shall be responsible as warehousemen, and not as common carriers, for goods *awaiting delivery*. When are goods "*awaiting delivery*"? If we recur to the positive provisions of this section, and the first proviso, we find this phrase corresponds precisely with the time when the Company may assume the duties of warehousemen; namely, after four days' notice, out of, and twenty-four hours' in, the city of Detroit. It is not unreasonable to suppose that the liability of the Company as warehousemen should commence with the commencement of their duties as such. If they are not liable as carriers up to that time, in what capacity are they liable? At common law, they would be liable as carriers until they assumed the duties of warehousemen; and to discharge them from that liability would require a positive legislative enactment, free from ambiguity. If we undertake to say that this last proviso is of that character, we give no force or effect to the phrase "awaiting delivery"; because, by omitting those words it would, in the most simple and natural language, express that idea. We must give them *some* meaning; and it is clearly no other than that which relates to the condition of the parties, as well as of the goods. If the consignee is not in condition to receive the goods, as he clearly is not if he has no knowledge of their arrival, they are not awaiting "delivery."

The carrier must discharge all his duties as such, before any duty can be imposed upon the consignee. This is not done until he has given notice. The law then fixes a reasonable time for the consignee to remove his goods, and if there

is any reason for continuing the liability of the Company beyond the deposit of the goods, the same reason would exist until the consignee has had a reasonable time to take possession.

2. There is no reason why the consignor, when himself, the consignee, should not have the same notice as other persons. As a general rule he would have no better means of knowing the time of arrival than any other consignee.

3. The Company having undertaken to become common carriers, any attempt on their part to limit or restrict their liability as such, is inconsistent with the undertaking, against public policy, and therefore inoperative and void. As to what is a common carrier, see 2 *Kent*, 498; *Ang. on Car.* § 67; *Coggs v. Barnard*, 2 *Ld. Raym.* 909.

This Company, by their charter, have agreed with the Government to assume the duties of this public employment; and they can not now, in violation of that agreement, divest themselves of that character, and discharge themselves of the *public* duty thus undertaken, by imposing special contracts upon individual members of the community.

An ordinary common carrier, having assumed this character at his will, may, at his own will, divest himself of it at any time he may choose, and rely upon his special contract. He is then no longer a common carrier.—6 *How.* 344. But this Company has entered into an engagement, irrevocable in its nature, to be and continue a common carrier, and are not therefore at liberty to divest themselves of that character, and to throw off their duties and liabilities as such whenever it may suit their convenience.—*Hollister v. Nowlan*, 19 *Wend.* 240; *Hyde v. Trent & Mersey Nav. Co.* 5 *T. R.* 387; *Mich. C. R. R. Co. v. Ward*, 2 *Mich.* 538.

MARTIN Ch. J.:

The first question presented in this case is, whether, after goods transported by the Railroad Company have arrived at

their place of consignment, and have been deposited in such Company's warehouse, according to the usual course of business, the Company's liability, from the time of so depositing them, would be that of warehousemen, or that of common carriers. The consideration of this question necessarily involves that of the second presented in this case, viz., the construction and effect of the sixteenth section of the Company's charter, — as this last contains really no independent proposition, but, as suggested by defendants' counsel, rather assigns a reason in support of the first. We will, therefore, consider the two as one.

The fifteenth section of the charter provides that "It shall and may be lawful for the said Company, from time to time, to fix, regulate, and receive tolls and charges taken for transportation of property and persons on said railroad as aforesaid, and for the storage of property remaining in the depots of said Company, if not taken away as hereinafter provided," &c.; and the sixteenth section provides that "The said Company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them, upon delivery thereof at any of their depots, and which shall have remained in any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified, if known, either personally, or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property, at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged: but such storage may be charged after the expiration of said twenty-four hours upon goods not taken away; *Provided*, That in all cases the said Company shall be responsible for goods in deposit in any of their depots, awaiting delivery, as warehousemen, and not as common carriers. And if said Company shall charge or take any re-

muneration for storage of goods otherwise than as aforesaid, it shall forfeit and pay to the State of Michigan, in each case, for so doing, the sum of fifty dollars."

These sections determine the question when the liability of this Company as common carriers ceases, and as warehousemen commences. Were it to be settled by the rules of the common law, much difficulty might be experienced in determining it — a conflict existing as to whether notice is, or is not, necessary; or whether the lapse of time wherein the consignee, by the use of diligence, might remove his property, is, or is not, necessary; or whether any, and what, reasonable time is allowed him in which to remove his property before the Company can be released from their liability as carriers. But we apprehend the rules of the common law can have no operation upon this question; and it is the resort to these rules, and the attempt to interweave one or the other of them into this charter, and so fix the liability of the Company, that has given rise to the doubts which surround it. The late Supreme Court, in the case of this Company *v. Ward*, (2 *Mich.* 538), held, that notice of the arrival of the property, and the lapse of the time allowed for its removal, were necessary, both by common law and under the charter, and that property could not be considered as *awaiting delivery*, within the meaning of the proviso to the sixteenth section, until after the expiration of the time limited for its removal. But, whether notice is required, or the use of diligence by the consignee, or whether neither, but the lapse of a reasonable time, after arrival for its removal, is allowed, or all, in the absence of any provisions in the charter upon the subject, becomes immaterial when such provision exists.

The necessity of a notice before the right to charge for storage arises, is clearly determined by the sixteenth section, and the imposition of a forfeiture of fifty dollars, if it should be charged, or any remuneration taken therefor, except as therein authorized, seems to indicate that the charging for storage was the paramount subject of the section, and that

the proviso was inserted to avoid the presumption that the liability of the Company as carriers should continue until notice, or removal of the property, or any period of time after the property had been transported and deposited for delivery.

The fifteenth section empowers the Company to fix, regulate and receive tolls upon all goods remaining in their depots, if not taken away within the time fixed by section sixteen. This time is twenty-four hours when goods are in the Detroit depot, and four days if at any depot elsewhere, after notice of their arrival shall have been given. But, has the notice any effect upon the liability of the Company? It is claimed by the defendants in error that it has; because, 1st, The liability of carriers only ceases when that of warehousemen commences; and they claim that this is when the right to charge for storage commences: and, 2d, Because the Company are liable as carriers until the property is "awaiting delivery," which, as they insist, is not until after notice, and the lapse of the time limited for their removal without charge for storage.

But is it true that the Company can not be warehousemen unless the right to charge for storage exists?

That no interval can elapse between their laying down the character of carrier and assuming that of warehousemen is true, — and these characters are defined by the liabilities as well as by the rights attached by law to them. The right to charge storage is an incident to that of warehousemen, and, unless restrained by law, exists from the moment of the deposit of goods in a warehouse; but a restraint of this right does not divest the warehouseman of his character any more than the imposition of any other restraint upon his business would.

This Company are created a railroad and transportation company, and are consequently common carriers; but the Legislature, presuming that property, after transportation, might remain a longer or shorter time in their possession before being removed, regards their depots as warehouses,

and recognizes them as being warehousemen for goods thus remaining therein, but imposes upon them the duty of notifying the consignee of the arrival of his property, if they would make such continued possession the foundation of a right to charge for its storage. It nowhere, by express words, creates them warehousemen, but it recognizes them as such in regard to property deposited in any of their depots, awaiting delivery, and restricts their right to charge for storage of such property, notwithstanding it may be thus deposited, unless notice shall have been given. Accordingly, as we have seen, by the provisions of section fifteen they are empowered to receive tolls upon goods received into their warehouse, unless taken away under the conditions and restrictions contained in section sixteen; but lest these should be construed as extending their liability as carriers until the right to receive tolls should arise, or leave in doubt the time when such liability changed to that of warehousemen, it is provided that, notwithstanding this disability to charge for storage for a limited time, the character of warehousemen should commence at the time when the goods are deposited in the depot and ready for delivery. This is what is meant by the words "awaiting delivery." By this, we do not mean to be understood that the mere deposit of goods in the depot is sufficient.

The facts of this case show, however, that the property was not only deposited, but in a situation to be delivered when called for; and being in such situation, they were within the proviso. Now, property is "awaiting delivery" as soon as it is in a situation to be delivered over to the consignee, when demanded; and such must be held to have been the view of the Legislature, unless we can suppose that two rules of liability were intended,—one respecting goods in the Detroit depot, and another respecting goods in a country depot. For such a distinction there is no apparent reason, and the very inequality of the rule contended for, shows that none such was in contemplation of the parties to the charter.

It was urged (and such was the decision of this Court in

the case against *Ward*), that the Legislature by the use of the term "awaiting delivery," had reference to the time which might elapse after the right to charge for storage accrued, and before removal of the property. But, for the purpose of shifting the liability of the Company as carriers to that of warehousemen, during this period, no such provision was necessary; as, by law, without any limiting proviso in the charter, such would be their liability during that interval of time, and the proviso, under such construction, becomes meaningless as a proviso.

Now, when a proviso is inserted in an act, its office is to limit the operation of such act, or to confine it to particular persons, or to a particular state of facts; and if it be held that the provisions of the charter respecting the collection of storage would primarily operate to continue the Company's liability as carriers until the right to collect it should arise, then the proper interpretation of the proviso is that which shall limit this effect. Otherwise, it is no proviso. It was urged that "awaiting delivery" presupposes the consummation of every preliminary requisite to delivery, and consequently presupposes notice to the consignee, and the elapsing of the time limited for its removal. But this is upon the assumption that notice, as well as reasonable time for removal, are common-law requisites to the discharge of a carrier's liability; and so long as these are open questions, it can hardly be assumed, we think, that the Legislature intended to incorporate into this charter, by the sixteenth section, either rule. The presumption is, rather, that they designed to adopt a certain and independent rule relative to the liability of this Company, to avoid the uncertainties of the common law upon this subject.

Now, goods are in deposit in the depots of the Company, either awaiting transportation, or awaiting delivery. The section has reference only to goods which have been transported and placed in the Company's depots for delivery to the consignee, and this language of the proviso was em-

ployed to designate the situation of the property, and not to create a new liability from such condition.

The office of the notice contemplated by the sixteenth section, is, then, we think, only to affix the right to charge for storage, and not to continue the liability of the Company as common carriers; and, if the necessity of notice to terminate the carrier's liability did not exist without, it was not created by, it; while if it did exist, it is removed by the limitation of liability to that of warehousemen when goods are in deposit, and in a situation to be delivered, whether such notice be or be not given.

There was, therefore, error in the refusal of the circuit judge to charge as requested by the plaintiffs in error, and alleged in their first and second assignments of error.

The next question, and the only one we deem it necessary to consider, is, whether the Company can limit their common law liability by contract. This question involves, under the facts of this case, both the power of limitation by notice and by special agreement; and in this respect it is more broadly put than the facts of the case warrant, as the point thus stated assumes the existence of an express contract, or implies it from the terms of the receipt and accompanying notice. The error assigned is that the court refused to charge that the Company had a right, by contract with the defendants in error, to limit their common law liability; and that if the jury should find that, by *the terms of the receipts* given by the Company to such defendants, it was stipulated between them, &c., such stipulation would define and limit the Company's liability in this case.

We say the question is more broadly stated than the case warrants, because the assumption of the request that "the terms of the receipt" (by which was intended the receipt, and notice limiting the Company's liability endorsed thereon) determine the contract, is not in accordance with the law — all the cases which give to such notice any validity agreeing that something more than mere notice endorsed upon a

receipt, or otherwise brought to the consignor's knowledge, is necessary to relieve the carrier from his common law liability. His assent to the limitation is still necessary; and this is a question of fact for the jury, to be determined by evidence *aliunde*, and is not the subject of presumption from the terms of the receipt alone. And this is the correct rule respecting notices of common carriers, designed to have such effect.

Now, by their charter, this Company were created common carriers; it was made their duty to transport property for all persons indifferently; and this they can not refuse to perform. This duty is, in the absence of any contract, attended with extraordinary responsibilities and liabilities, which constitute them insurers of property while in their possession as carriers, and they can no more restrict these, unless upon the free and full agreement of the party dealing with them, than they can refuse to carry when required.

Such agreement is not to be implied from the posting of notices, or the simple delivery of one to the consignor, as this would be no more than limitation of his liability by the carrier by *ex parte* action. Some evidence of assent to the terms of the notice is necessary, from which a contract may be implied. In such case, if it is sought to be inferred from the acceptance of a receipt specifying a limitation of liability, or referring to an accompanying notice, for such limitation; or if it is sought to be inferred from previous notice and dealings; if it appear that the price of freight was made lower in consideration of such special restriction, and the party has received the benefit of such reduction of freight; such, or similar facts, might, and undoubtedly would, furnish strong evidence of assent; as in *York v. N. M. Railway Co.* 22 *Eng. L. & Eq.* 315, and as in the case of *The Am. Trans. Co. v. Moore*, 5 *Mich.* 368. But, if in a case otherwise similar, no such difference in the price of freight was made, or if the party had paid, or agreed to pay, the higher rate, or the price uniformly demanded according to the tariff

of the Company in all cases, or if no optional tariff of prices, of which the forwarding party may avail himself, is shown to exist, little or no inference of assent to such special terms can be drawn, without allowing the Company, in effect, to limit their liability by a mere notice.

Again, upon grounds of public policy, this right should not exist in the Company. The public has a right to insist upon the full common law liability as carriers, unless a contract, releasing the Company from such liability, be clearly shown.

The immense powers and franchises bestowed upon them are granted in consideration that they shall, among other duties, "transport merchandise and property on their road, without showing partiality or favor, and with all practicable dispatch."— See *Charter*, § 15. From the facilities they offer, and are bound to provide, for transportation; and from their rapidity of locomotion, they do, and necessarily must, absorb nearly the entire business of carrying merchandise and property requiring carriage and deposit along and in the vicinity of their route, and competition is virtually destroyed. There is, in a certain sense, a compulsion upon all requiring transportation of property to employ them; and a restriction of liability by notice is measurably compulsory. There is no mutuality or freedom of choice offered. The person desiring goods forwarded is compelled in reality to have them carried forward by the Company; their obligation is to carry them; and a restriction of the liabilities primarily growing out of that obligation, by a notice, is an imposition of terms rather than a contract. We hold, therefore, that if the Company can, in any form, restrict their common law *liability*, they can not restrict it by notice *alone*. And this brings us to the principal question raised,— Can they by contract? We unhesitatingly say that the *Company* can not restrict their common law liability as carriers in any way. But the question involves more than this power of the Company. Whether they can enter into a contract with an individual desiring to

employ them, by which such individual relinquishes some of the rights which the law, in the absence of a contract, gives to him, is quite another question, and involves the power of all who seek to employ them, to contract respecting such employment. It is the unfortunate form in which this question has been presented that has surrounded it with difficulties, or suggested any doubts. The idea prominently conveyed by the question is, that of the *ex parte* action of the Company; and this arises from the form of the question,— Can the Company "restrict," or "limit"? &c.;—which suggests that of individual action. But when a contract is made, there are at least two parties acting, and to hold that the liability of the Company is inflexibly and unalterably fixed by law, denies to parties employing them the right of making any contract with them, upon any consideration by which the liabilities of the Company may be lessened. In other words, the doctrine leads to this result:—The law says to all persons who desire to have property transported by railway companies, you can only peremptorily require to have your property transported—the law affixes the terms; with the Company you have no right of choice or contract as to such terms, however advantageous to you such right may be. Now, the contract of an individual with the Company, made to subserve his interest, is not a restriction by the Company of their common law liability, even though a diminution of such liability results therefrom. All the authorities, with perhaps a single exception (see *The Rome Railway Co. v. Sullivan*, 14 *Ga.* 277) beside that of *The Mich. Central R. R. Co. v. Ward*, concur that such contract can be made; and in these cases the power of the Company to contract for the transportation of property, whereby their common law liability may be lessened, is denied as being against public policy, inconsistent with their charter, and incompatible with their continued existence.

It is said that they are created common carriers; that to

this character the law inflexibly attaches certain duties and liabilities; that these are necessary incidents, and can not be cast off, except by laying down such character, and consequently not without forfeiture of their charter, or, at least, the self-creation of a new character. But is this the correct view to take of this subject? The principle usually suggested as that upon which the right of the carrier to make a contract by which his liability will be limited or restricted, is that stated by Bronson J. in *Hollister v. Nowlan* (19 *Wend.* 247), viz.: That "the person entrusted with the goods, although he usually exercised that employment, does not, in the particular case, act as a common carrier."

The same idea is also thrown out by Mr. Justice Nelson, in *The New Jersey Steam Nav. Co. v. The Merchants' Bank* (16 *How.* 344), where he says: "The owner, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or neglect." Whether this be the correct principle upon which to base this right, or not, it is very certain that all the cases from the time of Lord Coke down, recognize this right of the carrier to contract respecting his employment, and thereby to diminish his liability. But this right is recognized as a power to contract, not to restrict.

For my own part, I can not appreciate the correctness of the reason, or accede to the principle, upon which this right is based. It has sprung, I think, from the undue prominence given to the idea that the carrier was, by the contract, *restricting* his liability, and in forgetfulness of the fact that such contract is the mutual act of parties in relation to a matter of private business. Now, it is true that the occupation of a carrier is a public employment, in a certain sense; that is, that he undertakes to carry for all persons indifferently for hire: but, in my view, *this* undertaking fixes his char-

acter, irrespective of rates and risks, and he only abandons it by refusing to carry. The duties and liabilities which the law imposes upon him, are only imposed because the public character has been already assumed by him.

They do not go to create it. When that character has been assumed, and so long as it continues, it is the right of every person to require of the carrier the transportation of his property along his route, upon the payment of freight. This can not be refused, although it may be regulated. In the absence of any contract, the law imposes upon the carrier the extraordinary liability of insurer against all loss, unless occasioned by the act of God, or the public enemy; and this becomes the terms of transportation, and may be called the contract of the parties, arising immediately upon the delivery of the property for carriage. But the law only makes a contract for the parties, or imposes a liability, when they have made no contract for themselves. The employer may procure the transportation of his property upon such terms as he may deem most advantageous to himself, if he can procure the carrier's assent to such terms; and, in that event, the carrier is none the less a common carrier, although acting under a special, and not an implied, contract.

In my judgment, he acts as a common carrier so long as he carries for all indifferently, whether under the common law liability, or under a contract with his employer. An inn-keeper is one who keeps a house open for the entertainment of travelers; and the law, in his case (as in that of common carriers), imposes upon him special liabilities in respect to his guest's property. Yet, no one doubts but that such liability may be lessened or restricted by a contract between the landlord and such guest; and if it should be, I apprehend no one would consider the former any the less an inn-keeper. He is still exercising his public employment, and bound by his primary obligation, namely, to entertain all persons applying; and this obligation extends in favor of the traveler who may, by special contract, have released him

from some, or all, of the extraordinary liabilities imposed by the law in his behalf. It is upon the basis of his holding such character that the contract is made.

But whatever my own view of this subject may be (and the Court expresses no opinion upon it)—whether the carrier lays down, in the particular instance, his public character or not—we are all agreed that the law does not compel persons dealing with carriers, to rely and insist upon this liability which it primarily imposes in their favor. In these, as in all other cases, the law recognizes the competency of parties to manage their own affairs, and to make such contracts in respect to them as they may deem to be most advantageous, and when the extent of the risk and responsibility of the carrier, on the one hand, and the rights and liabilities of his employer, on the other, have been ascertained and fixed by the contract of the parties themselves, the law applies the maxim, "*Expressum facit cessare tacitum.*"

It is said that these extraordinary liabilities are imposed by law upon common carriers from considerations of public policy, and that, therefore, they can not be thrown off by any act or contract, and the carriers still continue common carriers. It is true the liabilities are imposed from considerations of public policy; but paramount considerations of public policy secure to every man the right to regulate his own affairs, in his own way, and to make such contracts respecting his property as he may regard to be advantageous, if he violate no law; and it matters very little whether the carrier be denominated "public" or "common," or any thing else, so long as his primary obligation, and that which really characterizes his employment, viz., to carry for all persons indifferently, exists. The carrier is always bound to transport the property entrusted to him under the common law liability, if not waived, or in the absence of any contract; but if the person dealing with him thinks it to be for his interest to make a contract, whereby he agrees to hold the carrier to a less degree of liability, or if he choose to become his own insurer,

and can thereby obtain more advantageous rates of freight, or any other benefit, why may he not be allowed to do so?

What principle of public policy, superior to that which secures to every citizen the right to control his own affairs, is contravened, or what law is violated by him, in making the contract? He renounces the benefit of a liability which the law authorizes him to insist upon; and by this renunciation, which is voluntary, and can never be compulsory, the carrier is relieved from such liability. This is the result of his act and volition, as much as of the carrier; and if we hold that he can not do this, because of the benefit to the carrier accruing from it, we must deny to all who have property to transport, if sent forward by a carrier, the ordinary rights of choice and power to contract which belong to every man in every other instance. Such a doctrine we think to be "an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal rights."—*Dorr v. The New Jersey Steam Nav. Co.* 1 *Kern.* 493.

These considerations, we think, apply with full force to the case before us; and before we can hold that the charter of this Company has in any way prohibited them from entering into such contracts, we must be satisfied that it was not only the deliberate intention of the Legislature to tie the hands of the Company in this respect, but those also of every person doing business with them. A conclusion so at variance with popular rights is not to be inferred from slight grounds, or doubtful or uncertain provisions, but should be warranted by the clear intent and language of the charter.

By the charter, the Company were created a railroad and transportation company. This constitutes them common carriers; and, in the absence of any contract, affixes to them all the liabilities incident to such character, and invests them with the same rights and powers. Among the latter, as we have already shown, exists the universally recognized one of making contracts respecting the terms and liabilities of transportation. They can not discontinue the business of trans-

portation of property, nor refuse to carry that of every one offering it for transportation, according to their reasonable regulations, nor impose terms limiting or restricting their liability as common carriers.

But while these powers are denied them, it by no means follows that the citizen is denied the right of contracting with them; and if the citizen is not, they are not debarred the right of contracting with him, whether the result be to increase or diminish their liabilities.

Now, if they do contract, are they any the less a transportation company, or carriers for all persons indifferently for hire?

It was suggested on the argument that the power to contract was incompatible with the requirements of the charter, that they should "transport merchandise and property without showing partiality or favor, and with all practicable dispatch." But the offer of terms of transportation dependent on different degrees of risk—the freedom of choice by law remaining with the party contracting with the Company—or the contracting with such party in respect to prices and liability, is not within the clause of the charter. This was designed to secure to all the prompt transportation of property, and at uniform rates, in the absence of any contract, without partiality or favor in the order of its being forwarded. The Legislature could have had nothing further in view. They certainly could not, by such general terms, have intended to diminish the rights of the citizen to contract with the Company, according to the suggestions of interest, respecting the prices and risks of transportation.

But, by designing that property should be transported at uniform rates, they did not necessarily intend that it should be transported at uniform risks. If the Company fix certain uniform rates for all cases when the common law liability attaches to the undertaking, and offer different rates when contracts are made—the option of rates and risks remaining, as it must, in the employer—and making no distinction as to the time, order, or manner of transportation, no partiality or favor is shown, and, the option being given alike to all, the Company is exercising no right not available to every class of common carriers.

It is also urged that the charter is in the nature of a contract between the Company and the public, and that any attempt on the part of the Company to restrict their common law liability is against public policy, and void; and for this reason their power to contract upon this subject is denied. This argument has been already sufficiently answered. That their charter is in the nature of a contract, is, to a certain extent, true; but it is a contract that they shall be transporters of property, as other common carriers are. The extent of this obligation we have already shown. In exercising any of the powers common to all common carriers, no contract with the public is violated; nor is any consideration of public policy contravened by suffering a voluntary contract to be made with them by persons employing them, although it should necessarily follow that they contract also, or it should happen that a common law liability is restricted or surrendered. The liability is for the benefit of the employer, and public policy is subserved by compelling them to remain carriers, and forbidding any restriction of liability otherwise than by contract.

We therefore hold—overruling in this respect, also the case of *Mich. Central R. R. Co. v. Ward*—that although the liability of the Company can not be restricted by notice, it may be by contract.

These considerations render it unnecessary to consider the errors assigned by the defendants in error in the case of *Hale v.* this Company.* The object of the notice has been defined;

*The defendants in error in this case had also brought error upon the same judgment. Upon delivery of the foregoing opinion, the Court directed the following order to be entered in that case:

"*Lorenzo D. Hale and Others v. The Michigan Central Railroad Company.*

"This cause having been duly heard and submitted; and the judgment of the Circuit Court for the county of Jackson in this case having been already reversed upon the writ of error presented in this court upon the same record judgment and proceedings by the Michigan Central Railroad Company; and such reversal having disposed of this case in favor of the defendants in error: It is therefore, on motion of Lothrop, of counsel for defendants in error, *ordered and adjudged*, that said defendants in error do recover of and from the plaintiffs in error their lawful costs to be taxed, and that they have execution therefor."

and whether Hale or Howard was the owner of the wheat is immaterial under our view of the Company's liability.

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

The other Justices concurred.

Tilden Ames and Another v. The Port Huron Log Driving and Booming Company.

The act to provide for the formation of Rafting Companies (*Laws of* 1855, *p.* 55; *Comp. L. ch.* 66) in so far, at least, as it provides for the formation of companies, and their power to make contracts, is constitutional and valid.

The affidavit to be made by two directors of the Company, under section two of said act, is sufficient if made strictly according to the terms of said section, and it need not contain any detailed statement of the proceedings had in the formation of the Company.

The delivery by a person of a list of his log-marks to a company formed under the said act, does not operate as a contract for the receiving by the Company of all logs so marked that he may have upon the stream, within the limits of the Company's operations. The object of the provision requiring such list was to entitle the person furnishing it to notice of sale in case, by any casualty, his logs should become so placed as to authorize the Company to assume their management.

In the absence of any contract, such Company is only authorized to assume control of the logs of others, and acquire a lien for services with respect thereto, where, by reason of the logs having been put into the stream without adequate provision for running them without obstruction, some obstruction has actually been created.

Heard January 7th. Decided January 13th.

Error to St. Clair Circuit.

Replevin, brought by plaintiffs in error, for saw-logs, claimed by them under a purchase from the Black River Steam Mill Company. On the trial, the parties agreed in writing upon the facts in the case, and submitted the same to the court for its judgment.

Defendants claim to be a corporation, organized under "An Act for the Formation of Companies for Running, Driving, Booming, and Rafting Logs, Timber, and Lumber, and for regulating the Floatage thereof," approved February 9th,

1855. The evidence of their organization is contained in a copy of their articles of association, and an affidavit (of which the following is a copy):

"*State of Michigan*, *St. Clair County*, *ss.* Personally appeared before me, a notary public of St. Clair county, Alvah Sweetser, Christ. Reeve, Henry Fish, and Lewis Brockway, who, being by me first duly sworn, severally make oath and say: That they were elected directors of the Port Huron Log Driving and Booming Company, formed on the 1st day of March, 1855, at Port Huron, St. Clair county, pursuant to previous notice, published in the Port Huron Commercial, a newspaper published in said village; and that the articles of association hereto attached and signed, are the articles of association of said Company, and that all prior proceedings of said association have been in strict conformity with all the provisions of 'An Act to provide for the Formation of Companies for Running, Driving, Booming and Rafting Logs, Timber, and Lumber, and for regulating the Floatage thereof,' approved February 9th, A. D. 1855." (Signed and sworn to.)

This affidavit, plaintiffs claimed, was not in compliance with the law, and defendants were not, therefore, properly organized.

The remaining facts in the case are sufficiently stated by the Court.

The circuit judge ordered judgment for defendants, and plaintiffs brought the case to this Court, for review on bill of exceptions.

Mitchell & McAlpin, for plaintiffs in error:

1. The act under which defendants claim to be organized, is unconstitutional. It is in derogation of common right. It assumes to give any company organized under its provisions, the power and right to take charge and control of any public stream or waters within this state, and to bar all others of right thereto and therein. It is in conflict with section 4, article 18 of the Constitution, which provides that "No navi-

gable stream in this state shall be either abridged or dammed without authority from the board of supervisors of the proper county, under the provisions of law. No such law shall prejudice the right of individuals to the free navigation of such streams," &c.

The whole intent and scope of the law is to give any company, organized under it, the entire and absolute control of the stream they may choose to do business upon. The company is made the sole arbiter and judge of the manner the stream shall be used, what are obstructions, and when they shall be removed.

And, notwithstanding all its provisions to the contrary, it puts such company in the sole control of such stream, and ousts all others from its use and navigation. Such, at least, have been found to be its practical operations.

2. The affidavit attached to the articles of association is not sufficient. We claim that to comply with the true intent and meaning of this provision of the act, the affidavit should not merely have recited the statute, but should have stated fully all the proceedings, so that a court might determine as to their regularity.

3. The services performed by defendants were entirely gratuitous, and they are not entitled to charge for them. Nothing but the negligence of the owner in not providing adequate help, or permitting obstructions, could authorize the Company to take possession of and have a lien upon the logs. Nothing of the kind is claimed to have existed in this case.

4. Defendants, if they had a valid lien, could not become purchasers at the sale made to enforce it. They could not be both buyers and sellers at the same time.—14 *Pick.* 356; 2 *Mich.* 192; *Walk. Ch.* 346; 1 *Mason*, 341; *Harr. Ch.* 259; 2 *Johns. Ch.* 241;

Conger & Harris, for defendants in error:

1. The rights and liabilities of individuals, and of the public, upon the navigable streams of this state, and especially those

connected with the vast lumbering operations on its waters, were clearly defined in *Moore v. Sanborn*, 2 *Mich.* 519. The law in question was passed at the next session of the Legislature thereafter, and its provisions coincide with, and conform to, that decision.—See, also, *Angell on Water Courses*, 546, 550; 1 *McLean*, 350; 2 *McLean* 376; 10 *Johns.* 237; 2 *Fairf.* 278; 3 *N. H.* 321; 31 *Maine*, 9. The object, design, and operation of the law accords as well with the spirit of these cases as with the Constitution.

2. No affidavit was necessary to the corporate existence of the Company, but only for evidence of its organization. But whether necessary or not, plaintiffs are estopped from questioning the corporate existence of defendants,—1st, By commencing a suit against them as a corporation; 2d, By sending them a list of their marks, and leaving to them the management of their logs through that part of the stream over which defendants' operations extended. By this act, in view of the law, the parties enter into mutual obligations; and by the implied contract defendants are to perform the labor, and give notice of sale; and plaintiffs assent to and acknowledge their liability to pay the assessment.

3. The Court will not review a decision of the court below on questions of fact.—*Snow v. Perkins*, 2 *Mich.* 241; *Clapp v. Bromagen*, 9 *Cow.* 530; *Trowbridge v. Baker*, 1 *Cow.* 261; *Whitney v. Sutton*, 10 *Wend.* 413; *Miller v. Chaffee*, 1 *Mich.* 257; *Sweetzer v. Mead*, 5 *Mich.* 107.

CAMPBELL J.:

The plaintiffs in error replevied certain saw logs, which the defendants in error had taken and sold as the property of the Black River Steam Mill Company (who then owned them) to satisfy an alleged lien, under section six of "An Act to provide for the Formation of Companies for Running, Driving, Booming, and Rafting Logs, Timber, and Lumber, and for regulating the Floatage thereof," approved February 9th, 1855.—1 *Comp. L. p.* 624, *et seq.*

The case shows that the defendants, without any contract or request on the part of the Black River Steam Mill Company, took the logs in question, and ran them down Black River to the Mill Company's boom, where they were taken by the Mill Company's servants and put inside of the boom, whence they were seized and removed by the defendants, and sold for the expenses of running, and bought in by the defendants. The Mill Company had given a list of log-marks under section eight of the act, and the sale was regular, if authorized.

The first objection is to the constitutionality of the act of incorporation. We have no doubt that, so far as it provides for the formation of companies, and their power to make contracts, the act is valid. The view we have taken of this case renders it entirely unnecessary to determine whether any other portion of the law is invalid or not.

It is also objected, that the affidavit annexed to the articles of association is insufficient, in not setting forth the facts in detail. The law provides for a call, and a meeting in pursuance of published notice, at which meeting articles are to be subscribed, which are subsequently filed. Directors are to be elected at such meeting, two of whom are required to make an affidavit "setting forth that all prior proceedings of said association had been in strict conformity with all the provisions of this act"; which affidavit is to be endorsed on, or annexed to, the articles. The object of this affidavit is to provide that no articles shall be filed which were not fairly and openly signed at a public meeting; and the affidavit is made not conclusive, but only presumptive evidence. We think the act is satisfied by an affidavit made strictly according to its terms, and that the law does not require any detailed statement of facts. The affidavit before us contains the recital required by the act, and is in due form.

The question next arises whether the defendants had any legal lien upon the logs, which they could enforce by sale, under the act. It is claimed, in their behalf, that the deliv-

ery, by the clerk of the Steam Mill Company, of a list of log-marks, operated as a contract for the running of all logs so marked. We think this is not so. The first clause of the eighth section provides that the log-driving company shall keep posted up a list of their members, *and of all persons whose logs they have contracted to run*, with a description of their several marks. The next clause provides that *any other person* may furnish and have posted a like list, and shall be entitled to thirty days' notice of the sale of any logs upon which the company may have any lien for services. As the preceding clause had covered all cases of contract, it would be doing violence to the language of the law to hold that the last clause had any reference to contractors, or that filing a list of marks constituted a contract, or a request for any services. Its only object was to entitle the person filing to notice of sale in case, by any casualty, his logs should become so placed as to authorize the log-driving company to assume their management, and thus acquire a lien upon them. Inasmuch as there was no contract, the question next arises whether the case shows such a contingency to have happened as authorized the defendants to assume control over the logs, in order to run them down the river. This was only authorized by the sixth section, in cases where, by reason of logs having been put into the stream without adequate provision for running them without obstruction, some obstruction had actually been created. In such case, the log company was authorized to break the obstruction, and run the logs down, and hold a lien upon them for that service. The case does not show that when the logs were taken in charge, any such accident had occurred, and the act of the defendants was therefore wholly unauthorized, and gave them no claim to compensation under the section referred to. This being so, it is not necessary to inquire into the validity of that section, or into the further questions raised upon the argument.

The court below erred in sustaining the claim of the defendants upon the facts of the case, and the judgment below must be reversed, and a new trial granted.

The other Justices concurred.

Charles M. Wilson and Another v. Eunice T. Wilson.

In preparing the case for the argument in this Court, on appeal from chancery, the counsel must exercise his own judgment and discretion as to whether he will print the whole evidence, or omit the formal, and what he may deem the unimportant, portions. And the Court on taxation of costs will not interfere with the exercise of this discretion, unless it clearly appears to have been abused.

Heard and Decided January 13th.

Case reported *ante*, p. 9.

C. I. Walker, for complainants, moved for a re-taxation of costs. Among other objections to the bill as taxed, he claimed that the counsel had unnecessarily included, in the printed case prepared for the argument in this Court, the formal and immaterial portions of the testimony; and he raised the question whether allowance should be made in the taxation of costs for the printing of matter that might properly have been omitted.

THE CHIEF JUSTICE:

We think the counsel must exercise his own judgment and discretion in preparing the case for the printer, and we will not interfere unless it clearly appears that that discretion has been abused. In many cases—perhaps in the majority—the whole testimony ought to be printed.

J. M. Howard, for defendant.

Robert and John Tully v. The People.

On the trial of an indictment for murder, a verdict of guilty of murder generally, without specifying whether of the first or second degree, is erroneous.

Heard and Decided January 13th.

Error to Oakland Circuit.

The defendants and one Charles Tully were indicted for the murder of Patrick Tully. The indictment contained two counts, charging the crime of murder as at the common law. On the trial, the jury returned a verdict as follows:

"In this cause, the jury, heretofore impanelled, come into court, and having answered to their names, say, upon their oath, that they find the said Robert Tully and John Tully guilty in manner and form as the People have in their indictment in this cause charged; and they find the said Charles Tully not guilty in manner and form as the People have in their indictment in this cause charged."

Upon this verdict, the Court proceeded to judgment, and sentenced the plaintiffs in error to solitary confinement in the state prison for life.

M. E. Crofoot and *M. Wisner*, for plaintiffs in error, were stopped by the Court, who called upon the Attorney General to support the conviction.

J. M. Howard, Attorney General, declined to argue the case.

THE CHIEF JUSTICE:

The statute (*Comp. L.* §5713) is imperative that the jury in their verdict, or the Court on plea of guilty, shall determine the degree of the crime. The judgment must be reversed.*

*See the following authorities cited in the brief of counsel for plaintiff in error: *People v. Potter*, 5 *Mich.* 1; *Dick v. State*, 3 *O. S. R.* 89; *Parks v. State*, *Ibid.* 101; *Johnson v. State*, 17 *Ala.* 618; *Kirby v. State*, 7 *Yerg.* 259; *Cobia v. State*, 16 *Ala.* 781; *State v. Dowd*, 19 *Conn.* 389; *McGee v. State*, 8 *Mo.* 495; *State v. Upton*, 20 *Mo.* 397; *McCauley v. United States*, 1 *Morris* 486.

Sherman S. Barnard and Another v. The Lapeer and Port Huron Plank Road Company.

One partner can not bind his co-partner by any contract not within the immediate scope of the partnership, unless with such co-partner's knowledge and assent.

Such knowledge and assent must be established by evidence affirmatively showing it, or from which it may be clearly inferred.

That a plank road will be of incidental benefit to a copartnership engaged in the lumber business, will not authorize one partner, without the assent of the other, to bind the firm by a subscription to the stock of a corporation organized for constructing such road.

Where one partner has subscribed in the name of the firm to stock in a corporation, without the assent of the co-partner, the latter does not recognize his relation as stockholder in the corporation, and become liable to pay the subscription, by failing to express his dissent when demand of payment is made of the firm.

Heard January 8th. Decided January 14th.

Error to St. Clair Circuit.

This was an action of assumpsit, brought by the defendants in error upon a subscription for stock, signed by Coe, in the name of the firm of Coe & Barnard. The general heading of the subscription was in these words:

"Each of the undersigned agree to become a member of said Company, to pay in his stock as hereinunder taken, in such assessments as shall be made by the directors to be chosen, and to be bound and abide by the rules and regulations of said Company, under the law creating the same, and the General Plank Road Law, and the amendments thereto."

The defendant Coe subscribed to this three hundred dollars, in the name of the firm.

The summons was served only on Barnard. The declaration set forth the above subscription, with the usual averments of indebtedness and promises; also the common money counts. Plea, by Barnard alone, the general issue.

On the trial, the following admissions were made by the parties, in writing:

"The defendant Barnard admits the proper organization and acts of user by the Company, the plaintiffs; that the

defendant Coe was, at the time of the signing hereinafter mentioned, a partner of the defendant Barnard; that the defendant Coe signed the name of the firm to the books of subscription of stock in said Company; that the assessments were properly made, and demand of payment duly made. The plaintiffs admit that the name of the firm of Coe & Barnard was placed upon the subscription list of plaintiffs by the defendant Coe, and not by Barnard; they being partners in the lumbering business, owning lands in the county of St. Clair as such partners, and manufacturing lumber therefrom—their copartnership being limited to the general lumbering business, and the purchase and ownership of lands connected with that business. And further, that the question submitted to the court will be whether the defendant Coe could bind the defendant Barnard in this behalf, by signing the name of the firm, as set forth in the plaintiffs' declaration."

The plaintiffs then, under objection, proved by John Johnson, whose testimony was objected to as improper and irrelevant, that he knew the parties, and was acquainted with the lumbering business and lumbering region about the lower branch of Mill Creek, in town 8 north, range 14 east; that from that region logs are taken through Mill Creek to Port Huron; the road of the plaintiffs extends from Port Huron to Brockway, in town 8 north, range 14 east; that a road from Port Huron was, in his opinion, very necessary for carrying on the lumbering business in that region. Ordinarily, persons lumbering there would carry their supplies of provisions, &c., over a road from Port Huron; they are now usually taken over the plank road, and thence into the woods. Supplies can be taken in over the plank road cheaper than they could be over the old road. The plank road touches convenient points on the streams in which logs are floated, for supplying materials, provisions, &c., and these can be transported over the plank road, witness thinks, for one-half the expense required for such transportation over the road formerly used.

It was admitted in the course of the trial, but under the same objection as to relevancy and propriety, that the defendants were the owners of pine lands in town 8 north, ranges 13 and 14 east, adjacent to the termination of the plank road,—the defendant claiming that the fact of such ownership had nothing to do with the question submitted, and that the parties could not go beyond the case made by their stipulation.

The circuit judge held that the testimony was proper and admissible, and that the defendant Barnard was liable, as a partner, upon the subscription for plank road stock by his co-partner, Coe, and that his express assent was not necessary thereto; and thereupon judgment was rendered in favor of the plaintiffs for the amount of the subscription, against both the defendants.

The case was brought up for review on bill of exceptions.

Mitchell & McAlpine, for plaintiffs in error, were stopped by the Court.

Conger & Harris, for defendants in error:

The object and result of taking stock in the Plank Road Company, was to provide a more convenient and expeditious way of getting to the lumber woods, and carrying on lumbering operations. The advantages of the road resulted to the firm of Coe & Barnard, in common with others. We claim, therefore, that the building of a road was incident and appropriate to, and connected with, the partnership business, and that Barnard is liable as a partner with Coe for these reasons, and also because the firm had the use and benefit of the road, with knowledge of the joint obligation.

The partnership name, affixed by one member of the firm, is *prima facie* evidence of indebtedness by the firm—the plaintiff not being obliged, in the first instance, to show that

it was affixed in a partnership transaction.—11 *Johns.* 544; 6 *Wend.* 615; 16 *Maine*, 419; 17 *Ibid.* 180.

Where it becomes necessary to prove the assent of the other partner, an express assent need not be proved, but it may be implied from the facts and circumstances of the case (*Jones v. Booth*, 10 *Vt.* 268); as from the other partner not declaring his dissent within a reasonable time after the transaction comes to his knowledge.—*Foster v. Andrews*, 2 *Pen. & W.* 160. In this case, it is admitted that demands for payment were duly made; then, of course, Barnard had the proper notice, and it does not appear that he ever dissented from this act of Coe. Not having dissented, he is bound by this act of his partner.

Mitchell:

The principle that the partnership name, affixed by one member of the firm, is *prima facie* evidence of indebtedness by the firm, does not apply where the obligation itself appears on its face not to be within the scope of the partnership business.

MARTIN Ch. J.:

Barnard & Coe are admitted to have been "partners in the lumbering business, owning lands in St. Clair county as such partners, and manufacturing lumber therefrom." While such partners, Coe subscribed the name of the firm to the articles of association of the Plank Road Company, but without Barnard's knowledge or consent. This subscription, it is claimed, made Barnard a stockholder in the Company.

No rule is better settled than that one partner can not bind his co-partner by any contract not within the immediate scope of the partnership, unless with such co-partner's knowledge and consent. Each partner is an agent for all the members of the firm, in the transaction of all business of such firm; but as to matters foreign to such business, he is regarded as a stranger. The general business of the

firm being that of manufacturing lumber, and the ownership of land as incident thereto, the subscription to stock in a corporation, or to articles of association for the creation of one, was not an incident of such partnership. Incidental benefits would not authorize one partner to bind his fellow, and no authority so to bind him is shown.

And the knowledge and assent required to bind the copartner must be established by evidence affirmatively showing it, or from which it may be clearly inferred. This is sought to be established from the fact that assessments were made, and their payment demanded of the firm, which were unresponded to; and it is urged that it was Barnard's duty, upon such demands, to repudiate any interest in the Company, and that his silence should be construed into a recognition of his relation as a stockholder. Now, a demand either through the mail, or personal, is sufficient to bind a stockholder, but not to create one. If the person of whom demand is made be not one, it is not his duty to disclaim the character of stockholder; it is enough that he does not respond to such demand. The simple admission that demand was duly made of the firm, is not one of a personal demand of Barnard, nor is it of any thing more than a fact—its effect being a question of law. There is no evidence, nor any admission, in the case, that knowledge of the demand ever came to Barnard; and certainly none that he ever, by any word or act, recognized any connection with the Company.

The liability of Barnard is also sought to be established from the testimony of Johnson. This testimony is objected to, as inadmissible under the case as presented, and for general incompetency.

We do not regard the stipulation as the making of a case, but only as an admission of facts for the purpose of obviating the necessity of producing witnesses to prove them. Any other facts necessary for either party to show, could still be proven.

The testimony was competent as tending to show the interest of the partnership in the road, but falls far short of being sufficient to establish, or of tending to fix, any liability upon Barnard.

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

The other Justices concurred.

MAY TERM, 1859, AT DETROIT.

Jacob S. Farrand and Another v. Benjamin Bentley.

Defects of jurisdiction can not be waived by the parties.

A case agreed upon by the parties and submitted to the circuit court, for its decision under § 3421 of Compiled Laws, must be signed by the parties or their attorneys.

Where one of the parties caused a case to be filed in this Court which he claimed was a case settled after judgment, but it did not conclusively or necessarily show on its face that it was so intended; and the circuit judge who tried the suit and signed the document, certified to this Court that, in so signing it, he did not suppose he was settling a case under the statute, and that the one signed does not set forth the whole facts as they existed; — *Held*, That the papers should be remitted to the circuit court for such action as that court should deem proper under the circumstances.

The power to allow amendments to records, for the purpose of correcting mistakes and errors of haste and inadvertence, considered.

Heard May 3d and 4th. Decided May 5th.

Case from Genesee Circuit, filed in this Court by defendant as a case made and settled after judgment against him in the circuit court.

The document filed indicated that the circuit judge had disposed of the case upon an admission of facts in writing, by the respective counsel; which admission does not appear to have been signed. The certificate of the circuit judge to the case filed is in the following words: "The foregoing contains all the facts, and the whole case, submitted to the court as aforesaid."

The plaintiffs now present a certificate from the circuit judge, addressed to this Court, stating that he had never signed any document which he supposed was a settlement of a case, and that the one on file is imperfect in not setting forth the whole facts as they existed. They also present the

affidavit of their attorney, showing that no notice of the time and place of settling a case was served upon him.

Upon these papers, and the files,

A. B. Maynard, for plaintiffs, moves to dismiss the case, claiming, among other things, that on its face it does not purport or appear to be a case settled, either before or after judgment, and consequently this Court has no jurisdiction of it.

Whittemore & Crosby, for defendant, object that the cause has been noticed by plaintiffs for hearing at this term, and they insist that any prior irregularity is thereby waived.—*Durfee v. McClurg*, 5 *Mich.* 532.

[MANNING J.: A defect of jurisdiction can not be waived by the parties.]

They also produce their affidavits, showing due service by them of the proposed case upon plaintiffs' attorney, and that after the time for proposing amendments had expired, none being proposed, they presented the case to the circuit judge for his signature, supposing that the failure to propose amendments was equivalent to an assent to the case as it stood, and that consequently notice of the time and place of settlement of the case was unnecessary; and they claim that the certificate now sent up by the circuit judge is extra-judicial, and can not be received in opposition to his official signature to the case.

They also offer affidavits to show that the circuit judge is mistaken in supposing that all the facts submitted for his decision are not embraced in the case signed by him. And they claim that the written admission of facts submitted by counsel to the circuit judge for his decision, was a case made by the parties within the meaning of the statute; so that, in fact, it was only necessary for the clerk of the circuit court to certify that to this Court, to give it jurisdiction to review the decision of the circuit judge.

CAMPBELL J.:

In this case, a motion is made to dismiss, on the ground that there is no case properly before the Court.

The cause could properly come into this Court for review, upon a certificate of the clerk, in one of two methods: *First*, If it is a case agreed upon in the court below before judgment, under the statute; or, *Second*, If it is a case made and settled by the judge after judgment.

It is very evident that there was no case agreed upon before judgment, in the sense of the statute. That contemplates something which must be filed, and which can be certified by the clerk. The rules have always provided that no stipulation shall be binding unless reduced to writing and signed by the parties or their attorneys. And any other construction of the statute would leave the whole matter open to dispute.

Is the case filed, a case settled after judgment according to the statute and the rules? It does not on its face show, conclusively, or necessarily, that it was so intended. But in the absence of any thing tending to throw doubt upon its character, we should not be disposed to reject a paper of this kind upon any technical niceties of form only. But we are not prepared to hold that if a clerk should certify up a paper of an ambiguous character, no showing can be allowed to inform us what it really is. Our jurisdiction can not be concluded by any such dubious acts.

In the present case, the judge who tried the suit, and whose name is attached to the document certified up, has informed us, by his certificate, that he never put his name to any thing which he supposed to be a settlement of a case under the statute, and that this instrument is imperfect in not setting forth the whole facts as they existed. Objections are made to the reception of this certificate, and affidavits are offered to contradict it.

In the case of *Sweetzer v. Mead*, 5 *Mich.* 33, we had

occasion to consider the power of a judge of the circuit court to amend his finding, and we held that he could do so in his discretion. The practice of allowing amendments, either before or after error brought, to apply verdicts to the counts under which the evidence was all offered, has prevailed in England and in this country. In the case of *Clark v. Lamb*, 8 *Pick.* 414, such an amendment was allowed upon the judge's certificate, after error brought, and when the effect of the amendment was to cure the error which was alleged in the appellate court. In that case, and in *Mathison's Adm'rs v. Grant's Adm'r*, 2 *How.* 263, a number of authorities are cited, which show how universally courts have endeavored to preclude, in this way, errors of haste and inadvertence, whereby, if not rectified, substantial justice would be defeated; and the cases show the same doctrine to apply in other cases of mistake or inadvertence. The case of *Richardson v. Mellish*, 3 *Bing.* 334, 336, 7 *B. & C.* 819, and 9 *Bing.* 125, is very much in point. See also *Ex parte Justices of the County of Essex*, 15 *Eng. L. & Eq.* 571.*

We think the certificate of the judge is entirely proper; and that upon receiving such a notification, it is our duty, whether requested by counsel or not, to remit the papers to the clerk of the court below, for such action as they may require. — 3 *Bing.* 334. The certificate is sufficient evidence that the document filed was not intended by the judge to be regarded as a settled case, and does not contradict the former certificate. Upon such an intimation, we have no hesitation in ordering the papers to be sent back. The parties

* As to the general power of amendment after judgment, see *Emory v. Whitwell, post;* after error brought, or appeal, *Short v. Coffin*, 5 *Burr.* 2730; *Usher v. Dansey*, 4 *Maule & S.* 94; *Petrie v. Hannay*, 3 *T. R.* 659; *Tillotson v. Cheetham*, 3 *Johns.* 95; *Cunningham v. Fontaine*, 25 *Ala.* 644. That amendments must be made, in such a case, by the inferior tribunal, *Hutchinson v. Crossen*, 10 *Mass.* 251; *Cooper v. Bissell*, 15 *Johns.* 318; *Rowell v. Bruce*, 5 *N. H.* 381; *True v. Plumley*, 36 *Me.* 466; *Scribner v. Gay*, 5 *Mich.* 511; *Evans v. Norris*, *ante p.* 69. And the papers may be remanded for that purpose. — *Ibid.*

A justice of the peace can not amend a judgment rendered by himself, even to correct an error of computation in rendering it (*People v. Delaware Com. Pleas*, 18 *Wend.* 558); though he would have the power of amendment in the same manner as courts of record, before judgment. — *Near v. VanAlstyne*, 14 *Wend.* 230.

can take such steps in the court below as that court shall determine to be proper under the circumstances.

Let an order be entered remitting the papers to the clerk of the Circuit Court for the county of Genesee, for the further action of that court.

The other Justices concurred.

Oliver Goldsmith v. Margaret Goldsmith.

1 On an appeal from chancery in a divorce case, the Supreme Court has power to allow the wife temporary alimony, and to compel the husband to furnish her with pecuniary means to prosecute or defend the appeal.

2 That the decree in the court below was adverse to the wife *Held* not of itself sufficient ground for denying a motion for such allowance; which was accordingly made on the Court being satisfied by certificates of counsel that the appeal had been taken on her behalf in good faith, and the allowance being shown to be necessary to enable her to prosecute such appeal.

3 Such order vacated on its being shown by affidavits that the appellant had been guilty of repeated acts of adultery pending the appeal.

Heard May 4th. Decided May 7th.

Appeal from Wayne Circuit in Chancery.

The bill was filed for a divorce on the ground of adultery, alleged to have been committed by the wife. The answer denied the charge under oath. On the hearing, upon proofs, in the court below, a decree was made in accordance with the prayer of the bill, from which defendant appealed. Temporary alimony had been granted, which ceased on entry of decree.

C. I. Walker, for defendant, now applied for temporary alimony pending the appeal, and for an allowance to enable her to prosecute such appeal. He read the affidavit of defendant, that she was entirely without means of her own, except as she earned them by the labor of her hands; and, also, the certificate of two counsel, that they had examined the case, and considered it a proper one for an appeal, and had accordingly advised an appeal being taken.

A. B. Maynard, contra, objected, that this Court has no power to make such allowance, but is only empowered by the statute to review and pass upon the proceedings and decree appealed from. And he claimed, that, if the Court had the power, it would be improper to exercise it in a case like this, where defendant stands convicted by the decree of the court below of the adultery charged against her.

MANNING J.:

The power to allow temporary alimony pending proceedings for a divorce, and to compel the husband to furnish the wife with pecuniary means to defend or prosecute the suit on her behalf, is incident to divorce cases. It is necessary to the ends of justice. Without this power in the Court, the wife that should have no separate property of her own, would be without the requisite means of prosecuting or defending the suit, and of supporting herself in the mean time. The statute relative to divorces says: "The Court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency," but makes no mention of temporary alimony. So far as the statute goes, it is only confirmatory of the common law, which had been acted upon by our courts before we had any statutory provisions on the subject.—*Story v. Story, Walk. Ch.* 421.*

The decree below having been adverse to the wife is not, we think, of itself a sufficient ground for denying the motion. The certificate of two counsel shows the appeal was taken in good faith. We think this sufficient to warrant us in exercising the discretion with which we are vested.†

The other Justices concurred.

Motion granted.

*See also *McGee v. McGee*, 10 *Ga.* 477; *Patterson v. Patterson*, 1 *Hulst. Ch.* 389; *Amos v. Amos*, 3 *Green Ch.* 171; *Mix v. Mix*, 1 *Johns. Ch.* 108; and *North v. North*, 1 *Barb. Ch.* 241.

†The wife is entitled to temporary alimony up to final decree, notwithstanding a jury, upon a feigned issue, has given a verdict of adultery against her.—*Stanford v. Stanford*, 1 *Edw. Ch.* 317. And see *Williams v. Williams*, 8 *Barb. Ch.* 628.

On a subsequent day, on affidavits showing that defendant had been guilty of repeated acts of adultery pending this appeal, *Maynard* moved for an order vacating the allowance of alimony above made.

The counsel for defendant, now declining any further to appear in the case, the Court, on looking over the affidavits, granted the motion.

The People v. Samuel Scott.

On an indictment for an assault with intent to commit the crime of murder, it is wholly immaterial whether the murder intended would, if consummated, have been murder of the first or of the second degree.

The statute has not altered the common law definition of murder, but, recognizing it, has simply divided it into classes, or degrees of enormity, for the purpose of *apportioning* the punishment. Wherever, therefore, an assault with intent to kill is committed, and the circumstances are such that, if death had ensued, the killing would have constituted murder at the common law, the offense of assault with intent to murder, under the statute, is complete.

The degrees of murder under the statute considered, per CAMPBELL J.

The language of a judge's charge to the jury must be construed with reference to the facts in evidence, upon which it is given.

Where the charge of the judge to which exception is taken was not strictly correct, but the Court can clearly see that the jury could not have been misled by it, to the injury of the party excepting, a new trial will not be granted for that error.

Heard May 4th. Decided May 7th.

On exceptions from the Recorder's Court of the city of Detroit.

The prisoner was tried at the December term of said court, on an information for assault with intent to murder one McDonald. Several witnesses were examined, as well for the Government as for the prisoner, whose testimony established the following facts:

The prisoner and McDonald are both sailors, and met for the first time on the dock, where their respective vessels were lying, on the night of the assault. They had both

been drinking, and the latter was very much intoxicated. The prisoner was visiting the captain of the schooner Swan, and while on board this vessel, and at about the hour of 9 o'clock P. M., McDonald came alongside on the dock, and, in a loud and threatening tone, dared the persons on board to come off and fight him, saying, among other things, with an oath, that he could whip any of them. The captain of the Swan and McDonald had some talk about fighting, but the captain finally refused to fight, when McDonald took up a board, three or four feet long, and three or four inches wide, and said it would be a good thing to knock his brains out with, attempting at the same time get on board the vessel. His friends now came up and took him on board his own schooner, a short distance off. McDonald's manner was such as to induce the captain to anticipate further trouble during the night, and at his request the prisoner remained on board. About 12 o'clock, McDonald came back to the Swan, and, in a wild and threatening manner, boarded her. So far as appeared by the evidence, he was unarmed at the time, but was warned by the captain not to come on board. The prisoner and the captain were forward of the main mast when McDonald came on the vessel. The prisoner had a double-barrel gun in his hand, with which he shot McDonald in the face. The ball entered the left cheek, cutting the tongue nearly off, and passed out on the right side. The only injury done was the holes in the cheeks and wound on the tongue. The cook of the vessel swore he was in the cabin below deck, and that the prisoner called to him to hand up the gun, which he did. The gun was loaded, and the cook so informed the prisoner when he gave it to him, telling him at the same time he had better let it alone. The captain also testified that, before the prisoner fired the gun, he advised him to put it away, and that the latter replied, "Mind your own business"; at the same time cocking both barrels. The prisoner, after cocking the gun, pointed it at

McDonald, and said to the captain, "Louis, give the word of command"; at the same instant firing. He was within a few feet of McDonald at this time. McDonald fell, and the witnesses supposed he was killed.

The testimony and argument of counsel being closed, the Recorder proceeded to charge the jury, and, after commenting on the evidence, proceeded as follows: "At the common law, all killing was either murder, manslaughter, or excusable or justifiable homicide; but the humanity of modern legislation has subdivided the first into murder in the first degree and murder in the second degree. This is the subdivision under our statute; and were you trying the prisoner for the crime of murder, it would be your duty to ascertain in your verdict of which, if either of these, the prisoner was guilty. The statute under which the prisoner is informed against, reads as follows: 'If any person shall assault another with intent to commit the crime of murder, every such offender shall be punished by imprisonment in the state prison for life, or any number of years.' My view of the proper construction of this section, and of the duty of a jury in finding a verdict under it, makes it necessary that I should briefly define what constitutes murder, in either of the degrees, under our statute.

"Murder in the first degree is where one reasonable being willfully, deliberately, and premeditatedly, kills another, in the peace of the state; murder in the second degree is the intentional, unlawful killing of any reasonable being by another, without deliberation and premeditation; manslaughter is where one person unintentionally, but unlawfully, kills another; justifiable or excusable homicide is where the killing is necessary for self-defense, or by accident, under circumstances furnishing a reasonable excuse.

"An intent to kill is a necessary ingredient in murder, either of the first or second degree, but is excluded from the crime of manslaughter.

"In order to convict the prisoner of an assault with

intent to murder, you must be satisfied, beyond a reasonable doubt, that, had death ensued, it would have been murder either of the first or second degree. If you find that the prisoner committed the assault willfully, deliberately, and premeditatedly, intending to take McDonald's life, then, had death ensued, it would have been murder in the first degree; if you find that the prisoner intended to kill McDonald unlawfully, but without deliberation and premeditation, then, had death ensued, it would have been murder in the second degree. Therefore, if you shall find, from the evidence, beyond any reasonable doubt, that had death ensued, it would have been murder either of the first or second degree, then it will be your duty to find the prisoner guilty as charged in the information; otherwise you must acquit of the main charge, but may bring him in guilty of an assault." To this charge, the counsel for the prisoner excepted.

They requested the Recorder to charge the jury that, in order to convict the prisoner of the crime charged in the information, they must find that, had death ensued, it would have been murder in the first degree; and if they do not so find, the prisoner must be acquitted.

The Recorder refused so to charge, and the counsel for the prisoner also excepted to this refusal.

The substance of all the evidence in the case was set forth in the bill of exceptions, and there was no controversy respecting it.

Ross & McEntee, for defendant:

Malice prepense or aforethought, either express or implied, is an essential element in the crime of murder under the statute, and should have had a place in the Recorder's definitions. One might rightfully shoot down the burglar or the assassin, and yet the act come within the definition given of murder in the first degree.

The intent to murder is not an ingredient of murder

of the second degree.—1 *Ashm.* 298; 2 *Ibid.* 231; *Whart, L. of Hom.* 385; and see 5 *Mich.* 9; 18 *Ala.* 532.

D. E. Harbaugh, Prosecuting Attorney for Wayne County, for the People:

The jury might convict of an assault with intent to murder, whether the crime, if consummated, would have been murder of the first or of the second degree.—19 *Ohio,* 387; 3 *Fos.* 321; 5 *Yerg.* 340.

CAMPBELL J.:

The respondent, having been convicted of an assault with intent to commit the crime of murder, alleged exceptions before sentence, and these are certified up for our opinion under the statute.

The first exception was taken to so much of the charge of the Court as defines the various classes of homicide, and instructs the jury what facts must exist to render the accused guilty of the offense charged.

As abstract definitions, we are of opinion that the definitions given are wanting in preciseness, and would not, in many cases, be as accurate as they should be to guide a jury. But it would be very unsafe, in practice, to construe the language of a charge without reference to the facts upon which it is given. In this case, the bill of exceptions sets forth the whole facts; and in determining the legal propriety of the charge, we must bear these in mind. If the whole facts were not before us, it might perhaps be necessary to look solely at the general correctness of the rules laid down, as universal propositions.

The facts show that there was no evidence in any way tending to prove that if death had ensued, the homicide would have been either excusable or justifiable. Neither do they tend to show that it would have come within the terms of voluntary manslaughter, for there are none of the elements in the case which would reduce an intentional killing to that

grade. Involuntary manslaughter was excluded, because the charge expressly informed the jury that an intention to take life was a necessary ingredient of the offense charged. The facts relating entirely to a case which, if death had ensued, would have constituted murder, there was no error in the charge given which could in any way prejudice the respondent, or mislead the jury to his damage, unless it was in so much of it as authorized a conviction where the intent was to commit murder in the second degree. This seems to have been the real ground of the exceptions appearing of record, as taken to the charge given; and it was in reference to this that a specific charge was asked, the refusal of which is the ground of the second exception.

We are somewhat at a loss to perceive the exact point of the objection to the charge of the Recorder on this subject. He had already laid it down very distinctly that in order to constitute the offense there must be an express intent to destroy life. If we should hold that murder in the second degree is always an unintentional killing, the refusal to charge as requested could do no harm, because the instructions actually given would prevent a verdict without proof of the more aggravated offense. The jury could not, under the charge, convict of any unintentional offense. But the language of the statute is entirely too plain for controversy. Whenever a man assaults another, intending to commit murder, the crime is complete. The intention to take life under any circumstances which would not render the killing manslaughter or justifiable or excusable homicide, constitutes the offense under the statute. As the questions presented seem to be founded on a misapprehension of the views expressed by this Court in the case of *The People v. Potter*, 5 *Mich.* 6, we deem it proper to repeat the explanations given on that occasion, and to define the different degrees of murder under our statute.

Murder at the common law, embraced all unlawful killing done with malice aforethought. Murder under our statute

embraces every offense which would have been murder at common law, and it embraces no other crime. But murder is not always attended with the same degree of wicked design, or, to speak more accurately, with the same degree of malice. It may be committed in cold blood, and with much calculation, and it may be committed on a sudden impulse of passion, where the intent is formed and executed in the heat of blood, without any sufficient provocation to extenuate the degree of the offense to manslaughter. In both of these instances, and in the intermediate cases where the design is of greater or less duration, there is the actual intent to take life. Other cases exist, where, in the attempt to commit some other offense which is *malum in se* and not merely *malum prohibitum*, human life is taken without an express design to take it, and yet the crime is held to be murder, because resulting from the same species of depravity or maliciousness which characterizes that offense when committed designedly.

The statute, recognizing the propriety of continuing to embrace within the same class all cases of malicious killing, has, nevertheless, divided these offenses into different grades for the purposes of punishment, visiting those which manifest deep malignity with the heaviest penalties known to our law, and punishing all the rest according to a sliding scale, reaching, in the discretion of the Court, from a very moderate imprisonment to nearly the same degree of severity prescribed for those convicted of murder in the first degree. Each grade of murder embraces some cases where there is a direct intent to take life, and each grade also embraces offenses where the direct intent was to commit some other crime. As the law names all of the offenses, an attempt to commit which renders the person who takes life guilty of murder in the first degree, no difficulty can arise in defining the degree of any murder committed, without the actual design either of taking life or of doing bodily harm to the person assailed.

Except in the cases expressly named in the statute, murder in the first degree requires the existence of a deliberate intention to take life; and any slaying in which a jury should find either the absence of deliberation, or that the intent was to commit another and a lesser injury, must be either murder in the second degree, or one of the lighter grades of homicide. Accordingly, in the case of *Potter*, where the court below had held that the jury could convict of murder in the first degree upon any proof which would establish murder at common law, we reversed the decision, and held that murder in the first degree, except in the specified cases, could only be made out by proof of express malice, and a deliberate design against life itself. We were not called upon in that case to go any further into definitions, and we accordingly abstained from so doing.

The common law having made no distinction in the offense or its punishment, it is not to be wondered at that text-writers should differ in their views of the exact boundaries between express and implied malice; and the terms are not such as would give a modern jury any very clear idea, without explanation. We think the language of the statute itself, taken in connection with its context, affords to persons in our times a very fair means of judgment. And the best modern writers have had the good sense to convey their ideas in such terms as are generally intelligible.

When, therefore, following the statute, we hold murder in the first degree to be that which is willful, deliberate, and premeditated, and all other murders to be murder in the second degree, we should be undertaking a task which, if possible, would be exceedingly dangerous to undertake, to enumerate what facts constitute deliberation, and what exclude it. Practically, a jury could rarely find much difficulty in applying the test. Where there is positive proof of previous threats, ill-will, or preparation, and all of such a nature as to lead naturally and clearly to a fatal crime, questions seldom arise. It is where surrounding circum-

stances are not clearly proven, and where the offense has no established antecedents, that difficulties have arisen in defining it.

In all these cases the circumstances proven must be taken into the account, and the jury must, from the whole facts, determine the intent and the deliberation. Voluntary manslaughter often involves a direct intent to kill, but the law reduces the grade of the offense because, looking at the frailty of human nature, it considers great provocations sufficient to excite the passions beyond the control of reason. But provocations often arise which are of less intensity, and are not in law regarded as sufficient to reduce the crime to manslaughter. If it appears that murder is committed upon a heat of passion engendered entirely by such provocations, and suddenly conceived, such a murder can not properly be called deliberate. But whenever murder is intentionally committed without serious provocation, and under circumstances which do not reasonably account for such an excitement of passion as naturally deprives men of deliberation, common experience teaches us that such an act is wanton, and its perpetrator responsible for it, as in other cases of cold-blooded crime. The time within which a wicked purpose is formed is immaterial, provided it is formed without disturbing excitement. The question of deliberation, when all the circumstances appear, is one of plain common sense, and an intelligent jury can seldom be at a loss to determine it. No sane man acts without some cause for his action; and it is not difficult, in most cases of murder, to determine whether the cause was a sudden heat or not. The Recorder, although not precisely accurate in confining all murder in the second degree to intentional homicide, presented very intelligibly the difference in intent between the two degrees.

As murder in the second degree, like voluntary manslaughter, does embrace some cases of intentional killing, he was entirely correct in refusing the instructions prayed for, which would confine the statutory assault with intent to

commit murder to the offense which involves a *deliberate* intent. The intent to kill must undoubtedly be established, as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which, to their minds, fairly proves its existence. Intentions can only be proved by acts, as juries can not look into the breast of the criminal. And where any act is knowingly committed which naturally and usually leads to certain consequences, a jury certainly has the right, in the exercise of ordinary sagacity, to draw the inference that such results are intended.

There is no error in the proceedings, and a new trial is denied. Let it be certified accordingly.

CHRISTIANCY J.:

I concur, with my brethren, in the opinion of my brother Campbell. The Recorder properly refused to charge as requested by the defendant's counsel. Under this information, the question of the degrees of murder was wholly immaterial. The statute has not altered the common law definition of murder; but, recognizing it, has simply divided it into classes, or degrees of enormity, for the purpose of apportioning the punishment; and this only when the prosecution is for murder, *eo nomine*. Both classes or degrees are equally murder, and if the defendant committed the assault with the intent to kill, under circumstances where the killing would have been murder in the second degree, he is equally guilty of an assault with intent to murder, as if the intent had been to kill under circumstances which would have made the killing murder in the first degree.

Perhaps the more appropriate charge, because the more simple, less difficult, and more easily intelligible, would have been to give the jury a definition of murder at common law, and to have instructed them that if they should find the prisoner committed the assault with intent to kill, and that the circumstances were such that, if death had ensued, the killing

would have constituted murder under this common law definition, they should find him guilty, otherwise, not guilty.

But such a charge would be equally faultless, in point of law, if, instead of defining murder at common law, it should accurately define what constituted the two degrees of murder under the statute; because these two degrees must, together, include all cases of murder at common law.

The Recorder chose the latter course; but, in defining the degrees, his attention being probably drawn only to the points on which he was requested to charge—which, I infer from the case, were the only points discussed before him—and confining his attention to the statute, which, instead of defining murder, only divides it into degrees, he inadvertently, it would seem, neglected to include in the first degree the ingredient of "malice aforethought." But no specific objection was made to the charge on this account, which, in fairness to the Court, ought to have been made, and doubtless would have been made had the defendant's counsel supposed the omission likely to prejudice his client. Had the attention of the Recorder been called to the point, I can not doubt it would have been at once corrected. Though the definition given by the Recorder, of murder in the second degree, may not have been technically correct, as an abstract definition, yet it was sufficiently so when taken in connection with that part of the charge which had reference to the intent, and could not possibly mislead the jury to the injury of the prisoner.

The only remaining question is (admitting the general exception to the charge sufficient to raise the question), should a new trial be granted on account of the inaccurate definition of murder in the first degree? If the error be one which might have misled the jury to the prejudice of the defendant, a new trial should be granted. If the nature of the transaction were doubtful, or the evidence of it conflicting, so that without weighing the evidence we could not determine whether the defendant might not have been prejudiced by the charge; or if the whole substance of the evidence bearing on the trans-

action were not before us, we might not, without usurping the province of the jury, be able to say that they had not been misled. But as we have all the testimony, and the case states it to have been undisputed, and from the whole transaction we can clearly see that, under any proper charge, the jury could not, without a violation of their oaths, fail to find the defendant guilty, it must be obvious that the defendant has not been injured by the charge, that a new trial would be of no avail, and that it ought therefore to be denied.

The other Justices concurred in the foregoing opinions.

Ebenezer Anderson and Others v. John C. Baughman and Others.

In computing time on notices of hearing, the day on which the notice is served is to be excluded, and the first day of term included.

An intervening Sunday is not to be excluded in such computation.

Heard and Decided May 10th.

Appeal from Wayne Circuit in Chancery.

A. Russell moved to strike the cause from the docket for insufficient notice of hearing. The notice was served April 28th, for the term commencing May 2d, and was sufficient if the first day of term and the intervening Sunday were both to be included in the four days required by the rules.

S. T. Douglass, contra.

THE CHIEF JUSTICE:

The notice is sufficient. Rule 7 governs this case.*

*Rule 7 is as follows: "The day on which any rule shall be entered, or order, notice, pleading, or paper served, shall be excluded in the computation of the time for complying with the exigency of such rule, order or notice, pleading or paper, and

Joseph VanBlarcom v. The Ætna Insurance Company.

Where, after judgment in the circuit court, a party caused a case to be made and settled for review in this Court, but neglected for more than two years to cause the same to be certified to this Court by the clerk,—*Held*, That, by analogy to the statute limiting the time for bringing writs of error to two years, the case must be deemed to have been abandoned, and will be dismissed—at least unless the delay is sufficiently accounted for.

Heard May 10th. Decided May 11th.

Case made from Branch Circuit.

T. M. Cooley, for plaintiff, moved to dismiss this case. From the record, it appeared that the cause was tried in the court below in January, 1857, and judgment rendered for plaintiff; a case made, settled, and filed with the clerk of the circuit court in February, 1857, but not certified to and filed in this Court until March, 1859.

A. Pond, contra, read an affidavit of the attorney for defendant in the court below, showing a request on his part to the clerk to cause the case to be certified to this Court immediately after its being filed; that the clerk promised to do so; that the attorney, about that time, was taken seriously ill, and so continued for a long while thereafter, in consequence of which he was compelled to give up entirely the business of his profession; that six or eight months thereafter, plaintiff's attorney called his attention to the fact that the case was not yet transmitted to this Court, but the deponent was still, at that time, unable to take charge of his professional business.

the day on which a compliance therewith is required, shall be included, except where it shall fall on a Sunday, in which case the party shall have the next day to comply therewith. When by the terms of any order an act is directed to be performed instanter, it shall be done in twenty-four hours."

The rule in respect to notices of hearing is as follows: "Rule 26. Notices of special motions, and of the argument of calendar causes, when necessary, shall be notices of at least ten days where the attorney of the adverse party resides over one hundred miles from the place of hearing; if over fifty and less than one hundred miles, of at least six days, and in all other cases of at least four days; and a copy of the affidavits and other papers on which any motion shall be made, shall be served with such notice."

The Chief Justice:

The case must be dismissed. By analogy to the statute limiting the time for bringing writs of error to two years, the party who, for that length of time, neglects to cause the case he has procured to be settled, to be returned to this Court, must be deemed to have abandoned it. If we look into the reasons given here for the delay, we can not regard them as sufficiently excusing it after the first six or eight months.

But as either party might have moved in the cause after the case had been settled and filed, we will not give costs on this motion.

Horace Gray v. Charles D. Gibson and Others.

An agreement for the formation of a limited partnership, executed under the laws of New York, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the parties named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners.

Where plaintiffs sue as partners, not upon any contract made or dealings had by them, as such, with defendant, nor upon negotiable paper, and the partnership is put in issue, the real question to be submitted to the jury is, whether plaintiffs are partners *as between themselves*, and not whether they have, in any way, made themselves liable as partners to third persons. And it is erroneous for the Court to charge the jury that if the evidence shows the plaintiffs have made themselves partners as to third persons, they have in fact become general partners, and as such are entitled to maintain the action.

Whether persons are partners *inter se*, is to be determined by the understanding and intention of the parties as between themselves; and they can not be made such without the assent of every member, and his actual intention to become a partner.

Heard December 2d and 3d, 1858. *Decided May 13th*, 1859.

Error to Wayne Circuit.

Charles D. Gibson, William H. Mason, and Amasa Mason brought replevin against Gray in the court below, for a quantity of wheat. Gray pleaded the general issue, and gave notice under that plea that the wheat was the property of one

Ells, and that he took the same as sheriff of the county of Wayne, by virtue of certain attachments issued to him against the property of Ells.

On the trial before a jury, plaintiffs gave in evidence Title I., of Chapter IV., Part II. of the Revised Statutes of New York; and then called one Graves as a witness, who testified as follows:

"I have knowledge respecting the formation of a partnership between the plaintiffs; there was an agreement of partnership reduced to writing, and signed in my presence, March 7th, 1853. I have not seen that agreement since September, 1857; it was then in the office and custody of the clerk of Erie county, New York. I asked the clerk to allow me to take the original agreement out of his office for the purposes of this trial, but he refused to allow me to do so. Mr. George Perkins, the subscribing witness to the original agreement, does not reside in the state of Michigan. I have a copy of that paper, which I took in pencil at the time I last had it. I then examined the signatures to original; they were genuine. There were acknowledgments of the execution of the certificate appended."

The plaintiffs then offered in evidence the copy which the witness testified to having so made. Defendant objected,—

1st. That it was not a copy of the whole paper filed with the clerk—the certificates of acknowledgment being essential parts of the instrument;

2d. If the paper was not, in fact, acknowledged, then, it not being such a paper as the county clerk was authorized to receive and file, it was not legally in his custody, and therefore no reason is shown why the original was not produced and proved;

3d. The paper does not show a general partnership was formed, nor tend to prove it.

The Court overruled the objections, and admitted the paper in evidence, and defendant excepted. The instrument was as follows:

"This is to certify that the undersigned have formed a limited partnership, pursuant to the provisions of the Revised Statutes of the state of New York, to be conducted under the name or firm of Charles D. Gibson: that the general nature of the business intended to be transacted, is the Commission and Exchange business: That Charles D. Gibson, who lives in the city of Buffalo, county of Erie, and state of New York, is the general partner: That William H. Mason, who resides in Thompson, Windham county, and state of Connecticut, and Amasa Mason, who resides in the city of Buffalo, county of Erie, and state of New York, are the special partners: That the said William H. Mason has contributed the sum of fifteen thousand dollars, as capital, to the common stock, and the said Amasa Mason has contributed the sum of ten thousand dollars, as capital, to the common stock: That the said copartnership is to commence on the 10th day of March, 1853, and is to terminate on the 10th day of March, 1858. Dated this 7th day of March, 1853. "WILL. H. MASON. [L. S.]" "AMASA MASON. [L. S.]" "CHARLES D. GIBSON. [L. S.]" "Witness; GEORGE PERKINS, to W. H. Mason."

The plaintiffs then offered in evidence a paper, purporting to be a copy of the same instrument, with certificates attached of the acknowledgment of execution thereof by each of the signers, one before a commissioner of deeds in New York, and the other before an officer in Connecticut; to which copy was annexed the certificate of the clerk of Erie county, New York, that the original, with the certificates of acknowledgment endorsed, was filed in his office, March 7th, 1853, together with an affidavit, of which the following is a copy:

"*Erie County, City of Buffalo*, ss.: Charles D. Gibson, being duly sworn, deposes and says, that he resides in the city of Buffalo, Erie county, and state of New York; that he is the general partner named in the above certificate; and that the sums specified in the above certificate to have been contributed, by each of the special partners therein named, to the common stock, have been actually, and in good faith, paid in cash." (Signed and sworn to.)

The clerk further certifies that these instruments were never recorded in his office.

The clerk's certificate was verified in the manner provided by the act of Congress for the authentication of records.

To the introduction of this certified copy, defendant objected,—

1st. That the act of Congress, providing for the authentication and exemplification of office books, does not extend to "files"—to papers filed, but not recorded;

2d. That the law of New York, under which it is claimed these papers were filed with the county clerk, requiring that they should be recorded, and as it appears they have not been, they can not be made evidence;

3d. There is witness to but one signature;

4th. That the officer before whom William H. Mason acknowledged the certificate in Connecticut was not authorized to take the same by the laws of New York;

5th. That the acknowledgment of the certificates by Gibson and Amasa Mason does not appear to have been made before an officer authorized by the law of New York to take the same:

6th. There is no provision in the law of New York by which a limited partnership can be converted into a general partnership until after the record of the certificates and affidavits; and as these papers are shown not to have been recorded, no limited partnership could have been proved; hence the papers offered do not even tend to prove the existence of a general partnership between the plaintiffs.

Which objections were overruled by the Court, and the papers read in evidence.

Plaintiff then introduced in evidence the laws of New York governing the acknowledgment of such instruments, one of which specified certain officers authorized to take the same, but not including commissioners of deeds, and another permitted such acknowledgments to be taken before any

officer authorized to take acknowledgments to conveyances of lands. He also introduced the following section from the Revised Statutes of that state, admitted to be still in force:

"Copies of all papers duly filed in the office of the county clerk, and transcripts from the books of the records kept therein by such clerk, with the seal of his office affixed, shall be evidence, in all courts, in like manner as if the originals were produced."

Plaintiffs then called one Sawyer as a witness; who testified as follows:

"In the fall of 1853, I had business transactions with Gibson. I was going to Chicago. He asked me to take along some of his blank acceptances, and if I found an opportunity to advance them in produce to go forward, to do so. I was to have the produce shipped to him at Buffalo. I agreed to do so. I took the acceptances, which were blank drafts, without signature, date, or amount, with the name of Charles D. Gibson written across the face, with me to Chicago. I made an arrangement with Ells to advance him one dollar per bushel on 15000 bushels of wheat for Mr. Gibson. I don't remember that I stated who Mr. Gibson was. Think Ells said he had heard of him. After I made the arrangement with Ells, I left for Milwaukee, and was absent three days. On my return to Chicago I had another interview with Ells. I asked him in regard to the shipping of the wheat. He gave me a bill of leading which I mailed to Gibson, at Buffalo, on the evening of October 15th."

The plaintiffs then introduced and proved the bill of lading, which was in the following words:

"N. B. ELLS, COMMISSION MERCHANT.

"*Chicago*, Oct. 15th, 1853.

"Shipped, in good order and well conditioned, by N. B. Ells, as agent and forwarder, for account and risk of whom it may concern, on boat the bark called the North Star,

whereof John Wake is master, now lying in this port, and bound for Buffalo, N. Y., the following articles, being marked and numbered as in the margin, and to be delivered in like good order at the port of Buffalo, N. Y. (the dangers of navigation excepted), unto the consignee named in the margin, or their assigns. Freight and charges to be paid as noted below. In witness whereof, the master of said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

"*Acct. of N. B. Ells.* Care Chas. D. Gibson, Buffalo, N. Y.	14172 45-100ths bushels wheat. Freight to Buffalo, fifteen cents per bu.

(Signed) "JOHN WAKE."

On the evidence being closed, defendant asked the Court to charge the jury, that in order to recover as plaintiffs, the plaintiffs must show a right as between themselves to do so, and are bound by the agreement made among themselves. The Court declined this request, but charged that if the evidence showed that the plaintiffs had made themselves partners as to third persons, they had, in fact, become general partners, and as such were entitled to maintain this action. To which refusal to charge, and charge as given, defendant excepted.

A verdict having been rendered for plaintiffs, and judgment given thereon, defendant brought error.

The errors assigned in this Court were,—

1st. That the judge erred in admitting in evidence the sworn copy of the certificate;

2d. That he erred in admitting in evidence the exemplified copy of the certificate;

3d. That he erred in charging the jury that if plaintiffs had made themselves partners as to third persons, they had in fact become general partners, and were entitled to sue as such.

H. K. Clarke, and *S. T. Douglass*, for plaintiff in error:

1. A writing deposited with a public officer does not become a public writing unless such deposit be authorized by law.—2 *S. & R.* 23; 1 *A. K. Marsh.* 24; 5 *Day*, 298.

2. The certificate of a public officer is not admissible in evidence unless expressly made so by law.—3 *Pet.* 28; 7 *Wend.* 377; 1 *Wash. C. C.* 333; 3 *Ibid.* 529. The paper which plaintiff below desired to prove, not having been recorded, of course it can not be urged that a copy of it could be an exemplification of any "office book" under the act of Congress. Nor are *files*,—papers filed, but not recorded—*records*.—3 *Denio*, 238; 3 *Bouv. Inst.* 370.

3. The agreement to form a special partnership between plaintiffs, did not tend to prove the formation of a general partnership. The two things are radically different, and proving the one, proves in the most emphatic manner that they had not made an agreement for the other.

4. If testimony be improperly admitted which may have influenced the verdict, the judgment rendered on such verdict will be reversed. The Court will not inquire whether there was sufficient proof in the case of a general partnership without the certificate. It is enough to know that the jury were allowed to consider proofs which were calculated to mislead them.—3 *Wend.* 418; 11 *Ibid.* 83; 1 *Dana*, 155; *Ibid.* 502; 2 *Bibb*, 89; 11 *Penn.* 469; 11 *Fred.* 632.

5. A liability as partners does not constitute a partnership in fact.—*Coll. on Part.* §§ 78 *to* 98.

J. M. Howard, and *W. Gray*, for defendants in error:

1. The law of New York provides for the *filing*, as well as recording, of an agreement for a limited partnership. When filed with the clerk, though not recorded, it becomes subject to his official custody, and no power is given him

to part with or remove it. Such being the case, it was competent to prove its contents by a sworn copy.

It was also competent to prove it by a copy authenticated under the act of Congress of 1804.—See *Story on Const.* 180; 10 *Barr*, 158. That *files* belonging in a public office are public records, see 3 *Dane's Abr.* 308, *et seq.*; *Bouv. L. D.*, *verb.* "*Record.*"

2. The recording of such an agreement, under the law of New York, operates in favor of the special partners simply as an exemption from, or rather a limitation of, their common law liability to creditors. In the present case, in consequence of the failure to record, the parties had not gone far enough to secure this exemption to the Masons, and the agreement must be therefore viewed as a similar one would have been viewed if not filed. If acted upon, it indubitably made them partners as to third persons, whether it was recorded or not. The test of the partnership is the community of interest of the parties in the stock. Such an agreement may not be complete evidence of the existence of a partnership, but was competent to go to the jury.

3. The charge of the judge, that if plaintiffs had made themselves partners as to third persons, they had become general partners, and were entitled to sue as such, is in accordance with the principles of the law of partnership, and with adjudged cases.—See *Coll. on Part.* §5; 14 *Vt.* 540; 21 *Ibid.* 433.

CHRISTIANCY J.:

The view we have taken of the question presented by the third assignment of error, renders it unnecessary to determine those raised by the first and second.

We shall therefore notice the matters covered by the first and second assignments of error only so far as they may tend to throw light upon the question raised by the third. We think it unnecessary to the decision of the cause to determine whether the copies of the certificates

were duly proved as copies, or were admissible as such; because we think the original certificate, with the due preliminary proof of execution, could not, of itself, without evidence *aliunde*, have any tendency to show a partnership of any kind between the plaintiffs. If admissible at all for such a purpose, it must have been in connection with acts of the parties tending to show they had actually gone into business as partners. The only purpose for which such a certificate was authorized by the New York statute was, we think, when the same should be duly recorded, to create a limited partnership under the statute as to third persons. We do not think the statute contemplates this as necessarily *the agreement* or contract of partnership between the parties themselves; certainly not as the only agreement, though doubtless the parties might make it so. But whether the *record* of this certificate could be admissible evidence for the plaintiffs, for any other purpose than to show a *limited* partnership restricting the liability of the special partners, may well be questioned; as this would seem to be the only purpose, beneficial to the partners, for which the statute authorized the record. And it is perhaps still more questionable whether the affidavit filed with the certificate, could, if duly authenticated, be admitted for any purpose in favor of the plaintiffs as general partners in this case, to prove the facts set forth in it, any more than if such affidavit had been made on the trial of the cause. But however this may be, the certificate in this case not having been recorded, did not, and was not claimed to, have the effect to create a limited partnership (see *N. Y. R. S. Part* 2, *Title* 1, *Chap.* 4), and the only natural and legitimate inference to be drawn from the unrecorded certificate alone, would seem to be that the attempt to create such limited partnership had been abandoned; but we are unable to perceive how this, of itself, without other evidence, could warrant the further inference, or tend in any degree to prove, that the plaintiffs had formed a general

partnership, or any partnership whatever, or that they had gone into business as partners. It is probably true that this inference of abandonment might have been rebutted by proof of the subsequent acts of the parties, tending to show they had gone into and carried on business in accordance with its terms; and though the tendency of this evidence might be only to prove them, in some degree, special partners as between themselves, it would, as we shall endeavor to show, be equally available to them in the present suit.

It is also true, that, without the aid, and even in contradiction of the certificate, the plaintiffs might have proved a partnership between themselves, by written or oral proof, by their mode of doing business, joint contribution of capital, participation in profit and loss; or by showing that they actually carried on the business in question *ostensibly* as partners, and that they *recognized* each other as partners in the business *as between themselves;* and it is possible, that such facts might have a greater tendency to prove such partnership when taken in connection with this unrecorded certificate than if considered alone without reference to it. The certificate, in this view, might, if properly proved, be admissible as tending to explain such extrinsic facts, and the acts of the parties. But, standing alone, without any extrinsic evidence tending to show that they had actually entered into business as partners, it could not, we think, tend to prove an actual partnership between the plaintiffs; and if no such extrinsic evidence was given, we think it would have been the duty of the Court to charge the jury that there was no legal evidence from which they were authorized to find the fact of such partnership.

There may have been other evidence bearing upon this point; it was conceded on the argument that there was some slight evidence of this kind; but the case does not disclose it, and of its precise character we are not informed.

But the partnership was controverted by the defendant; and the charge of the Court on which the third assignment

of error was based, was manifestly, we think, intended to apply to all the evidence in the case bearing upon this question, whatever that evidence might be, and to furnish to the jury a legal standard for weighing and applying the evidence.

The charge was, that, "If the evidence showed that the plaintiffs had made themselves partners as to third persons, they had, in fact become general partners, and as such were entitled to maintain this action."

Was this charge correct? The plaintiffs had sued jointly for the wheat; they were therefore bound to show a joint right to, or interest in the wheat as between themselves. They sued as *partners*, and claimed the joint right or interest in no other way. It was necessary, therefore, to prove a partnership which would constitute such joint right or interest. But, though this joint right would depend upon the fact whether they were partners *as between themselves*, it was in no way material whether, as between themselves, they were general or special partners, or what was the share of each in the capital, or what special stipulations existed between them, not inconsistent with the existence of a partnership. If partners at all as to this wheat, they would have a joint interest in it, and a joint right of action in respect to it; they would be general partners as to third persons. Had they perfected their arrangement for the creation of a limited partnership, the right of action would have vested in one of the partners only, though, as between themselves, they would still have had a joint interest. But it is the statute alone which gives the right of action to the single partner; and in cases not coming within the statute, it is not competent for partners, by any arrangement between themselves, to vary their right of action against third persons, nor to give the right to one of their members to bring an action in his own name against strangers. —*Radenhurst v. Bates*, 3 *Bing.* 470; *Clark v. Howe*, 23 *Me.* 560; *Davies v. Hawkins*, 3 *M. & S.* 487, and see *Horback v. Huey*, 4 *Watts*, 445. Had the Court charged the jury that if they should find that the plaintiffs went into business as

partners under and in pursuance of this certificate, and were so in business at the time this transaction occurred, the plaintiffs would be general partners, and entitled to sue as such, the charge would not have been erroneous if the certificate was properly in evidence, because, as to the distinction between general and special partners, it would have been immaterial, and such a charge would substantially have submitted the question whether the plaintiffs were partners as between themselves, and would not have given to the jury a false standard by which to estimate the evidence. But this is not the fair import of the charge as given, nor could it have been, we think, so understood by the jury.

Taking this charge in connection with the request in answer to which it was given — and the request may be looked to for the purpose of understanding the charge, though its refusal is not assigned for error — the effect of the charge is to deny the necessity of showing any partnership or joint right as between the plaintiffs themselves, and to instruct the jury that any thing which would make them partners as to third persons, would enable them to sue and recover as such. This was applying the same rule in all respects to the proof of partnership of plaintiffs, as would be applicable had they been sued as partners. We do not understand this to be the law, especially in a case like the present. Had the plaintiffs held themselves out to defendant as partners, and had he contracted with them as such in respect to this wheat, they might, perhaps, have maintained an action as partners against him for any thing growing out of the contract, without showing that they were strictly partners as between themselves. — *Bond v. Pittard*, 3 *M. & W.* 358. Or if the suit had been upon a written contract made expressly with all the plaintiffs as partners, or upon negotiable paper, endorsed in blank, &c., no partnership, perhaps, need be proved. But here the suit is not upon a contract. The defendant is a stranger to the firm. The name of the firm is that of a single individual. The blank acceptances with which the wheat is claimed to have been

purchased, were in the name of Charles D. Gibson alone, and the wheat consigned to his name. There is nothing, therefore, in the name of the firm, or in the transaction connected with the purchase and shipment of the wheat, *prima facie*, to suggest the idea of a partnership; nor, as an act of the parties, can it tend to prove an actual partnership. No doubt a partnership can be proved in such a case as well as in ordinary cases, though it would require evidence at least as strong as that usually required to establish a partnership between plaintiffs. At least, there is nothing to take the case out of the general rule, that the right of action by partners depends upon the contract of partnership as existing between themselves.—*Coll. on Part. 3d Am. ed.* (*by Perkins*) §§ 3, 5, *and* 6.

The question, whether persons are partners *inter se*, is to be determined by the understanding and intention of the parties—or, in other words, the contract, as between themselves; and no partnership, as between the parties, can be formed without the assent of every member, and his actual intention to become such. But several persons may become partners as to third persons, and liable to be sued as such, by holding themselves out as partners to the world, or to any particular person with whom they may deal, by verbal admissions and declarations, by acts which may justify third persons in believing them to be partners, and in a great variety of ways, without any actual partnership between themselves, and even contrary to their own express contracts with each other. These are elementary principles in the law of partnership, and hardly require the citation of authorities.—See *Coll.* §§ 78 *to* 98; *Pars. Mer. Law*, 166; *Bird v. Hamilton*, *Walk. Ch.* 361.

Though much of the same kind of evidence usually adduced to prove the partnership of defendants (partnership as to third persons) is often admissible also as tending to show a partnership between plaintiffs (partnership *inter se*), yet much which would be admissible for the former purpose would be wholly inadmissible for the latter, such as the

naked admissions of the parties; and much, if not most of that which would be equally admissible for either purpose, such as acts of the parties, would have much more decisive weight and significance to prove a partnership *against* defendants, than to prove the like partnership in their *favor* if plaintiffs. Mr. Greenleaf in his work on Evidence, vol. 2, §483 speaking of evidence to prove partnership of defendants, very properly says: "The utmost strictness of proof is not required; for though, when they sue as plaintiffs, they may well be held to some strictness of proof, because they are conusant of all the means whereby the fact of partnership may be proved, yet when they are defendants, the facts being less known to the plaintiff, it is sufficient for him to prove they have acted as partners, and that by their habit and course of dealing, conduct and declarations, they have induced those with whom they have dealt to consider them as partners."

The question of partnership which *should have been* submitted to the jury was, whether the plaintiffs were partners as *between themselves:* the question *actually* submitted, was, whether they had rendered themselves partners as to third persons; the fair import of which is, that if the evidence was such as would be sufficient to render them liable as partners, it was sufficient to enable them to recover as such. The charge submitted a question not properly involved in the cause; it gave the jury an erroneous standard by which to estimate and apply the evidence, and the verdict does not determine the real question involved, because that question was not submitted to them.

The charge was therefore equally calculated to mislead, whether the certificate was properly in evidence or not,— whether it was the only evidence of partnership, or was accompanied with other evidence tending to show that plaintiffs had gone into business as partners. It is difficult to conceive any state of the evidence (short of the admission of the partnership) in which this charge would not be calculated to mislead.

For this error, the judgment must be reversed, and a new trial granted.

MARTIN Ch. J. concurred.

MANNING J.:

I think the sworn copy of the certificate of partnership was properly admitted to go to the jury. Three objections were taken to it:

1st. "That the paper produced by the witness was not a copy of the whole paper filed with the clerk, the certificates of acknowledgment being essential parts of the instrument," &c.

2d. "That if the certificate of partnership was not, in fact, acknowledged by the plaintiffs, then, it not being such a paper as the clerk of Erie county was authorized to receive and file in his office, it was not legally in his custody."

These objections do not very clearly state what I suppose to be the real objection intended. The first objection would seem to be that the certificates of acknowledgment were a part of the certificate of partnership; and the second, that there was no evidence that the certificate of partnership had been acknowledged. As the certificates of acknowledgment are no part of the certificate of partnership, which is a complete instrument in itself without them, and as the witness stated that certificates of acknowledgment were appended to the original certificate of partnership on file, I suppose the objection intended in each case to be this: That the copy should contain a transcript of the certificates of acknowledgment, to enable the Court to determine whether the acknowledgments were taken by proper officers, and in due form; the objection assuming these facts to be essential to the legal custody of the certificate of partnership by the clerk.

The rule requiring the best evidence to be adduced, refers, not to the weight of evidence, but to its quality, when com-

pared with other evidence to prove the same fact, in possession of the party, or within his reach by due process of law. The reason of the rule — and it is to that we should look in determining its applicability in a given case — seems to be, that when superior evidence is attainable, the law presumes a sinister or improper motive in offering secondary evidence. It can not, on principles of ordinary prudence, otherwise account for a party's willingness to hazard his case on such evidence, when that which is more satisfactory and conclusive is at his command. All suspicion, however, is removed, and secondary evidence is allowed, provided it be the next best, when it is shown, to the satisfaction of the Court, that, without any fault of the party, the superior evidence is not to be had. Hence oral evidence is received of the contents of a bond, or other written contract, after proof of its execution and loss or destruction; or, if it be in possession of the adverse party, after due notice to produce it on the trial, and its refusal; and when a contract, or other writing, to give it legal effect, is required to be placed in custody of the law, and to be kept at a particular place, and it is shown to be in such custody, as in the case before us; its non-production, I think, is sufficiently accounted for within the reason of the rule we have been considering, to admit secondary evidence of its contents. "Rules of evidence," says Thompson J., "are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they were designed."—*United States v. Reyburn*, 6 *Pet.* 367.

If the object of plaintiffs had been to prove a partnership under the statute, the form of the acknowledgments, and the officers before whom they were taken, would have been material to enable the Court to determine whether the act had been complied with. As the evidence, however, was not offered with that view, but to prove a partnership outside of the statute, the only question was whether a sufficient showing had been made to admit secondary evidence. Did the evidence offered for that purpose show the certifi-

cate of partnership in the legal custody of the clerk of Erie county? I think it did. The law relative to the reception and filing of papers, and the subsequent power of the officer over them, I understand to be this: He may refuse to receive them when they are not properly authenticated, and, if he err in refusing them, the injured party may compel their reception by mandamus: That, when received and filed, they cease to be private papers, and become public records; and that the officer can not afterwards, by any act of his, divest the public of its interest in, or control over, them. His subsequent powers are those of a custodian only. He can not undo what he has already done. Such a power would be extremely dangerous in such an officer, and, if sanctioned by law, would open a door that might be used for the worst of purposes. It was therefore immaterial whether the certificate of partnership should, or should not, have been received and filed in the first instance, as it was acknowledged, and the requirements of the law seem to have been complied with, in form, if not in substance; for, admitting the officer erred in receiving it, it was still in his official custody.

The third objection was, the certificate did not tend to prove a general partnership. I think it did, and shall notice this objection more particularly hereafter.

The plaintiffs next offered in evidence, duly authenticated under the act of Congress, a copy of the certificate of partnership, with the certificates of acknowledgment, and a copy of an affidavit of Charles D. Gibson, stating that the capital mentioned in the certificate had been paid to the partnership; the statute requiring such an affidavit to be made and filed with the certificate. The evidence was objected to, and an exception was taken to the ruling of the court admitting it,

1st. Because the act of Congress of 1804, providing for the authentication of office books, does not extend to "files"—to papers "filed, but not recorded."

I have already stated that when contracts, or other writings, to give them a legal effect they would not other-

wise have, are required by law to be deposited with, and to be kept by, a public officer, they are, when so deposited, in custody of the law; that the public has an interest in them; and that they cease to be private papers, and become public property. And when they come in possession of the officer in strict compliance with law, they are, in my opinion, public records within the meaning of the Constitution of the United States, and of the act of Congress of 1804. They are memorials of acts affecting the public, and for that reason are required to be placed in its keeping. The public interest is asserted by the law in requiring the deposit. The act of Congress, it is said, does not extend "to papers filed but not recorded." I see no ground for the distinction. Enrollment is not essential to a record. The files and journal entries of our courts are the only records we have of their judgments — the common law judgment record having been abolished. The objection admits, that if the certificate had been recorded, that is, transcribed into a book, the transcript would be a record within the act. When the original is to be permanently left with the officer, and is not deposited for recording only, I see no good reason for the transcript being a record and the original not; or why a copy of the former, which is itself but a copy, should be better evidence than a copy of the original.

The second objection is, that as the statute of New York required the certificate to be recorded, and it was not, a copy of it could not be made evidence. Why not evidence? Because it was not recorded, and therefore was no record; and not being a record, could not be exemplified under the act of Congress. Viewed in this light, for I can not see its bearing in any other, this objection is a repetition, in a roundabout way, of the one I have just been considering, and is already answered.

The third and fourth objections were abandoned on the argument.

The fifth objection is "That the acknowledgment of the

certificate by Charles D. Gibson and Amasa Mason does not appear to have been made before an officer authorized by the law of New York to take the same."

The acknowledgment was before a commissioner of deeds, who is not one of the officers named in the act authorized to take the acknowledgment. By a subsequent statute, which was in evidence, it might be taken by any officer authorized to take the acknowledgment of conveyances of land; but no statute was in evidence showing commissioners of deeds could take such acknowledgments. For that reason, we are asked to reverse the judgment, and send the case back to the court below for a new trial. If the acknowledgment was not before a proper officer, the certificate is no record; and if not a record, it could not be exemplified under the act Congress. The question is of no importance as it respects the certificate of partnership, for that was already in evidence, and a subsequent error in admitting a second copy would not vitiate the prior evidence. It is important, however, as it respects the certificates of acknowledgment and the affidavit of Gibson. At first view it seems a little surprising that plaintiffs' attorney, with the Revised Statutes of New York in his hands, should not have turned to the law authorizing commissioners of deeds to take acknowledgments of conveyances of real estate. But on looking into the bill of exceptions, it is obvious to my mind how the omission occurred. The statute providing for limited partnerships, was the only statute of New York in evidence when the objection was made and overruled. After the evidence had been received, and not before, as appears from the bill of exceptions, the statute was introduced and read in evidence, authorizing the acknowledgment to be taken by officers empowered to take acknowledgments of conveyances of real estate. This undoubtedly was supposed at the time to be a complete answer to the objection, more especially as the name, commissioner of deeds, would of itself seem to indicate the duties of the office, and as no further objection was made.

If defendant was not satisfied with it as an answer, he should have renewed his objection, varying it to suit the new aspect of the case, and pointing out particularly the still existing defect, that plaintiffs might obviate it by further testimony, if in their power. Not having done so, he must be considered as having assented to the sufficiency of the evidence for that purpose.

There is another reason, equally conclusive with me, why the judgment should not, on this account, be disturbed. When the error is one for which a new trial will not be granted, there would be an absurdity in reversing the judgment. In *Duncan v. Duboys*, 3 *Johns. Cas.* 125, the Court refused to grant a new trial because the printed statute book was read in evidence of a *private* act, when, from an exemplification of the act, it appeared the printed book was correct. In *High v. Wilson*, 2 *Johns.* 46, which was an action of trespass for taking goods, defendant justified as sheriff, under an execution against one Blanchard. On the trial it was objected, that defendant, to make out a justification under the execution, must prove the judgment on which the execution issued. The objection was overruled; and a verdict having been rendered for defendant, plaintiff moved for a new trial. On the motion, the judgment record was produced, and the Court refused a new trial, although the judge erred in admitting the execution in evidence without proof of the judgment.—See *Burt v. Place*, 4 *Wend.* 591; *Watson v. Delafield*, 2 *Cai.* 224. In these cases the admissibility of the evidence depended on the existence of a record that was not produced and proven at the trial; and the subsequent motion for a new trial failed, on the record being produced, as the truth of it, had it been used on the trial, could not have been controverted. In the case before us the objection is, that the evidence should not have been permitted to go to the jury, because the plaintiffs did not produce a statute of the state of New York authorizing commissioners of deeds to take acknowledgments of conveyances

of real estate. May not this Court now look into the statutes of that state to see whether there is such a law? I have no hesitation in saying we may. We have a statute declaring printed copies of the statutes of sister states, "if purporting to be published under" their authority, "shall be admitted in all courts, and in all proceedings within this state, as *prima facie* evidence of such law."—*Comp. L.* §4315. The question, *If purporting to be published under authority of the state*, is a question for the Court to decide, upon inspecting the printed copy. It is not, under the statute, a question of fact for the jury; and it seems to me we may look into the statutes of New York to decide a question of law, made on the trial under a statute of that state, in the same way we would look into our own statutes to decide a question raised under them. When the statute is one of a sister state, it should be produced and read on the trial for the information of the Court, which is not supposed to know the statute laws of other states; but if it is not, and the decision is in conformity with the statute, it is not a good ground for reversing the judgment. We are as well prepared now, after having looked into the statutes of New York, to decide a commissioner of deeds could take the acknowledgment, as we would be had the statute been read on the trial; and under such circumstances, it would be sacrificing substance to form to send the case back for a new trial.

The sixth and last objection is, that "there is no provision in the law of New York by which a limited partnership can be converted into a general partnership, until after the record of the certificate and affidavit; and, as these papers are shown not to have been recorded, no limited partnership could have been proved; hence the papers offered do not even tend to prove the existence of a general partnership between the plaintiffs."

It is a sufficient answer to the first part of this objection, to say that the evidence was not offered to prove a limited

partnership, or that such a partnership had afterwards become a general partnership. The latter part of the objection—that the papers do not tend to prove a general partnership—is a repetition of the third objection taken to the sworn copy; which I have already answered in part, and shall hereafter notice more fully.

Three exceptions were taken to the charge of the Court. The first was waived on the argument. The other two are as follows:

The Court was asked to charge the jury, "That in order to recover as plaintiffs, the plaintiffs must show a right as between themselves, to do so, and are bound by the agreement made among themselves." The Court declined so to charge, but charged the jury that if the evidence showed that the plaintiffs had made themselves partners as to third persons, they had, in fact, become general partners, and, as such, were entitled to maintain their action. To which refusal and charge, the defendant excepted.

The error assigned on this part of the record is, that the circuit judge erred in charging the jury that if the plaintiffs had made themselves liable as partners to third persons, they had become partners in fact, and were entitled to sue as such.

The charge was erroneous, in stating that if plaintiffs had made themselves liable as partners to third persons, they might sue as partners. To sustain an action as partners, plaintiffs must be partners in fact. A partnership must actually exist between them, and they must have a joint interest in the subject-matter of the suit. Two or more persons who are not partners, by holding themselves out to the world as partners, will make themselves liable as partners to persons deceived thereby into dealing with them as partners. Though not partners in fact, the law, in such circumstances, to prevent fraud, imposes on them the liability of partners. The evidence of a partnership in such cases is not of a positive and direct character, but circumstantial only—

that is, it is not of a partnership in fact, but of circumstances from which a partnership may be inferred—and the evidence may be such as not only to warrant a verdict of partnership as to third persons, but of a partnership in fact; the only difference being, the evidence should be stronger to find a partnership in fact, than to warrant a verdict of partnership as to third persons only. There was nothing in the character of the evidence before the jury, so far as it appears from the bill of exceptions, calling for this discrimination in the charge of the Court.

The error was in charging the jury on a rule of law having nothing to do with the case. The evidence was of a partnership in fact, and not of circumstances only from which a partnership might be inferred. I do not see how the jury, on this part of the case, could have rendered a different verdict from the one they did. The evidence consisted of a written admission of the partnership, signed by all of the plaintiffs, and acknowledged by them before an officer authorized by law to take the acknowledgment. It states they had formed a limited partnership, under the name or firm of Charles D. Gibson, and that William Mason had contributed fifteen thousand dollars capital, and Amasa Mason ten thousand dollars. It also states the business to be transacted by the partnership, and that the partnership was to commence on the 10th of March, 1853, and to terminate on the 10th of March, 1858. The certificate is dated on the 7th of March, 1853. It was acknowledged by William Mason on the 10th of that month—the day the partnership was to commence; and by Amasa Mason, and Gibson, on the 14th, or four days afterwards. On the last mentioned day, Gibson made an affidavit that the capital mentioned in the certificate had actually, and in good faith, been paid in cash; and three days thereafter, that is, on the 17th day of March, the certificate and affidavit were filed with the clerk. If these acknowledgments and acts of the plaintiffs—all of which took place long before the transaction giving origin to the present suit—

are not evidence in their favor, it is not easy to comprehend the legal principle admitting articles of partnership as such evidence.

It is objected that the evidence consists wholly of plaintiffs' admissions; and that, although such admissions are evidence between themselves, as well as in favor of third persons, of a partnership, they are not evidence in their favor against third persons. The admissions are something more than dry, naked declarations: they are a part of the *res gestæ*—part and parcel of acts done by plaintiffs, in pursuance of law, with a view to limit the liability of two of the partners. They are found embodied in a certificate which the law requires should embrace them, and which, without them, would be nugatory. Starkie on Evidence, vol. 1, p. 52, says: "In general, where the evidence is offered as a mere fact which is connected with the matter in dispute, and not with a view to affect the party, otherwise than as the actual existence of the fact affects the nature of the transaction itself; then, although it was a transaction between others, yet, as a mere fact, and part of the *res gestæ*, it is evidence. Suppose, for instance, that goods consigned by A to B are injured by the defendant while they are in the hands of the carrier; in an action for the wrong, brought either by A or B, according to the circumstances, it would be competent to either of them, being plaintiff, to establish his right of property in the goods, by proof of such an agreement between them, as either left the right of property and of action in himself, or vested it in him, by the delivery to the carrier; this would be, it is true, nothing more than an agreement between A and B to which the defendant was not privy, but it would be evidence against him, not as concluding any right of his without his assent, but as affecting the nature of the transaction itself, and showing to whom the injury was done."

If the certificate was to be treated as an admission only, I should still hold it competent evidence for plaintiffs of a partnership. An admission by A that he and B are

partners, is evidence against A of such partnership in favor of B or a third person, but it is not evidence against B. If it were, it would be in A's power to subject B and his property to the payment of A's debts;—nay, more, it would enable A to claim an interest in B's property, by declaring the existence of a partnership between them. The sole object of the rule is to protect B against the dishonesty of A. Now it is clear, the reason of the rule does not apply to admissions made by both A and B, or by all of the partners; and where the reason of a rule of evidence ceases, the rule itself is of no force. To apply it in such a case would impede the administration of justice, by throwing as an obstacle in its way what was intended only to rid it of impurities. Such an admission is evidence of a partnership in fact, because made by all of the partners—the admission of each one concluding him individually; and a partnership in fact, is a partnership as to all the world. There is no such thing as a partnership between the parties themselves, and not as to third persons. It is not essential to a partnership that it should be public, or known to the world. All rights acquired, and all debts incurred, by it, are partnership rights and liabilities, whether the persons dealing with it had notice of the partnership or not. If ignorant of its existence at the time, a subsequent discovery works no injury to them: if creditors, it gives them a larger number of persons to whom they may look for payment: if debtors, their liability is not increased, as it is matter of no moment to them whether a sum of money they are owing, when paid, goes to one or more persons, so long as they can not be called on to pay a second time.

In the case before us, the partnership business was to be carried on in the name of Gibson, and the wheat in controversy was purchased in his name. Admitting the wheat belonged to him individually, the judgment record will be a bar to any future action by him, as he is one of the plaintiffs.

When several persons are jointly interested in a contract the action must be brought in the name of all, or the plaintiffs will be nonsuited on the trial. It was to bring themselves within this rule of law — to show a joint interest in the wheat between themselves, and not their right to it against defendant, that made it necessary for plaintiffs to prove the partnership. The question of partnership affects defendant in no way except as to the form of the remedy against him; viz. whether the action should be in the name of Gibson alone, or of all the plaintiffs. It has nothing to do with the right to the wheat between him and plaintiffs; and, however determined, makes nothing against his right, or that of any other person, to the wheat. It is a question of right as to the wheat between the plaintiffs alone; and the right being established as between them, the form of the remedy follows as a necessary incident. Hence, "a father who holds out to the world that his son is his partner, and who sends bills and signs receipts in their joint names, in an action brought in his own name, is not precluded from proving that his son is not a partner."—*Glossop v. Colman*, 1 *Stark.* 25 (2 *E. C. L.* 279); *Kell v. Nainby*, 10 *B. & C.* 20 (21 *E. C. L.* 17).

Did the certificate tend to prove a general partnership? At common law, all partners are alike liable for the debts of the firm. The only difference between a common law partnership and a limited partnership under the act (for they are both partnerships) is, that in the latter the liability of some of the partners is limited to the capital invested by them in the partnership. This is a personal privilege, conferred by the statute when its provisions have been strictly complied with, but not otherwise. In the case before us the act was but in part complied with. The certificate was made and acknowledged, and, with the requisite affidavit, was filed. But it was not recorded. Why it was not, does not appear. It may have been from various causes; as ignorance of the law requiring it to be recorded,

or negligence in not paying the clerk for making the record, or a subsequent determination not to claim the benefits of the act. From whatever cause, it did not put an end to the partnership, but left it as if nothing had been done under the act — an unlimited partnership, or partnership at common law. Gibson, who was to be the general partner, and in whose name the business was to be done, states, in his affidavit filed with the certificate, that each of the other partners had "actually and in good faith paid in cash" the sum named in the certificate to have been contributed by him. The partnership was then launched, if not before, and there is no evidence of a subsequent dissolution.

As the error in the charge was on a point of law not involved in the case, and could not have injured the defense, I think the judgment should be affirmed.

CAMPBELL J. did not sit in the case, having been counsel for one of the parties.

Judgment reversed.

Morris N. Littlefield v. Samuel F. Hodge and Another.

Negotiable paper is not liable to be reached by garnishee process against the maker before maturity.

A note payable to order, and without contingency, on a day certain, is not the less negotiable because purporting to be according to the condition of a mortgage, when the terms of the mortgage correspond with those expressed in the note.

Heard May 13th. Decided May 14th.

Appeal from Wayne Circuit in Chancery.

The case is sufficiently stated in the opinion.

J. Van Rensselaer, for complainant.

Wells & Hunt, for defendant.

LITTLEFIELD *v.* HODGE.

CAMPBELL J.:

The complainant, being the holder of a negotiable promissory note given by S. F. Hodge, the defendant, secured by mortgage, filed his bill to foreclose. The note was originally given to one Cowles, and it was set up in defense that Hodge had, prior to the maturity of the note, been garnisheed upon a claim against Cowles, and suffered judgment for a portion of the amount of the note. It appears very clearly that Littlefield was a *bona fide* assignee of the note before it became due, and the evidence in no way tends to impeach his good faith.

We think the decree below was rightly made, in favor of the complainant. He was an entire stranger to the garnishee proceedings; and they could not stop the currency of commercial paper, the negotiability of which is recognized and protected, not only by the law merchant, but by express statute. Garnishee process is not, we think, properly applicable to such paper, until it has ceased to become negotiable, by falling due. The debtor can not know certainly in whose hands his obligation may be when it matures, and his admission that such a note is outstanding can not be effectual as an admission of indebtedness to the original holder, of such a character as to be a continuing liability in his hands. The courts have, very generally, in the absence of statutes to the contrary, regarded negotiable paper as not liable to be reached in this way; and the reasons on which they have so decided are obvious and unanswerable.—See *Drake on Attachment*, §577, *et seq.*

It was urged that the note in question here, although payable to order, and without contingency, on a day certain, was not negotiable, because it purported to be according to the condition of a mortgage. But as the terms of the mortgage correspond with those expressed in the note, there is nothing to affect its negotiability. Whatever might be the effect of a repugnancy (upon which we express no

opinion), nothing short of that could impair the negotiable character of the security.

The decree must be affirmed, with costs.

The other Justices concurred.

Angeline G. Moore v. Charles Olin.

The Supreme Court has no power to require an appellant in chancery to give a new or further appeal bond, in addition to the one approved by the circuit court commissioner, and which is alleged to be insufficient.

Heard May 17th. Decided May 18th.

Appeal from Calhoun Circuit in Chancery.

G. V. N. Lothrop, for appellee, moved that the appellant be required to file a further appeal bond in such penalty as should be fixed by the Court. He claimed that an examination of the record would show the penalty of the bond given, and which had been approved by the commissioner, entirely insufficient to secure the performance of the decree rendered in the case, if it should be affirmed.

C. I. Walker, for appellant, objected that the Court has no power over the subject. The giving of a bond to be approved by the commissioner is a jurisdictional fact. It is the condition which the statute has prescribed to the appeal. When the bond is given and approved, the appeal is perfected under the statute, and the Court can not impose additional conditions.

THE CHIEF JUSTICE:

This Court has no jurisdiction over the subject of this motion. The statute (§ 3597, *Comp. L.*) requires the party claiming an appeal in chancery to execute a bond conditioned to perform the decree of this Court, &c. The penalty of

this bond is to be fixed, and the sureties approved, by a judge or circuit court commissioner. The power vested in these officers is exclusive; and to entertain this motion, or any other of a kindred nature, would be, in reality, the exercise of an appellate jurisdiction not vested in the Court. If the bond were solely to secure the payment of costs, the rule might be different, for courts may have power over this subject independent of statutory provisions.

However desirable it may be that the power should be vested in this Court to review the judgment of the officer fixing the penalty of the bond and approving the sureties, we can not exercise such a power without legislation authorizing it.

Motion denied.

Nelson B. Nye and Others v. Caleb Van Husan and Another.

A schedule, detailing at large the property conveyed, is not necessary to the validity of an assignment for the benefit of creditors.

The necessity or effect of a schedule, if one is referred to in an assignment, is to be determined by the intent of the parties as gathered from the whole instrument, and which, when ascertained, is to govern in the construction of assignments as in the case of other written instruments.

An assignment which clearly manifests an intention on the part of the assignors to transfer all their property to the assignees, and that it shall have immediate operation, will have that effect, though to the general terms describing the property are added the words "as the same is more particularly described in a schedule *proposed* to be hereafter annexed," and which schedule is not annexed.

The reservation to the assignors of a power to perfect the schedules attached to an assignment, will in no respect impair or restrict the assignment itself.

Where an honest intent can as clearly be inferred from the terms of an assignment as a fraudulent one, the courts are not at liberty to infer the latter.

A clause in an assignment authorizing the assignees to "sell and dispose of the" assigned property, "either at public or private sale, as they in their judgment may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interests of the creditors, converting the same into money," &c., will not be construed as conferring a power to sell upon credit.

A preference of individual debts in a copartnership assignment does not, of itself, independent of an actual intent to defraud, render the assignment void.

NYE *v.* VAN HUSAN.

A clause in an assignment, by which the assignors nominate and appoint the assignees, "their executors, administrators, or assigns, their, or each of their true and lawful attorneys, irrevocable, with full power and authority to do and perform all acts, matters, or things which can or may be necessary in the premises, as fully and completely as the said [assignors] might or could do were these presents not executed; and attorney one or more under them to make, nominate and appoint, as they may deem necessary, with full power of substitution and revocation," &c., does not confer upon the assignees the power to delegate their trust, and is proper and unobjectionable.

Heard December 1st and 2d, 1858. *Decided May 19th.*

Error to Washtenaw Circuit Court.

This was an action of replevin for a quantity of merchandise, brought by Van Husan and Bickford, who claimed the goods as assignees of Daniel D. Wallace and Edwin W. Wallace, partners under the name of D. D. Wallace & Co. A copy of the assignment, which constitutes a part of the bill of exceptions, is given below.

The defendant Nye was sheriff of Washtenaw county, and (his co-defendants Crissey and Perkins assisting him) had seized, and claimed that he was entitled to hold, the goods, under and by virtue of sundry writs of attachment in favor of different plaintiffs, and against the said Daniel D. and E. W. Wallace, issued out of Washtenaw Circuit Court, subsequently to the date of their above mentioned assignment.

On the trial in the circuit court, the jury found a verdict in favor of the plaintiffs below, upon which judgment was afterwards entered in their favor.

To reverse this judgment, the defendants below removed the cause into this Court by writ of error, accompanied by bill of exceptions.

From the exceptions, it appears that, upon the trial, the counsel for the plaintiffs proved the execution of an assignment, made November 2d, 1854, by Daniel D. Wallace, and Edwin W. Wallace to the plaintiffs, and offered the same in evidence without a schedule of property; to the admission of which the defendant objected, for the following reasons: 1st, Because the assignment so referred to the schedule to

be annexed as to render that necessary to the conveyance of any property, and that no property could pass without such schedule; 2d, Because the assignment was void as not purporting to convey all the assignors' partnership property; 3d, Because the assignment was void, as allowing the assignors power to change the schedules; 4th, Because the assignment was void, as allowing the assignees to sell on credit; and, 5th, Because the assignment was void, as allowing the assignees to delegate their trust without restriction.

Which objections the Court overruled, and admitted the assignment to be read in evidence; and defendants excepted.

The plaintiffs offered as a witness *John A. Laird*, who was admitted to be a member of the firm of Draper, Knox & Co., and a preferred creditor under the assignment; and the defendants objected to his being sworn, on the ground that the suit was prosecuted for his immediate benefit; but the Court admitted the testimony under the exception.

The plaintiffs then introduced evidence to prove the taking possession, by the assignees, of the goods in certain stores and the ashery mentioned in the assignment; and that the assignees made an inventory of said goods and property, embracing certain property of the assignors not in any of the stores or the ashery, and which was not delivered to the assignees; and that the assignors took no part in designating said property or making the inventory; and that, after the goods replevied in this cause were taken by the defendants on attachment, the inventory was attached to said assignment by the assignees, and marked "Schedule A., referred to in the foregoing assignment."

The plaintiffs proved the taking of the goods by the defendants, by virtue of several writs of attachment, issued out of the Circuit Court for the county of Washtenaw, in favor of creditors of said D. D. Wallace & Co., who are mentioned in the assignment.

The defendants then introduced testimony tending to show fraud in the making of said assignment, and that it was made with a view to hinder, delay, and defraud the creditors of said D. D. Wallace & Co.; that the said co-partnership had property not included in said stores, ashery, or schedule, and that some of the debts preferred were private debts of Daniel D. Wallace; and also proved the value of said property replevied, and the amount of their special interest therein.

The plaintiffs having given rebutting evidence, and rested, the defendants then asked the Court to charge the jury,—

1st. That the said assignment, if valid, only became operative on the annexation of the schedule of the property, and that any rights of the defendants, attaching before such annexation, took precedence of it:

2d. That such schedule should have been made by the assignors, or by the assignors and assignees jointly; and a schedule made by the assignees, alone, was invalid:

3d. That no property, except such as was specifically referred to in the assignment, could pass before the execution and annexation of the schedule of property:

4th. That upon the assignment, as drawn and executed without the schedule, the presumption arises that the assignors had property not conveyed, and that it was the duty of the plaintiffs to rebut that presumption:

5th. That, upon the assignment and schedule, a presumption arose that the assignors had property not assigned, and it was the duty of plaintiffs to rebut this presumption:

6th. That it was unlawful for the assignors to make preferences in favor of private debts of either of the co-partners, and that such preferences would avoid the assignment:

7th. That said assignment was void in law.

All which instructions the Court refused to give; and instructed the jury that the said assignment was valid to

convey, and purported to convey, the whole partnership property of D. D. Wallace & Co., from its date, without the schedule of property, and that no presumption arose, from the assignment itself or the schedule, that there was any property not conveyed: That it was lawful to prefer private debts in an assignment of partnership property, and that said assignment was, in law, a good and valid instrument upon its face: That the Court would not pronounce the deed of assignment void for the reasons urged against it, yet it was competent for the jury to take them into consideration in deciding the question of fraud in fact.

To all which instructions and refusals, the defendants excepted.

The circuit judge, under the charge and with the directions aforesaid, left the case to the jury, who returned a verdict for the plaintiffs.

The following is a copy of the assignment:

"*This Indenture*, made the second day of November, in the year eighteen hundred and fifty-four, by and between Daniel D. Wallace and Edwin W. Wallace, copartners in trade, in business under the name and style of D. D. Wallace & Co., of the village of Saline, county of Washtenaw, and state of Michigan, of the first part, and Caleb Van Husan and Joseph Bickford, of the city of Detroit, county of Wayne, and state of Michigan, of the second part, *Witnesseth*,

"Whereas, the said copartnership of D. D. Wallace & Co. is largely and justly indebted in sundry considerable sums of money to various persons in the states of Michigan, Massachusetts, and New York, and by reason of the late severe and protracted embarrassment in business affairs, has been wholly unable to discharge the same with punctuality or in full, and being desirous of securing to their several creditors the possession of whatever property and effects they stand seized of, at as early a day as possible, and to prevent an undue sacrifice of the same:

"Now, therefore, this indenture witnesseth, that the said parties of the first part, in consideration of the premises above recited, and of five dollars to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, released, transferred, and set over, unto the said parties of the second part, and by these presents do so grant, bargain, sell, assign, release, transfer, and set over, unto said parties of the second part, and to their heirs and assigns for ever, all and singular the goods, chattels, merchandise, bills, bonds, notes, books of account, and bank accounts, claims, demands, choses in action, judgments, evidences of debt, and personal property of every name and nature whatsoever, of the said party of the first part, as the same is more particularly described in the schedule proposed to be hereafter annexed to this instrument, marked "Schedule A.," and especially including all the stock and merchandise in the three several stores of the party of the first part —one in the building on Chicago street, in the village of Saline, known as the Burnham Store, including the boot and shoe shop appurtenant thereto, and all the stock and tools comprising the same; one on the same street, in said village, being the first door west of William H. Davenport's; and one in the village of Manchester, in said county of Washtenaw, and the building in which the same is kept, under the care and charge of David Bowen, the head clerk thereof; together with all the notes, accounts, dues, and demands belonging to the business of said three firms, as herein already intended to be conveyed, together with all the ashes on hand belonging to said Daniel D. Wallace & Co., party of the first part, at the ashery three miles west of Saline aforesaid; the said party of the first part hereby reserving the right and privilege of perfecting the Schedule A. above referred to, showing the exact amount of said personal property hereby intended to be conveyed, at some future time, if necessary:

"To have and to hold the same, and every part and parcel thereof, unto the said parties of the second part, their heirs, executors, admininistrators, and assigns, in trust nevertheless, and to and for the following uses, intents and purposes, that is to say:

"That the said party of the second part shall at once, or as soon as practicable, take possession of all and singular the personal property, effects, rights in action, hereby assigned, and sell and dispose of the same, either at public or private sale, as they in their good judgment may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interest of the creditors of said party of the first part, converting the same into money, and also to collect all and singular the debts, due-bills, notes, demands, choses in action, judgments, claims, and demands, or so much thereof as may prove collectable; and thereupon to execute and deliver all necessary acquittances and discharges, and by and with the proceeds of such sale and collection (*First*) the said party of the second part shall first pay and disburse all the just and reasonable expenses, charges, and disbursements of carrying into effect this assignment, and all other charges that may become necessary for the purposes aforesaid, until the same shall all be sold and disposed of and converted into money: and by and with the residue or net proceeds and avails of such sales and collections, that said parties of the second part (*Secondly*) shall pay and discharge in full all the several and respective debts, notes, sums of money, or accounts, due, or to grow due, from the said parties of the first part, or for which they are liable from the said parties of the second part, and the several other persons and firms designated in the schedule hereto annexed marked "B.," together with all interest money or moneys, to grow due thereon (the said party of the first part reserving the right to correct the amounts appearing in said schedule, should the same, as stated, be found incorrect), and if said net proceeds shall not be found sufficient to pay and discharge the same in full, then such net proceeds and

avails shall be distributed *pro rata*, share and share alike, among the said several persons and firms named in the said schedule "B.," according to the amount of their several and respective claims as the same shall be finally and correctly established: (*Third*) by and with the residue and remainder of said net proceeds and avails, if any there shall be, the said parties of the second part shall pay and discharge all the other copartnership debts and liabilities whatsoever, and now existing, whether due, or hereafter to become due, and the principal part (if not all) of which are set forth in schedule hereto annexed marked "C.," provided such remainder shall be found sufficient for the purpose, and, if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of said debts, demands, and liabilities, according to their several and respective amounts, the said parties of the second part reserving the right to correct in detail the said list or schedule "C.," should the same, on close examination of their books, be found incorrectly stated in amount or otherwise: (*Fourth*) by and with the residue and the remainder of the said net proceeds and avails, if any there shall be, the said parties of the second part shall pay and discharge all the private and individual debts of the said parties of the first part, or either of them, whether due or to grow due, provided such remainder shall be sufficient for that purpose, and, if insufficient, then the same shall be applied *pro rata*, share and share alike, to the payment of the said debts, according to their respective amounts, whatever the same on examination shall be found to be:

"And for the better execution of this instrument, and the trusts and duties thereby conferred, the said parties of the first part do hereby nominate and appoint the said parties of the second part, their executors, administrators, or assigns, their or each of their true and lawful attorneys, irrevocable, with full power and authority to do and perform all acts, matters, or things which can or may be necessary in the premises, as fully and completely as the said parties of the first part, or either of

them, might or could do, were these presents not executed; and attorney one or more under him to make, nominate, and appoint, as he deem necessary, with full power of substitution and revocation, hereby ratifying and approving all and every thing whatever which our said attorneys shall do, or cause to to be done in the premises.

"*In Witness Whereof*, We have hereunto set our hands and seals, on the day and year first above written." "D. D. WALLACE. [L. S.]" "E. W. WALLACE. [L. S.]" In the presence of "THERON FORD," "SAMUEL H. HARTWELL."

"We hereby accept the trust conferred on us by virtue of the foregoing instrument, and assume the discharge of the duties growing out of the same." "November 2, 1854." "CALEB VAN HUSAN." "JOSEPH BICKFORD."

The only schedules attached to the assignment were schedule B., containing a list of preferred, and schedule C., containing a list of non-preferred, creditors. They are not given here, because unnecessary to a full understanding of the case.

S. T. Douglass, for plaintiffs in error:

1. An assignee under an assignment, whether good or bad on its face, is not now regarded as a *bona fide* purchaser.—*Pierson v. Manning*, 2 *Mich.* 445; *Burr. on Ass'ts*, 439, *and cases cited.*

2. This assignment is bad on its face.

a. It contains no sufficient description of property, without recourse to the schedule; that being referred to for identification. Where a schedule is so referred to, nothing passes except what is therein mentioned, and until appended there is no description. General words of description in a deed are always limited by such a specification, and nothing passes excepting what is so specified.—5 *Eng. L. & Eq.* 471; *Burr. on Ass'ts*, 243, 327; 5 *Johns.* 335; 12 *Pick.* 22; 21 *Pick* 503; 14 *Barb.* 39; 10 *N. H.* 358; 11 *N. H.* 471; 6 *Barb.* 470; 2 *Wis.* 60, 61.

b. It does not purport to convey all the property of the assignors, although it purports to be, and is, a general assignment. With such a reference to the schedule as is contained here, the presumption arises that there is property not embraced in it, even if the references to the stores and ashery were broad enough to convey every thing there; or, in other words, even if the reference to the schedule did not limit them.—*Burrill*, 244, 245; 5 *Wheat.* 107; 5 *Mason*, 280; 8 *Md.* 418.

The most that could be claimed by assignors would be that they might show affirmatively that all their property was actually covered by the assignment. But this the Court held they need not do.

c. This assignment is bad because it allows the assignors to change the schedules. If the assignment contained a conveyance of all the property, without reference to the schedule, then the power retained might be regarded as one merely to rectify clerical and numerical errors. But when the schedule, as here, is descriptive, and necessary to point out what is intended to be conveyed, a power to alter it amounts to a power to make material changes in the assignment, and renders it void.—1 *Am. Lead. Cases*, 97; *Burr. on Ass'ts*, 333, 234, 209, 212, 235.

d. The assignment is void because it allows sales *on credit*. The words "*terms and conditions*" are always applied, in common parlance, to the time and mode of payment, and such is the only sensible construction here, when every other contingency is expressly provided for.—*Burr. on Ass'ts*, 197, 452; 21 *Pick.* 185; 1 *Metc.* 79; 2 *Duer*, 533; 2 *Wis.* 59; 1 *Wis.* 286.

e. The assignment provides for an unlimited delegation of powers. That assignees should have power to act through agents in ordinary business matters, is well enough, but to give them power to appoint attorneys, not only with their own broad powers, but with power of substitution, is, we submit, a most dangerous excess.

3. The assignees could only hold (as against creditors who attach) such property as is delivered to them under the assignment.—*Burr. on Ass'ts*, 298; *Comp. L.* § 3188.

And they could not lawfully make the schedule. As part of the assignors' deed, the assignors must either make it, or at least cause it to be made, and know its contents, and adopt it.

4. The preference of a private debt is illegal.—1 *Sandf. Ch.* 348; 3 *Barb. Ch.* 46; 25 *Vt.* 351.

The whole question of fraud in fact, including this matter, was submitted by the Court to the jury.—24 *Barb.* 127.

G. V. N. Lothrop, for defendant in error:

1. Such a construction must be given the assignment as will fairly carry into effect the intention of the parties so far as it can be collected from the whole instrument. Where two constructions are admissible, that should be preferred which will render it legal and operative, rather than that which would render it void.—22 *Wend.* 483; 17 *Pick.* 181; 11 *Wend.* 187; *per Mitchell J.*, 18 *Barb.* 550; *per Parker J.*, 17 *Barb.* 392.

2. The assignment in question was clearly intended to operate *in presenti*. It transfers in the most comprehensive terms all the partnership property, and provides for immediate possession by the assignees. A schedule was not necessary to define the property assigned—the assignment itself does not make it so, and the reference therein to a schedule means no more than if the words had been "of which it is proposed that a particular schedule shall be made out hereafter and annexed hereto."—See 15 *Conn.* 152; 22 *Pick.* 468; 2 *Paige*, 311; 14 *M. & W.* 47. The acts of the parties cotemporary with the making of the contract, or nearly so, may be looked at to aid in its interpretation (2 *Cush.* 283); and the proof of their acts shows this to have been their construction of the instrument.

3. Even if the assignment did not purport to convey all the partnership property, the deed would not be void unless property was withheld with actual fraudulent intent. — 24 *Barb.* 120.

4. The right reserved in the assignors to perfect the schedules did not invalidate the deed. Any reservation, directly or indirectly *for the benefit of the assignor, to the prejudice of the creditors*, avoids the deed. — 4 *Ired.* 204; 11 *Wend.* 202; 15 *N. Y.* 144; and see 16 *N. Y.* 563. But the reservation in this deed does not fall within the principle. It reserved a right simply to look over the schedule to be made, to see if it was perfect, *if this should be found necessary*. It was a reservation, not for the benefit of the assignors primarily, but for the benefit of the creditors.

5. The assignment did not authorize the assignees to sell on credit. — 11 *Barb.* 198; 21 *Barb.* 65; 21 *Barb.* 128; 1 *Kern.* 304; 3 *Kern.* 215.

6. As to the right to make preferences of individual debts, there is some conflict of cases. There are two cases which seem to imply a denial of the right. — 2 *Sandf. Ch.* 448; 4 *Sandf. S. C.* 252. On the other hand, the following cases seem to affirm the right. — 3 *Barb. Ch.* 46; 1 *Clarke Ch.* 193; 1 *Liv. Law Mag.* 442. But whatever may be the law on this subject, it has always been held that such a preference did not, in law, avoid the assignment; that the preference was illegal, *not under the statute, but only under the equitable rule which devotes partnership property primarily to the satisfaction of partnership debts.* — 11 *Wend.* 206; 3 *Barb. Ch.* 46; 4 *Sandf. S. C.* 298; and see 15 *N. Y.* 96.

But it is to be further observed that the expression of opinion of the Court on this point was, so far as this case is concerned, a mere abstract opinion. The assignment does *not prefer* private debts.

If any of the creditors named in schedules B. or C.

were in fact individual creditors, that would appear only in evidence. It would indicate either a mistake on the part of the assignors, or else a fraudulent design to palm individual debts off for partnership debts. If there was a mistake, it would not vitiate; if on the other hand, it was the result of a fraudulent *design*, it would bring the assignment directly within the statute, and this would be a question of fact for the jury.

Now, this was the only way this question could properly arise in this case. No such point was, in fact, made on the trial. No request to instruct the jury with reference to such a case was asked by the defendant's counsel. The Court was asked to instruct the jury that it was unlawful to prefer the private debts of the copartners, which, under this assignment, was an abstract question.

MARTIN Ch. J.:

It is well settled that a schedule detailing at large the property conveyed, is not necessary to the validity of an assignment. — *See Hollister v. Loud*, 2 *Mich.* 309; *Rundlett v. Dole*, 10 *N. H.* 458. It is sufficient to constitute a legal transfer that the property is described with reasonable certainty. If then a schedule be referred to in an assignment, it may, or may not, be a necessary part of such instrument, for the purpose of ascertaining what property is conveyed; and it may, or may not, have the effect to restrict the general words of the grant, according to the context, and the mode in which reference is made to it. No arbitrary rule can therefore be laid down respecting the necessity or effect of a schedule, if one be referred to, but these are to be determined by a consideration of the whole instrument, from which the intent of the parties making it is to be gathered; and such intent, when ascertained, is to control its construction in this respect, as in all others.

A great diversity exists in the reports respecting the construction of debtors' assignments, and a disposition has been

not infrequently manifested to construe them with great technical nicety, sometimes approaching illiberality. This tendency has led to the application of particular and subordinate rules of construction in some instances, in disregard or forgetfulness of those paramount rules which control the interpretation of all other written instruments. The principle most generally applied to the construction of this class of instruments is this: "That if a general clause in an instrument be followed by special words which accord with the general clause, the deed shall be construed according to the special matter." But in the application of this principle care is not always taken to observe how far the special words accord with the general clause, nor the manner of their application to it; and general words have been controlled and limited in their operation by special words, from an arbitrary application of this principle, although at the obvious sacrifice of the intent of the assignor, as manifested by the whole instrument. The diversity also which exists in the forms of assignments, their subjects, and the manner in which schedules have been referred to, has induced some errors from want of care in observing their dissimilarities.

"In construing contracts, deeds, and other written instruments," says Selden J., in *Platt v. Lott*, 17 *N. Y.* 478, "resort is had to a variety of legal rules for the purpose of aiding in their interpretation; but all other rules are subordinate to that primary rule which requires that every such instrument should be construed according to the intention of the parties. Whenever, from an examination of the writing itself, and on a comparison of its various parts, the intent with which it was executed can be clearly ascertained, that intent is to govern, whether the construction to which it tends is, or is not, in accordance with those minor rules, which are merely auxiliary to the one great paramount rule referred to. Hence, notwithstanding the ordinary rule, that general words are controlled in their operation by those which are more particular and specific, if, upon looking at the assignment

in this case, we are able clearly to see that it was the intention of the assignors to convey to the assignees their whole property, we are bound to give effect to that intention."

The cases cited will be found, upon careful examination, not to conflict with this rule, while *Driscoll v. Fiske*, 21 *Pick.* 503, expressly recognizes it. — See also *Burr. on Ass'ts* (2 *ed.*), 265, 268.

An examination of the deed of assignment from Wallace & Co., and a comparison of its different provisions, leave no doubt in our minds as to the design with which it was executed. It commences by a recital of the reasons which induced it, and the object sought to be accomplished by it; the reasons being the heavy indebtedness of the assignors, and their utter inability to discharge it with punctuality or in full; and the object being to secure their creditors the possession of whatever property and effects they were seized of, at as early a day as possible, and to prevent undue sacrifice of the same. It then, in general terms, conveys all their personal property and choses in action, *of every name and nature whatever*, to the assignees "as the same is more particularly described in the schedule *proposed* to be hereafter annexed to this instrument, marked schedule A., and especially including all the stock and merchandise" in their several stores, describing their locality, and "other property, accounts, debts, and demands as herein already intended to be conveyed," together with all the ashes on hand at their ashery, &c. It further requires and empowers the assignees to take immediate possession of the property and choses in action assigned, and to appropriate them to the payment of their debts. These provisions clearly manifest an intention by the Wallaces to assign all their property for the purposes expressed in the instrument, and that it should presently operate. And such, we think, was its effect, notwithstanding the reference to a schedule. And so it was evidently regarded by the parties; for the proof is that the assignees did immediately reduce

the assignors' property to possession, as well that specially designated, as other property not mentioned but obviously regarded as embraced in the general language of the assignment.

But the reference to the schedule is claimed to render one necessary to the conveyance of any property. The difficulty in this case, is from the reference being made in the present tense. If it had been "as the same *is to be* more particularly described," or had a provision been inserted that a schedule should be made and annexed, no doubt would have arisen respecting the present operation of the assignment, nor of the property covered by it. Such we think to be the true purport of this reference. Language is to be construed by its context; and no one can read this instrument without arriving at the conclusion that the schedule was contemplated to be subsequently made, and was not in existence when the assignment was drawn up. The inartificial manner in which this reference is made can not affect the general and controlling language of the instrument, but such reference should be read so as to accord with it. Now if, as we have already shown, a schedule is not necessary to the validity of an assignment, and if, when one is referred to, it will become necessary or not, according as the language of the whole instrument shall demonstrate such necessity to determine what property is conveyed, it follows that the absence of such schedule, although referred to, does not necessarily render the instrument incomplete, nor authorize the presumption that the assignors had property not conveyed by it.

In *Platt v. Lott* (*supra*), where the general words of assignment were no stronger than those in the one before us, the reference to the schedule was as follows: "The same being more fully and particularly enumerated and described in a schedule thereof hereunto annexed," &c.: the assignment, from a consideration of the whole instrument, was

held good to convey all the assignor's property, whether enumerated in the schedule or not; and the Court says, "This (the reference to the schedule) however by no means indicates an intention to qualify or limit the broad and comprehensive language previously used. A schedule would, of course, be necessary as a matter of convenience, and as a guide to the assignee; and the provision for its annexation, although it is thereby made a part of the assignment, does not warrant the inference that it was intended that if any portion of the property of the assignors should be omitted, which might well occur through accident or inadvertence, the title to such property should not pass to the assignee."

In the case before us, the reference is to a schedule *proposed to be annexed;* and when this is read in connection with the declared object of the assignment, the desire expressed that the creditors should have possession of all the property and effects of the assignors "at as early a day as possible," the general words of the grant, and the subsequently declared trust that the assignees should at once, or as soon as practicable, take possession of the property assigned, the idea that such proposed schedule was necessary to the perfection of the instrument, and that nothing was assigned until such schedule should have been made and attached, is without foundation. It is very apparent from a consideration of the whole deed, that this reference to a schedule was not made in contemplation that when annexed it would operate as the only descriptive words of the grant, nor to limit or restrict its general words; but that, as the assignment was by general words, the nature and situation of the property was such as to render one necessary to afford the assignees specific information of the items of property and choses in action thereby assigned, to enable them fully and understandingly to execute their trusts.

The reservation of a power to *perfect* the schedule at some future time, if it should become necessary, strongly

confirms our construction of the reference to the schedule, and clearly shows that the schedule was not regarded as essential to the immediate operation of the assignment, or as limiting its general language. But it was objected that this reservation renders the assignment void. From what has been already said, it follows that the exercise of this reserved right can have no effect to restrict, in any degree, the assignment, or to limit the general words of conveyance, or to divest the assignees of the property reduced to possession, whether scheduled or not. The evident intention in inserting it was to secure the right to furnish evidence of the particular property embraced within the *general terms* of the assignment, if that should become necessary. The power to perfect the schedule does not imply the power to impair the assignment.

The first three objections to the admissibility of the assignment as evidence were therefore properly overruled. By this construction, we give effect to the instrument consistent with the intention expressed in its preamble, and with the construction put upon it by the parties at the time of its execution, as manifested by the change of the possession of the property before a schedule was made; and when an honest intent can as clearly be inferred from its language as a fraudulent one, we are not at liberty to infer the latter.

It was fourthly objected that the assignment was void as allowing the assignees to sell upon credit. The assumption that they were allowed to sell upon credit is based upon the following language: "And sell and dispose of the same, either at public or private sale, as they, in their good judgment, may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interest of the creditors, converting the same into money," &c. If it be true that the grant of a power to sell upon credit would render the assignment void (which is a question not before us) yet we think a fair and reasonable interpret-

ation of this language will not justify the conclusion that an illegal act was contemplated. This provision is usually found in the forms of assignments consulted by draftsmen; and it is as reasonable to presume that the intent in following such form, and in using the language, was for a lawful as for an unlawful purpose. It was undoubtedly inserted to clothe the assignees with full and entire power over the assets, and to invest them with every discretionary power which they might lawfully exercise. We think, therefore, as no express power to sell upon credit is given by the assignment, so none should be inferred from this general and, to some extent, technical language; and such are now the later and better adjudications.—See cases cited in *Burr. on Ass'ts* (2 *ed.*), 217, 222.

It was lastly objected that the assignment was void as allowing the assignees to delegate their trust without restriction. It is difficult to determine the meaning of this objection. The instrument concludes with the usual clause authorizing substitution, and was evidently intended to clothe the assignees with power to appoint such agents or attorneys as they might find necessary for the collection of debts, or the transaction of any other business matters where an agent might be necessary, and can not, except upon the most violent presumption, be construed into a power to delegate their trusts. We see nothing unusual or objectionable in this provision.

The assignment being valid, the court below properly refused the first five requests of the plaintiffs in error, in charging the jury. The sixth request of the counsel for the plaintiffs in error was also properly refused.

The assignment itself makes no preference of any private and individual debts of the assignees, but such are placed in the fourth and last class.

It is true that there was evidence in the case showing that individual debts were included in the schedule of preferred debts, but how many, or to what amount, does not

appear. Whether the assignors have the right to prefer individual debts, or not, is a question upon which some diversity exists in the courts of the different states, but one we are not required to determine in the present case, as the current of authorities, and the better opinion, we think to be that such preference does not render the assignment void.—See *Hollister v. Loud*, *supra*; *Newman v. Bagley*, 16 *Pick.* 570; *Kirby v. Schoonmaker*, 3 *Barb. Ch.* 46; *Nicholson v. Leavitt*, 4 *Sandf. S. C.* 252; *Kemp v. Carnley*, 3 *Duer*, 1; *Burr. on Ass'ts* (2 *ed.*), 137, 140.

The judgment of the court below is affirmed, with costs.

MANNING and CHRISTIANCY JJ. concurred. CAMPBELL J. did not sit in the case, having been counsel for one of the parties.

James Edwards v. Jesse K. Sanborn.

In an action for the non-delivery by defendant, at the time agreed upon, of an article purchased and paid for by plaintiff, the jury may, without proof of special damage, award the plaintiff, as damages, interest on the price of the article from the time it should have been, until it actually was, delivered.

Heard May 7th. Decided May 19th.

Error to Wayne Circuit.

The action was assumpsit, by Edwards against Sanborn. The declaration contained two counts, the first of which alleged that on July 21st, 1855, plaintiff bought of defendant a circular saw mill at the price of $435, to be paid for as follows: $233 in plaintiff's note at six months from August 15th, 1855, with interest; $202 in cash, August 15th, 1855, which was paid when due; and in consideration thereof defendant promised to ship the said saw mill from Sandy Hill, New York, where defendant resided, to plaintiff, at Ontonagon, on the day last aforesaid. Breach, that defendant did not ship the said saw mill as agreed, but neglected to do so for two months there-

after, by reason whereof it did not reach its place of destination during the season of navigation, but was detained through the whole winter, and until the spring of 1856, whereby plaintiff suffered great damages in the hiring of laborers who remained idle, in expenses, and money laid out in preparing his ground and buildings for immediate use of said circular saw mill, and in stocks of provisions which became useless; and had been deprived of large gains and profits which he might and would have made in the business of sawing lumber, for which said saw mill was intended, and for which plaintiff had prepared at great expense.

The second count alleges, that in consideration that plaintiff, on August 25th, 1855, had bought of defendant a circular saw mill, he (the defendant) undertook and promised forth with, to ship the same to plaintiff by Griffith's Western Line, to Detroit, and from thence, by McKnight's Lake Superior Line, to Ontonagon. Breach, that defendant did not forthwith ship the same by the said lines, or in any other manner, but neglected to do so for the space of two months, by means whereof the said saw mill was further delayed and detained so long in reaching the city of Detroit, that it could not be shipped to plaintiff at Ontonagon, by McKnight's Lake Superior Line, during the then season of navigation, but was shipped, without the knowledge or consent of the plaintiff, on board a sail vessel, so late in the season that it did not reach Ontonagon until the May following. By means whereof plaintiff suffered damages as alleged in the first count.

Defendant pleaded the general issue.

On the trial, the contract being proved, and the payment, as alleged by plaintiff—as to which there does not appear to have been any contest—plaintiff introduced, among other evidence to show special damages, a number of depositions, as follows (all that portion of each of which in italics being objected to by the defendant, and excluded by the court):

William S. Bliss testified that during the summer of 1855 plaintiff purchased lands and put up buildings for the purpose of carrying on a saw-mill business: That he employed men and made various improvements, beside the erection of buildings, for facilitating the business of sawing lumber: *That such improvements must have cost plaintiff several hundred dollars:* That said plaintiff was very anxious, and used every exertion, to get his mill in running order before the winter months; *and deponent believes, and has no doubt, that plaintiff would have so done had it not been for the non-arrival of the machinery:* That the machinery did not arrive until May, 1856, *and that in consequence of its non-arrival in due season, plaintiff was thrown out of his legitimate employment during the winter months, besides having lost the profits which would have probably accrued from it: That, in the opinion of the witness, plaintiff sustained damages to from* $500 *to* $1000. Witness can not tell exactly how much land plaintiff purchased for his mill site, but it was six or eight lots. The saw-mill building was erected, covered, and partially enclosed. Witness saw as many as 250 logs on the grounds. Plaintiff built a smith shop on his lots, and made improvements on the sluice-way for the better conveyance of logs. The improvements will not pay cost unless sold for mill purposes.

Augustus Colburn testified that, *on account of the non-arrival of said mill, plaintiff was entirely stopped in his business of making lumber, and sustained damage to, at least,* $800 *or* $1000.

James K. Paul testified that *the plaintiff must have been damaged by the non-arrival of said machinery* $1000 *or* $1200.

James Carson testified that *the loss of the plaintiff was a serious one, in not being able to set his mill in operation, in consequence of the non-arrival of the mill. The value of pine lumber in the log in* 1855 *and* 1856, *at Ontonagon, was from* $4.00 *to* $5.00 *a thousand. When sawed, pine lumber was worth, on an average, about* $14.00 *a thousand at that place.*

The cost of manufacturing would be about $3.50 *a thousand.* If the saw-mill had been shipped at Sandy Hill, August 25th, it would have reached Ontonagon in thirty days by the usual course of transportation. *From October 5th to May 5th, the mill would cut, on an average, six thousand feet in twenty-four hours.* Never saw a mill running of this kind, and from actual knowledge, can not say what, or how much it will saw. There would have been no difficulty in procuring logs to stock the mill.

Abner Sherman testified that plaintiff contracted the mill for the purpose of manufacturing lumber at Ontonagon. He commenced the work of getting ready for the mill about the first of August, and continued in his work of preparation until about the middle of October. He had employed, during that time, a number of hands, as carpenters, engineers, and common laborers. He had two hands, an engineer and assistant engineer, who were kept idle by the non-arrival of the mill, one of whom was idle a month, and the other about three months. The principal engineer was retained until the arrival of the last boat from Detroit, which arrived between the first and middle of November. *He cost the plaintiff* $60 *a month, board and wages. His assistant cost in the neighborhood of* $30 *a month, besides board, which was* $12 *a month in the cheapest boarding-house in Ontonagon. According to witness' means of information, the mill would cut, on an average, from October* 18*th to May* 18*th, about seven thousand feet in twenty-four hours. The loss, from not being able to get the mill running in the fall, when he was ready for it, was more serious to plaintiff than the actual loss of dollars and cents. The disappointment threw him out of employment the whole winter. The non-arrival of the mill for six or seven months after it was to come, brought the maturity of the note given for the mill, and other obligations, before the mill could be put in running order, and he could get the means of paying for them. The consequence of this was that he had to close up his business in the spring of* 1856. *The mill building and black-*

smith shop would not bring more than half what they cost. Should think the cost of the mill building was $500. *Plaintiff will lose* $50 *by the shop, and* $50 *or* $60 *on the sluice-way. Plaintiff's credit was good, at this time, in Ontonagon.* Knows plaintiff paid his principal engineer $60 a month from what plaintiff said: thinks he has heard the engineer say so. As to the sum the assistant was to receive, witness got his knowledge from plaintiff's papers, or from the engineer. Judging from what competent men say, and from his knowledge of the power of the engine, and of other mills, witness would think this mill would cut what he has stated. Has never seen one of these mills at work.

Plaintiff also put in evidence a letter from defendant, the material portion of which is as follows:

"*Detroit*, October 1st, 1855.

"Mr. EDWARDS:—*Dear Sir:* I have rec'd yours, making inquiries for your mill. I received your money about the 28th Aug. I ordered my foreman to ship your mill next day,—your order being then on the books with other orders. I left home for two weeks, returned, and to my utter astonishment found my foreman had sent a mill to another man, he supposing he had filled my orders in regard to your mill, but instead had sent a mill whose order was on the books with yours, and with yours awaiting remittance. I immediately sent your mill, and came here to see if your engine had gone up, intending to send a mill I had here if you was to be delayed in your work by my delay; but I find your engine has not yet gone, and your mill will now be in time for you. It will reach you in two weeks, at most, which will be before you can get your engine set; and I shall have no need to send one from here."

He also gave evidence that he could have procured a boiler and engine at Ontonagon to set his mill going, if the circular saw mill had arrived.

Upon the foregoing evidence of damages, the circuit judge instructed the jury that plaintiff, under the evidence

shown by him, was entitled to nominal damage only, and that the jury should so find; to which instruction plaintiff excepted.

Verdict having been rendered for plaintiff for six cents damages, plaintiff removed the case to this court, for review on the exceptions to the rejection of said evidence, and to said instruction to the jury.

D., S. A. & D. Goodwin, for plaintiff in error:

How far profits lost may be allowed, is a question much discussed, and in very many cases they have been allowed. We think they should have been in this. These profits should, of course, be fairly estimated by the jury, considering all the circumstances; and those only which would naturally have resulted but for the wrong of the defendant.

But if not entitled to lost profits, the plaintiff was entitled to, at least, compensation for the loss of the use of the mill; and this is to be fairly estimated by the jury under all the circumstances. — 11 *Price*, 19; 20 *Eng. L. & Eq.* 410; 7 *Hill*, 62; 3 *Barb.* 424; 4 *Comst.* 288; 14 *Barb.* 611; 6 *Barb.* 419; 3 *Fos.* 171; 25 *Pa. St.* 382; *Wright*, 229; 8 *Pick.* 356; 17 *Ala.* 689; 18 *T. R.* 620; 6 *Bing. N. C.* 212; 9 *Wend.* 325; 4 *Moore*, 12; 6 *Bing.* 16; 9 *Bing.* 68; 2 *M. & W.* 519; 4 *M. & W.* 337; 13 *How.* 307; *Ibid.* 101; 5 *Mason*, 1.

The judge erred in withdrawing the question of damages from the jury. He should have submitted it to them, with instructions as to the proper principles to govern them. But, in fact he took the whole case from them, as if he, instead of the jury, was himself trying the cause under the statute. — 1 *Saund. Pl. & Ev.* 150, 401; 2 *Greenl. Ev.* § 255; *Chit. on Cont.* 343.

Plaintiff was entitled to at least interest on the amount paid.

R. P. Toms, for defendant in error:

1. The opinions of witnesses are not evidence except on certain subjects. This case does not involve one of those subjects; and if it did, it does not appear that any of the witnesses came within the class who may testify as experts.—17 *Wend.* 137; 24 *Wend.* 672; 7 *Wend.* 78; 23 *Wend.* 426; 4 *Barb.* 261; *Ibid.* 256.

2. Witnesses can not testify as to the *amount* of damages sustained. It is their duty to give *facts*, and that of the jury to determine the amount.—17 *Wend.* 136; 2 *Comst.* 514; 23 *Wend.* 434; 4 *Barb.* 261.

3. The defendant is only liable for the *proximate* damages arising from the breach of the contract; not for those which are remote or contingent.—2 *Greenl. Ev.* § 256; 2 *Pars. on Cont.* 455, 459; 3 *Mich.* 62; 7 *Hill*, 67; *Sedgw. on Dam.* 63, *et seq.*

4. Anticipated profits are not recoverable.—2 *Pars. on Cont.* 458; 4 *Barb.* 261; 7 *Hill*, 61; 21 *Wend.* 342; 20 *Eng. L. & Eq.* 410.

5. Defendant is not liable for any act of plaintiff, not connected with the contract, by which the plaintiff's loss was increased; nor for his insolvency resulting from a breach of the contract.—4 *Denio*, 546; 2 *Pars. on Cont.* 454; 3 *Denio*, 406; *Sedgw. on Dam.* 69; 7 *Hill*, 69.

6. The testimony offered being inadmissible on the question of damages, and the court having ruled it out, there was nothing to submit to the jury except testimony which was entirely too vague and uncertain; and, the breach being proved, the charge of the court was unobjectionable; for, as matter of law, the plaintiff was entitled to nominal damages only.—*Sedgw. on Dam.* 53, *et seq.*; 1 *Taunt.* 121; 56 *Eng. L. & Eq.* 398.

EDWARDS *v.* SANBORN.

MANNING J.:

This is an action to recover damages for not shipping from Sandy Hill, in the state of New York, to the plaintiff at Ontonagon, a circular saw mill purchased of defendant, and agreed to be shipped by him on a certain day.

On the 31st of July, 1855, plaintiff contracted with defendant for a circular saw mill. The contract price was four hundred and thirty-five dollars, of which sum two hundred and thirty-three dollars were paid at the time, by a note at six months, payable, with use, at the Michigan Insurance Bank, and the balance was to be paid in cash on the 15th of August, when the mill was to be shipped. The declaration, after setting out the contract, alleges the balance of the purchase money was paid in cash on the 15th of August, and that defendant did not ship the saw mill on that day, nor until two months thereafter, and that by reason thereof it did not reach its place of destination during the season of navigation, and was detained until June of the following year; whereby the plaintiff sustained great damages in the hiring of laborers, who remained idle, in expenses, and money paid out in preparing his ground and buildings for immediate use of said circular saw mill in the sawing of lumber, and in stocks and provisions which became useless, and had been deprived of large gains and profits which he might and would have made in his said business of sawing lumber, for which the said circular saw mill was intended, and for which he, the said plaintiff, prepared at large expense, &c.; to his damage of three thousand dollars.

On the trial, plaintiff introduced depositions of some half dozen witnesses to prove the matters set out in the breach of his declaration. Certain parts of each one of these depositions were objected to, and by the rulings of the court were not permitted to go to the jury; and exceptions were taken by plaintiff. I do not deem it necessary, nor is it my intention, to notice these exceptions further than to remark,

that the object of plaintiff, it would seem, and the tendency of nearly if not all of the excluded testimony, was to prove the profits plaintiff might have made in the business of manufacturing lumber had the circular saw mill been shipped on the day mentioned in the contract, and arrived at Ontonagon in due course of navigation early in the fall. I have no hesitation in saying, in this view of the case, the judge was correct in ruling as he did—so far, at least, as the testimony offered related to profits.

If the object of plaintiff had been that, as he had shown every thing save the circular saw mill was in readiness to commence the manufacture of lumber, he was entitled to recover as damages what the use of the mill was worth in a complete state, for the time he was deprived of its use by reason of defendant's not performing his contract; and if the rejected testimony had tended to prove the value of such use, the question would have arisen whether that was the proper measure of damages in such a case; but as it is not before us, I do not wish to be understood as expressing an opinion one way or the other. By use of the mill I do not mean what might have been made in running it, for that is more properly profits, but what would have been a fair rent for it by one wanting it for the manufacture of lumber. The question, however, would not have arisen had the excluded testimony been received; 1st, Because it did not appear plaintiff had a boiler and engine on the mill premises, or at Ontonagon, for propelling the saw; and, 2d, Because none of the witnesses were examined as to the value of the use of the mill. I am therefore of opinion the testimony was properly rejected by the circuit court.

There was evidence before the jury of the price of the mill, and of its payment, and that it was not shipped by defendant at the time he agreed to ship it, nor until some time thereafter, and that it did not reach Ontonagon until some time in May, 1856, and that if it had been shipped at Sandy Hill on or about the 25th August, it would have reached Ontona-

gon in thirty days by the usual course of transportation. With this evidence before the jury, the judge charged them that plaintiff was entitled to nominal damages only, to which an exception was taken; and the question is now before us, whether the charge was correct under the circumstances. I think in such a case the plaintiff is entitled to damages equal to the interest on the four hundred and thirty-five dollars, the price paid defendant for the mill, for the time he was deprived of the possession of it in consequence of defendant's breach of the contract. It is the same as though he had retained the mill in his possession, against the will of the plaintiff, for the same length of time. Will the law permit the vendor of an article to retain both it and the money he has received for it, against the will of the vendee, without making the latter compensation equivalent to the use of the money he has given in exchange? Shall he be permitted to say to the vendee, "If you had had the article in your possession you would not have used it"; or that, "The use of it would not have been equivalent to the interest on the money you paid me for it, and therefore you have sustained no damages, or less damages than you demand." It is not for a wrong doer to put such a question to the injured party; and if put, the reply to it is, "If you had delivered me the article and I had retained the money, the law would give you the money with interest. The article I purchased of you, in my hands, is equal to the money I gave you in exchange; otherwise I should not have purchased it of you: why not then give me interest on its cost while you have wrongfully withheld it from me? Suppose it was Power's Greek Slave I had purchased of you at $10,000,—would the law require me to show the use I would have made of it, and the dollars and cents I had lost in being deprived of the possession of it? The law is guilty of no such absurdity."

I think the judgment below should be reversed, and a new trial granted.

CHRISTIANCY J.:

I agree entirely with my brother Manning in the result at which he has arrived, and substantially in his reasoning, as applicable to the peculiar facts of the case.

Profits, as such, are generally excluded from the estimation of damages, not because they are profits, but because, in the great majority of cases, they depend too much upon contingencies to be estimated with reasonable certainty. And this would be emphatically true of the profits sought to be estimated by the loose *data* furnished by the evidence in this cause.

But in cases (and they are numerous) where profits are but another name for the ordinary use of a thing, or where they may be estimated with reasonable certainty by the test of experience, I think the loss of such profits as just a claim, and as certain a ground for the estimation of damages, as any other item or cause of loss or injury; since, in such cases, they fall as clearly within the principle of compensation, and must have been as much within the reasonable contemplation of the parties, in making the contract, or in committing the act which has occasioned the damage.

Take, for example, the case of an ordinary grist mill for custom work, which has been for years in operation, the profits of which have been nearly uniform one year with another, at any particular season—say five dollars per day. An injury is done to the dam which requires ten days to repair, during which the mill is compelled to lie still. In such a case, there can be no better or more certain criterion of damages, than these profits, which, added to the cost of repairing, would constitute the damages against the party causing the injury.

As to the propriety of allowing interest on the price of an article, in lieu of nominal damages, in a case like the present, and where the plaintiff fails to prove any other damages, I can entertain no doubt. The plaintiff had paid

the purchase price (the principle would be the same if he had given his note on interest). The defendant contracted to ship the mill by a certain day, and failed to do so until so late a period that it did not, and could not, arrive until many months after it would have arrived if shipped by that day. The plaintiff had a right to rely upon the contract, and during this whole period of delay, was entitled to the use, full property, and control of the mill. But the defendant, during this long period, wrongfully detains both the mill and the money which was paid for it, and prevents the plaintiff from any use, control, or disposition of it. I think these facts constitute, in law, conclusive evidence of a loss to the plaintiff equal to the interest of the money; or, in other words, that in the absence of any other evidence of damage, the law must infer damages equal to the interest. To refuse this would be to encourage the breach of such contracts, on the slightest grounds; as in many cases the actual damages for the breach, though very serious, hardly admit of adequate and certain proof. The interest of the money, though less, in most cases, than the actual damages, must, it seems to me, approach much nearer the standard of just compensation than the uniform nominal damages of six cents.

A party who, in violation of his contract, detains from another the use and dominion of an article for any period of time, has no right to say that the party whose rights he violates would not have used it if he had had it. This is a question with which *he* has no concern; its decision belongs exclusively to him who is entitled to the property, and who has a right to decide for himself, according to his own views of convenience or profit, how or when he will use it, or on what terms he will dispose of it. To permit such a defense would be to sanction a most unwarrantable interference with the exclusive rights of others in the management and disposition of their own property.

Take as strong a case as can be suggested for the defendant. A wrongfully detains from B a cider mill during

the spring months, or a sleigh during the summer. Can A be allowed to set up in bar of all but nominal damages, for this detention, that B could not have used the article if he had had it? B was entitled to control his own property in his own way, as much as if it had been money in his pocket; and though he could not make cider with his mill, or ride in his sleigh, during those particular months, he might have sold them and converted them into money, had he not been wrongfully deprived of the opportunity. No man is compelled to keep and use any article for any specific purpose. The right of sale is the most valuable incident of personal property, and every man is entitled to judge for himself, not only how he will use, but when and under what circumstances he will sell it; and he who deprives him of that right by wrongfully detaining it, can never be allowed to complain if he is compelled to pay damages equivalent to the interest of its value, since, if sold, its price would have earned that interest.

I think, therefore, in all such cases, a plaintiff should be allowed to elect to take the interest of the price of the article, or such other damages as he may be able to prove. But he should not be entitled to both.

CAMPBELL J.:

Being of opinion that there was no error in the court below, it is only necessary, in connection with the views expressed by my brethren, that I refer to the question whether the judge erred in not instructing the jury to allow interest in the absence of any special damages.

The damages in a case like this, as all agree, arise, not out of the depreciation in the value of the machinery as an article of merchandise, but in the loss of its possession as a thing of use.

In the absence of proof of the amount of damage, the law, upon proof of a breach of contract, does not defeat the right of action entirely, but infers some damage. Where money is

detained, it infers a precise amount, which is always the legal rate of interest. But where it draws such an absolute inference in the absence of proof, it will not allow the introduction of proof to enhance or diminish the rate. It fixes a rule for all cases. In the absence of a statutory rule, I am aware of no authority which, where there is no proof, will infer any amount of damages which is more than nominal.

The principle of allowing the recovery of damages for the breach of contracts, is universally based upon the rule of compensation. The law imposes no penalty, as such, but simply requires the defaulting party to make good such pecuniary loss as his neglect has entailed upon the other party. And this loss is to be ascertained according to established principles. The loss or gain of the defaulting party is not the test. He is bound to make good such injury as the complaining party can show that he has sustained, within the legal rules, and he is liable to nothing more. His own gains do not aggravate, neither do his own losses diminish, the losses of his adversary. There are peculiar cases, such as marriage promises, in which a wider range is allowed for proof of injury, but even there, compensation is the only thing aimed at. And in no case, so far as I can ascertain, in the absence of any statutory rule, has the law inferred any specific amount of damages beyond nominal damages.

If a party wishes to recover more than these, the amount of injury is as clearly a specific issue, as the breach of the contract. I do not perceive how the law can determine by inference that the use of a chattel is worth one sum or another, whether the rate inferred be minimum or maximum. As a matter of every day experience, we know that farming implements are of no use at certain times, and of use far beyond interest on their cost at others. The same difference exists in the use of other chattels. If a farmer has paid for his plow, and does not need the use of it, and no one else could use it either, it can make no difference to him that the money he has paid is worth seven or ten per cent. to the manufacturer.

The only question he is concerned with is how much has he been damaged by not having his plow.

No rule which the law can adopt will give adequate relief in all cases; and I think the only safe rule is to leave the amount of damages on contracts, in all cases not regulated by law, to be settled upon proof. The rule of interest may be a convenient one, but it is no nearer the actual damage in each case than any other arbitrary basis of computation, while it, in my judgment, is more in the nature of a penalty than of remuneration.

I think the judgment should be affirmed.

MARTIN Ch. J. did not sit in this case.

Judgment reversed.

Loyal Tower v. Calvin Lamb.

Where plaintiff, in his declaration in justice's court, claims damages beyond the jurisdiction of the court, but the defendant pleads to the merits, and, after trial and judgment against him, appeals to the county court, where the cause is again tried on the merits, he can not afterwards take advantage of the excessive claim on writ of error in this court.

Where process in trespass was taken from a justice against three, but discontinuance entered as to one, and declaration against the others claimed damages beyond the jurisdiction of the court, but defendants joined issue upon it, and judgment was rendered by the justice against both, and one defendant appealed to the county court, where the others both appeared, and trial was had, and judgment again rendered on the merits against the two who were convicted before the justice,—*Held*, That on error to this court, by the defendant who appealed, he could not object either to the judgment of the justice, or to the joining of the other defendants in the proceedings of the county court.

Heard May 18th. Decided May 21st.

Error to Washtenaw Circuit.

The case is sufficiently stated in the opinion.

O. Hawkins, for plaintiff in error.

[There was no appearance for defendant in error.]

TOWER *v.* LAMB.

MARTIN Ch. J.:

Lamb, the plaintiff below, brought his action in a justice's court against Tower and two other defendants, Burch and Cooper. The declaration was in trespass, and the damages claimed $500. A discontinuance was entered as to Cooper, and, after trial, judgment was rendered against Tower and Burch for $100 and costs. From this judgment Tower appealed to the county court, and there Tower, Burch (and, by some error, Cooper) all entered their appearance by attorney. Upon trial in the county court, judgment was rendered against Tower and Burch for $200. The cause is brought to this Court upon writ of error, by Tower alone. The errors assigned are,—1st, The insufficiency of the declaration; 2d, That the claim of $500 damages ousted the justice of jurisdiction; 3d, That the county court had no jurisdiction of Tower and Burch, as the appeal was by Tower alone; and, 4th, That there was no judgment rendered by the justice from which Tower could appeal, and the proceedings in the county court were, for these reasons, void.

The first error assigned is, very properly, not urged by the plaintiff in error. The second is within the rule of *Wells v. Scott*, 4 *Mich.* 347, where it was held that this objection comes too late after appeal, when the objection is not raised in the appellate court. The third error assigned is based upon the fact that Tower alone appealed. But the appearance of Burch obviated any objection which can be made in this court, by either Tower or Burch, to the jurisdiction of the county court. It is, moreover, one which Tower, as appellant, can not take, as he suffers no injury by a joint judgment, and had most certainly submitted himself to the jurisdiction of that court; and Burch is not a party assigning errors. But the record showing that Burch did appear, no objection to the jurisdiction or judgment of the court can prevail.

The fourth error assigned is that no proper judgment

was rendered by the justice, from which Tower could appeal. But he did appeal, and without objection to the form of that judgment; and that fact, and the further one of a judgment in the county court, makes this objection come too late.

After appeal and trial, no error can be assigned upon the form of the justice's judgment.

The judgment of the court below is affirmed, with costs.

The other Justices concurred.

Emily Jones and Others v. Comfort Tyler and Others.

Bill by the widow and heir-at-law of A against the widow, heirs-at-law, and administrator of B (who was the father of A), to compel the conveyance to complainants of certain premises alleged to have been given by B to A, in consideration of natural affection, but not conveyed,—*Held*, That in such a case conveyance would be decreed only on the most conclusive proof of the gift, and of some satisfactory reason why it was not consummated by a conveyance.

The statements of a person since deceased can no more be made evidence on behalf of his representatives, than they could have been on his own behalf, if living.

Possession of the premises by A, subsequent to the alleged gift, can not avail complainants when it is sufficiently explained by the relationship of father and son existing between the parties.

A mortgagee of B, subsequent to the alleged gift, but not charged with notice of it, could not, in any event, be affected thereby.

Submitted May 19th. Decided May 21st.

Appeal from St. Joseph Circuit in Chancery.

The bill of complaint avers: That one Job Tyler, in 1841 or 1842, in consideration of love and affection, gave his son, De Witt C. Tyler, in fee, certain premises described therein: That pursuant to said gift, De Witt went into possession of the premises, and made large improvements thereon, and finally died in possession thereof in the year 1850, leaving the complainants his widow and heir-at-law: That Job Tyler is since deceased: That said Job Tyler frequently promised to execute, and intended to execute, a deed of said premises

to De Witt, and permitted said De Witt to make improvements thereon under an agreement that he would execute to him such deed: That defendant Asa Bennett has been appointed administrator on the estate of Job Tyler, and the other defendants, except Hamden A. Hecox, who claims some interest in the premises as mortgagee of Job Tyler, are the widow and heirs-at-law of said Job. And the bill prays that defendants be decreed to release and convey to complainant all their interests in said premises.

Bennett, the administrator of Job Tyler, answered the bill, denying the alleged gift, and claiming that the improvements made by De Witt Tyler upon the premises in question were made for and at the expense of said Job Tyler. Bennett subsequently died, and an administrator *de bonis non* being appointed, was substituted as defendant in his stead. Two of the other defendants were infants, and answered by their guardian *ad litem*, and the bill was taken as confessed by the others.

On the hearing in the court below, the court dismissed the bill, and complainants appealed.

The following is the substance of the testimony on behalf of complainant:

Charles L. Miller knew De Witt C. and Job Tyler in their lifetime. Knows the premises that De Witt C. Tyler occupied in his lifetime; knew him in the occupation of the premises, two or three years continuously, before his death. The premises were located near Job Tyler's residence, a short distance southeast, on the opposite side of the road. De Witt occupied eighty acres of land. He was in debt to me, and a short time before his death, Job Tyler told me that he (Job) had given De Witt the land which he occupied, and that was all he could do for him. These remarks were made by Job in a conversation with him by me, in relation to De Witt C. Tyler being able to pay his debts, at the public house in Centerville. De Witt, at the time of this conversation, occupied the land above spoken of. I always had the

impression that De Witt owned the land, and credited him, him on the strength of it.

Charles F. Dickinson knows the premises occupied by De Witt before his death; they are the same spoken of by Miller. Knew De Witt in possession of those premises for six or seven years immediately preceding his death. The land was wild and unbroken when he moved on to it. De Witt built the log house now upon the premises. Should think over forty acres of said land had been broken up and cultivated since he went on to it. De Witt managed and controlled the improvement of the premises. There is a tolerable good fence around the outside of said land; cross fences are not much, if any. There is a small orchard, peach trees and cherry trees, on the premises. Let De Witt have a team to break up a part of said premises, and he worked for witness to pay for the use of the team; he also had cattle of witness to draw brick for a chimney to the house on the premises. He paid for the use of the cattle for that job. Job Tyler, all this time, occupied premises of his own, near by.

At the time De Witt lived upon the premises, witness supposed he owned them—his father told witness he did. At the time De Witt had team of witness, his father helped him in breaking said land—some three or four acres; that being all that was done when he had the team. He had one or two yoke of oxen; his father had, witness thinks, two yoke, and the oxen of witness, and one other yoke, constituted the breaking team. Job and De Witt exchanged work frequently. There has been no improvement on said land since De Witt's death. Was at De Witt's house when he was at work chinking it up, and at work about the roof. The house was raised by the neighbors. De Witt asked witness to attend the raising.

Rensselaer Strong had known De Witt in possession of the premises from 1841, '2, or '3, until his death in 1850. Saw De Witt Tyler making rails and laying them up into

fence; also, when he was cutting logs for house. Saw him at work on the premises all along for the time he was living on them. About the time De Witt commenced working on said land, witness had a conversation with Job, in which he (Job) said, I have given that land to De Witt. What brought up the subject was, that De Witt was then at work on said land, in sight. He said De Witt had been a good boy in helping him get started, and that that land was for him (De Witt) to make him a home. At the time De Witt went into occupation of said premises, the land was worth about two dollars and one-half per acre. The premises now are worth about one thousand dollars. There has been no improvement on said land, as witness knows of, since De Witt's death. There are about sixty acres improved; the fences were put up in pretty good order all around said land. De Witt always, and in all places, claimed to own said land, and witness never heard it disputed until after both De Witt and Job Tyler were dead.

Stephen C. Cleveland knows the premises. Witness broke twenty acres on those premises for De Witt, eight or nine years ago. De Witt Tyler paid for said breaking.

John B. Dickey attended De Witt in his last sickness. De Witt told witness that he had no deed for his place; that he could obtain one from his father any time he had a mind to call for it; that he had perfect confidence in his father; that if he should die, his father would do right in the matter. This conversation occurred the summer before his death. Witness had other conversations on the same subject with De Witt. Witness repeated the language that De Witt had used, as above specified, to Job Tyler, who made no reply.

Asher Bonham, in the August previous to the death of De Witt, was applied to by the latter to make a deed from Job to him, of the premises he (De Witt) then lived on; he (De Witt) saying that his father had been ready a long time to give him a deed of the premises. Witness

told Job Tyler what De Witt had told him, soon after it occurred. Job said that any time that De Witt was ready to pay the expense of making a deed, he would execute it. Witness never made the deed, — the times were so busy, cutting hay, &c., that it was omitted, and he (De Witt) died soon after.

There was some little other evidence in relation to improvements made by De Witt on the premises, and to his statements that he was the owner.

H. H. Riley, for complainants.

P. M. Smith, and *C. Upson*, for the administrator.

MARTIN Ch. J.:

There is no evidence in this case clearly establishing the fact that Job Tyler ever gave, or agreed to convey, the property in question to his son De Witt. That he sold it, there is no pretence. As against the widow and heirs of Job Tyler, a decree for a conveyance would be made only on the most conclusive proof of the gift, and of some satisfactory reason why it was not consummated by a conveyance, even if upon the case made by the bill relief would, in any case, be granted. The statements of Job Tyler which are relied upon to sustain the complainants' case, are loose, indefinite statements, that he had given the land to his son; in one instance made to a creditor of that son, who was evidently pressing the father to pay the son's debt; in another, it is accompanied with no evidence explanatory of the occasion of the statement, or of the conversation preceding or following it, from which its full import can be gathered. The evidence of Bonham is the most direct and satisfactory of any, but even this shows no contract or agreement — nothing but an unexecuted intention. The statements of De Witt can no more be considered in behalf of the complainants, than they could in his own behalf, were he living, and seeking the conveyance. Nor do we think

his occupancy of the land, and labor performed upon it, any part performance, or regard them as proof of delivery of possession, or of expenses incurred upon the faith of any agreement or offer respecting the land. Their relation of father and son explains this more satisfactorily than the evidence does the complainants' claim. As against Hecox, the mortgagee of these premises, neither the facts, nor the consideration, if the gift were proven, would authorize a decree. —See *Wilson v. Wilson*, *ante p.* 9.

There was therefore no error in the decree of the court below, and it must be affirmed with costs.

The other Justices concurred.

George D. Evans v. Mark Norris.

By the terms of a lease of a hotel, the rent was made payable in monthly installments, and the lessor agreed to take one-half the same "in board, as the same falls due";—*Held*, That it was not optional with the lessee to pay in money or board, but that he was under the same obligation to pay the board, if demanded, as the lessor to receive it.

The lessee was under no obligation to call upon the lessor, and demand that boarders be sent, but the lessor was bound to call for the board within the term, and substantially as the same came due.

Heard May 18th. Decided May 21st.

Error to Washtenaw Circuit.

The action was by Norris, the lessor, against Evans, the lessee, upon a lease of the Western Hotel, in Ypsilanti. The clauses in the lease with respect to the payment of rent, upon which the questions arise in this case, are as follows:

"The said George D. Evans doth hereby hire the said premises for the term of one year, as above mentioned, and doth covenant and promise to pay the said Mark Norris the annual rent of two hundred and fifty dollars, in monthly installments, to wit: The sum of twenty 84-100ths

dollars at the end of each month, the first installment to be paid on the first day of May next.

"And it is hereby agreed, that if the said Evans shall elect to keep said premises for a longer term than one year, he may do so by giving said Norris two months' notice of his intention so to do, before the end of the first year, and upon payment of the like rent and time of payment, as provided for the first year; and it is further agreed, that if the said Evans shall give the like notice that he will do so, then this lease shall be extended from year to year, for five years after the first two years, provided that for each year after the first two, the said Evans shall pay the sum of three hundred dollars for each year, to be paid in monthly installments of twenty-five dollars for each month. And the said Norris agrees to take one-half of the [first] year's rent in board, as the same falls due."

On a trial in the court below, before a jury, the circuit judge charged the jury that Norris was not bound, by the terms of the lease, to call for that portion of rent payable in board as the same became due, and within the year; but was at liberty to call for the same in board at any time; and if Evans refused to pay the same in board when demanded, that then Evans was liable to pay the plaintiff the amount in money; and that if the defendant wished to avoid the payment of the rent in money or board at any future period, it was the defendant's duty to notify Norris that he was ready to board any persons sent by him, and demand that Norris should send boarders there, within the time prescribed by the lease. To this charge the defendant excepted.

Other exceptions were also taken, but the foregoing is the only one noticed in the opinion.

Judgment having been rendered for plaintiff in the court below, defendant brought the case to this court by writ of error.

EVANS v. NORRIS.

H. T. Backus, for plaintiff in error.

L. D. Norris, for defendant in error.

CHRISTIANCY J.:

The principal question in this case arises upon the construction given to the lease, in the charge of the court below to the jury, which was, "That Norris was not bound by the terms of the lease to call for that portion of rent payable in board, as the same became due, and within the year, but was at liberty to call for the same in board at any time; and if Evans refused to pay the same in board when demanded, that then Evans was liable to pay the plaintiff the amount in money; and that if the defendant wished to avoid the payment of the rent in money or board at any future period, it was the defendant's duty to notify Norris that he was ready to board any person sent by him, and demand that Norris should send boarders there within the time prescribed by the lease."

We think this charge was erroneous, and not warranted by a fair construction of the lease. The provision for taking half the year's rent in board "as the same falls due," applies, we think, exclusively to the first year's rent; and such, on the argument, was admitted to be the express words of the lease, though the word "*first*" is omitted in the record. As it applies only to the first year's rent, it is quite evident, from the whole instrument, it should be read in connection with the covenant for the payment of the rent of that year, and as a part or qualification of that covenant, and clearly implies the assent and obligation of Evans to pay in that way, as much as that of Norris thus to receive it.

It is not optional with Evans to pay in money or board. He would not be at liberty to refuse the board; and though such refusal might render him liable to pay the money, it

would be as *damages* (and not *necessarily* as the entire damages) for the breach of the contract. The cases cited by counsel for the defendant in error, as to the right of election to pay in one of two ways, do not therefor apply.

By any fair construction of this lease, we think Norris *was bound* to call for that portion of the rent payable in board, *within the year*, and substantially as the same became due; that he could not claim the whole board during a single month, nor any part of it after the expiration of the year, which would be entirely outside of the contract. — *Clement v. Clement*, 8 *N. H.* 215. Having a right wholly to refuse to board after the year had expired, he might, if he chose to board at all, make such terms, and impose such conditions, as he pleased.

The fair import of the whole contract is, that the board was to be furnished at the hotel to be kept by the lessee; and it would be a most unnatural perversion of the instrument which should extort an inference that Evans was required to furnish it elsewhere. No other place is mentioned; the furnishing of board is one of the ordinary uses to which hotels in this country are applied.

It would be equally extravagant, we think, to infer a duty on the part of Evans to call upon Norris and demand that he should send the boarders. He had contracted to receive half the rent in board, and was entitled to it in no other way. His own interest ought to be sufficient to prompt him to notice his rights and obligations under his own contracts.

The charge was therefore erroneous, and tended to mislead the jury to the injury of the defendant.

There are other errors assigned upon the charge, but as all those which are presented with sufficient clearness grew out of, and are included in, the one already noticed, it is not necessary to notice them here.

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

The other Justices concurred.

David Maiden v. Edward Ingersoll.

When a treaty has been made by the proper federal authority, and ratified, it becomes the law of the land, and no courts have the power to question, or in any manner look into, the powers or rights recognized by it in the nation or tribe with whom it was made.

By a treaty made in 1807 between the United States and the Chippewa, Ottawa, Pottawatomie and Wyandotte tribes of Indians, certain lands near Detroit, among others, were reserved to these tribes. The treaty did not show on its face what tribe was in the occupancy of these lands. By another treaty with the Pottawatomies in 1827, these lands, therein stated to have been before "reserved to the use of the said tribe," were ceded to the United States. — *Held*, That this treaty having recognized the right to this reserve to have been in the Pottawatomies, the courts are bound so to regard it, and must consider the treaty of 1827 as extinguishing the reserve.

Submitted May 18th. Decided May 21st.

Case reserved from Oakland Circuit.

The statement and questions reserved are given in the opinion.

Baldwin & Draper, for plaintiff:

Under the statute (*Comp. L.* 2489) the certificate of purchase issued by the Commissioner of the State Land Office, is, of itself, sufficient evidence of title to enable plaintiff to maintain this action. The courts of this state must assume that the state, as trustee, has title to all the lands the commissioner assumes to convey. The only way to defeat a recovery is by showing a better title in the defendant.

The Pottawatomies assuming to cede this land to the United States, and their right being recognized by the treaty, it must be presumed that they had either acquired the rights of the other tribes mentioned in the treaty of 1807, or else that the land was originally reserved for them, and that they had the actual title when the last mentioned treaty was formed.

Backus & Harbaugh, for defendant:

The treaty with one of the four tribes of Indians to whom this reservation was made, would, at the most, have extin-

guished the Indian title to an undivided one-fourth of the lands only. If this be so, they were not subject to designation as University lands.—4 *Stat. at Large*, 180.

We have a right to show collaterally, in a court of law, that the State had no title to the land it assumed to sell.—6 *Con. U. S. R.* 355; 3 *Ibid.* 319, 360; 10 *Johns.* 23; 12 *Ibid.* 81; 18 *How.* 87.

CAMPBELL J.:

This case comes before us upon the following statement and reservation from the Circuit Court for the county of Oakland:

"This is an action of ejectment, brought by the plaintiff, for the recovery of the west half of the northeast quarter of section thirty-one, town one north, of range ten east, in the township of Southfield and county of Oakland; and for the purposes of this suit, the parties hereto mutually admit the following as the facts in the case: That the premises in question are a part of the reservation made for the Ottawa, Chippewa, Wyandotte, and Pottawatomie nations of Indians, under and by virtue of the sixth article of a treaty between the United States and said nations, of the date of the 17th November, 1807.

"That said premises are a part of the reserve mentioned in said article, at or near the Tonquish village, on the River Rouge, in said county and township aforesaid. That the premises in question are a part of section 31, being one of seventy-two sections which the Secretary of the Treasury of the United States designated or reserved, purporting to act under and by virtue of an act of Congress of the 20th day of May, 1826, entitled "An Act concerning a Seminary of Learning in the Territory of Michigan." That the only extinguishment of the Indian title to the said premises, shown by the plaintiff, was by virtue of a treaty between the United States and the Pottawatomie Indians, of the 19th September, 1827; which said treaties and acts of Congress are hereby made a part of this case.

"It is further admitted, as facts in this case, that the sole title claimed by the plaintiff to said premises, is the certificate of the proper authorities of the state of Michigan, under the laws of the state for the conveyance of University lands. And further, that the only title of the state of Michigan to said land for University purposes, is by virtue of the designation and reserve of the Secretary of the Treasury, under color of the said act of Congress. And it is further admitted, that at the time of the commencement of this suit, the defendant was in possession of the premises in controversy.

"The court, deeming the questions arising in this case of sufficient importance, hereby reserves the same for the opinion and advice of the Supreme Court; which questions are as follows:

"1st. Was the Indian title to said premises ever so extinguished as to authorize or warrant the designation or reservation of the same, by the Secretary of the Treasury, under and by virtue of the said act of Congress, of the 20th of May, 1826?

"2d. Had the state of Michigan any title to the same, for University purposes, which they could grant to the plaintiff?

"3d. Has the plaintiff any title as derived from his said certificate?"

On the 20th of May, 1826, an act of Congress was passed, authorizing the Secretary of the Treasury "to set apart and reserve from sale, out of any of the public lands within the Territory of Michigan, to which the Indian title may be extinguished, and not otherwise appropriated, a quantity of land, not exceeding two entire townships, for the use and support of a University," &c.—4 *U. S. Stat. at Large*, 180.

The premises in question form a part of the two mile reservation near Tonquish's village on the River Rouge, made by the sixth article of the treaty of Detroit of 1807,

between the United States and the Chippewas, Ottawas, Pottawatomies, and Wyandottes.—7 *U. S. Stat.* 105. The reserve was not made for the benefit of any individual grantee, but was, among others, reserved to the Indian nations, and consequently remained as if there had been no cession or treaty whatever. The treaty in question does not show upon its face what tribe was in the occupancy of this reserve. But in 1827, a treaty was made with the Pottawatomie tribe in the following terms (7 *U. S. Stat.* 305):

"In order to consolidate some of the dispersed bands of the Pottawatomie tribe, in the Territory of Michigan, at a point removed from the road leading from Detroit to Chicago, and as far as practicable from the settlements of the whites, it is agreed that the following tracts of land, *heretofore reserved for the use of the said tribe*, shall be, and they are hereby, ceded to the United States." Among the lands thus ceded are the premises in question.

When a treaty has been made by the proper federal authority, and ratified, it becomes the law of the land, and the courts have no power to question, or in any manner look into, the powers or rights of the nation or tribe with whom it is made. The action of the treaty making power is conclusive upon such inquiry. And when territorial rights are by treaty recognized as having existed in one tribe, we are bound so to regard them. We must, therefore, consider the treaty of 1827 as extinguishing the reserve made in 1807. And consequently the land was subject to designation for University purposes as soon as the treaty became operative.

The next question to be considered is whether the title to the land so designated was in the state of Michigan when the certificate issued to the plaintiff. This question is answered by the Ordinance of June 23d, 1836 (4 *U. S. Stat.*) containing the terms of admission into the Union offered by Congress for the acceptance of Michigan, which were accepted by the state. By that act, the seventy-two

sections set apart for University purposes, under the act of 1826, were granted and conveyed to the state in terms of absolute conveyance, to be appropriated to the use and support of the University in such manner as the Legislature should prescribe. The state became invested with the fee of the land without further conveyance.

The third question reserved is disposed of by the answers to the others.

Let it be certified to the Circuit Court for the county of Oakland, as the opinion of this Court, that each of the questions reserved should be answered in the affirmative.

The other Justices concurred.

George Starkweather v. Elisha Smith and Others.

Since the act of 1855 (*Comp. L.* §3292), a married woman has the same power, in all respects, over her property that she had while unmarried.

Where defendants are sued in trespass, by the husband, for the taking of personal property which is proved to belong to the wife, evidence of request on her part that they would remove it from plaintiff's possession, is competent on their behalf.

Heard May 14th. Decided May 24th.

Error to Macomb Circuit.

Plaintiff in error brought trespass in the court below, against defendants, for the taking and carrying away of certain household furniture and other personal property.

On the trial, plaintiff proved the taking and carrying away of the property, in March, 1857, from the house occupied by him. He then proved its value, and rested his case.

Defendants then offered to prove that the property in question belonged to Ann Starkweather, wife of the plaintiff, and was removed by them at her request. To this

evidence, the plaintiff objected that the evidence on part of plaintiff showed the goods and chattels to have been in his possession at the time defendants took and removed them. The circuit judge overruled this objection, and allowed the evidence to be given, and plaintiff excepted.

Defendant then called one *Harriet Smith* as a witness, and asked her if she did not, a short time previous to the removal of said property, hear the plaintiff's wife request the defendant Smith to remove the goods from plaintiff's house to the house of said defendant.

To which question the plaintiff objected,—

1st. That it was not competent or lawful for the wife to remove her said goods and chattels and personal property from the possession of her husband, during his absence, and without his assent: 2d. That the wife did not have the legal right to remove her property from the possession of her husband, and of using and enjoying said property without her husband's assent and permission: 3d, Because it was not competent nor legal to give the wife's statement in evidence against her husband, and in a suit where the wife was not a party to the record: 4th, That a wife could not be examined as a witness in such a case, and therefore no evidence could be given of her acts or statements in the premises.

The circuit judge overruled the objections, and decided that it was competent for the wife to remove her personal property from the possession of her husband, and to use the same without his assent; and that it was competent to give in evidence the statements of the wife against her husband relative to the removal of her property from the possession of the plaintiff to the house of the defendant Smith; to which decision the plaintiff excepted.

Defendants then gave evidence showing that the wife was the owner of the property, and that she requested defendant Smith to remove the same from the plaintiff's premises to Smith's house, where she has since resided, and that

Smith requested the other defendants to assist him in the removal.

Verdict and judgment having passed for defendants in the court below, plaintiff removed the cause to this court, for review on the exceptions.

Eldredge & Hubbard, for plaintiff in error:

1. The act of 1855, being in derogation of the common law, is to be construed strictly. The evil intended to be remedied by it was the sale of the wife's property without her assent, whereby she was, many times, reduced to want and suffering. That evil was remedied by giving her such an estate in her personal property as would prevent the husband selling it without her consent, and freeing it from liability for his engagements. The statute authorizes the wife to contract, sell, transfer, mortgage, devise, and bequeath her property, but does not take from the husband the possession of it so long as he uses that possession for the benefit of himself, his wife, and family. The court should not so extend this statute as to authorize the wife, without cause on the part of the husband, to remove herself and her property from his care and possession, and thereby break up the family, and destroy his peace and comfort.

It is also contended that, by the marriage contract, the wife tacitly agrees to put into possession of her husband her personal estate, and not remove so long as he provides her a suitable home. He is liable for the support of herself and her children, while there is no such obligation on her part to support him.

This property was in the husband's lawful possession, and, until demand made, any person would be a trespasser who intermeddled with it against his consent.

2. The wife not being a competent witness against the husband, her statements could not be proved for or against him.

A. S. Robertson, and *A. B. Maynard*, for defendant in error.

MANNING J.:

The circuit judge was correct in admitting the evidence, and in stating the law, which is too clear to admit of doubt.

The statute of 1834 (*Comp. L.* §3289) did not give a married woman full power to control her separate property without the assent of her husband. It provided all property acquired by her before or after marriage should continue to be her separate property, and should not be liable for her husband's debts, engagements, or liabilities; but prohibited her from giving, granting, or selling or removing it from the premises of her husband without his consent, except authorized thereto by the judge of probate, &c.

By the act of 1855 (*Comp. L.* §3292), these restrictions are removed, and she is authorized to contract, sell, transfer, mortgage, convey, devise, or bequeath it, in the same manner, and with the like effect as if she were unmarried. The object of the Legislature, by this act—for the language is too clear, it seems to us, to admit of any doubt—was to give the wife the same power, in all respects, over her property that she had before marriage. That it was intended to release or emancipate such property from the common-law rights and dominion of the husband, is not only obvious from the language referred to, but from the additional fact that the statute also provides that actions may be brought by and against her in relation to such property as if she were unmarried.—*Comp. L.* §3294.

It follows, as a necessary consequence, that the authority given by her to defendants to remove the property, was competent evidence for defendants.

The judgment below must be affirmed.

All the Justices concurred.

Willard Daniels and Others v. The People.

In a criminal recognizance, the description of the offense which defendant is held to answer as "the crime of incest" is sufficient, and the facts constituting the offense need not be set out.

So also where the description is "the crime of attempt to procure an abortion."

Where defendant has been committed for want of bail by the examining magistrate, and, subsequently, on his own application, is let to bail by a commissioner, it is not necessary that the recognizance should show upon its face that the offense was committed within the jurisdiction of the magistrate. The entering into such recognizance being a voluntary act of defendant, of which he can only avail himself on his own showing of a legal commitment, the presumptions are in favor of its validity.

Circuit judges have power, independent of statutory provisions, to take bail in criminal cases out of court, and the Legislature may therefore confer the same power upon circuit court commissioners, even if the power to take bail be a judicial power within the meaning of that clause of the Constitution conferring the judicial power of the state upon specified courts.

But such power is not a judicial power within the meaning of the clause in question.

Heard May 21st. Decided May 24th.

Error to Oakland Circuit.

The action was against plaintiffs in error, upon two recognizances. On the trial before the court, without a jury, the circuit judge found the following facts:

"That a short time prior to the 5th day of February, A. D. 1857, Willard Daniels, one of the defendants, was arrested and taken before B. Rush Bagg, Esq., Police Justice of the city of Detroit, at his office in said city, charged with some offense or offenses, of the character referred to in the recognizances hereinafter set forth: That the said Willard Daniels thereupon waived any examination before said police justice, and for want of bail was, by the said police justice, committed to the common jail of the county of Wayne, situated in the city of Detroit, in the said county; and that on the said 5th day of February, 1857, the said Willard Daniels, being so imprisoned, was, at his own request, brought before Robert H. Brown, Esq., a circuit court commissioner for said county of Wayne, at his office in the said city

of Detroit, for the purpose of giving bail for his appearance in the circuit court for said county, to answer to such charges; and thereupon the said defendants entered into recognizances before the said Robert H. Brown, as such commissioner as aforesaid, of which the following are copies, viz.:

"*State of Michigan, County of Wayne, ss.* Be it remembered, that on the 5th day of February, one thousand eight hundred and fifty-seven, before me, a circuit court commissioner in and for the county aforesaid, came Willard Daniels, as principal, of Troy, in Oakland county, and Benjamin Daniels, Wilder Winslow, Jr., and Alanson C. Daniels, as sureties, of Troy, in the county aforesaid, and acknowledged themselves jointly and severally indebted to the People of the State of Michigan, in the sum of four thousand dollars, to be levied of their, and each of their, respective goods and chattels, lands and tenements, to the use of the said People, if default be made in the condition hereinunder written.

"The condition of the foregoing recognizance is such, that if the said Willard Daniels, who stands committed by B. Rush Bagg, Esq., police justice of the city of Detroit, in the county of Wayne, aforesaid, for the crime of incest, shall personally be and appear at the next March term of the said circuit court, to be holden at the court house in the city of Detroit, in said county of Wayne, on the 17th day of March next, at nine o'clock in the forenoon of that day, and shall then and there plead to said charge, and stand trial thereon, and shall not depart therefrom without leave of the court, and shall abide the order and direction of said court in the premises, the said recognizance shall be null and void, otherwise be and remain in full force and virtue." "WILLARD DANIELS. [L. S.]" "BENJAMIN DANIELS. [L. S.]" "WILDER WINSLOW, JR. [L. S.]" "ALANSON C. DANIELS. [L. S.]"

"Taken and acknowledged before me, at Detroit, the 5th

day of February, A. D. 1857. "ROBERT H. BROWN, Circuit Court Commissioner."

The second recognizance was like the first, except that the penalty was but $800, and the offense described therein was "the crime of attempt to procure an abortion."

"And the said court further finds, that afterwards, and at the said March term of the said Circuit Court for the county of Wayne, the said Willard Daniels did not appear in said court in pursuance of his said recognizances, but made default, and thereupon the said recognizances were duly estreated and ordered by said court to be prosecuted, the same having been duly filed in said court. Upon the foregoing facts, the court find the law to be, that the said Robert H. Brown, circuit court commissioner, as aforesaid, had jurisdiction and authority to let the said Willard Daniels to bail, and to take recognizances at the time, in the manner, and under the circumstances aforesaid, and that the said recognizances are good and valid, and binding upon the said defendants, and the said plaintiffs are entitled to recover of the said defendants, by reason of the premises, the sum of four thousand eight hundred dollars; and to each and every of the conclusions of law found by the said Circuit Court for the county of Oakland, upon the foregoing facts, the said defendants then and there excepted."

The defendants, on the trial, objected to the evidence offered of the facts which preceded the giving of such recognizances, and excepted to the ruling of the court admitting the same.

A. B. Maynard, for plaintiff in error:

1. The recognizances should have shown that the offenses were committed within the jurisdiction of the police justice. If he had no authority to cause the arrest, the recognizances would be void. — *Solomon v. People*, 15 *Ill.* 291; *State v. Maynard*, 14 *Ill.* 419. A record must be proved by itself; and where there has been no previous indictment, the recog-

nizance should show all the facts which give jurisdiction.—*Commonwealth v. Bail of Gordon*, 15 *Pick.* 193.

2. The first recognizance is void, because no offense known to the common law, or within the statute of this state, is set out or described in it. "Incest" was not a crime at the common law, but was only taken cognizance of and punished by the spiritual courts. If an indictment do not state an offense, or the facts constituting one, upon which an indictment would lie, it is void.—1 *Dana*, 165; 1 *Stew. & P.* 465; 17 *Wend.* 254; 33 *Maine* 539; 4 *Tex.* 417; 3 *Mich.* 42.

3. Circuit court commissioners have no authority to let to bail. The power is a judicial power, and can not be exercised by them unless possessed by circuit judges at chambers.—*Const. Art.* 6, §16. No such power was ever conferred by our statutes upon circuit judges, and judges had no such power in England, except as given by statute.—2 *Chit. Gen. Pr.* 23, 24, 34, 327; and see 1 *A. K. Marsh.* 421; 1 *Mo.* 403; 15 *Ohio*, 580. Our statutes which conferred this power upon circuit court commissioners, were repealed, by implication, by the Constitution.

H. D. Terry, for the People:

1. It is not necessary that the recognizance should state the specific charge in such language as would be required in an indictment. It is sufficient if it inform the court of the nature of the offense charged, by the use of any term which is ordinarily understood to embrace it.—4 *Mich.* 609; 9 *Yerg.* 386; 17 *Wend.* 252; 15 *Ala.* 431; 2 *Ind.* 371; 8 *Tex.* 547; 15 *Ill.* 291; 10 *Barb.* 35; 3 *Mich.* 50.

2. The recognizances need not show that the offenses were committed within the city of Detroit. It is sufficient that the justice had authority in cases of that general description, and the condition is to do some thing to which a party may be legally bound by recognizance. The bailing officer gets jurisdiction by the voluntary appearance of the

prisoner before him and entering into the obligation. The presumption is that the charge was properly preferred and investigated, and the proper decision made, before it was entered into and acknowledged. — 2 *Comst.* 92; 4 *Denio*, 530; 10 *Barb.* 35; 1 *Blackf.* 200, 338; 5 *Barb.* 360, 511; 4 *Scam.* 477; 3 *A. K. Marsh.* 456; 4 *Mich.* 609.

3. The circuit judges had power to hold to bail, in criminal cases, at chambers. The power was expressly conferred upon judges of the Supreme Court, which the circuit judges were *virtute officii*. They had the power independent of this statute. They were conservators of the peace, and had authority to issue warrants of arrest, and, as a necessary incident, the power to let to bail. — *Vaughan*, 103; 4 *Bl. Com.* 299; 1 *Salk.* 105; 2 *Strange*, 911; *Hob.* 195.

The power, as exercised in this case, was merely ministerial — not judicial. If it were in the discretion of the commissioner to let to bail or refuse to do so upon the facts presented, it would be the exercise of a judicial power; but under our laws and Constitution, he can not refuse; he is bound to take the recognizance, and therefore acts ministerially. — *Const. Art.* 6, §29.

CAMPBELL J.:

Judgment was rendered in the Circuit Court for the county of Oakland, against the defendants, upon two recognizances taken before the circuit court commissioner of Wayne county in February, 1857. Each purported to be for bailing Willard Daniels upon commitment by the police justice of Detroit, to answer charges, one of "the crime of incest," and the other of "the crime of attempting to procure an abortion." Errors are assigned, *First*, That the crimes are not sufficiently described as legal offenses; *Second*, That the jurisdictional facts to authorize the taking of the recognizances do not sufficiently appear; and, *Thirdly*, That the circuit court commissioner had no power to take bail in any case.

In the case of the *People v. Rutan*, 3 *Mich.* 42, and the

People v. Dennis, 4 *Mich.* 609, the late Supreme Court referred to the rules governing in the description of offenses in recognizances. We think the description of the offenses charged in each of the instruments before us substantially accurate. In an indictment it is necessary to conform to legal phraseology, and for that reason it would not be sufficient to use the language which is used here. But we do not think the legal phrases describe the offenses any more perfectly to the common understanding, or that they are any less liable to misconstruction. Incest means, in all cases, illicit intercourse between persons within the degrees of consanguinity within which marriages are forbidden by law. This is the offense prohibited by statute, and the statute itself uses the term "incestuous," to characterize the illegality of the marriage.—2 *Comp. L. p.* 1543. An attempt to procure an abortion is equally well described by the statute (2 *Comp. L. p.* 1509) relating to attempts to procure miscarriage. The terms used in the index to the Compiled Laws are precisely the same contained in these recognizances. They are not open to mistake or ambiguity.

It is next claimed that it should appear upon the face of the recognizances, that the police justice in making the commitment acted within his jurisdiction. No objection is made to his power to commit for such offenses, if charged upon a proper complaint to have been committed within his jurisdiction; but the error assigned is that it does not appear that the crimes charged were committed within his jurisdiction.

This is not a case where a person is held to bail by the examining officer, and forced to enter into the recognizances or stand committed. Here the commissioner acts upon the application of the prisoner, who has already been committed by a magistrate. The statute declares that the commissioner, "on application of any prisoner committed for any bailable offense, may inquire into the case and admit such prisoner to bail."—2 *Comp. L. p.* 1577. And the same statute (*p.*

1579) declares that no action shall be defeated "for any defect in the form of the recognizance, if it sufficiently appear from the tenor thereof, at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance.

The commissioner is one of the officers named as having, in the language of the court in *People v. Dennis*, "authority by law to act in cases of that general description"; and, further than this, it appears, in the language of the statute, that Daniels was "committed for a bailable offense." It would be dangerous to require, in cases of this character, any further recital of jurisdiction, and would lead into collateral inquiries entirely out of place. It must be remembered that the jurisdiction of the commissioner is invoked by the prisoner himself, and not against him. The accused must bring himself within the statute before he has any right to ask the aid of the commissioner. If he has been illegally committed, he has the remedy by *habeas corpus*, and in no other way. The recognizance is therefore a voluntary act, and one of which the accused could not avail himself, except upon his own showing of a legal commitment. He certainly can not now claim that it is defective in not containing affirmative statements establishing that fact, even if such defects exist. The presumptions in such case must be in its favor. Voluntary recognizances have always received a liberal construction. — *Champlain v. People*, 2 *Comst.* 82. We should be far from holding that such presumptions may not be rebutted, and we are not aware of any rule preventing it. But, until rebutted, we think the recognizances were certainly sufficient.

It is claimed by the respondents that the circuit court commissioner had no power to act. Prior to the Constitution of 1851 this power was vested in commissioners by express statute. But it is urged that the Constitution operated as a repeal of this, — *First*, Because it provided that the

judicial powers of commissioners should not exceed those of a circuit judge at chambers; and, *Second*, Because circuit judges are not mentioned in the statute, and, whether mentioned or not, have no such chamber powers.

The statute mentions only judges of the Supreme Court. But under the new Constitution, the circuit judges were at that time judges of the Supreme Court, and no other persons answered the description. And we do not regard the language of the Constitution as at all ambiguous upon the extent of judicial power authorized to be conferred on these officers. It is well known that many powers, legal and equitable, are vested in the circuit judges out of court; and in those counties where no judge resides, great inconveniences would arise if no one else could perform those functions. Many of these powers had, under the old Constitution, been vested in circuit court commissioners. We think the plain meaning of the Constitution was to permit the Legislature to invest these officers with any of the judicial powers which a circuit judge might lawfully exercise when not in court. How many of these powers should in fact be granted was left to the legislative discretion. Admitting the power exercised by the commissioner to be in all respects a judicial power, it is, we think, plainly within the terms of the Constitution. It is a power which has been intrusted to single judges from remote centuries.

But it admits of grave doubts, at least, whether the power of letting or holding to bail is "*judicial power*," within the meaning of that clause of the Constitution which confines such power to courts. By the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation.—See, upon this subject, *Story on Const.* §1640, *et seq.* Although the whole judicial power of the United States is vested in the Federal Courts, the power to take examinations and hold to bail has always been

vested in certain officers who are not judges of those courts. It was held in *Ex parte Gist*, 26 *Ala.* 156, that this delegation was lawful for the reason that it did not bestow "judicial power" within the meaning of the Constitution. And the court of King's Bench, in the case of *Cox v. Coleridge*, 1 *B. & C.* 37, distinguish expressly between trials before magistrates and proceedings to examine and hold to bail, and declare the latter not to be judicial acts. *Holroyd J.* says: "A magistrate, in cases like the present, does not act as a court of justice; he is only an officer deputed by the law to enter into a preliminary inquiry"; and *Best J.* says: "So far was this examination from being a judicial inquiry, which means an inquiry in order to decide on the guilt or innocence of the prisoner, that, as the law was administered a few years after the passing these statutes, the justices, even where it appeared that a prisoner was not guilty, were not to discharge him without bail.—*Dalton*, *c.* 164. The modern practice is, indeed, different, and is more consistent with law and humanity; and I refer to *Dalton* only to show that it could not then have been the opinion of the profession that this examination was any thing like a judicial inquiry."

The right to bail is a constitutional privilege, and if it could only be obtained through courts, not only would their sessions be cumbered with applications, but, where those sessions are infrequent, there would be a gross failure of justice, equivalent to a denial of this unquestioned right. The origin of the whole system is to be found in the authority of conservators of the peace. While each court might commit and hold to bail offenders to be tried before it, the power, in other cases, was vested in the court of King's Bench, and in its judges separately, as well as in other high officers. The office of Justice of the Peace was originally created for the same purpose.—3 *Hawk. Pl. Cr.* 51, 231; *Bac. Abr.* "*Justices of the Peace.*" Our Constitution makes judges and justices conservators of

the peace. — *Const. Art.* 6, §19. Each person holds the authority, not as a member of a court while in session, but as an officer in that special capacity. Conservators of the peace appear to have been regarded as no more judicial than executive officers, and several of the high executive functionaries exercised their powers. Discretionary and judicial powers are often convertible terms, and there are many acts requiring the exercise of judgment, which may be fairly said to be of a judicial nature, and yet in no sense coming within the judicial power as applicable to courts. In Connecticut, it was early held that a sheriff could take bail in a criminal case, and that it was not a judicial act. — *Kingsbury v. Dickinson*, 2 *Day*, 1. And in New York, in *Tillotson v. Cheetham*, 2 *Johns.* 63, it was held that a sheriff presiding over a jury of inquest, acted ministerially and not judicially, and could therefore act by deputy. In that case the subject is fully reviewed.

Without undertaking to lay down precisely where the dividing line is, it is very manifest that the discretion exercised and needed in an inquiry into the amount of bail which should be required of a prisoner, is of a very different character from the judicial discretion used in the trial of causes, and has very little to do with fixed legal principles. It must, of necessity, be open to the Legislature to provide for the various new cases which from time to time arise, requiring some discretionary powers to be vested in proper officers. The rights of individuals to have fair trials in the courts are amply secured by the Constitution. Beyond this, it would be a forced construction to hold that every act and investigation involving the exercise of a *quasi* judicial discretion must be vested, of necessity, in courts which are utterly unfitted by their organization for any such purposes.

Upon any view of this question, we think the commissioner had power to act in the premises.

The judgment must be affirmed.

The other Justices concurred.

Leonard H. Steward v. Harvey M. Dixon.

Motions to dismiss for irregularity must be made at the earliest opportunity.

Heard and Decided May 31st.

Case made after judgment from Calhoun Circuit.

Judgment was rendered against defendant in the court below, and he was the moving party here.

R. P. Toms, for plaintiff, moved to dismiss the case for want of written notice of the filing in this court. The case was filed here July 28th, 1858.

C. I. Walker, *contra*, read affidavits showing that, though no written notice of the filing was served, plaintiff was informed thereof soon afterwards.

THE CHIEF JUSTICE:

We think the plaintiff too late with his motion. He appears to have known that the case was filed here soon after that was done, and no reason is given why the motion was not made earlier.

David Caswell, Jr. v. Charles C. Comstock and Others.

An appeal in chancery to this Court, will only lie from a final decree or final order.

A decree is not final which directs a reference to a master or other officer to do what the Court, but for its power to make such reference, would itself have to do before it could decide the case.

Heard May 31st. Decided June 1st.

Appeal by defendants from Kent Circuit in Chancery.

G. V. N. Lothrop moves to dismiss the case on the ground that the decree appealed from is not a *final* one, and therefore the appeal would not lie.

The following is the decree, omitting the formal portions only, and sufficiently indicates what was the case upon which the decree was rendered.

"It appearing that the deed of conveyance, executed by complainant to defendant Comstock, dated December 6th, 1853, and the contract of same date, between same parties, and relating to same subject-matter, were cotemporaneous acts, and part and parcel of the same transaction, and that said deed was not intended as an actual conveyance, but that said deed and contract were intended as a security to defendant Comstock for whatever advances he should make under said contract, and for the performance of the undertakings of complainant contained in said contract, with the option on the part of Comstock to purchase premises described in said deed, should he elect to do so within two years from the date of said deed and contract.

"Further, that by a subsequent contract between complainant and defendants Comstock and Chapin, dated August 1854, Comstock waived his right to become absolute purchaser of said premises.

"Further, that the undertakings of complainant, contained in said last contract, respecting the completion of saw-mill, on said premises, were designed as a security to defendants for the payment of the sums of money agreed to be paid to them by complainant in said first contract, and not as a condition precedent to the performance of the undertakings of the defendants contained in said last contract.

"*It is therefore ordered, adjudged, and decreed*, that the said last contract, dated August 2d, 1854, be specifically performed by defendants Comstock and Chapin.

"*Ordered* that it be referred to William Ashley, Jr., *to take proof respecting damages*, alleged in bill of complaint to have been sustained by complainant on account of alleged breaches of contract of August 2d, 1854. Also, *to take proofs of sale, disposition, or conversion*, by defendants, of real estate, saw logs, or other personal property, the sub-

ject of said last contract, charged in bill of complaint to have been sold, disposed of, or converted by defendants contrary to the provisions of said contract.

"*And that he report* such proofs, together with the sums with which defendants are charged on account of such damages, and sale and disposition of property, as aforesaid.

"*And that he compute* amount of payments made to defendants by complainant under said contract.

"*And report* the amount due to defendants from complainant under said contract, after deducting all payments, and all sums chargeable to defendants, as aforesaid, for damages sustained by complainant, and for property sold or converted, as aforesaid.

"*And that* in case any balance should be found due to defendants, or either of them, upon the tender of such sum, the defendants, or such of them as hold the legal title thereto, *execute, acknowledge, and deliver* to complainant deeds of bargain and sale of lands mentioned in the last contract [a description of which is given].

"And in case defendants shall, for the space of — days after the tender of sum found due as aforesaid, neglect or refuse to execute said deed, it shall be lawful for complainant to cause a certified copy of this decree to be recorded in the office of register of deeds for county of Kent, and said decree so recorded, shall have the effect of a deed of conveyance of said premises, and the record of said decree shall have the effect of a record of a deed, as notice to subsequent purchasers or incumbrancers, and for all other purposes for which deeds are required by law to be recorded.

"*Decreed further*, on neglect or refusal of complainant to pay said balance found due defendants, as hereinbefore stated, it shall be lawful for defendants to have premises described in contract of August 2d, 1854, or such portion thereof as shall be necessary, sold at public auction, due notice to be first given, by such person as this court

shall appoint, and out of the avails to pay such balance, and costs and charges of sale, refunding surplus to complainant.

"*Decreed further*, that Comstock be perpetually enjoined from the further prosecution of the suit at law mentioned in bill of complaint."

Mr. Lothrop cited in support of the motion, *The Palmyra*, 10 *Wheat.* 502; *Brown v. Swan*, 9 *Pet.* 1; *Forgay v. Conrad*, 6 *How.* 202; *Perkins v. Forniquet*, *Ibid.* 206; *Beebee v. Russell*, 19 *How.* 283; *Farrelly v. Woodfolk*, *Ibid.* 288; *Travis v. Waters*, 12 *Johns.* 507; *Jaques v. Methodist Church*, 17 *Johns.* 559; *Kane v. Whittick*, 8 *Wend.* 224; *Jenkins v. Wild*, 14 *Wend.* 539; *Berryhill v. McKee*, 3 *Yerg.* 157; *Wing v. Warner*, 2 *Doug.* 288; *Prentiss v. Rice*, *Ibid.* 297; *Morris v. Morris*, 5 *Mich.* 171.

C. I. Walker, *contra*, claimed that under the statute the party may appeal from any *decree*, final or interlocutory — the words of the statute being "any *decree or final order*." As to what is a *decree*, he cited *Dan. Ch. Pr.* 1192. He claimed also, that this decree was final in its character, and did not necessarily contemplate or require further action by the court. He cited *Benedict v. Thompson*, 2 *Doug.* 302, 306; *Taylor v. Reed*, 4 *Paige*, 567; *Mills v. Hoag*, 7 *Paige*, 18; *Dickinson v. Codwise*, 11 *Paige*, 189; *Wright v. Miller*, 3 *Barb. Ch.* 382; *Travis v. Waters*, 1 *Johns. Ch.* 87.

MANNING J.:

A motion is made in this case to dismiss the appeal on the ground that the decree appealed from is not a final decree. Our attention was called by opposing counsel to the phraseology of the statute, which allows an appeal from "the decree or final order" — the word "final" being used in connection with "order," and not "decree." All decrees

are, like judgments at law, either interlocutory or final;—the latter when they are the final determination of the court on the rights of the parties, and the former when they are auxiliary only to the final determination. And when the word decree alone is used in a statute, we think it is to be understood to mean a final decree, unless there be some thing in the context showing an interlocutory as well as a final decree is intended. The universal understanding—one that has been acted on by both the bench and bar—we believe, has been that a final decree only could be appealed from; and such, we think, is the true construction of the statute.

The decree, after stating a certain contract between the parties should be specifically performed by defendants, directs a reference to take proof of damages, alleged in the bill to have been sustained by complainant, and of the sale and conversion by defendants of certain real and personal property. It then directs the officer to report such proofs, with the sums that defendants are to be charged with, and that he also compute the amount of payments made to defendants by complainant under the contract, and report the amount due to defendants from complainant under the contract, after deducting such payments and damages. And in case a balance should be found due to defendants, or either of them, on complainant making a tender to them of such balance, they are required to convey the premises described in the contract to complainant. Such a decree is clearly interlocutory and not final. No decree, we think, is final that directs a reference to a master, or other officer, to do what the court, but for its power to make such reference, would itself have to do before it could decide the case. Such references are made, not in execution of the decree, but to relieve the court of what it would otherwise have to do itself. The acts and doings of the master in all such cases are in their nature judicial, and not ministerial, and, to be effectual, must be confirmed by the court, when they become the acts of the court itself.

There appears to be some little confusion in the cases as to what is a final decree, which we are disposed to attribute to the fact, that the court, in some few of the cases, does not seem to distinguish between directions given for the execution of a final decree, as in mortgage sales, and references that are preparatory to a final decision upon the merits. A decree with such a reference can, with no more propriety, be called a final decree, than a judgment at law with a reference to a clerk or a jury to assess damages, can be called a final judgment.*

CHRISTIANCY and CAMPBELL JJ. concurred. MARTIN Ch. J. did not sit in this cause, having decided the case in the court below.

*The same motion was made in the case of *Angeline G. Moore v. Charles Olin*, from Calhoun Circuit, and was disposed of at the same time, in the same way. The bill in that case was filed by complainant against her late guardian to set aside certain deeds and a lease made by her to him, to declare void a receipt which she had given him, and for an account, &c. The decree declared the deeds void, except that, under the circumstances of the case, they should stand as security for any amount that should be found due the defendant from complainant on accounting—it declared the lease and receipt void, and referred the cause to the circuit court commissioner for Calhoun county to take an account between the parties, with specific directions in respect to such account, and to report thereon. And all questions of costs, as well as all further directions, were reserved until the coming in of the commissioner's report.

G. V. N. Lothrop, for appellee.

C. I. Walker, for appellant.

The case of *John W. Turner v. Oliver S. Chapman and Others*, dismissed a few days earlier, was an appeal from a decree made on bill filed for the specific performance of a contract for the conveyance of lands. The decree was that complainant is entitled to a specific performance, and that it be referred to a circuit court commissioner to ascertain if defendants can make good title to the premises in question, and to report thereon, and also to report the amount due from complainant on the agreement; and that the question of costs and all other directions be reserved until the coming in of his report.

J. G. Sutherland, for appellee.

A. Gould, for appellants.

The following, in addition to those cited on the argument, are cases in which courts have discussed the question, *What is a final decree? Craighead v. Wilson*, 18 *How.* 199; *Gudgell v. Mead*, 8 *Mo.* 58; *Young v. Skipwith*, 2 *Wash.* 300; *Williams v. Field*, 2 *Wis.* 421; *McMurtry v. Glascock*, 20 *Mo.* 432; *Choteau v. Rice*, 1 *Minn.* 24.

Henry D. Bassett v. William Armstrong and Others.

Where plaintiff had a contract with a firm engaged in sawing lumber, by which they were to receive certain saw logs belonging to him, manufacture the same into lumber, ship the lumber to parties to whom the same had been contracted, receive the payment therefor, and pay over to him a certain amount per thousand feet, retaining the balance for their services, and the contract provided that the logs and lumber were at all times to be the property of plaintiff until he received the amount so to be paid him, and the logs were levied upon in the hands of the firm and as their property, — *Held*, That as against the officer making such levy, plaintiff was entitled to immediate possession of the logs, and might maintain replevin therefor.

Heard May 25th. Decided June 2d.

Case reserved from St. Clair Circuit.

The action was replevin. From the case as reserved, it appears that, on trial before a jury, the facts stated below having been given in evidence, upon the suggestion of the circuit judge presiding in said court that it was doubtful whether the plaintiff had such an immediate right to the possession of the property replevied as to entitle him to maintain an action of replevin therefor, the plaintiff submitted to a nonsuit, with leave of the court to move to set the same aside. The facts so proved are as follows:

That on the 27th day of March, 1857, the plaintiff was, and ever since has been, and still is, the owner of the steam saw mill situate on the shore of Lake St. Clair, in the state of Michigan, mentioned and referred to in the instrument of writing first hereinafter set forth, and on that day made, executed, and delivered to one William Jenny a writing in the words following:

"*Know all men by these presents*, That I, Henry D. Bassett, of the city of Chicago, state of Illinois, have appointed, and do by these presents nominate and appoint, William Jenny, of Mt. Clemens, state of Michigan, my agent, for the purpose of buying in my name and for me, a quantity of pine logs, for the purpose of supplying my steam saw mill, situated on the shore of Lake St. Clair, in said state of Michigan aforesaid. All his acts in any purchase of pine

logs, I hereby authorize; and will approve any and all stipulations and agreements to pay for such logs as he may thus buy in my name, and for me, I hereby ratify and approve."

"*Chicago*, March 27th, 1857." "H. D. BASSETT."

That on the same day, the plaintiff made and entered into an agreement in writing with said William Jenny and one George Phelps, who were partners in the business of manufacturing and dealing in lumber, and doing business under the name and style of Jenny & Phelps; which agreement is as follows:

"*This Contract and Agreement*, made in Chicago this 27th day of March, 1857, by and between Jenny & Phelps, of New Baltimore, state of Michigan, and Henry D. Bassett, of Chicago, state of Illinois, *Witnesseth as follows*, to wit:

"Said Jenny & Phelps agree to receive, raft, and saw any and all pine saw logs that William Jenny, one of the parties of Jenny & Phelps aforesaid, may buy for said H. D. Bassett, as his agent, as per contract and appointment made between said Jenny and Bassett, of this date.

"Said Jenny & Phelps agree further to manufacture said lumber as per contracts they have made with G. H. Richardson & Co., of Sandusky, Ohio, and with the Columbus Tub and Pail Manufactory of Ohio, and to ship said lumber to the parties named in such contracts, as agreed therein; that of all moneys received for such lumber, the sum of seven 50-100ths dollars shall be paid to said Bassett's order, and the balance that may be paid for said lumber shall be, or may be, paid to the said Jenny & Phelps; which amount shall be in full for their services for receiving, rafting, manufacturing, shipping, and for any and all labor performed by them as in this contract intended. Said logs, and the lumber sawed therefrom, shall be at all times the property of the said Bassett, until he is paid the full sum of seven 50-100ths dollars as aforesaid, on each and every thousand of said lumber manufactured as herein agreed.

"Signed in duplicate, in Chicago, on the day and date aforesaid." "H. D. BASSETT." "JENNY & PHELPS."

That under, and in pursuance of the authority conferred upon him by the instrument of writing first above set forth, the said William Jenny, as agent of the said plaintiff, and in his name and behalf, some time in the season of 1858, purchased a large quantity of pine saw logs, in or upon the banks of Black River, in the county of St. Clair, and at a distance of forty miles or over from said steam saw mill, and for the purpose of stocking said mill, amounting by measurement to two hundred thousand feet or over, board measure, and of the value of one thousand two hundred dollars or over; which logs were paid for by the plaintiff.

That said Jenny & Phelps, in pursuance of their agreement with the plaintiff above set forth, received the logs at the place where they were so purchased, and at their own expense caused the same to be rafted in the waters of Black River, and floated down the same to the mouth thereof, and from thence down the St. Clair River, and in the direction of the said mill, as far as the city of St. Clair, and about fourteen miles from the place from whence the same were rafted; at which latter place, being in the county of St. Clair aforesaid, on the 13th of November, 1858, said logs were seized by the defendant Cox, who was then a deputy sheriff of the county of St. Clair, by virtue of an attachment issued out of the circuit court for the said county, in favor of the said defendants Armstrong and O'Brien, against the goods and chattels, &c., of the said Jenny & Phelps, and were afterwards replevied by the plaintiff.

The plaintiff having made his motion to set aside the said nonsuit, the circuit court, after hearing the arguments of counsel, reserved for the opinion of this court the following question: Had the plaintiff under the circumstances so proven, such a right of possession of the property at the time of the commencement of this suit, as to entitle him to maintain his said action of replevin?

L. Bishop, for plaintiff, was stopped by the Court.

W. T. Mitchell, and *W. Grace*, for defendant:

Under our statute, the owner can not maintain replevin unless entitled to immediate possession.— *Comp. L.* § 5009; *Walpole v. Smith*, 4 *Blackf.* 304; *Ingraham v. Martin*, 15 *Me.* 373; *Beebe v. De Baun*, 3 *Eng.* 510; *Chinn v. Russell*, 2 *Blackf.* 172. His right must exist at the time of the taking or detention.— *Gates v. Gates*, 3 *Mass.* 310; *Collins v. Evans*, 15 *Pick.* 63; *Wheeler v. Train*, 3 *Pick.* 255; *McIsaacs v. Hobbs*, 8 *Dana*, 268.

In this case, Jenny & Phelps, not the plaintiff, were the only persons entitled to immediate possession.

CAMPBELL J.:

The construction of the contract between the plaintiff and the firm of Jenny & Phelps is the only matter necessary to be determined. It is very clear that Jenny & Phelps had, under that agreement, no proprietary interest in the logs or lumber. They had no claim of property except in the proceeds after sale. And, being mere agents of Bassett, with an interest which could never attach, even to the proceeds, until they should have completed their labor on the lumber, and made sales, it becomes entirely unnecessary to decide what rights of possession they might have had against Bassett himself, to ensure the completion of their work. Being placed in a position which prevents them from completing it, the contract is, as to these logs, terminated, and Bassett is therefore entitled to recover them. The special purpose for which Jenny & Phelps received them was entirely defeated by the seizure on execution, which made it impossible for them to regain possession, and consequently deprived them of the power to complete the manufacture and sale of the lumber.

It must be certified to the Circuit Court for the county

of St. Clair, as the opinion of this Court, that the plaintiff had such a right of possession as entitled him to recover in the action.

The other Justices concurred.

Samuel N. Rawson v. Isaac Parsons, Jr.

The statute (*Comp. L.* §3436), requiring the circuit judge who tries a cause without a jury to give his decision on or before the first day of the term succeeding that in which the cause was submitted, is directory merely.

Where, in ejectment, a claim is filed under the statute (*Comp. L.* §4608) for the value of improvements made by defendant on the premises in controversy, the case may be tried by the court without a jury, if a jury be not demanded by one of the parties.

Where such claim is filed by defendant, and the plaintiff files none for an estimation of the value of the land had no improvements been made, the jury must estimate the increased value under defendant's claim, and if the verdict be for the plaintiff for the land, the latter will be entitled to judgment for the recovery of the premises, but will be deemed, under the statute, to have abandoned all claim thereto, unless he shall pay the sum so estimated for improvements within a year after the judgment. If the plaintiff would have the jury estimate what would have been the value of the land had no improvements been made, he must file a claim for that purpose before the trial.

Such claim of plaintiff, when filed, is an *essential part of the record*, and must appear therein. It is not sufficient that there be a recital in the entry of judgment that one has been filed.

Where, in such case, trial is had before the court without a jury, the finding of the judge is in the nature, and stands in the place, of a special verdict, and must be filed in writing before any judgment can be rendered.

The plaintiff in such case, when the finding of the judge in his favor upon the title, and also upon the respective claims of the parties, has been filed, may elect to take judgment either for the possession of the premises, subject to the obligation to pay for the improvements, or for the value independent of the improvements. But he can not be permitted, after taking judgment for possession, to abandon that and elect to take judgment for the value.

Heard May 25th. Decided June 2d.

Error to Branch Circuit.

The action was ejectment.

With the plea of the general issue, the defendant filed the following notice:

"Sir, *Take notice*, That the defendant will give in evidence on the trial of this cause, that he has been in actual possession of the premises set forth and described in the plaintiff's declaration, for six successive years (and more) before the commencement of this suit; claiming title by virtue of a sale made by the treasurer of the county of Branch, for the non-payment of the taxes assessed thereon in the years 1841 and 1842. The defendant, therefore, hereby claims compensation for the buildings and improvements on the said premises (in case he fails in his defense to the action, and the plaintiff is entitled to recover possession), and hereby requests that an estimation, by the court or jury, may be made of the increased value of the premises by reason thereof." "E. G. FULLER, Defendant's Attorney." "To ELON G. PARSONS, Esq., Plaintiff's Attorney."

The record returned to this court, after giving the pleadings in the case, and the foregoing notice, proceeds as follows:

"At a general session of the Circuit Court for the county of Branch, held at the court house in the village of Coldwater, in said county, on the 25th day of September, A. D. 1857—Present, Hon. Nathaniel Bacon, Circuit Judge.

"*Isaac Parsons, Jr. v. Samuel N. Rawson. Ejectment.*

"This case having been duly brought on for trial before the court without a jury, and the court having heard the proofs and allegations of the parties, the same is continued for argument.

"At a general session of the Circuit Court for the county of Branch, held at the court house in the village of Coldwater, in said county, on the 30th day of September, A. D. 1858—Present, Hon. Nathaniel Bacon, Circuit Judge.

"*Isaac Parsons, Jr. v. Samuel N. Rawson. Ejectment.*

"Come now the parties, by their respective attorneys, and the issue above joined having been tried and submitted at the September term, 1857, of this court, and due deliberation being thereupon had, it is found and determined by

the court, now here, that the said Samuel N. Rawson is guilty of unlawfully withholding from the said Isaac Parsons, Jr., the premises in the said declaration described as "all that," (&c., 80 acres, more or less) "and that the said Isaac Parsons, Jr., is well entitled to hold the said lands in fee simple, as he hath in his declaration complained. And the court assess the damages of the said Isaac Parsons, Jr., by reason of the matters aforesaid, over and above his costs and charges by him about his suit in this behalf expended, at six cents; and for those costs and charges, to six cents. Thereupon it is considered that the said Isaac Parsons, Jr., do recover against the said Samuel N. Rawson, possession of the premises above described, with the appurtenances, and the damages and costs aforesaid, by the court aforesaid, now here, assessed, with the costs of this suit, adjudged of increase, to be taxed.

"And thereupon, the said Isaac Parsons, Jr., prays the writ of the People of the State of Michigan, to be directed to the sheriff of the county of Branch, to cause him to have possession of his said lands and premises, with the appurtenances, and it is granted to him.

"And the said Samuel N. Rawson having filed his claim in writing to (for) compensation for buildings and improvements upon the premises, and a request for an estimation of the increased value thereof by reason of his having been in actual possession of the premises for six successive years, and more, before the commencement of this suit, claiming title by virtue of a sale made by the auditor general for non-payment of taxes: And the court having found and determined that the said Samuel N. Rawson had been in actual possession of the said premises for six successive years, claiming title as aforesaid, assess the increased value of the premises, by reason thereof, at the sum of seven hundred dollars. And the said Isaac Parsons, Jr., having filed his request in writing that the jury also estimate what would have been the value of the premises at the time of the trial

aforesaid, if no buildings had been erected, or improvements made thereon, and the court now here find and assess the value of the premises, at the time of the trial as aforesaid, had no buildings been erected or improvements made upon the said land, at the sum of eight hundred dollars: And the said Isaac Parsons, Jr., now at this time having elected, and now enters his election of record, to abandon, and does abandon, the premises hereinbefore described to the defendant Samuel N. Rawson, at the value thus estimated by the court:

"It is thereupon considered and adjudged by the court now here, on motion of Elon G. Parsons, for the said Isaac Parsons, Jr., that the said Isaac Parsons, Jr., do recover of the said Samuel N. Rawson, the said sum of eight hundred dollars, the value of the land described in said declaration, so estimated as aforesaid, with his costs and charges by him about his suit in this behalf expended, to be taxed; and that the said Isaac Parsons have execution thereof."

The defendant removed the cause to this court, and assigned errors as follows:

1. That the said cause was tried by the court without a jury, and submitted at the September term, 1857; and it does not appear that the decision of the court was given in writing, and filed with the clerk on or before the first day of the term succeeding that in which the cause was submitted, but was made orally, on the last day of the September term, 1858, when several terms had intervened since such cause was tried.

2. That it appears by the said record that the said cause was tried by the court without a jury, and the decision of the court was not given in writing, and filed by the clerk, as required by law.

3. That, by the record aforesaid, it appears that there are two distinct judgments in favor of the said Isaac Parsons, Jr., *v.* the said Samuel N. Rawson: first, to recover possession of the premises described in the said declaration,

and costs; and, second, to recover the sum of $800, the value of the land had no improvements been made thereon, with costs of suit (the said Parsons having first elected to recover possession of said premises, and then elected to take judgment also, for the value therof, &c.).

4. That by the record aforesaid, it appears that the court, and not "the jury," estimated what would have been the value of the premises at the time of trial, if no buildings had been erected, or improvements made thereon, &c.

E. G. Fuller, and *T. M. Cooley*, for plaintiff in error.

C. Upson, and *Jerome & Swift*, for defendant in error.

CHRISTIANCY J.:

The first error assigned in this case raises the question, whether, under sec. 2 of the act of February 14th, 1853 (*Comp. L.* §3436), the decision of the court can legally be given after "the first day of the term succeeding that in which the cause was submitted."

We are all of opinion that this provision, as relates to the time within which the decision shall be given and filed, is directory merely. It imposes a duty upon the judge: but as the parties have no control over his action, it would be a harsh construction which should deprive them of the fruits of the litigation because the judge fails to decide by a particular day. This provision has been practically construed as only directory, in most, if not all, the circuits.

The first error, therefore, is not well assigned.

The fourth assignment of error raises the question, whether the first section of the act of February 14th, 1853, providing "that all questions and issues of fact shall be tried by the court unless a jury be demanded by one of the parties," applies to a case of this kind, where a special provision had been made by an earlier statute for a particular kind of verdict, and, in language, applicable only to a

trial by jury. We think the act of 1853 does apply to cases of this kind as well as to others, and that, in this particular case, the finding of the court upon the facts takes the place of the verdict; and no jury being demanded by either party, it was competent for the court to try the questions of fact involved in the case.

The second and third assignments of error turn upon the construction to be given to the record.

This record is so confused and imperfect as to render it difficult, if not impossible, to determine what proceedings actually took place, or the order in which they occurred. But as neither party has alleged diminution, or complained of any deficiency of the return, we must consider the return as containing the whole record, and as exhibiting precisely the form of the original.

Doubtless we should liberally exercise the power of amendment in such a case, or entirely disregard such errors as are capable of amendment here, if we could discover what those amendments should be. But if we can find nothing to amend by, and can not ascertain what judgment the court intended to give, or ought to have given, the power of amendment will have nothing to operate upon.

The statute applicable to actions of ejectment of this particular class, is found in Compiled Laws, pp. 1238 and 1239 (§§ 4603 to 4606), and from these provisions (in connection with the act of February 14th, 1853, referred to) it is clear,

1st. That to entitle the defendant in this action to an allowance for buildings and improvements, he must, before trial, file his claim therefor in writing, with a request for an estimation by the jury of the increased value of the premises on that account.

2d. If he file no such claim and request, the verdict will be general, and the plaintiff, if he succeed, will be entitled to judgment for the recovery of the premises as in other cases.

3d. If he does file such claim and request, and the plaintiff files none for an estimation of the land without improvements, the jury must estimate the increased value under defendant's claim, and if their verdict be for the plaintiff for the land, the latter will be entitled to judgment for the recovery of the premises. But in such case, unless the plaintiff shall, within a year from the rendition of the judgment, pay to the clerk of the court, for the use of the defendant, the sum so found for buildings and improvements, he will be deemed to have abandoned all claim to the land; and no writ of possession will issue till such sum is paid.

But, 4th. The plaintiff, when defendant has filed his claim and request, may also, before trial, file a request in writing that the jury would also estimate what would have been the value of the premises at the time of the trial, had no buildings been erected, or improvements made, or waste committed. And when both requests have thus been filed, it is the duty of the jury, when the trial is by jury, to make both these estimates, and state them in their verdict; and if the trial is by the court without a jury, the finding of the court upon the facts must take the place of the verdict, and be just as explicit and complete in itself, and as distinct from other proceedings in the cause, as the verdict of the jury is required to be.

5th. The finding of these facts, or the making of the estimates, though a part of the verdict, is distinct from, and necessarily precedes, any judgment whatever. After the verdict (for it is but a verdict whether found by the court or the jury), if it be in favor of the plaintiff for the premises, he has the right, at the same or the next subsequent term, to make his election on record to abandon the premises to the defendant at the value estimated (under his request) by the jury; and in case he so elects, judgment is to be rendered against the defendant for the sum

so estimated, with the costs of suit. If he do not so elect within the prescribed time, the case will stand as if he had filed no request, and judgment may be entered against the defendant for the recovery of the premises, though subject to be defeated by the non-payment, within the year, of the sum assessed for buildings and improvements.

But in no case can the plaintiff be entitled to more than one judgment, or one election, in the cause.

As so much, therefore, depends upon this finding or verdict, it is of the utmost importance, when found by the court, that it should be clear and complete in itself; distinct from the other proceedings in the cause, and in such form that, when examined in the court below, or in this court, it may at least be possible to ascertain where it begins and where it ends; and not so blended and intermixed with mere clerical entries, conclusions of law, and matters of recital, as to destroy its identity, or render it unintelligible. We express no opinion as to the necessity of having the "decision" of the court, in other and ordinary cases tried by the court under the second section of the act of February 14th, 1853, reduced to writing and filed with the clerk; though it can not be doubted it would prevent confusion, and greatly conduce to certainty in all cases. But we are all of opinion that a special finding or verdict, by the court acting in the place of a jury, in a case like the present, must be reduced to writing and filed with the clerk, before any judgment can be rendered upon it. It is plain from the face of this record that this was not done in this case, and that there has been no such verdict, or finding, as the statute contemplates in ejectment cases of this kind, but that the whole was made by the clerk, and in so confused and unintelligible a manner as to be incomprehensible. No more conclusive reason need be given for requiring this special finding to be in writing than is furnished by this record. Had it been in writing

in this case, much of the obscurity in which it is now involved would have been avoided.

The second error, therefore, is well assigned.

But while the record fails to show some things which ought to appear, it shows two distinct judgments entered in the case when it ought to have shown but one. The first is for a recovery of the premises, with nominal damages, and six cents costs, followed by an award of a writ of possession. This seems to have been given directly after the general finding upon the issue of not guilty, and before any finding under the request of either party. Then follows the recital that such requests had been made, and the finding upon them. Next, the statements of plaintiff's election to abandon to defendant, and to take judgment for the value; and, finally, a judgment for the value, with costs to be taxed.

Now, independent of the question whether the finding or verdict should have been in writing, the question arises which, if either, of these judgments was intended to be given by the court, and is to be treated as a judgment. It is possible that if the record contained a request in writing by the plaintiffs, duly filed before the trial, for the estimation in his behalf, and it also appeared that such estimate was properly made, as a part of the verdict or finding, we might reject the first judgment as a nullity—as mere surplussage. But there is no record evidence that any such written request was ever filed by the plaintiff; much less that it was filed before the trial. This request constitutes as essential a part of the record in such a case as the declaration or plea. The verdict of the jury, or the finding of the court, must be founded upon it, and is unauthorized without it.

That on the part of the defendant seems to have been duly filed with his plea, and appears in full in the record; but none appears on the part of the plaintiff. There is a recital in what is claimed as the decision or finding of

the court, that such written request had been filed, though it does not state when. But it is not the office of this verdict, or finding of facts, to find or state the pleadings; and such recital is no better evidence of its existence, or its contents, than if stated in the verdict of a jury. A verdict could hardly supply the want of a declaration, or make the record good without it, unless, possibly, where there should appear evidence of its prior existence and subsequent loss. There being, therefore, no evidence of any such claim filed by the plaintiff, the first judgment would be the only one authorized, if any, and would terminate the plaintiff's right of election. But, judging from the record, it is impossible to say that the court intended to give one of these judgments more than the other. The only inference of intent, judging from the recitals, is that both were intended.

The judgments must be reversed, and a new trial granted.

The other Justices concurred.

The Michigan Insurance Co. v. Porter Kibbee and Others,

AND

Porter Kibbee and Another v. Joseph Thompson and Others.

By a contract between P. and H. C. K. of the one part, and T. of the other, the former agreed to sell to the latter certain mill premises at $7500; and there being a mortgage upon a portion of said premises, and a decree in chancery obtained for the sale of said portion to satisfy another mortgage, for which mortgage and decree the holder had proposed to take $6000 in certain payments, the K.s authorized T. to pay that amount therefor towards the $7500 to be paid for said premises, and T. agreed to pay the same, but was to be at liberty to make any other arrangement with the holder he saw fit, but only $6000 to apply on the purchase; and if said mortgage and decree could not be obtained for $6000, then T. was to attend the sale to be made under said decree, and bid off the premises, and if obliged to bid more than $6000, to prevent any other person becoming the purchaser, then the K.s were to provide for the overplus—and $1500, the balance of the $7500, was to be paid by T. to the Michigan Insurance Company, within six months after he should acquire title to said premises,

KIBBEE *v.* THOMPSON.

to satisfy a subsequent mortgage on said premises held by said Company. By said contract, it was further provided that T. should be put into immediate possession of the said premises, and should deposit $800 with a third person, to be forfeited in case of non-performance on his part—both of which were done. The K.s, on T. performing, were to convey to him the premises. On a bill filed by the Insurance Company to foreclose their mortgage, and a cross bill filed by the K.s setting up these facts, it appearing that T., jointly with others, but in his name, had bought said first mortgage and decree, paying therefor over $6000, but without apprising the K.s of the necessity of paying more, or giving them an opportunity of negotiating for said claims, and T. had taken up the $800 so deposited by him, on the supposition, as he states in his answer, that the sale would be completed according to the contract, and the K.s, at the same time, with his assent, deposited quit-claim deeds of the premises, to be delivered to him when the mortgage and decree were discharged, and the persons buying with T. had knowledge of this contract at the time;—*Held*, That, although they went on afterwards and caused the premises to be sold to themselves, under the decree, for an amount that, with said mortgage, would make $6000, leaving about $1200 still back on the decree, the mortgage of the Insurance Company was still a lien on the premises, and T. and his associates were liable for the payment of the amount thereof, and that they should be enjoined from collecting the balance of the decree against the K.s.

T. was at liberty, under this contract, to negotiate for the first mortgage and decree as he saw fit, with the privilege of applying them at $6000 and no more, on his purchase—whatever might be the amount paid. If he saw fit, or thought it for his interest, to pay more, rather than allow sale to be made under the decree, the loss or the speculation—whichever it might prove—was his own.

In their answers to these bills, T. and his associates set up, as a defense, that the K.s had title only to an undivided two-fifths of the premises. The evidence as to the state of the title, was not satisfactory; but this objection appearing to be now taken for the first time, and being inconsistent with the acts of the defendants, and with their answers, which averred a willingness and readiness to perform T.'s engagements therein, claiming only that the whole amount paid for the first mortgage and decree should be applied on the purchase price of the premises,—*Held*, That this defense could not avail defendants.

The undertaking of T., in this contract, to pay the $1500 to the Insurance Company, was independent, except in point of time, of the engagement to take up the other mortgage and decree, and did not depend upon the amount he might have to pay to obtain such other mortgage and decree.

Heard December 3d and 4th, 1858. *Decided June 3d.*

Appeal from Macomb Circuit in Chancery.

The Michigan Insurance Company filed their bill of complaint against Porter, Henry C., and Fanny Kibbee, Joseph Thompson, and Asa E. and Robert Hart, setting forth: That on the 9th day of June, A. D. 1851, Porter and H. C. Kibbee were indebted to complainants in the sum of $5116.23, upon a promissory note, to secure the payment of which, they, together with Fanny the wife of said Porter, executed to complainants a mortgage on the mill lot of

the Kibbees, in the village of Frederick, on Clinton River, and a lot adjoining in the bend of the river: That on June 10th, 1851, to secure the payment of the same moneys, the defendant Porter Kibbee and wife gave complainants another mortgage, upon other lands particularly described in the bill; and the two mortgages were properly acknowledged and recorded: That $1586.38 is now due on these demands: And that Thompson and the Harts claim some interest in the premises.

The bill then proceeds to state that, on January 5th, 1852, P. and H. C. Kibbee entered into an agreement in writing with Thompson, as follows:

"*This Agreement*, made and entered into this 5th day of January, A. D. 1852, between Porter Kibbee and Henry C. Kibbee, of Mt. Clemens, in the state of Michigan, of the first part, and Joseph Thompson, of Bridgeport, Connecticut, of the second part, *Witnesseth*,

"That the said parties of the first part, in consideration of the covenants and agreements hereinafter contained, hereby agree to sell unto the said party of the second part all those pieces and parcels of land bounded, known, and described as follows, to wit: All that certain piece or parcel of land lying and being in the town of Clinton, county of Macomb, and state of Michigan, a certain lot in the village of 'Frederick,' so called, in said town, known as the 'Mill Lot,' and being the same lot on which Kibbee's Mills, so called, are located, which said lot is bounded," &c.

"Also another piece of land lying in said village of Frederick adjoining to and north of the land above described, and lying within and filling the bend of said River Clinton, and bounded," &c.

"Also all other lots and real estate, in and to which the said parties of the first part have any interest in, claim or demand to, lying within the said village of Frederick aforesaid, including also the cooper-shop, dwellings, and grocery

store situated thereon; and also all that part, and no more, of the land known as the Thurston Farm, so called, in said town and county, as lies south of the 'ravine,' near the dwelling of Calvin Emerson, including the dam thereon, containing about twenty-eight acres, whether the same is included in said village plat or not,—for the sum of seven thousand five hundred dollars.

"And the said party of the second part, in consideration of the premises, hereby agrees to pay for said premises the sum of seven thousand five hundred dollars as hereinafter mentioned.

"And whereas a portion of said real estate was conveyed by two indentures of mortgage, by the said parties of the first part, to David N. Tuttle, of Buffalo, New York, one of which said mortgages was executed by the parties of the first part, October 16th, 1849, to secure the payment of the sum of three thousand dollars, and appears of record in the Registry of Macomb county aforesaid, in Liber M. of Mortgages, folios 1, 2, and 3; the other indenture of mortgage being executed by the parties of the first part and also by Fanny S. Kibbee, the wife of said Porter Kibbee, June 14th 1850, to secure the payment of the sum of three thousand five hundred and forty dollars, and appears of record in the Registry aforesaid and same liber, at folio 279, upon which last mortgage the sum of $540 has been paid; and whereas the said David N. Tuttle has filed his certain bill of foreclosure in the Circuit Court of the United States, for the District of Michigan in Equity, and has obtained a decree for a sale of a portion of said premises by virtue of the mortgage last above mentioned, and the said David N. Tuttle has proposed to take and receive, in full satisfaction and discharge of his said mortgages and decree, the sum of six thousand dollars, as follows: Three thousand dollars to be paid when said proposition shall by the parties be accepted, and the agreement therefor concluded; the balance (three thousand dollars) to be paid in three years as follows,—

Five hundred dollars each and every six months thereafter, with interest on the amount unpaid annually, and payable at the village of Mt. Clemens aforesaid at the rate of seven per cent.; and which said sum of six thousand dollars the said party of the second part hereby agrees to pay, and the same is to apply to that amount on the purchase price of the whole of said property, and he is at liberty to make such other agreement and terms with said Tuttle as he, the said party of the second part, may think proper, but the sum of six thousand dollars only, is to be allowed as aforesaid for the discharge and release of said mortgages, but the said six thousand dollars is to be paid by said party of the second part, provided said mortgages can not be released on better terms for a less sum.

"And whereas 'The Michigan Insurance Company of Detroit' also hold two other certain indentures of mortgage on said property, one of which is executed by the said Porter Kibbee and his wife, dated June 10th, 1851, to secure the payment of certain demands and debts therein mentioned, and is recorded in the Registry aforesaid, in Liber N. of Mortgages, folios 96, 97, and 98; the other mortgage executed by the parties of the first part hereto and the said Fanny S., wife of said Porter, also dated June 9th, 1851, to secure the payment of certain demands and debts therein mentioned, and recorded in Liber N. of Mortgages, folios 84 and 85, in the Registry aforesaid; and the said Michigan Insurance Company having agreed to accept the sum of one thousand five hundred dollars in full satisfaction and release of said premises hereby agreed to be conveyed, the said party of the second part hereby agrees to pay the same with interest, six months from the time when the title to the premises hereby agreed to be conveyed shall become vested in the said party of the second part.

"And it is further hereby covenanted and agreed, in behalf of the said party of the second part, that if the said

mortgages and decree of said David N. Tuttle, hereinbefore mentioned, can not be purchased and released for said sum of six thousand dollars, and a sale shall be made under said decree, that he, the said party of the second part will, at said sale, bid thereat and for said property the sum of six thousand dollars, less the amount due on the first of said mortgages to said Tuttle, if necessary to prevent any other person than the parties hereto becoming the purchaser thereof; and the parties of the first part hereby covenant and agree to provide for, and pay the balance of said decree, and the said first mortgage of said Tuttle, to the intent and purpose in that event that the amount to be paid by the said party of the second part shall not exceed seven thousand five hundred dollars, payable at the time and upon the terms and conditions the same as if the said mortgages and decree had been released and discharged as hereinbefore set forth.

"And the said parties of the first part hereby put and place the said party of the second part in the full and complete possession of all and every the said premises and the appurtenances thereto, in contemplation of and in part performance of this agreement.

"And it is further agreed and understood that in case of the destruction of the flouring mill on said premises by fire, or should the mill dam or bulkhead on said premises be carried away without the fault of the said party of the second part (and he using due care and diligence) before the consummation of said sale, then this agreement is to be wholly void and of no effect.

"And the said parties of the first part hereby covenant and agree that upon the performance by the said party of the second part of the covenants on his part to perfect said sale, they will make, execute, and deliver to the said party of the second part, and his heirs, good and sufficient deed or deeds of conveyance for said premises, the said party of the second part first executing and delivering such in-

denture of mortgage and other security as may be necessary for securing the balance of the purchase money of said premises remaining unpaid.

"And for the faithful performance of this agreement on the part of the party of the second part, he has deposited with the third person holding this agreement, the sum of three hundred dollars, for the purpose of paying for the use of said mill by the party of the second part, if said sale is not perfected, and being for three months, but should it be for a less time, owing to the destruction of said mill, bulkhead, or dam, then in that proportion; and if said sale shall be perfected, then said three hundred dollars shall be applied to the payment of said purchase price; and further, that the said party of the second part covenant and agree to pay to the said parties of the first part, in case of any default on his part in any of the covenants and agreements on his part to be kept and performed herein, the sum of one thousand dollars as fixed and settled damage by the parties.

"Witness whereof, the aforesaid parties have hereunto set their hands and seals, this 5th day of January, A. D. 1852." (Signed) "PORTER KIBBEE. [L. S.]" "(Signed) HENRY C. KIBBEE. [L. S.]" "(Signed) JOSEPH THOMPSON. [L. S.]"

"Signed, sealed and delivered in presence of "D. C. HOLBROOK." "ALEX. DAVIDSON."

The bill then alleges that, in pursuance of this agreement, Thompson entered into the premises described, and the sale contemplated thereby was fully perfected: That Thompson became thereby the owner of said premises, subject to the payment of $1500, and interest from the date of said agreement: That the Harts have become jointly interested with Thompson in said premises, with full knowledge of the agreement: And prays the usual decree for payment, and sale, &c., in default thereof.

The Harts answered, denying that Thompson had any interest in the premises described in complainants' mort-

gages, and claiming title in themselves to those covered by complainants' second mortgage, and to so much of the land covered by the first mortgage, and known as the Thurston Farm, as lies south of the ravine, near the dwelling of Calvin Emerson, including the dam thereon, containing twenty acres. They admit that Thompson and the Kibbees entered into the agreement set out in the bill, and that Thompson entered into the premises under the same, but deny that the sale thereby contemplated was ever perfected, or that Thompson ever owned, or claimed to own, the premises described in the agreement. They deny that Thompson became liable to pay said $1500 and interest, except upon condition that he could purchase the Tuttle mortgage and decree for $6000; or if he could not, then, if the Kibbees should pay off and discharge the balance thereof which might remain after Thompson should have bid at the sale $6000, less the amount of the first mortgage from the Kibbees to Tuttle. They claim title in themselves to the premises described in the Tuttle mortgage, by virtue of a deed executed by Geo. G. Bull, Master in Chancery of the Circuit Court of the United States for the District of Michigan, dated January 30th, 1852, and given on a sale made under the Tuttle decree; and also by virtue of a deed given by Thompson to A. E. Hart, October 4th, 1852. And they aver that Thompson performed the agreement with the Kibbees, on his part, according to the true intent and meaning thereof, and claim for themselves all benefit and advantage thereof.

Thompson also answered, denying any present interest in the premises, or that he is, or ever was, the owner thereof; or that he ever owned, or claimed to own them, subject to the payment of $1500 to complainants: Avers that, in pursuance of his agreement with the Kibbees, he did appear on the day on which the premises were sold under the decree, and bid $2300, which was $6000, less the amount due on the first Tuttle mortgage; and notified the Kibbees in writing, of his so bidding, on February

14th, 1852, and requested them to provide for, and pay, the balance due on said first mortgage. (A copy of this notice is given in the opinion.) He avers also that he could not purchase said decree and mortgage for $6000, and that he paid $7400, or thereabouts, therefor; that the Kibbees have neglected to provide for, and pay, the balance over the $6000, as they were in equity bound to do; and submits that he is not bound to pay complainants the $1500, and interest, or any part thereof.

The Kibbees filed a cross bill against Thompson, the Harts, and the Insurance Company, setting forth that prior to January 18th, 1852, they (the Kibbees) had been the owners of the property described in the mortgages, and had been engaged in the manufacture of flour; that they had become involved and embarrassed in their circumstances, and in order to secure their indebtedness to Tuttle, they executed and delivered to him the two mortgages described in the Thompson agreement hereinbefore set forth: That Tuttle filed his bill in the Circuit Court of the United States for the District of Michigan, March 28th, 1851, to foreclose his mortgage dated June 15th, 1850, and decree of foreclosure and sale was afterwards entered thereupon: That thereafter, and on the 5th day of January, 1852, they entered into the agreement with Thompson set out in the original bill: That such agreement was immediately deposited with William B. Wesson, as the third person to hold the same, and Thompson at the same time deposited with Wesson the $300 mentioned in the agreement, to be held by Wesson until the sale should be perfected, and Thompson immediately entered into possession of the premises: That immediately thereafter Thompson assumed exclusively the right to negotiate with Tuttle for his decree and mortgage: That the negotiation was conducted through the Harts, Thompson remaining in Detroit, and Tuttle being in Buffalo, and the two having no direct communication with each other. And they charge that, instead of complying with the terms of the offer of

sale made by Tuttle to the Kibbees, Thompson, for reasons unknown to them, failed and neglected to purchase the Tuttle mortgage and decree for $6000, as he might have done: That Thompson, as he had a right to do, made such other terms and agreements as he thought proper; but they allege that it was a great object for Thompson to purchase said mortgage and decree, even at $10,000. And they claim that Thompson, having made such terms as he saw fit in this purchase, as he might under said agreement, instead of having them released, as he should have done, took an assignment of said mortgage and decree without their consent: That the principal object they had in making the agreement with Thompson was to be immediately released from their debts and liabilities: That Thompson, instead of paying Tuttle down, as Tuttle's offer contemplated, paid but a small portion, and the balance remained unpaid for a term of years.

That on the 20th of January, 1852, Thompson told them he had paid said decree and mortgage in accordance with said agreement, and thereupon they gave him quit-claim deeds of the premises mentioned in said agreement: That Wesson then re-paid Thompson the $300 so deposited with him, and as Thompson had not then received from his agent at Buffalo the release of said mortgage and decree, the quit-claim deeds were deposited with Wesson, to be held by him until the papers should arrive, and the mortgage and decree be actually discharged of record: That, notwithstanding this, Tuttle having advertised under his decree, and Thompson having wrongfully taken an assignment of the decree and mortgage, the latter persisted in making sale under the decree, though they (the Kibbees) notified the master in writing that the decree and mortgage were paid, and objected to the sale: That Thompson, for himself and the Harts, who are averred to have been equally interested with Thompson in said agreement, bid at such sale $2300, and the premises were struck off to them for that sum, a deed given, and a report of the sale made by the

master, showing a balance still due from the Kibbees of $1205.81; for which Thompson claims execution: That after said sale Thompson served on them a written notice that Tuttle had withdrawn his offer to sell, and requesting them to provide for and pay the balance. And they insist that Thompson, under his agreement, was bound to pay the $1500 and interest to the Insurance Company, but they say that he now repudiates the agreement, and refuses to receive the deeds deposited with Wesson, but he and the Harts still retain possession of the property, to which they claim title only under the mortgage and master's deed: And they pray that the $1500 and interest be decreed still a lien on the premises, and Thompson and the Harts held liable therefor; and that they be directed to release the Kibbees from said mortgage and decree.

The Harts answered this cross bill, denying that the Kibbees were ever the owners of more than an undivided two-fifths of the mill property, and alleging that other persons named are the owners of the other three-fifths. They deny that Thompson assumed the exclusive right to negotiate with Tuttle for his decree and mortgage, as charged by the Kibbees: Admit that they concluded the negotiation for the purchase from Tuttle: Aver that they had frequent communications with Thompson in respect thereto, in which Thompson directed and urged them not to pay Tuttle over $6000: Deny that Thompson failed, neglected, or refused to comply with the terms of his agreement, but aver that he was anxious to make the purchase of Tuttle for $6000. And they say that for a long time previous to said agreement they had been desirous of purchasing mill property in Michigan, and for that purpose made an agreement with Thompson that he should make inquiries for such property; in pursuance of which he proposed to them to purchase with him the mill property in question: That the Kibbees represented to Thompson that they were the owners of a complete title to said mill property, and they (the Harts)

assented to the purchase thereof at $7500: That in pursuance of the agreement between Thompson and the Kibbees they offered Tuttle $6000 for his mortgage and decree, but he refused to sell at that price, and said he had withdrawn the offer he had made: That they then bought of Tuttle for the full amount due him, though urged by Thompson not to do so: That the assignment of the decree and mortgage was made to Thompson for the convenience of business, he being then in Michigan. Deny that the premises are worth more than $7500. State that they paid Tuttle $1500 down, with short credit for the balance, all of which, except $200, has been paid. That they got the best terms they could from Tuttle, but were obliged to pay more than they would have been had the Kibbees not interfered with the sale under the decree, and procured a postponement thereof from January 2d, 1852, when it was first advertised to be made, contrary to the interests of Tuttle: They deny knowledge of the quit-claim deeds from the Kibbees to Thompson, but insist, if executed, they did not vest the title in Thompson: Aver that the $6000 bid on such sale, less the amount due on the first Tuttle mortgage, was bid in accordance with Thompson's agreement, and claim the balance reported by the master as due on the decree.

They claim that in purchasing of Tuttle they did not act as agents for Thompson, but used their own money, and Thompson had no right to discharge the decree and mortgage, except with their assent. Admit that Thompson took and retained possession of the premises until October 4th, 1852, but since that time they have been in possession as of their own property, and not in joint interest, or as partners, with Thompson. Deny that they, or Thompson, repudiate his agreement with the Kibbees, but say they recognize the same, and claim that Thompson has performed on his part. Deny that they claim title only under the master's sale, but say they claim under said agreement also; and are willing to pay for the premises $7500, less

the amount paid Tuttle. Allege that Tuttle, up to the time when the Kibbees procured a postponement of the sale under his decree contrary to his wishes, was willing to take $6000, as he had offered, but that he then withdrew his offer, and, through Stevens, his agent, notified H. C. Kibbee of such withdrawal, and both Thompson and the Kibbees knew of such withdrawal when they entered into the agreement: That the Kibbees fraudulently concealed the fact that they owned only a two-fifths interest in the premises; and that they, the Harts, paid more for the Tuttle decree and mortgage than all the interest of the Kibbees in the premises was worth.

Thompson also filed an answer to the cross-bill, containing, in the main, the same admissions and averments contained in the answer of the Harts. He denies that he ever informed the Kibbees that he had paid the Tuttle decree and mortgage, though he might have told them he and the Harts had become the owners on 20th of January, 1852. He admits the excution of the quit-claim deeds by the Kibbees as alleged, but denies that they were executed at his request. Says he deposited the $300 with Wesson, as security that he would perform his part of the agreement, and make all reasonable and proper exertions to purchase the Tuttle decree and mortgage for $6000, and, in case of failure so to purchase, the $300 to be held as security for rent: That when he informed the Kibbees of the purchase of Tuttle, it was then considered by all that the purchase would then be completed according to the agreement, and thereupon Wesson returned the $300, with the assent of the Kibbees. Denies that the quit-claim deeds were deposited with Wesson at his request, or that he ever agreed to discharge said decree and mortgage, unless complainants would pay the balance over $6000: And submits that the execution of the quit-claim deeds was not a performance by the Kibbees of the agreement on their part to convey to him.

On the hearing on the pleadings and proofs, the circuit

court made a decree in accordance with the prayer of the bill and cross bill, and Thompson and the Harts appealed.

The testimony in the case was voluminous, and it is not considered necessary, to illustrate the decision, that it be set forth here.

H. D. Terry, and *J. M. Howard*, for appellees.

Eldredge & Hubbard, and *D., S. A. & D. Goodwin*, for appellants.

MARTIN Ch. J.:

The Michigan Insurance Company was the holder of two mortgages executed by the Kibbees, at the time the contract between them and Thompson was executed, and at the same time one David N. Tuttle, of Buffalo, was the holder of two other mortgages upon a portion of the same premises, of prior date to those of the Insurance Company; the second of which had been foreclosed, and the property advertised for sale by a master under the decree of foreclosure. Tuttle had offered to discharge the first mortgage, and the decree of foreclosure, for the sum of six thousand dollars, one-half to be paid down, and the residue in three years, by semi-annual installments of five hundred dollars each, with interest; and the Insurance Company had also offered to take one thousand five hundred dollars in satisfaction and discharge of its mortgages; and these offers of the Company and of Tuttle were known to Thompson, and were the basis of the contract between the Kibbees and him. With such knowledge, and in the hope of securing the benefit of these offers, the contract of January 5th, 1852, was entered into. By it, the Kibbees agreed to sell, and Thompson to purchase, the property covered by the several mortgages, for seven thousand five hundred dollars, which was to be paid in the following manner: Thompson was to pay six thousand dollars to Tuttle, to satisfy his claims against the Kibbees, and one thousand five hundred to the

Insurance Company for a like purpose, and each payment was independent of the other, as we will endeavor presently to show. The six thousand dollars was to be paid to Tuttle, if it should be found necessary to pay so much, to procure the release of his mortgage and decree; but Thompson was at liberty to make any better, or any other, bargain he could with Tuttle; but the sum of six thousand dollars only was to be allowed to him for obtaining the discharge of these debts, whatever might be the price at which he should procure it, and that sum was to be allowed to him in any event. The instant Tuttle was satisfied his debts, the sum of six thousand dollars was paid upon this purchase from the Kibbees, irrespective of the cost to Thompson: the speculation was his, the profit or loss equally accruing to him, as circumstances or his choice might determine. But because Tuttle might not adhere to his offer to discharge the mortgage and decree for six thousand dollars, or Thompson be unable from any other reason to procure such discharge, a provision was inserted to meet such a contingency, and Thompson agreed that in such event, if the property should go to sale under the decree, he would bid at such sale the six thousand dollars, less the amount due on the first mortgage, if necessary to prevent a purchase by any other party; and as this would not be sufficient to satisfy the decree, interest, and costs, the Kibbees were to provide for and pay the balance of the decree and the first mortgage, so that the amount to be paid by Thompson should not exceed seven thousand five hundred dollars, to be payable at the same time, and upon the same terms and conditions, as if the mortgage and decree had been discharged by Tuttle without sale. In other words, the parties contracted that if the property should be sold by the master, Thompson should bid a sum equal to the remainder after deducting the amount of the first mortgage from the sum of six thousand dollars, and as such bid would not satisfy the decree, the Kibbees were to provide for the balance, and were also to take up

the first mortgage, which would remain still outstanding; and Thompson was to pay to them the balance over and above his bid, so as to make the amount of six thousand dollars, in semi-annual installments of five hundred dollars and interest, as it was contemplated and provided he would pay Tuttle if the negotiation was consummated with him, and the sale of the property prevented.

The residue of the seven thousand five hundred dollars —viz. one thousand five hundred dollars—was entirely separated from this transaction respecting the Tuttle mortgage and decree, and dedicated to another use. This sum, Thompson agreed he would pay to the Insurance Company for the satisfaction of its mortgages, six months after he should have acquired a title to the premises; and this he was entitled to have immediately upon his procuring a release of the mortgage and decree from Tuttle, by negotiation, or after the sale under the decree, if a sale should be made, and he bid thereat as provided in the contract. The time, and nothing but the time, for this payment was contingent upon the success of Thompson's negotiation with Tuttle, as, if that was consummated, the title would be presently conveyed to him, while if the property should be sold, and the Kibbees be compelled to pay off the first mortgage, a longer or a shorter time might elapse before they could convey, according to circumstances. This conclusively shows that this payment was in no way contingent upon the amount of the residuum left after paying Tuttle's mortgage and decree.

The Kibbees, on their part, agreed to convey the property to Thompson upon his performance of his covenants; he first executing such mortgage or other security as might be necessary for securing the payment of whatever balance of the purchase money might remain unpaid, which might be more or less according to the result of his negotiation with Tuttle, but would at least cover the ob-

ligation to pay the debt of the Kibbees to the Insurance Company. Thompson was put into immediate possession of the premises, and they are yet held by him or the Harts, under that surrendry, and, as we shall see, under the contract. The contract was deposited with one Wesson by the parties, and Thompson, at the same time, deposited with him three hundred dollars to be paid to the Kibbees as and for rent, if the sale to him was not perfected in the way contemplated in the contract, or to be applied towards the payment of the purchase price; that is, be refunded, or appropriated towards the satisfaction of the decree and mortgage, as the case might be, if the sale should be consummated.

From this synopsis of the contract it appears that Thompson was restricted to two methods of extinguishing Tuttle's claims; first, by negotiation, in which case, whatever he paid, more or less, he was to be allowed six thousand dollars therefor; and, second, by bidding at the sale, in which case the Kibbees were to provide for and pay the balance of the decree, as also the first mortgage; so that in either or any event, in whatever mode Tuttle was satisfied of his claims, and for whatever consideration he released them, such discharge and release should cost the Kibbees no more than six thousand dollars, unless the property should be sold under the decree, and they be compelled to pay to Tuttle, for the discharge of the mortgage, a sum which would increase that amount; in which event, Thompson would only be required to pay them sufficient over his bid to make the six thousand dollars.

He could, in no event, compel them to pay more than six thousand dollars, to discharge the Tuttle claims. They might be compelled, it is true, to do so, but that necessity was left contingent only upon the necessity for a negotiation by them with Tuttle for the discharge of the mortgage, which could only arise after a sale under the

decree; and the right to make this negotiation the Kibbees reserved to themselves.

The amount which Thompson should pay to Tuttle for a release of his decree and mortgage was therefore a matter of indifference to the Kibbees, as was to him the amount which they should pay to Tuttle for a release of the mortgage in case of a sale under the decree.

The Kibbees, in their bill, charge and insist, among other things, that immediately after the execution of the contract, Thompson assumed exclusively the right to negotiate with Tuttle, who resided at Buffalo, and that the negotiation was conducted through the Harts at his request, without any direct communication between him and Tuttle; and they charge, substantially, that he executed the contract upon his part, so far as relates to the Tuttle mortgage and decree, by negotiation, and without sale, although he purchased the same for a sum exceeding six thousand dollars (which they claim was at his peril under the contract), and took an assignment instead of a discharge and release, which they insist was contrary to the terms and true intent of the contract, and was without their consent: That afterwards, he informed them that he had paid the decree and mortgage, and was the holder thereof, and that they thereupon executed to him quit-claim deeds of the premises mentioned in the contract (part only of which were included in the mortgages to Tuttle), at his request and to his satisfaction, and deposited them, with his consent, with Wesson, to be held until the release of the mortgage and decree should arrive from Buffalo, and that, at the same time, Thompson, with their consent, withdrew the three hundred dollars deposit.

The defendants Hart and Thompson, in their answers, admit the contract, and the deposit of three hundred dollars by Thompson, but deny that he thereafter assumed the exclusive right to negotiate with Tuttle for the purchase of the mortgage and decree.

We can discover but one object in making this denial, viz. to establish a standpoint from which to argue that the purchase by the Harts of the mortgage and decree was upon their own account, and independent of Thompson's contract. Its falsity and utter worthlessness for such purpose will be manifested as we examine the other portions of the answers, and the evidence.

In their answers they admit, notwithstanding this denial, that the Harts concluded the negotiation with Tuttle for the purchase of the mortgage and decree, and that during such negotiations there were direct communications between themselves respecting it, and that in all such communications, Thompson directed and urged them to pay but six thousand dollars for such decree and mortgage. And they deny that Thompson failed, neglected, or refused to comply with the terms of Tuttle, as set out in the contract; but they aver that, on the contrary, he was always ready, willing, and desirous of purchasing the mortgage and decree for six thousand dollars. The Harts, in their answer, aver that they had for a long time been anxious to purchase some mill property in Michigan, and had agreed with Thompson to make inquiries for them; and that, in pursuance thereof, he proposed to them to purchase the property of the Kibbees with him, which, after learning the situation of the property, they agreed to do for seven thousand five hundred dollars. Thompson, in his answer, substantially admits the same facts.

The defendants Hart, in their answer, further aver that in pursuance of the true intent and meaning of the agreement of Thompson and the Kibbees, they (the Harts) did propose to Tuttle to purchase from him the decree and mortgage for six thousand dollars; that he declined to sell for that price, and that they then, in pursuance of the contract, bought them for the amount due upon them, and insist that they had a right so to do. But they say that Thompson urged them not to pay over six thousand dollars. They also insist that they paid their own money for the mortgage and decree

and that Thompson has no right or title to them; and they deny that in such purchase they acted as agents for Thompson, but claim that they acted for themselves; and Thompson, in his answer, avers that the Harts paid their own money, against his express instructions not to pay over six thousand dollars.

These are a portion of the inconsistent statements of the Harts and Thompson upon the subject of the purchase and of Thompson's interest; and although these answers are not evidence (the oath having been waived), they may be examined as to the defenses set up, to illustrate the faith with which the defendants, making them, have acted, and with which they contest the Kibbees' claims against them. Here we find them at one time claiming that Thompson had never assumed the exclusive right of negotiation with Tuttle, and yet admitting that he was in constant communication with the Harts, directing and limiting them in such negotiations. We find that Thompson acquired his right to negotiate with Tuttle from the agreement; under which, and in consideration that he would act in the matter for the Kibbees, a contract of sale and purchase was made, and possession of the premises surrendered to him; and we also find that he, through the Harts, attempted to purchase the mortgage and decree for six thousand dollars, and instructed and limited them to the payment of that amount (he evidently understanding the true import of the contract, as also knowing the object and intention of the parties); and we find the Harts insisting that they have executed the contract according to its true intent and meaning, and that they bought under it, asserting no privity of contract with the Kibbees, claiming only to act under Thompson's power, claiming no purchase or assignment from him, but admitting that they agreed with him, upon his representations, to purchase with him the property in question; and after all this, insisting that they bought with their own money, and that Thompson has no right or title to the mortgage and decree, and deny-

ing that they acted as his agents in the purchase, but claiming that they acted for themselves; and from all these inconsistencies, they would seem to seek to have the court deduce the crowning inconsistency that they bought independently of any agreement with, or authority from, any one, and yet bought under the contract in question, according to its terms and import, and in execution of it.

We will now look into the testimony bearing upon this branch of the defense. Holbrook, who drew the contract between Thompson and the Kibbees, swears that immediately after its execution there was considerable conversation between the parties to it as to the best manner of communicating with Tuttle about accepting and closing with his offer to take six thousand dollars for the mortgage and decree, and that Porter Kibbee proposed to go through Canada to see him, but that Thompson dissuaded him from this by telling him that he could telegraph *an agent of his* at Buffalo, which would answer the same purpose, and that Kibbee assented to that arrangment. Tuttle testifies that the Harts attempted to purchase the decree and mortgage for six thousand dollars, and failing in that, they purchased them for seven thousand two hundred and ninety-one dollars, all paid down, or very soon, except three thousand dollars, for which sum he took drafts in five hundred dollars each, payable every six months, precisely as to time, and substantially in manner, it will be observed, in which the three thousand dollars not paid down was to be paid by the terms of the contract; a coincidence remarkable if not designed. He also testifies that the mortgage and decree were assigned by him to Thompson at the request of the Harts, without any reason given for such request, and that they stated to him that they would have an interest with Thompson in the property.

The testimony of these witnesses, coupled with the admissions of the Harts and Thompson, in their answers, evidence a want of candor on Thompson's part respecting the manner in which he intended to conduct the negotiation with

Tuttle, if they do not show a fraudulent design, and intentional concealment of his connection with the Harts; and also establish the fact that the Harts assumed to act under Thompson and his contract, complied with the latter so far as the terms of payment of the three thousand dollars were concerned, and expected to have an interest with him in the property, through the execution of the contract. If then they paid their own money, it was by way of advance to Thompson, and not as an independent investment. When Thompson dissuaded Porter Kibbee from negotiating with Tuttle in person, to secure a release of the decree and mortgage on the most favorable terms to himself and Henry C., he did it, we must presume, so as to secure to himself the exclusive control of the negotiation; and whether with honest or fraudulent intent is immaterial. He represented the Harts as his "*agent*"; it is impossible to conclude from the evidence but that they must have known the terms of his contract, and whether they expected to have an interest with him in the property or not, they must be held to have acted for him, and to have advanced and paid what money they did, for him and not for themselves. Whatever may have been their private understanding, it was concealed from the Kibbees, who knew Thompson only; and he must be considered as having operated through the Harts in the negotiation; and they can claim nothing for themselves adversely to the Kibbees' rights under the agreement. Or, to assume the position of the defendants Harts and Thompson, if Thompson was acting on behalf of them all, they are all bound by his contract, and his acts and declarations; and their acts will be construed as his alone.

The evidence nowhere discloses the fact that Thompson informed the Kibbees of his connection with the Harts, nor does it show that the Harts informed Tuttle, or that he ever knew, that they were negotiating for Thompson, or for him and themselves, or under a contract with the Kibbees; nor does Thompson's name appear to have been used until in-

structions were given that the assignments should be made to him. Thompson, in this particular, appears to have deceived the Kibbees, and, perhaps, to have been himself deceived by the Harts. However, this may be, neither of them can complain if they are held to the consequences of the deception. Thompson can not, if he intentionally concealed from the Kibbees his connection with the Harts, and by their act was obligated with them in a greater amount to Tuttle than he contemplated; and if deceived by the Harts, and their pretence be true that they bought with their own money and for themselves, he suffers nothing, and they will not be permitted to make any thing from their double fraud.

Nor do the Harts and Thompson pretend that the Kibbees ever knew of the existence of the Harts while these negotiations were carried on. Thompson studiously kept them out of sight. Had the Kibbees been told that they were concerned with Thompson in the subject of the contract, additional and perhaps stronger reasons might have occurred to the Kibbees why they should attempt the negotiation with Tuttle personally. The evidence most clearly shows that it would have been better for them had they done so. After the purchase had been made and the assignment of the mortgage and decree had been executed to Thompson, he still kept up in the Kibbees the impression that he had negotiated with Tuttle through his agent, and gave them to understand, according to Wesson's and Holbrook's testimony, that the negotiation had been conducted according to the contract, and took back his deposit of three hundred dollars upon that representation; for we can not suppose it would have been given up otherwise. Thompson also told Holbrook, in the presence of Henry C. Kibbee, that he had purchased the mortgage and decree from Tuttle, but had not yet received his papers, and that he had purchased through *his agent*, but did not know upon what terms. He afterwards, and when the Kibbees deposited deeds of the property with Wesson, and he withdrew his deposit of three hundred dollars, gave

the Kibbees to understand the same thing, and that, as his papers had not then arrived, he could not then deliver to them the release of the decree and mortgage, but that when they did arrive the Kibbees were released from their engagements; and to keep up the deception, he also told them that *he* had paid more to Tuttle than he expected; and inquired of Mr. Holbrook, who was present, whether the Telegraph Companies were liable for mistakes. These facts indicate that the defense, so far as regards the rights of the Harts, and their purchase for a sum exceeding six thousand dollars, and their claim for the excess, was either concocted after the negotiation with Tuttle, or was fraudulently designed and contemplated from the beginning, but concealed until after the three hundred dollars could be obtained back, and a title obtained under the master's sale; and however we may regard the transaction as between the defendants, as between them and the Kibbees it was grossly fraudulent.

But this is not all of the inconsistency of these defenses, nor of the conduct of the parties making them. The Kibbees charge in their cross bill, that Thompson, after the transaction with Tuttle had taken place, and he had acquired the mortgage and decree, insisted upon making sale under the decree, against their wishes and objections, and that he and the Harts, bid at such sale for the property two thousand three hundred dollars, and it was struck off to them at that price; upon which they claim that a deficiency of one thousand two hundred and five dollars remains, which they insist upon collecting; and that after such sale Thompson served upon them a written notice informing them that Tuttle had withdrawn his proposition, and requiring them to provide for the balance due on the decree &c.; all which they insist is fraudulent.

These things, the defendants by their answers substantially admit, and do insist upon the benefits of the sale, and claim that the Kibbees should execute the contract as though such sale had been made by Tuttle. The testimony upon this

point shows a most wanton attempt to overreach the Kibbees. Holbrook testifies that when Thompson informed the Kibbees that he had perfected the negotiation with Tuttle, quit-claim deeds of the property were prepared and executed by them, which were examined by Thompson, and the parties then agreed that the deeds should be deposited with Wesson, and the three hundred dollars returned to Thompson; all which was done. That at that time it was stated that Thompson was to have the property sold under the decree, to get title through that also; and it was agreed that he was to be at the expense of that sale. That, Kibbee or Thompson, both being present, stated that when his papers transferring the decree and mortgage came, the Kibbees were released from all their engagements under the contract: That Henry C. Kibbee said they were anxious to avoid all risks on their part of the dam being carried off, and as Thompson had not got his papers, and wanted to get his title under the decree, the deeds were to be deposited with Wesson, and Thompson was to get his money; and Thompson said he wanted a sale under the decree, and as he had not got his papers from Buffalo he could not then discharge the decree and mortgage. Wesson testifies that when the deeds were deposited with him, he asked the parties if the matter was arranged between them, and understood from them that it was. Walker testifies that on the same day, and after the deposit of the deeds with Wesson (for we find from all the evidence that this must be the time), Thompson and Kibbee were in the Bank of the Insurance Company, to arrange the claim of the Company against the property: That he told them the property could be released for one thousand five hundred dollars, or upon Thompson's giving his note for that sum at six months: That a note was drawn in blank, and a release of mortgage executed and placed in the hands of the cashier to be delivered to Thompson when he signed the note. At this time Thompson said he had purchased the property and would sign the note: That

afterwards (and when this afterwards was, will be sufficiently apparent when we consider the conduct of Thompson at and after the sale), Thompson came into the Bank, and said he had concluded not to sign the note. Mr. Bull testifies that on the 30th of January he sold the property under the decree; that Thompson bid it off, and directed the deed to be made to the Harts: That at that time Kibbee asked Thompson if he had an assignment of both mortgages, and that Thompson said he had; that Kibbee then asked him if he was ready to discharge them according to the agreement, and that Thompson evaded an answer, when Kibbee objected to the sale.

This sale, it is manifest, was intended and expected at the time Thompson took up the deposit of three hundred dollars and the Kibbees deposited their deeds of the property, to be at the expense of Thompson, for the purposes of his title, and in no way connected with, nor to affect, the contract, or the rights of the parties; at any rate, such were the Kibbees' expectations, based upon Thompson's representations and acts. His whole course at that time, his conversations and statements to them, to Holbrook and Wesson, and his arrangement with Walker, can be explained in no other way than that it was understood the contract was in reality executed by both parties, so far as the extinguishment of Tuttle's claims and liens were involved. Certainly the Kibbees so understood it, and had a right to understand it, and if Thompson did not, it is because he was maturing his fraudulent schemes upon them. Not until the time of the sale, so far as the case shows, had the Kibbees any suspicion, or reason for suspicion, that they were in danger of being overreached.

Immediately after the sale, Thompson served the notice upon the Kibbees referred to in their bill, and admitted in the answer. This notice sufficiently explains why he informed the Insurance Company that he had concluded not to sign the note for one thousand five hundred dollars,

and fully reveals the fraudulent designs of himself and the Harts respecting the Kibbees in their misfortunes. It is as follows:

"*Mt. Clemens*, February 4th, 1852.

"To PORTER KIBBEE and HENRY C. KIBBEE: Gents,—You are hereby notified that I have been unable to purchase or obtain a release of the two mortgages executed by you to David N. Tuttle, and referred to and specified in a written contract entered into between you and me on the 5th day of January, 1852, the said David N. Tuttle having withdrawn his proposition in said contract mentioned, and having refused to assign or release the said mortgages for the sum of six thousand dollars. You are further notified that in pursuance of said contract, I attended at the time and place when and where the premises in the said mortgage described were advertised for sale under and by virtue of the decree in said contract specified and mentioned, and at said sale did bid for said premises in said decree mentioned, the sum of two thousand three hundred dollars; which sum of two thousand three hundred dollars was the amount of six thousand dollars less the amount due on the first mortgage by you executed to said David N. Tuttle. You are therefore hereby further notified to provide for and pay the balance remaining over on said decree, and the amount due on said first mortgage."

It is unnecessary to recapitulate the evidence already referred to, to show that this notice is false in letter and false in spirit; that it could only have been devised for the purpose of fraud; and that the claim for payment of the excess over six thousand dollars, paid in procuring the decree and mortgage, is founded in fraud also. If these things evidence good faith, and an honest intention to execute the contract, and are consistent with honesty and fair dealing we can imagine no case where fraud, as a fact, can be proven, or where equity will withhold its aid to enforce iniquitious demands.

It will be observed, that in this notice Thompson formally informs the Kibbees that Tuttle had withdrawn his offer to take six thousand dollars for the decree and mortgage, and he and the Harts allege in their answers, and insist as a ground of equity, that it was entirely through the perversity of Henry C. Kibbee in forbidding the sale on the 2d of January (three days before this contract was executed) that they failed to procure the discharge of the decree and mortgage for six thousand dollars; and they claim as a result that they were therefore justified in paying seven thousand three hundred dollars, and in insisting that the Kibbees shall refund to them the excess. But they also aver in their answers that the contract, which was made on the 5th of January, was made with full knowledge on the part of Thompson of what Kibbee had done, and that the offer of Tuttle had been, in consequence, withdrawn, and that no offer of Tuttle then existed. This admission of the answers throw light upon the character of the notice, and if such be the fact, it fortifies the position we have already assumed, that Thompson took his chances under the contract, hoping, and perhaps expecting, that he could induce Tuttle to renew it, but in any event running the risk of the speculation; and clearly under such circumstances as precludes any claim of bad faith on the part of the Kibbees, from which he and the Harts can claim any equities to themselves.

Another ground of defense remains to be noticed, viz.: that the Kibbees represented themselves to Thompson as having good title to the premises, and that, in fact, they had not; and that the deeds deposited with Wesson, for this reason, do not satisfy the contract. This defense is inconsistent with the other parts of their answers, and is wholly unsustained by the evidence. At the time Thompson withdrew the deposit of three hundred dollars, which could only have been withdrawn upon the assumption that the contract, so far as related to Tuttle's claim, had been

executed, deeds for the whole property were deposited with Wesson for Thompson, to remain until the release should be produced. Thompson at that time admitted that the contract was performed on their part thereby. On the the same day, and before the deposit of the deeds (as we infer from the testimony of Wesson and Holbrook), they were examined by Thompson in Holbrook's office, and their deposit was agreed upon. The Kibbees expressed their anxiety to perform all that could be required of them, and stated the contents of the deeds; and one of them (Porter Kibbee) explained to Thompson the condition of the different parcels. It was then, and upon that information, arranged that Thompson should have the property sold under the decree, to get title through that source also, but at his own expense. These facts, and others which have been already adverted to, are hardly consistent with the assumption that the Kibbees falsely represented the title, or that Thompson was ignorant of its true condition, whatever that may be. The answers also show that this defense is not made in good faith, but is a mere "make weight." The Harts admit that Thompson disclaims these deeds because the complainants have not provided for and paid the balance of the decree and mortgage, and they offer yet to pay any balance that may be found due from them, after allowing them the seven thousand three hundred dollars for their purchase, but no pretence is set up of a disclaimer because of defect of title; and they continually insist upon a claim of the title by virtue of the agreement. Thompson also admits that he disclaims the deeds, and assigns a like reason, "because complainants have not fulfilled their covenants" in providing for or paying the balance of the six thousand dollars over and above the sum bid by him at the foreclosure sale. And this is the only reason really assigned for refusing to accept them. He also insists upon the agreement, and the title under it, and avers, as do the Harts, that he has ever been ready

and willing, and he offers, to pay to complainants the balance of seven thousand five hundred dollars remaining unpaid, after deducting therefrom the amount paid Tuttle for the decree and mortgage. Under this kind of defense, and this evidence, it is of little moment what the title of the complainants was. From the evidence of title, we have no satisfactory information respecting it, but we do know that Thompson was informed respecting it, and that all the defendants still insist upon and claim under the agreement, and are still willing to perform it on their part, if they can draw out of the complainants the excess above six thousand dollars which they fraudulently paid Tuttle for his claims. Under these circumstances we regard this defense as fictitious, and unworthy of serious consideration.

Thompson and the Harts must either repudiate the contract altogether, or execute it — they can not claim rights and benefits under it, and repudiate it at the same time.

From a consideration of the whole case we are satisfied that Thompson pursued neither of the two modes contemplated in the contract for the extinguishment of Tuttle's claims; that the Harts acted with him, and are bound by his contract and acts and declarations, as well as he by theirs, and that they have no rights independent of his, superior to those he can assert; and that the whole transaction has been grossly fraudulent towards the Kibbees.

By the purchase of the decree and mortgage they deprived the Kibbees of a right, reserved by the contract, to negotiate with Tuttle, and provide for the payment of the first mortgage, and the balance of the decree remaining after Thompson's bid, if a sale by Tuttle should take place — a power which, in their embarrassed condition, might be valuable to them; but by that purchase they put themselves in the place of Tuttle, and in a condition to release the decree and mortgage for the six thousand dollars. The power to negotiate, which the Kibbees reserved, so as to procure the release for as small a sum as possible if the

property were sold, can now be exercised so that the contract shall be executed according to its true spirit; the will which it was feared Tuttle might not exercise, Thompson and the Harts now control, and they must be held to perform that which they contracted to procure Tuttle to perform, so long as they have voluntarily placed themselves, and that by their own fraud and bad faith, in his place, and in a condition to do it. If a loss occurs to them, they can attribute it to their own voluntary act, in departing from the contract, by which they were empowered by the Kibbees to procure the release of the decree and mortgage, and which they undertook to perform. They can claim no rights independent of the contract, or power, except that conferred by it, so long as they claim under it, which in this defense they persist in doing: and whatever they have done under it, inures to the Kibbees' benefit.

In this examination we have omitted to notice the case made by the original bill, and the answers of the Harts and Thompson to it. These will be found to be utterly inconsistent with those to the cross bill of the Kibbees, and further show, if such be necessary, the falsity and bad faith of the defenses, and the fraudulent character of their whole conduct relative to the execution of the contract. Nor have we shown all of the inconsistencies of the defense to the cross bill; but enough, we apprehend, has been shown to render it evident that the Insurance Company, and the Kibbees, are entitled to the relief they have asked.

The decree of the court below must be affirmed, with costs of the complainants in the original and cross bill to be taxed against the defendants Thompson and the Harts, and this cause must be remitted to that court for execution of the decree.

MANNING and CHRISTIANCY JJ. concurred. CAMPBELL J. did not sit, having been of counsel.

Amos Pettibone v. Thomas McGraw and Others.

Stockholders in a plank road company organized under the General Plank Road Act of 1851, are severally liable for demands against the company (not for labor) to the amount of the stock held by each in the company when the debt accrued. And it is not therefore indispensible that a judgment-creditor, who, after return of execution against the company unsatisfied, files his bill to compel the payment of his judgment by stockholders, should make all the stockholders defendants.

Nor is it necessary that all be made parties to such a bill when the demand for which the judgment was rendered was for labor.

Independent of statutory provisions, Chancery may, on behalf of the creditors of corporations, compel stockholders to pay in any amount that may be unpaid on their stock.

Under the Plank Road Act of 1851, stockholders in a plank road company are liable to its creditors for demands, other than for labor, to the full amount of their stock, and not merely for the amounts which remain unpaid on their stock.

Heard May 25th. Decided June 7th.

Appeal in Chancery from Oakland Circuit.

Complainant in his bill set forth, that the defendants, together with eighty-nine other persons, some of whom are since dead, others removed from the state, and others unknown to complainant, in January, 1852, formed themselves into an association under the General Plank Road Act of 1851, to be known as the Novi and White Lake Plank Road Company, for the purpose of building a certain plank road, and entered into articles, which were duly filed, and the company thereby incorporated: That the company contracted with one John N. Pettibone for the construction of a portion of such road, and he proceeded to make the same, but the company neglecting to pay therefor, he brought suit in the Circuit Court for the county of Oakland, and on the 9th day of March, 1856, recovered judgment against the company for $3355.52 and costs: That execution was subsequently issued on such judgment to the sheriff of said county, who returned the same wholly unsatisfied except as to $22.25: That defendants were stockholders in said plank road company when the indebtedness for which such judg-

ment was rendered accrued, and still continue such stockholders: That on July 24th, 1856, said John A. Pettibone assigned such judgment to complainant: And he prays that defendants may be decreed to pay him the amount thereof with interest.

Defendants filed a general demurrer to this bill, which was overruled, and the bill taken as confessed. The court thereupon referred the cause to the circuit court commissioner to inquire and report what amount of the judgment was for labor, and what amount for materials furnished, and to report also the amount of stock held by each defendant at the date of the contract with John N. Pettibone. The commissioner, in pursuance of this reference, reported $1338.16 of the judgment to have been for labor, and the balance for materials, and set forth specifically the amount of stock in the company held by each of defendants when the contract was entered into; and thereupon a decree was made that "defendants are jointly and severally liable to complainant for the sum of $1338.16," "and also for the costs of this suit to be taxed, and that complainants have execution therefor against the said defendants." And further, "that said defendants are severally liable to the said complainant" for the balance of said judgment "to the extent of the stock owned by each of said defendants respectively at the time the debt was contracted upon which said judgment was rendered" (setting forth the specific liability of each upon this basis), "and that complainant have execution for" the same "against each and every of said defendants to the extent to which they are respectively liable, as above set forth."

Defendants appealed from this decree.

M. E. Crofoot, and *A. B. Maynard*, for defendants:

1. The statute makes all the stockholders jointly and severally liable, in their individual capacity, for labor. All must, therefore, be sued jointly, or *one* severally.

2. A stockholder, under this act, is only liable (except for labor) to the amount of the stock held by him; and this whether paid in assessments, or to a creditor of the company, or in any other manner, if paid for the purposes of the corporation. The court should therefore have directed the commissioner to report the amount paid by each defendant upon his stock, and should have made the decree for the payment of the balance of the amount.

George Andrews, and *S. T. Douglass*, for complainant.

MARTIN Ch. J.:

The defendants, with some eighty-nine others, formed an association, styled "The Novi and White Lake Plank Road Company," under the act of 1851. A judgment was obtained against the company by the assignor of the complainant, for work and labor done, and for other indebtedness, to the amount of about three thousand four hundred dollars, and an execution was issued thereon, and returned unsatisfied, except as to the sum of twenty-two dollars. Thereupon this bill was filed against the stockholders, to recover the amount of the judgment. A general demurrer was interposed to the bill, and it is now urged that the bill should be dismissed for want of proper parties; the defendants insisting that all the shareholders should have been made defendants to the suit.

A careful examination of the statute, and a consideration of its purposes, satisfies us that the liability created by the statute is in no sense joint. The section creating it is as follows: "The stockholders of every company incorporated under this act, shall be jointly and severally liable in their individual capacity for all labor performed for such company; and shall also be liable for the payment of the debts of such company for an amount equal to the amount of stock they have severally subscribed or held in said company, to be recovered of the stockholder who is such when

the debt is contracted, or of any subsequent stockholder."—1 *Comp. L. p.* 618, §1916. This section creates no joint liability, co-extensive with the claim of the plaintiff, except in the case of labor performed: in any other case it is confined to the amount of the defendant's stock. As to the liability for work and labor, it is not created by personal obligation, but by statute; and its character must be ascertained by a consideration of the whole law. Now, it is not contended, nor can it be successfully, as we think, that the complainant, in a case like the present, can not recover against stockholders for labor performed, and also for debts contracted for other considerations, in the same action; and if such be the case, it follows that the Legislature could not have intended to employ the words "jointly and severally" in their strict technical sense, when applied to the liability for labor, and so as to create the same necessity for making all the stockholders parties, as would exist at law in the case of joint obligors and promissors.

This view is strengthened by a consideration of those portions of the statute which provide for and govern these proceedings in chancery against the individual stockholders. Sec. 1918 of chap. 65 provides, that no such proceedings shall be had against them until after a judgment against the company, and the return of an execution unsatisfied in whole or in part, or until the company shall have been dissolved; and further provides that "Any stockholder who may have paid any debt of said company, either voluntarily or by compulsion, shall have a right to sue and recover of such company the amount thereof, with interest, costs, and expenses; and any such stockholder who may have paid as aforesaid, shall have a right to bring an action against, and recover of, the rest of the stockholders, *or any one or more of them*, the due proportion thereof which such stockholder or stockholders ought to pay; and if such action for contribution shall be brought against more than one stockholder,

the judgment and execution shall specify the amount to be recovered and collected from each defendant." And sec. 2161 of chap. 73, p. 703, enacts that in cases where the officers and members of a corporation shall be liable for any of its debts, or shall be liable for contribution, the same may be recovered by bill in chancery, and that such court "may make all such orders and decrees therein as may be necessary to do justice between the parties."

Reading all these provisions together, it is very clear that they give to a creditor a right, in a case like the present, to sue and collect from one or more of the stockholders, the amount of his demand; a contrary construction of the law would, in many, and perhaps in most, instances, render it impotent to afford a remedy, as the great number of stockholders in many of these associations, their liability to be scattered all over the country, and the consequences of the death of any of them, before or pending the litigation, would render a joinder of all frequently an impossibility, and always of so d btful and expensive a nature as to deter a plaintiff from pursuing the remedy. But were the liability of the stockholders to be construed as strictly joint and several, we think the objection for want of parties could not prevail in equity, as it is a well settled rule that when it is apparent that the parties who may be affected by the decree are very numerous, and that to require the joinder of all who may be interested will be virtually to deny any remedy to a complainant, their joinder will not be insisted upon. — See 2 *Pet.* 483, 487, 488.

The next, and principal, question arises upon the construction of the statute creating the liability (§1916, *supra*). The defendants insist, that, by a correct construction, this section imposes upon the stockholder a liability equal only to the amount of his stock, less the sum paid in thereupon, except for labor performed, for which, it is conceded, he is liable, irrespective of the amount of his stock, or the payments thereon: that, if the whole stock had been paid in,

no liability would exist against the holder of such stock, for general debts, and if but a part had been paid in, then the liability would be determined by the amount remaining unpaid.

The statute can receive no such construction. The stock, when paid in, either wholly or in part, becomes a portion of the corporate property; and as this remedy against the stockholders can only be pursued after judgment against the company, and the return of an execution unsatisfied, wholly or in part, the presumption is that this has been already reached by the execution, or that it has been otherwise appropriated. If it has not all been paid in, a court of equity, upon long established and well settled principles, would compel its collection by the directors of the company, as a fund for the benefit of creditors.

The effect of the construction contended for by the defendants is that the Legislature intended nothing by this provision, as the stockholders are liable to the extent contended for, by virtue of their subscription, and under the common law.

It was to extend this liability beyond that incident to their subscription to the stock, or subsequent purchase, and to impose upon them an additional individual liability to creditors, that this provision was inserted in the law. They are liable individually, whether subscribers or purchasers, to the extent of their stock, above their liability in their corporate capacity. Such liability for general debts is precisely the same in character as that for labor performed, with this difference only, that for general debts it is limited to the amount of their stock, while for labor performed for the company it is limited only by the amount of the demand.—See *Briggs v. Penniman*, 8 *Cow.* 395.

The decree must be affirmed, with costs.

CHRISTIANCY and CAMPBELL JJ. concurred. MANNING J. did not sit, having been counsel in the cause.

William H. Craig and Another v. Charles W. Grant and Another.

Where defendant, after plaintiff has closed his case, recalls one of plaintiff's witnesses and proves by him facts which are material to the defense, and it does not appear that defendant has been surprised or induced to call the witness by statements he had previously made different from the facts to which he has testified, and he was not a witness the defendant was compelled to call, like the subscribing witness to an instrument, defendant has thereby made the witness his own, and it is error in the court to permit him afterwards to impeach such witness.

A replication to a notice of special defense, under the old rules, was not necessary where the matters set out in the notice were admissible in evidence under the general issue.

Where replevin was brought for the unlawful *detention* of property at Hampton, in Saginaw county, and defendants justified under attachments issued out of the circuit court for that county,—*Held*, That plaintiffs were not estopped by this issue from showing that the *taking* of the property under the attachments was at Hampton, in Bay county.

The question of the organization of Bay county having, as before decided by this court, been submitted to a popular vote in the proposed county, and defendants claiming that the return of votes did not show the number cast within such limits, and that Bay county never in fact became organized,—*Held*, That the question of such organization was one of fact for the jury, and an offer of the plaintiffs to show that the attachments were levied in Bay county involved this question, and should have been allowed.

Heard June 1st. Decided June 7th.

Error to Saginaw Circuit.

The case is sufficiently stated in the opinion.

E. C. Hinsdale, and *C. I. Walker*, for plaintiffs in error:

1. The admission of testimony contradicting the testimony of Henry M. Bradley, in his answer to a question asked by defendants, was erroneous.

The defendants, by calling him as their own witness, to show the value of their replevied property, and the management of it by plaintiffs, had represented him as worthy of belief, and could not, therefore, impeach the general reputation of their own witness.—1 *Phil. Ev.* 308; 1 *Green. Ev.* 442; *Bul. N. P.* 297.

Nor does this case come within any of the exceptions

to the general rule. The witness Bradley was called voluntarily by defendants. He was not one the law obliged them to call, as a witness to a deed, or the like.

Nor did his answer relate to a particular fact *pertinent to the issue*, so that it was proper for the party introducing him to show that the fact was otherwise than testified to by him. Even on cross-examination, a party can not contradict a witness in matters not material to the issue.—1 *Greenl. Ev.* §§ 462, 449; *Shields v. Cunningham*, 1 *Blackf.* 85; *Harrington v. Inhabitants of Lincoln*, 2 *Gray*, 133; *Hathaway v. Crocker*, 7 *Metc.* 266; *Harris v. Tippet*, 3 *Campb.* 637; *Seavy v. Dearborn*, 19 *N. H.* 351. Still more must the *fact* about which the witness testified, whom it is proposed to contradict, be material to the issue, to allow a party to contradict his own witness.—*Commonwealth v. Buzzell*, 16 *Pick.* 158; *Commonwealth v. Starkweather*, 10 *Cush.* 59; *People v. Safford*, 5 *Denio*, 112; *Chamberlain v. Sands*, 27 *Me.* 458; *Stockton v. Demuth*, 7 *Watts*, 39; *Smith v. Price*, 8 *Ibid.* 447; *Commonwealth v. Welsh*, 4 *Gray*, 535; *U. S. v. Dickinson*, 2 *McLean*, 330; *Rixey v. Bayse*, 4 *Leigh*, 330.

2. Plaintiff [should have been permitted to show that the taking of the property under the attachments was in the county of Bay. Process from a circuit court can not lawfully be served out of the limits of the county in which the court sits.—*Turrill v. Walker*, 4 *Mich.* 177.

The return of the sheriff to the writs of attachments that the goods were seized in "Hampton," in Saginaw county, was only *prima facie* evidence of the fact; and strangers to that suit were fully at liberty to refute it, statements.—*Messer v. Bailey*, 11 *Fos.* 9; *Watson v. Watson*, 6 *Conn.* 334; *Dutton v. Tracy*, 4 *Ibid.* 79; *Augier v. Ash*, 6 *Fos.* 99; *Brown v. Davis*, 9 *N. H.* 76.

J. M. Howard, and *John Moore*, for defendants in error:

1. Defendants had not made Bradley their own witness. He was recalled for the purpose of cross-examination, and

the evidence given by him is only a continuation of his former examination. It was competent for the court to permit him to be recalled for that purpose, either to lay the foundation for an impeachment, or to further explain and bring out the circumstances to which he had already testified.—1 *Greenl. Ev.* §§ 431, 433, 446.

What was said by Bradley while acting as agent for plaintiffs in consummating the thing which he was employed to do, was *res gestæ*, and the proof of it was therefore material.

2. Plaintiffs could not, under the issue, be permitted to show that the levy of the attachments was made in Bay county. They allege in their affidavit for the writ of replevin, that defendants detained the property in Saginaw, the return of the officer who served it shows that he took the property from defendants in Saginaw, and plaintiffs, in their declaration, alleged that defendants then detained the property in Saginaw. But independent of this, plaintiffs could not give this evidence without replying to defendants' notice. We deny that the levy was made in Bay county, and if the plaintiffs had put in a replication setting up that the levy was made beyond the jurisdiction of Saginaw county, we should have been prepared to meet the question.

3. But we deny that there is any such county as Bay. The case of *The People v. Burns*, 5 *Mich.* 114, was decided entirely upon the showing made in that case, and which formed the basis of the decision.

There is no law organizing such a county. In this case there is no evidence of any organization. The court will take judicial notice of the boundaries of counties, because they are fixed by statute; but in this case, from the peculiar wording and frame of the act authorizing the question of the organization of Bay county to be submitted to the people, its effect is made dependent upon *matters of fact* which the court can not notice except as they are brought before the court in the way of evidence. And we deny that

any vote was ever cast in favor of the act—much more, a majority.

CHRISTIANCY J.:

The plaintiffs in error brought an action of replevin in the court below, against defendants Grant and Ellis, the former of whom was sheriff of Saginaw county, and the latter his deputy.

The affidavit described the property in question as being in the town of Hampton in Saginaw county, and the declaration was for the detention of the property at the same place.

The defendants pleaded the general issue, and gave notice with their plea, alleging the taking and justifying the detention at the place mentioned in the declaration, by virtue of two writs of attachment issued out of the Circuit Court for the county of Saginaw, against Lot Frost and Charles Bradley, one dated the 19th and the other the 21st day of September, 1857, and both returnable on the 6th of October, 1857; under which they claim to have seized and to detain the property; and alleging also that judgments were recovered under the respective attachments, one on the 19th and the other on the 21st of November, 1857; and stating the amount of the respective judgments against Frost and Bradley.

On the trial, the plaintiffs claimed the property under a conveyance or bill of sale from Frost and Bradley to them, dated September 19th, 1857; and after proving the due execution of the instrument, and before introducing it in evidence, called Henry M. Bradley as a witness, who, after certain preliminary questions, testified that previous to the 19th of September, 1857, he had charge of the property at Saginaw belonging to Frost and Bradley, as their agent, and that on that day he was employed by the plaintiffs to take charge of the property transferred to them by Frost and Bradley by said conveyance; and that plaintiffs gave him, as evidence of such employment, a written power of attor-

ney: That he left Detroit on the 19th. of September, and reached Saginaw September 21st, 1857, and immediately took possession of said property for the plaintiffs, except such as had been attached, and continued in possession and management thereof from that time: That the property described in the writ of replevin in this case is a part of the property described in the conveyance of September 19th, 1857: That on 21st of September, 1857, it was in the possession of the defendant Ellis at Hampton, in what was then called Saginaw and now called Bay county, and that he claimed it under an attachment made by him as deputy sheriff. That most of the lumber was in cribs in the river.

The plaintiffs then introduced the conveyance, or bill of sale mentioned, and evidence showing its filing with the city clerk of the city of Detroit on the day of its date. They then rested their case.

The counsel for the defendants, to maintain the issue on their part, introduced evidence showing the issue and service of the writs of attachment on 21st of September, 1857, and the recovery of the judgments as set up in the defendants' notice. And it was admitted that Grant was sheriff and Ellis was deputy sheriff of Saginaw county at the time of said seizure.

The defendants further introduced the deposition of Lot Frost, and also called Henry M. Bradley, who testified to the value of the replevied property, and generally to the manner in which the property described in said conveyance of September 19th, 1857, was disposed of and managed; tending to show that the said conveyance was executed for the purpose of hindering, delaying, and defrauding creditors.

The defendants also inquired of said Henry M. Bradley whether he did not, on or about 21st of September, 1857, say to George W. Bullock, at his store, in Saginaw City, that the conveyance of September 19th, 1857, was made to gain time; and he denied that he so said. The defendants

also introduced several other witnesses, whose testimony tended to prove the fraudulent character of said conveyance of September 19th, 1857.

The defendants also called George W. Bullock, who was duly sworn, and the defendants offered to prove by him that the said Henry M. Bradley did, on or about the 21st day of September, 1857, in the store of the witness, at Saginaw City, say to witness that the said conveyance of September 19th, 1857, was made to gain time. It appeared on the cross-examination that said witness Bullock was a creditor of Frost and Bradley. The plaintiffs objected to the evidence, on the ground that the defendants had made Bradley their own witness, and could not impeach him. The court overruled the objection, and admitted the testimony, to which the plaintiffs excepted. And upon this the first error is assigned.

If the plaintiffs had rested their case immediately on the close of the direct-examination of H. M. Bradley, and before the defendants could have an opportunity to cross-examine him, it is clear that their right of cross-examination would not have been cut off; that they might at once have proceeded to the cross-examination, and should have availed themselves of this right before introducing other evidence, unless they obtained leave of the court to waive it for the present, and to enter upon it in a future stage of the cause. But it appears from the bill of exceptions that the plaintiffs did not rest their case immediately on the close of the direct-examination of Bradley, but that they afterwards introduced the conveyance of September 19th, 1857, together with evidence showing its filing, &c., so that the defendants appear to have had an opportunity to cross-examine Bradley at the proper time, at the close of his direct-examination; and their neglect to do so, or to obtain the leave of the court to reserve the cross-examination to a future stage of the cause, furnishes a strong inference of their intention to waive any cross-

examination of the witness; and this inference is rendered conclusive by the fact that instead of examining Bradley immediately after the plaintiffs rested, and before resorting to other evidence in defense, they first open their defense by introducing the evidence of the issuing and service of the attachments, and the recovery of the judgments under them, and the admission that one of the defendants was sheriff, and the other deputy, at the time of the seizure. They then introduce the deposition of Lot Frost; and all this *before* they call upon Bradley. It is evident, therefore, they had fully entered upon the evidence in support of their own defense before calling upon him. And when they have at length called him, instead of proceeding at once to examine him upon any matter about which he had testified in chief, they proceed to examine him as to the value of the replevied property — a most material fact in support of the defendants' case, and in no way connected with his direct-examination; — and it is upon *his* testimony *alone* that this most material part of the defense was left to stand, as no other witness appears to have testified to the value.

Some small portion of the subsequent examination of the witness might possibly, if entered upon at the proper time, have been legitimate cross-examination; though even this is stated to have tended to show that the conveyance was executed for the purpose of hindering, delaying, and defrauding creditors — an indispensible fact in support of the defense, and to prove which they seem to have introduced several other witnesses who had not been examined by the plaintiff. For these and other obvious reasons, we can not doubt that defendants had made Bradley their own witness, as much as any other witness produced by them. He was not a witness they were compelled to call, like a subscribing witness to an instrument. It does not appear that defendants had been surprised or induced to call him by any statements he had previously made different from the facts to which he testified; and there is no ground upon which

they could be allowed to impeach him in the manner here attempted, even if the statement to which Bullock testifies had been sufficiently material to the issue to be admissible as an impeachment in any event; which may well be doubted, since he, as agent for taking possession and managing the property, could hardly have authority to bind his principals by any statement of his as to a past transaction — the purpose with which the conveyance had been made to his principals; nor can we see how it was, in any sense, a part of the *res gestæ*, going to explain the character of the possession or transfer. The admission of Bullock's testimony was therefore clearly erroneous, and the first error is well assigned.

After the defendants had rested, the plaintiffs recalled Henry M. Bradley and offered to prove by him that the levy of the attachments was made by the defendants in Hampton, in Bay county, and no where else.

To this testimony the defendants objected, and the court sustained the objection, and rejected the testimony; to which plaintiffs excepted. The rejection of this evidence is the second error assigned.

The defendants' counsel contend that this evidence was properly rejected, because, as they insist, no such issue was made by the pleadings; that the plaintiffs having sued out their writ from the Circuit Court for Saginaw county, and in their affidavit and declaration complained only of a detention in that county, and the defendants having taken issue on this, and in their notice justified the detention in that county, by virtue of the writs of attachment, the plaintiffs were precluded from showing the taking to have been in another county.

Had the declaration been only for the taking of the property, instead of the detention, the plaintiffs might have been thus estopped; but the action was only for the wrongful detention; and as the defendants had undertaken to justify this detention by a seizure under the writs of attach-

ment, and in no other way, whatever would make the seizure tortious, would make the detention equally so. It was therefore competent for the plaintiffs to rebut this defense by showing that the levy of the attachments was made in another county, where the writs of attachment were but waste paper, and could not justify a seizure. If the seizure was wrongfully made by defendants in another county, and the property removed by them into Saginaw county, the writs could afford no justification for the subsequent detention: the seizure and removal being a tort, the consequent detention would be equally so. The property could not thus be brought within the jurisdiction of the writs: the rights acquired by the trespass would be but the rights of a trespasser.

But as the issue was joined in this case before the new rules, the defendants' counsel insists that to entitle the plaintiffs to rebut the case made by defendants' notice, they must, under rule 16 (old rules) have filed a replication taking issue upon it, or alleging the seizure in Bay county by way of avoidance. However this might have been where such notice on the part of defendants is required by section 24, chapter 124 of Compiled Laws, the rule can not apply where the statute required no such notice on the part of the defense. The rule must be construed with reference to the statute; to extend it further would be to restore special pleading where the statute had abolished it. This court decided in the case of *Snook v. Davis* [*ante p.* 156], that no notice of justification under an execution was necessary on the part of the defendant in replevin, but that such justification was admissible under the general issue without notice. The justification under these writs of attachment must stand upon the same ground; and as no notice of it was required on the part of the defendants, the 16th rule did not apply, and no replication to the notice was necessary.

But it is insisted by defendants that no such county as Bay existed at the time this property was seized upon the attachments (September 21st, 1857); that by the act for the

organization of this county, approved February 17th, 1857 (*S. L.* 1857, *p.* 438 *to* 441), the question of its organization was to be and was submitted to a vote of the people: that this court decided in *People v. Burns*, 5 *Mich.* 114, that the submission was to be only to the voters within the territory of the proposed county; that there is nothing in the return of the votes made to the secretary's office showing the number of votes given for or against the proposition within the prescribed limits; and that, as the case of the *People v. Burns* was decided upon a statement of facts agreed upon in that suit, that admission and that decision can not bind others who were not parties to that suit. This may be true, but if so, the question whether a county or not was a question of fact in the case now before us; and the offer of the plaintiffs to prove "that the levy of the attachments was made by the defendants, in Hampton in Bay county, and nowhere else," was broad enough to admit this proof, and would cover any evidence necessary to show the existence of the county.

The evidence offered was therefore improperly rejected, and the exception was well taken.

The judgment must be reversed and a new trial granted.

The other Justices concurred.

Moritz Herschfeldt v. Paul J. George and Another.

As a general rule, a deed which is fraudulent as to existing creditors, is fraudulent as to subsequent creditors also.

Where one who was considerably indebted, caused his real estate to be conveyed to his wife, and soon thereafter contracted large debts, representing himself to be still the owner of this real estate, and within a few months failed, and made an assignment, but showing assets to less than half the amount of his debts, and there was no explanation of these facts,—*Held*, That the settlement upon the wife was fraudulent and void as to the subsequent creditors.

Where one makes a settlement upon his wife under such circumstances as, if voluntary, would render it void as to creditors, and receives from her a small and indequate consideration, such settlement will be sustained, in equity, only so far as to secure to her the re-payment of that sum.

HERSCHFELDT *v.* GEORGE.

The homestead exemption is to be claimed, under the statute, at the time of, or after, a levy, and before sale. And when it consists of a town lot, its value is to be estimated at that time.

One can not claim, under the homestead exemption, a lot which he has caused to be conveyed to his wife, on the pretence that such conveyance was for the purpose of vesting the title in her as a homestead.

Heard November 18th and 19th, 1858. *Decided June 8th.*

Appeal in Chancery from Wayne Circuit.

The bill was filed against Paul J. George, Sally George (his wife), and John George; and sets forth: That on September 1st, 1852, Paul J. George, being indebted to complanant in $1866.61, gave complainant therefor three promissory notes, due in four, six, and seven months from date: That on March 24th, 1853, complainant caused an attachment to be issued from the Circuit Court for the county of Wayne against the property of said Paul, on the first two of said notes, which attachment was served by attaching lot 61, on the Lambert Beaubien farm, on Jefferson Avenue, Detroit, and also a part of lot 3 of subdivision of private claim number 19, being in Hamtramck, Wayne county, and was also served personally on the said Paul; and that on September 22d, 1853, judgment was rendered for complainant in the attachment suit, for $1015.07 and costs of suit: That on April 5th, 1853, complainant commenced another suit by attachment, on the third note, in which the same property was attached, and judgment rendered therein July 1st, 1853, for $920.53 and costs of suit: That executions were issued on said judgments, December 9th, 1853, and levied on said premises.

The bill further sets forth that on March 17th, 1852, said Paul was the owner in fee, jointly with John George, of the said premises, and on that day said John and wife conveyed to Paul the west half of said lot 61, and the east half of the Hamtramck lot: That on August 23d, 1851, said Paul and Sally, for the nominal consideration of $2000, conveyed to one Henry Train the west half of said lot 61; and that on July 8th, 1852, Train and wife, for the nominal

consideration of $400, conveyed the same, by deed of warranty, to said Sally: That on August 2d, 1851, said Paul and Sally, for the nominal consideration of $500, conveyed the Hamtramck lot by warranty to Henry Zender, who, on the next day, for the nominal consideration of $1000, conveyed the same to the said Sally: That at the time of making said conveyances to Train and Zender, as complainant is informed and believes, said Paul was largely indebted in New York and elsewhere, and utterly insolvent; and that said conveyances were without consideration, and made for the purpose of defrauding the creditors of said Paul, and of preventing them from collecting their debts, and in secret trust that the lands should be conveyed to said Sally, to keep them beyond the reach of such creditors.

He further alleges that at the time of contracting the indebtedness for which said judgments were rendered, said Paul represented to complainant that he was still the owner of said premises, and it was upon the faith of such representations that complainant trusted him: That on January 31st, 1853, said Paul, with a view further to defraud creditors, gave to John George a mortgage for $1779.19 on said premises, which is charged to be without consideration.

And complainant prays that said conveyances to Train, Zender, and Sally George, and said mortgage, may be declared void as to the creditors of said Paul, and as against the lien of said executions.

Each of the defendants answered the bill separately, but John George having died pending the suit, the bill was voluntarily dismissed by complainant as to his representatives.

Complainant afterwards amended his bill by charging said several conveyances to have been made with a view to defraud subsequent creditors; and further, that in August and September, 1852, said Paul fraudulently contracted debts to the amount of nearly $10,000, including that to complainant, and that in January, 1853, he became so entirely insolvent that he made a general assignment for the benefit of

creditors, showing assets to the nominal amount of $4000, and debts to over $11,000.

The answer of Paul George admits the conveyances to Train and Zender respectively, and by them respectively to Sally George, and that the considerations named in the deeds were only nominal. Denies all the allegations in the bill as to the conveyances being made to defraud creditors, or upon fraudulent trusts, or to shield the property from attachment or levy. It then avers that on the 10th day of March, 1842, Charles Moran conveyed lot 61 to David and John George, as tenants in common, and on the 14th of the same month David conveyed to this defendant: That defendant and John procured the lot for the express purpose of building dwelling houses thereon, to be occupied by themselves and families, as homesteads; they agreeing between themselves that defendant should have for his own the west half and John the east half of the lot: That each erected on his respective half a dwelling house: That defendant moved into his in the autumn of 1842, and removed therefrom in the fall of 1853, and then only for a temporary purpose, and with the intention of returning: That from time to time prior to 1851, Sally George, his wife, importuned him to vest said west half in her as a homestead, and he promised to do so, but delayed until August, 1851, when, in order to carry out that purpose, he joined in the deed to Train; that at the time of making said deed defendant proposed making one for his half only of said lot, but it being suggested that of record the lot stood in him and John in common, and being advised that a quit-claim of the whole would convey his interest, and that on the interchange of deeds between himself and John, Train could then deed the west half to Sally George, he gave a quit-claim accordingly. He avers that, though he had determined to vest in his wife the said west half of lot 61 as a homestead, yet she, as an additional inducement thereto, offered to allow

him to receive from Train, who was administrator on the estate of her deceased father, the sum of four hundred dollars, due her from said estate, and that he actually did receive the same, and expended it in and about his business.

Defendant further says that he and John being on unfriendly terms, no communication was had between them until March 17th, 1852, at which time John and his wife deeded the west half of lot 61 to defendant, and defendant and his wife deeded the other half to John, in pursuance of said verbal partition; that Train and wife afterwards deeded said west half to said Sally; and that at the time of the partition between himself and John, when he chose and had said west half of lot 61 as a homestead, its value did not exceed $1500. And he claims that the deed from himself and wife to Train, and from Train and wife to said Sally, was an appropriate way of fixing a homestead under the laws of the state, but that even if they were void, he is still entitled to claim said premises as a homestead under the statute.

He further says the deeds between himself and John, of the Hamtramck land, were also executed in pursuance of a previous parol agreement for partition: That at the time of the deed to Zender, defendant had received a severe bodily hurt, and was in danger of not recovering; that his wife and some of his friends urged upon him that it would be right to fix in his wife the title to said Hamtramck land, and he did so — the conveyance to Zender being for that purpose. And he denies that that conveyance was made to defraud creditors: He alleges that at that time he was only indebted to his brother John, and to one or two others in small amounts; that he had sufficient assets, open, visible, and to be reached, to pay off every creditor and debt without any reference to said real estate: That after said deeds were executed, by a series of unforseen losses, he failed in business, and became unable to pay his debts. He denies the false representa-

tions charged against him in the bill; and denies all fraud or illegality, actual or intended, and any purpose to defraud any creditor whomsoever.

The answer of Sally George contains substantially the same averments as that of her husband. She claims that, ever since the conveyance of said west half of lot 61 to her, she has held and possessed, and still holds and possesses, the same as a homestead. She says that, before the deed to Zender, her husband had been severely hurt; that he was then lying ill, and that his habits had become so intemperate that she feared he would resume them upon his recovery, and that it might lead to injury to himself and his business: That she deemed it a duty to herself and her children to secure the Hamtramck land as a means of future support; that she therefore urged her husband to convey it to some one who would convey it to her, and thus vest it in her for the purpose aforesaid; that her husband assented to this, and the deeds to Zender, and from the latter to her, were made accordingly. She denies all fraudulent intent; and says that at the time of the conveyance to Train and Zender she supposed, and still believes, her husband had property enough, independent of the lands, to pay all his debts; that she knew of no debt then of any consequence, except that to John George. And she claims, as respects the west half of lot 61, the benefit of the homestead exemption.

Replications being filed to these answers, proofs were taken as follows:

Henry Zender proved the assignment of Paul George to himself, for the benefit of creditors, showing assets amounting to about $4000, and debts to upwards of $9000, not including the demand of John George. He testified that he took possession of the assigned property, but was only able to realize some $500 or $600 from it.

William Moser was a dealer in furs in New York when Paul J. George contracted this indebtedness to complainant.

Paul told witness at that time that he owned a nice house in Detroit, and a pair of horses, and some lands. Think he said he owned a good deal of land. He said he was doing well and making money. Witness sold him goods at this time which were not paid for.

Magnus Frank testified to similar statements having been made by Paul to complainant about the same time. Paul told complainant he was perfectly good—he was dealing in furs, and doing a good business.

Simeon Dreyfous, also a New York dealer, testified to similar statements made to himself about the same time. He also sold goods to Paul.

George Miller, called on behalf of defendants, testified that the said west half of lot 61 was occupied by defendants as a residence and homestead for many years, until about two years since. It was so occupied in 1851, '52, and '53. In 1851 it was worth somewhere from $1500 to $1700 or $1800: The property rose in value during the following year. Can not say how much.

The cause being brought to a hearing, the court decreed the conveyance to Train, and by him to Sally George, without consideration, except for the sum of $400; as to which amount it was directed to stand as security to said Sally in the nature of a mortgage, but fraudulent and void to every other purpose as to complainant. And decreed also that the conveyances to Zender, and by him to Sally George, were entirely fraudulent as to complainant, and his lien on the property.

From this decree, defendants appealed.

C. I. Walker, for complainant:

1. A voluntary conveyance, as against existing creditors, is fraudulent and void, without regard to actual fraudulent intent. The broadest qualification of this rule only protects such conveyances where the grantor is unembarrassed in his circumstances, and the conveyance is but of a small

portion of his property compared with his debts.—*Reade v. Livingston*, 3 *Johns. Ch.* 492; *Parkman v. Welch*, 19 *Pick.* 231; *Parish v. Murphree*, 13 *How.* 98.

2. Where it is made with actual fraudulent intent as to existing creditors, it is fraudulent and void as to subsequent creditors also.—1 *Am. Lead. Cas.* 56; *Parish v. Murphree*, 13 *How.* 98.

3. If made for the purpose of defrauding subsequent creditors, or with reference to future indebtedness, then it is void as to such creditors.—*Sexton v. Wheaton*, 8 *Wheat.* 242; *Howe v. Ward*, 4 *Greenl.* 195; *Reed v. Reavis*, 7 *Ired.* 343; *Vertner v. Humphrey*, 14 *S. & M.* 143.

4. The fact that debts are contracted immediately after the conveyances, is sufficient evidence that the deed was made in reference to such debts. Ordinarily it is the only evidence to be had.—*Walker v. Burrows*, 1 *Atk.* 93; *Ridgeway v. Ogden*, 4 *Wash.* 139; *Thompson v. Dougherty*, 12 *S. & R.* 458. To make the conveyance actually fraudulent, it is not necessary that a party should deliberately entertain the corrupt intention to cheat. It is enough that he make a conveyance with reference to future indebtedness, and to guard against the hazards of business.—*Ibid.*; *Kirby v. Ingersoll*, *Harr. Ch.* 119.

5. Mrs. George can not claim as a homestead the lot conveyed to her.—*People v. Plumsted*, 2 *Mich.* 465. Her husband is estopped from claiming it by his own deed. It is only the *owner and occupant* that can make such claim. Creditors may hold his deed good for one purpose, and void for another.—*Wisner v. Farnham*, 2 *Mich.* 472; *Fox v. Willis*, 1 *Mich.* 321.

6. The only way in which the homestead exemption can be claimed is from the officer when the levy is made, or when it is first brought to the debtor's knowledge.—*Comp. L.* § 4497.

W. P. Wells, and *G. V. N. Lothrop*, for defendants:

1. A voluntary conveyance will not be set aside in favor of subsequent creditors unless there is clear proof of a fraudulent intent.—*Story Eq. Juris.* §§ 361, 362; *Reade v. Livingston*, 3 *Johns. Ch.* 497; *Sexton v. Wheaton*, 8 *Wheat.* 229; *Bennett v. Bedford Bank*, 11 *Mass.* 421; *Cosby v. Ross*, 3 *J. J. Marsh.* 290; *Benton v. Jones*, 8 *Conn.* 186.

2. Where subsequent creditors seek to set aside a settlement on the ground of indebtedness at the time, they must, in England, show an indebtedness large enough to amount to insolvency.—*Lush v. Wilkinson*, 5 *Ves.* 384; *Shears v. Rogers*, 3 *B. & Adol.* 362. The American cases do not go so far, but require that they should at least show that the person was largely indebted.—*Reade v. Livingston*, 3 *Johns. Ch.* 501; *Parkman v. Welch*, 19 *Pick.* 231; *Jones v. Slubey*, 5 *Har. & J.* 372; *Hudnal v. Wilder*, 4 *McCord*, 294. An inconsiderable amount of indebtedness is not sufficient evidence of fraud.—*Howard v. Williams*, 1 *Bail.* 575; *McEwell v. Sutton*, 2 *Ibid.* 128. In case of a settlement upon a wife or child, if the debtor retain sufficient to pay his debts then existing, the settlement is not void, even though he does not pay such debts.—*Van Wyck v. Seward*, 6 *Paige*, 62. There must be sufficient evidence to establish the presumption of a secret trust in the grantor.—*Clark v. French*, 23 *Me.* 221.

Complainant fails to show any existing debt except that to John George. The presumption of fraud as to subsequent creditors, arising from this indebtedness, is repelled by the fact that it was secured by mortgages.—1 *Am. Lead. Cas.* 72; *Wood v. Savage*, 2 *Doug. Mich.* 316.

3. Where an intent to defraud subsequent creditors is sought to be established, the conveyance must appear to have been made with a view to subsequent indebtedness, and with an existing intention, in the mind of the grantor, to become afterwards indebted, *and to defraud.* A mere in-

tent to continue in business, in which debts would necessarily be incurred, can not be sufficient. There must be a *fraudulent* intent.

4. The Jefferson Avenue property is exempt from execution under the Homestead Law.

MARTIN Ch. J.:

The conveyances to Sally George were fraudulent and void, as against the complainant. That of the Hamtramck property was entirely without consideration, and appears to have been solicited by her, and procured for the support of herself and children, and under circumstances which, we think, show a purpose of keeping it from the reach of John George, then Paul J.'s creditor. That of the west half of lot 61, in Detroit, was alike voluntary, and, as is claimed, for the purpose of securing a homestead, except that a partial consideration—the sum of four hundred dollars—was paid by the wife to the husband at the time of its execution. However laudable it may be in the husband to make provision for the support of his wife and family—and it is certainly not merely laudable, but a duty, when it can honestly be done—yet the law will not suffer it at the expense of creditors, when its operation is fraudulent, or when the design to defraud them is apparent.

As far as we can ascertain the facts from the pleadings and proofs, at the time these conveyances were made by the defendants to Train and Zender, Paul was indebted to John George, his brother, in about the sum of one thousand seven hundred dollars, and a most bitter hostility existed between them—so great, that no communication or conversation passed; an intensity of hatred, between brothers, that warrants and impels us to the conclusion that the conveyances were made for the purpose of placing the property beyond his reach. The value of the property, at this time, appears to have been about equal to the amount of the debt, and although the defendants insist, in their answers,

that at that time Paul J. was not insolvent, and was indebted only to his brother, and to one or two others in small amounts, and had sufficient assets, open and visible, and within reach, to pay every creditor abundantly, without any reference to said real estate, yet this averment, although put in issue, was not substantiated by proof, nor was any offered to establish its truth. It was settled in this state, in *Beach v. White*, in accordance with the general rule of equity, that a deed which is fraudulent as to existing creditors, is fraudulent as to subsequent creditors.—See *Walk. Ch.* 496. To this rule there may be exceptions, as when the debt sought to be collected was contracted long after the fraudulent conveyance, or after the embarrassment which existed when it was executed had passed away, or a new embarrassment had occurred from subsequent causes, and the like; but the present case comes within none of the exceptions.

It is true that voluntary conveyances are not necessarily fraudulent, even when made by a person indebted at the time. A man always has the right to dispose of his property as suits himself, provided he acts in good faith. But if he is largely indebted at the time, and such conveyance embraces the larger, or any considerable, portion of his property, such conveyance will be deemed fraudulent as to creditors. It is good when made without any fraudulent intent, and by a person not indebted at the time, or, if indebted, whose debts are so small in amount, when compared with the means still retained by him to pay them, as to repel all presumption of fraud on their account.—See *Beach v. White*, *Walk. Ch.* 496; *Cutter v. Griswold*, *Ibid.* 437.

In March, 1852, we find that a reconciliation took place between John and Paul George, and then deeds passed between them concerning the property in question, and John conveyed to Paul the lands which in August before he had conveyed to Train and Zender, from whom Sally George

derives her title. The deed from Train to her of the Hamtramck property was executed in August, 1851, and that from Zender in July, 1852. Shortly after this deed of July, 1852, we find Paul George expanding his business, and becoming suddenly and very heavily indebted to various houses in New York, and, among others, to this complainant, in some one thousand nine hundred dollars; and we find that at the time he contracted these debts, he represented himself to be the owner of the very property in question, for he could have referred to no other. This expansion of business was followed in less than six months by his mortgaging this very property, but without his wife joining, to John George, for the indebtedness which existed when the deeds to Train and Zender were executed, and which now amounted to one thousand seven hundred and eighty dollars, and by his making a general assignment of his property for the benefit of his creditors. His debts at this time amounted to nearly ten thousand dollars, besides that owing to John, and the nominal value of his assets to only about four thousand, while their real value turned out to be only about four hundred or five hundred dollars. These things are entirely unexplained, and taken in connection with the other facts of the case, manifest, beyond question, that Paul George meditated fraud, whether his wife was cognizant of it or not. Certainly if there is any case where a voluntary conveyance, and a cotemporary indebtedness of the grantor, make out a *prima facie* case for the creditor, this is that case; and it was the duty of the defendants, if they would prevent its becoming conclusive upon them, to have rebutted it by showing that the pecuniary circumstances of the grantor at the time were such as to repel the presumption of fraud.

The conveyance of the Hamtramck property can not, then, for a moment, be sustained. But it is thought that that of the west half of lot 61, in Detroit, stands upon a different footing. It seems that four hundred dollars of

money belonging to Sally George was given to Paul upon its execution; but it is not claimed that this was all, nor the material consideration which produced the conveyance to her. The real reason appears to have been, as now claimed in the answers, to secure it as a homestead. So far as relates to the four hundred dollars, the property is shown to have been worth at the time some one thousand five hundred to one thousand eight hundred dollars. This inadequate consideration, under the circumstances, will not sustain the deed as against creditors, although it will sustain it for her protection, so far as to secure to her the re-payment of that sum. The reason, or rather the pretence, that the property was conveyed to the wife to secure a homestead, can be of little value to determine the object of these conveyances to be *bona fide*, when we find that, as a part of the same transaction, although consummated at a different time, the Hamtramck property was conveyed without consideration and without explanation, and that, immediately subsequent, this sudden expansion of his business occurred, which as suddenly and disastrously collapsed. Why should this attempt to secure this Detroit property as a homestead be first made at the particular juncture of Paul's quarrel with John, and be consummated just before this expansion of his business, and the contracting of these debts?

But if the reasons be true, the claim of the property as a homestead, secured by this conveyance, can not avail these defendants. The law was never intended to be executed by parties in this manner. A homestead not to exceed forty acres, or a city or village lot not to exceed in value one thousand five hundred dollars, is exempt from execution; but such exemption must be claimed, and this value ascertained, at the time of the levy, or at least after it, and before sale. To hold that such exemption can be claimed at any other time, or in any other manner, than such as is contemplated by the statute, would open the door to the most monstrous frauds. If the claim can be made months

and years before a levy, and if the value at the time of the claim is to determine its value at the time of the levy, thousands of dollars may thereby, through rise in value, and the squandering of money in improvements and ornaments, be sealed up beyond the reach of creditors. The law never intended such a result.

But a homestead can not be secured by alienation of the property. No one but the debtor can claim it,—his grantee can not. If it was her property, it was not liable to be taken on execution for his debts; if it was not, her pretended title can be of no avail to him for the purposes of exemption. As owner, she can not claim it to be under the Exemption Act, against his debts—having conveyed it, the title is good as between him and her, although void as to creditors; and he can not claim it as exempt, for no title remains in him upon which to base such a claim.—See *Wisner v. Farnham*, 2 *Mich.* 472.

The decree of the court below must be affirmed, with costs.

MANNING J. concurred.

CHRISTIANCY J.:

I concur entirely with my brethren in the opinion given by them in this case, so far as relates to the land situate in Hamtramck; and I concur in the result, but not in all the reasoning, in reference to the dwelling house and half lot in Detroit. I place my concurrence in the result, as to this house and lot, entirely upon the ground that, as shown by the evidence, the value of the property exceeded fifteen hundred dollars, the limitation fixed for a homestead.

From so much of the opinion of my brethren as implies the necessity of any particular mode of selecting, or ascertaining the value of a homestead, when it consists of a dwelling house and a single separate lot in a city or village, I entirely dissent; nor can I concur in the opinion that, in

such case, it can only be claimed when, or after, it has been levied upon by execution. But in my view of this case, these questions are not before us, and I reserve the expression of any opinion upon them till a case arises which may render it necessary.

CAMPBELL J. did not sit, having been of counsel.

Decree affirmed.

Deborah M. Snyder v. Philip Snyder.

The holder of a mortgage shall lose no substantial rights by becoming owner of the equity of redemption.

Where the holder of a mortgage given by husband and wife became owner of the husband's equity of redemption, and, subsequently, conveyed the lands with warranty, — *Held*, That, in a proceeding for the recovery of dower brought after the husband's death by the wife against the grantee, the amount of the mortgage must be deducted from the whole value of the premises, and such portion of the land set off to the widow's use as is worth one-third of the residue.

Such deduction may be made when the proceeding for the recovery of the dower is by action of ejectment.

The conveyance of the equity of redemption to the assignee of the mortgage is, in such circumstances, such a merger as authorizes him to stand in the position of an assignee of the mortgagor satisfying it, under § 2777 Compiled Laws.

Submitted May 27th. Decided June 8th.

Case reserved from Calhoun Circuit.

The action was ejectment for dower.

On the trial before the court without a jury, the following facts were admitted:

The marriage of the plaintiff with Samuel Snyder, and the death of Samuel Snyder: That during the marriage, on June 17th, 1840, Peter Snyder conveyed the premises in question to said Samuel Snyder: That on April 25th, 1853, said premises were conveyed by sheriff's deed, by virtue of an execution issued on a judgment against Samuel Snyder, to David and Walter Peabody, who, in December fol-

lowing, conveyed to Alvah E. Snyder, and the latter to defendant October 5th, 1855, by warranty deed: That in September, 1849, Samuel Snyder gave Chester Moss a mortgage for $500 and interest, in which the plaintiff joined, which mortgage was assigned to said Alvah E. Snyder, June 14th, 1853, and remains unpaid; and that the defendant is in possession of the premises.

Upon the foregoing facts, the circuit court reserved the following questions for the opinion of this court:

1st. Did the deed of the mortgaged premises from the Peabodys to Alvah E. Snyder, the assignee of the mortgage, operate as a merger of the mortgage as between the parties to this suit?

2d. Is the plaintiff entitled to maintain ejectment for dower in this case?

H. A. & L. G. Noyes, for plaintiff:

The union of the two titles in Alvah E. Snyder was a merger, and consequent extinguishment, of the mortgage lien. —2 *Bl. Com.* 177; 4 *Kent*, 99 *to* 101; 1 *Wend.* 478; 2 *Cow.* 284; 4 *Mich.* 646; 15 *Barb.* 8.

The purchase by Alvah Snyder of the interest acquired under the execution sale, did not cancel the mortgage debt, and when he afterwards conveyed to defendant, the debt remained outstanding in his hands against the husband's estate. If there was technically no merger of the mortgage lien, still the debt was separated from the mortgage interest by the conveyance to defendant, which, being by warranty, estops Alvah E. Snyder from using the mortgage in opposition to his deed.

Defendant can not set up the mortgage, because his deed does not operate as an assignment of it to him, but only a conveyance of the husband's interest in the equity of redemption, and a release or discharge of the land from the mortgage, leaving the debt, which has an independent existence, in its original validity. If a mortgagee grants

the land mortgaged, with warranty, the purchaser does not come in as assignee of the mortgage. — 2 *Cow.* 230; 19 *Johns.* 325; 10 *Ibid.* 481.

Hughes & Woolley, for defendant:

As between the widow of the mortgagor claiming dower, and the mortgagee, no merger takes place by the legal and equitable estates meeting in the same person. — 4 *Kent*, 45; 3 *Pick.* 475; 19 *Wend.* 162; 6 *Johns. Ch.* 422; 14 *Pick.* 98; 7 *Greenl.* 377; 3 *Hill*, 103; 8 *Mass.* 490; 2 *Mason*, 531; 9 *Fos.* 202; 6 *Blackf.* 477; 7 *Johns.* 282.

The only remedy of the plaintiff is by bill to redeem. — 14 *Pick.* 103; 3 *Hill*, 103; 7 *Greenl.* 41; 7 *Metc.* 157; 6 *N. H.* 25.

CAMPBELL J.:

This case comes up on reservation from Calhoun Circuit.

The plaintiff, who is widow of Samuel Snyder, brought ejectment for her dower in certain premises occupied by the defendant. The property was sold during the life-time of Samuel Snyder, upon an execution against him. Prior to the execution proceedings, Samuel Snyder had executed a mortgage upon the premises, in which the plaintiff joined by way of releasing her dower. The execution title having become absolute, was purchased by the holder of the mortgage, who subsequently conveyed the whole property by warranty deed to the defendant in this action.

The plaintiff claims that she is entitled to dower in the premises, without any deduction on account of the mortgage, on the ground that it has been extinguished by the union of titles.

The authorities are quite uniform that the holder of a mortgage interest shall lose no substantial rights by becoming owner of the equity of redemption. It would be a rule in conflict with every principle of justice, to hold that by the union of two separate interests, each of which repre-

sented a full and valuable consideration, either should be destroyed, unless some duty lay on the holder inconsistent with the assertion of any such rights. In this case the wife was fairly entitled to dower in the fee of the land, because she never released her dower in it; but she certainly could have no claim to dower as against the mortgage, unless that had been paid or discharged by some one whose act would in law inure to her benefit.

Our statute (2 *Comp. L. p.* 851) provides that when the heir, or any other person claiming under the husband, shall pay and satisfy a mortgage in which the wife has joined with her husband, the amount of the mortgage shall be deducted from the whole value of the land, and the widow's dower shall be set off in the residue. In setting off dower under such a state of facts, the commissioners, having ascertained the whole value of the property, deduct from that value the amount of the incumbrance, and set off such a portion of land to the widow's use as they consider worth one-third of the residue. The amount of the incumbrance being ascertained, there is no practical difficulty in performing their duty.

Mr. Alvah Snyder, holding the execution title and the mortgage, and having conveyed the land as an entirety, it is fair to presume that he intended to regard the mortgage as extinguished, as an independent security. But this extinguishment being made by himself, and he being, in virtue of his execution title, an assignee of the husband, this can not enlarge the widow's rights. She can only claim dower in the residue. And inasmuch as the statute provides for making the deduction in setting off dower, that is the proper occasion for making it.

The only remaining inquiry is whether this can be done in the action of ejectment. Our statute does not require dower to be set off before ejectment. It authorizes an action to be brought by any one entitled to dower, and, in case of recovery, provides that it shall be set off

by commissioners, in the same manner as in probate proceedings.—2 *Comp. L. p.* 1240, § 4612.

As the widow's dower is to be reduced by any such incumbrances as have been referred to, it would seem that they should be proven in order that a proper foundation may be laid for instructions to the commissioners. In this case the amount of the mortgage is agreed upon, and there is therefore no difficulty in giving the proper instructions.

We are of opinion that the facts before us are such that the whole rights of the parties may be disposed of in the action of ejectment, and that the conveyance to Alvah Snyder was, under the circumstances, such a merger as authorized him to stand in the position of an assignee of Samuel Snyder satisfying it.*

The other Justices concurred.

Reuben Emery v. Samuel W. Whitwell and Another.

Ejectment. Plaintiff claimed the premises under an execution sale. To prove a judgment on which execution issued, plaintiff gave in evidence the following journal entry entitled in the cause: "On hearing counsel in this cause, ordered, on motion of plff's. att'y, judgment for plffs. on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in plffs.' declaration; and the clerk having computed the amount due by the condition of said bond at $800, the penalty thereof, to be discharged on the payment of $624.11, with costs to be taxed." He also offered in evidence the execution issued for $800 debt, with endorsement to collect $624.11 and costs, the files in the case, showing declaration on a money bond in the penalty of $800, plea thereto, demurrer to the plea, and joinder. Also writ of error brought by defendant, in the same case—the return thereto giving a transcript of what purports to be a formal judgment record, and the proceedings in the Supreme Court thereon, where judgment was affirmed. The circuit court rejected all this evidence.—*Held*, erroneous.

By MANNING J.

By the practice and statutes of this state, no formal judgment record need be made up unless required by one of the parties, but the judgment is evidenced by the

*See *Brown v. Lapham*, 3 *Cush.* 557.

files and journal entries. Admitting the journal entry in this case to be defective, the transcript sent up in return to the writ of error, showing a formal judgment record signed by the clerk and judge, is evidence both of such record and of the judgment of the circuit court.

By CHRISTIANCY J.

Where the files in the case clearly show that judgment for a definite sum should have been entered, and was intended by the court to be entered, but the entry actually made was defective, it is entirely competent to amend the record to what it should have been, at any time thereafter.

But in such case no actual amendment need be made; but the record will be treated as amended, or rather as though no such error appeared.

A record, like other writings, must always be subject to construction, and is, in fact, what its fair construction makes it. The question of amendment in such a case is, therefore, practically one of construction, and must arise whenever and wherever the record is brought in question.

Notice of application to amend the record is not necessary in such case, because the effect of the record is not changed by it, and no one's rights are affected. Notice is only necessary where the nature of the error and the appropriate amendment depend on matters not apparent on the face of the record, but shown *aliunde*.

By CAMPBELL J.

Where no question can arise as what were the rights of the plaintiff on the record itself, and where it would not have been in the power of the court to render a different decision without error, an omission to state that right, or to render that judgment properly on the record, can be regarded as nothing but a clerical omission; and is not only amendable of course, at any time, but, in reading the record, it should be considered as supplied, whether actually corrected or not.

The whole record should be read, when brought up collaterally, precisely as if the amendments due as a matter of right had been actually made.

As either the record in the court below, or that sent up in return to the writ of error, shows the judgment that should have been entered, and the execution is correct in accordance with that, the execution title should be sustained.

By MARTIN Ch. J. dissenting.

The journal entry in question shows that the court intended to enter, not a final, but an interlocutory judgment merely, and this court has no power to transform it into a final judgment.

A clerical error in entering judgment may be amended at any time. But where the record fails to show that a judgment was intended to be entered, though it clearly appears that it might have been, this can not be regarded as a clerical mistake in the entry of a judgment, but as want of evidence of judicial action.

The return of the clerk to the writ of error is to be regarded as merely the formal return of the clerk; in a form which he supposed proper, and can not be used as evidence of a judgment in the same court in which record should be, if one was ever rendered, when the record itself is not shown to be lost or destroyed.

Error to Calhoun Circuit.

Defendants in error brought ejectment in the court below, claiming title in fee to the premises in question.

On the trial (June 8th, 1858) before the court without a jury, they introduced in evidence a patent of the land from the United States to Reuben Abbott, a deed from Reuben to Samuel W. Abbott, dated February 25th, 1841, a chain of conveyances from the latter to themselves, and possession by defendant at the commencement of suit; and rested.

Defendant, to support the issue on his part, then presented the journal of said circuit court, containing the following entry:

"*Reuben Emery and Harriet L. Emery v. Reuben Abbott.*

"Dec. 6th, 1841. — On hearing counsel in this cause, *Ordered*, on motion of George Woodruff, plffs.' att'y, judgment for plffs. on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in plffs.' declaration, and the clerk having computed the amount due by the condition of said bond at $800, the penalty thereof, to be discharged on the payment of six hundred twenty-four dollars and eleven cents, with costs to be taxed ($624.11)."

At the same time of presenting said journal, defendants submitted a motion entered in the special motion book as follows:

"*Reuben Emery and Harriet L. Emery v. Reuben Abbott.*

"The surviving plaintiff in this cause, Reuben Emery, by George Woodruff, his attorney, comes and moves the court that the entry of judgment in said cause, made in the journal of the court on the 6th day of December, A.D. 1841, be amended by the files and other entries in the cause so as to exhibit such a judgment as ought to have been rendered in said cause, *nunc pro tunc*, and that such entry may stand as follows: 'In this cause, the court now here having heard the arguments of counsel of the respective parties, upon the demurrer joined therein, and

considered the same, do adjudge that the plea of the said defendant is not sufficient in law to bar the said plaintiff's action: And it is therefore ordered, adjudged, and considered that the said plaintiffs do recover against the said defendant their debt aforesaid to eight hundred dollars, the penalty of the bond set forth in their declaration, with six cents damages, and costs to be taxed.' Which motion will be founded upon the files and entries in said cause, or upon authenticated copies thereof. Dated Oct. 27th, 1857."

The court declined to grant the motion, and defendant excepted.

Defendant then offered in evidence the journal entry above given, and also the files and entries in the cause entitled therein, showing, That the action was upon a money bond dated July 28th, 1838, given by said Reuben Abbott to the plaintiff Harriet, then Harriet L. Rossiter, and since married to the other plaintiff, in the penal sum of $800, conditioned for the payment of $100, September 1st, 1838, and $700 on July 28th, 1840, with interest: That declaration was filed therein November 14th, 1840, in the ordinary form in debt, and defendant pleaded thereto *nil debet:* That plaintiff demurred to said plea, and defendant thereupon filed an amended plea, setting forth that said Harriet, at the time of the giving of said bond, was administratrix on the estate of Daniel Rossiter, and that said bond was due to said estate, and not to said Harriet, except in her official capacity as such administratrix. That plaintiff also demurred to this plea, and defendant joined in demurrer.

Defendant also offered in evidence a transcript of a judgment of the Supreme Court, from which it appears that on the 16th day of June, 1842, said Reuben Abbott sued out of said court a writ of error directed to said circuit court, commanding the return of the proceedings in said cause; to which writ return was made, which, after reciting the pleadings and proceedings therein, set forth judgment as follows:

"And now, at this day, to wit, on the day and year and in the term of the said court first aforesaid, and before the judges aforesaid, at the court house in the village of Marshall, came the said parties by their attorneys aforesaid, and all and singular the premises aforesaid having been seen by the court now here, and fully understood, and mature deliberation being thereupon had, it seemeth to the said court now here, that the plea of the said defendant, and the matters therein contained, are not sufficient in law to bar and preclude the said plaintiffs from having and maintaining their aforesaid action thereof against him, the said defendant, and therefore the said plaintiffs ought to recover their damages; whereupon, on motion of George Woodruff, attorney for plaintiffs, it is referred to the clerk to compute the amount due upon the bond mentioned in the plaintiffs' declaration, and the clerk having computed the amount due by the conditions of said bond at eight hundred dollars, the penalty thereof to be discharged on the payment of six hundred and twenty-four dollars and eleven cents; and on further motion of said plaintiffs, by their attorney aforesaid, final judgment is rendered for said sum, with costs of suit. Therefore it is considered that the said Reuben Emery and Harriet L. Emery do recover against the said Reuben Abbott the sum of six hundred and twenty-four dollars and eleven cents for their said debt, and also twenty-six dollars and ninety-six cents for their damages, which they have sustained as well on occasion of the detaining of said debt, as for costs taxed and charges by them about this said suit, in this behalf expended, by the said court now here adjudged to the said plaintiffs, with their assent, which said debt and damages amounts in the whole to six hundred and fifty-one dollars and seven cents; and the said defendant in mercy, &c.

"Judgment rendered December 6th, 1841."

That error was assigned on said writ of error as follows:

"The plff. in error, by Gibbs and Bradley, his attor-

neys, comes and says, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, there is a manifest error, in this, to wit: that by the record it appears that the judgment aforesaid, in form aforesaid, was given against the said Reuben Abbott, whereas by the law of the land the said judgment should have been in favor of the said Reuben Abbott, and no judgment upon said record could legally have been had against him; and the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled, and held for nothing."

That on the 12th September, 1842, the following judgment was entered in said cause in the Supreme Court:

"On hearing of counsel in this cause, on the return to the writ of error heretofore issued in said cause, and mature deliberation being thereupon had, it is ordered, on motion of Mr. Pratt, of counsel for defts. in error, that the judgment below be affirmed, with ten per centum damages, and double costs to be taxed. Judgment of court below $651.07; dgs. at ten per centum, $49.94; amt. $701.01. It is therefore considered and adjudged by the court that the defendants in error do recover of the plaintiff in error the sum of seven hundred and one dollars and one cent, with double costs to be taxed."

Defendant also offered in evidence the docket entries in said cause in the circuit court, noting the entry of judgment therein, the issue and return of execution, &c. Also the execution, issued December 8th, 1841, commanding the collection of the debt of $800, and $26.96 costs, with endorsement thereon directing the sheriff to collect $651.07, and interest from December 6th, 1841. Also an endorsement upon such execution, signed by Loren Maynard, as sheriff of Calhoun county, showing a levy upon the premises in question December 9th, 1841; and a return upon the same that said premises were sold by Charles Dickey, then sheriff of said county, to Reuben Emery De-

cember 20th, 1845, for $861.87. Also the sheriff's certificate of the said sale, and the record of the sheriff's deed given thereupon to said Reuben Emery. Also notice given of said levy in writing to said Reuben Abbott, by the sheriff, at the time of making the same, and that said Reuben Abbott was then in possession of the premises.

Defendants also offered to prove that said Maynard and Dickey were respectively sheriffs of said county at the time of said action by each. Also that the deed from Reuben to Samuel W. Abbott was given without consideration, and for the purpose of preventing the premises being taken to satisfy any judgment that might be rendered in said cause. Also that plaintiffs were notified, prior to their purchase of said land, that defendant had a lien upon the same by virtue of said levy.

But to each of said offers of evidence by defendant the plaintiffs objected, and the court sustained the objections, and rendered judgment in favor of plaintiffs for the recovery of the premises.

Defendant removed the cause to this court, for review on exceptions to the rulings of the court.*

*This cause was once before in the Supreme Court on reservation by the circuit court, and will be found reported in 3 *Mich.* 84. On the opinion of this court being certified back, judgment was entered in the circuit court in favor of plaintiffs, in accordance with that opinion. A new trial was afterwards granted, on which the proceedings above recited took place. On the case being now called for hearing, Mr. Blair raised the question whether this court would hear a re-argument upon the same point directly passed upon by the late bench in this very cause. He contended that the case now presented was substantially the same, in every particular, with the one presented on the reservation. Plaintiff in error claimed that, by giving in evidence on this trial the files in the cause, he has added to the former showing, and has in fact shown that such proceedings had taken place that plaintiffs in the original suit were entitled to final judgment at the time they claim judgment was attempted to be entered. But it will be seen by the report in 3 *Mich.* that the proceedings down to that time were assumed, by counsel and the court, to have been correct—that no question was made as to there having been a proper declaration, a plea, and a demurrer which was sustained; but assuming these proceedings to have been had, the question passed upon was, What was the effect of the journal entry? It can therefore make no difference here that defendant has proved those matters here which, on the former occasion, were assumed to exist. As to the writ of error and return thereto, these can not make a judgment if none existed before.

The court took the matter under advisement, and, on a subsequent day, stated that the majority considered this case as differing in important particulars from that before presented, and the argument proceeded.

G. Woodruff, and *S. T. Douglass*, for plaintiff in error:

1. There is no peculiar sanctity in a judicial record which requires that it should be construed upon any different principles from any other writing.

2. All parts of a record should be construed together, and with reference to the jurisdiction and the known and established practice and course of proceeding of the court. —1 *Lou. An. R.* 92.

3. And whenever it appears, with reasonable certainty, from the whole record, so construed, that some order or judgment was actually made in the cause, or some proceeding had, which either is not entered at all, or is erroneously entered, of record, through the misprison of the clerk, or even of an attorney of the court, which is essential to the validity of the subsequent proceedings,—the omission will be supplied, or the erroneous entry corrected by amendment; or, if the record comes in question collaterally, it will be treated as if amended.

4. And the amendment will be made upon comparatively slight evidence where the omission or defect is in respect to some judgment, order, or decree, to which the party claiming the benefit of it was entitled, as a matter of course and of right, according to the established practice of the court.—6 *Ired.* 425; 4 *Dev.* 295; 7 *Cush.* 282; 5 *Ala.* 28; 16 *How.* 577; 19 *Ga.* 300; 22 *Ohio*, 11; 2 *Wall. Jr.* 569.

5. Especially where there has been acquiescence by the party entitled to avail himself of the defect, or subsequent proceedings taken by him in the cause, upon the assumption that no such defect existed.—16 *How.* 579; 19 *Ga.* 288; 3 *Watts*, 87; 19 *Ohio*, 67; 2 *Wall. Jr.* 569; 10 *Ired.* 144.

6. Or where the amendment is necessary to support rights acquired, in good faith, by proceedings founded upon the judgment, order, or decree amended.—3 *Watts*, 87; 4 *Dev.* 295; 8 *Ired.* 70; 1 *Pick.* 352; 16 *How.* 571; 19 *Ohio*, 67; 2 *Pa. St.* 338; 2 *Wall. Jr.* 569; 19 *Ga.* 300.

7. Any error or defect in a record, which occurs through the act or omission of the clerk of the court, in entering or failing to enter of record its judgments or proceedings, and is not an error in the express judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error*, and *amendable*, no matter in how important a part of the record it may be. And where the error or defect is in respect to the entry of some judgment, order, decree, or proceeding, to which one of the parties in the cause was of right entitled as matter of course, according to law and the established practice of the court, it will always be *presumed* to have occurred through the misprison of the clerk, and will be amendable if from other parts of the record it can be ascertained, with reasonable certainty, what judgment, order, or decree, &c., the party was entitled to.—21 *Law Rep.* 680; 3 *Watts*, 87; 4 *Dev.* 295; 7 *Cush.* 282; 8 *Fos.* 473; 8 *Ired.* 70; 5 *Ala.* 28; 6 *How. Miss.* 93; 1 *Blackf.* 132; *Bus. Law*, 382; 8 *Ala.* 252; 16 *How.* 571; 11 *S. & R.* 357; 4 *Leigh*, 321, *note*; 9 *Ala.* 335; 24 *Miss.* 188; 19 *Ohio*, 67; 4 *Wend.* 463; 22 *Ohio*, 11; 8 *Ala.* 297; 9 *Ala.* 337; 8 *Blackf.* 100; 1 *Green* (*N. J.*), 195; 3 *S. & M.* 248; 7 *Gill. & J.* 73; 5 *Ala.* 223; 4 *Leigh*, 309; 7 *How. Miss.* 599; 18 *Johns.* 502; 1 *Cow.* 189; 2 *Ham.* 31; 4 *H. & McH.* 498; 19 *Johns.* 244; 2 *Hill* (*So. C.*), 475; 5 *Rand.* 546; 6 *Pick.* 512; 2 *Pa. St.* 335, 338; 2 *Wall. Jr.* 569; 4 *Eng.* 375; 11 *Humph.* 192; 6 *Humph.* 281; 10 *Me.* 281.

8. *Clerical errors* may be amended at any time. It is not necessary that the amendment should be made during the term at which the judgment is rendered.—4 *Mod.* 371; 2 *Gilm.* 437; 3 *Ala.* 607; 1 *Scam.* 122; 6 *Ired.* 425; 8 *Fos.* 473; 6 *Cush.* 354; 1 *Pick.* 351; 7 *Cush.* 282; 24 *Ala.* 281; 4 *Conn.* 71; 5 *Ired.* 12; *Bus. Law*, 382; 4 *M. & S.* 93; 8 *Ala.* 252; 16 *How.* 571; 2 *Wall. Jr.* 570; 9 *Ala.* 335; 12 *Ala.* 363; 5 *Ired.* 204; 1 *Green* (*N. J.*), 195; 3 *S. & M.* 248; 2 *Ala.* 29; 4 *Leigh*, 308; 18 *Johns.* 502; 1 *Cow.* 189; 2 *Ham.* 31; 4 *H. & McH.* 498; 19 *Johns.* 244; 2 *Hill* (*So. C.*), 475;

4 *Rand.* 546; 9 *Ala.* 58; 3 *Ala.* 281; 10 *Me.* 281, *and cases there cited.*

9. And if the amendment of a clerical error *is made solely upon evidence contained in other parts of the record and proceedings*, read in the light of the established practice and jurisdiction of the court, it may be made upon motion of any party interested, or even of a stranger (or upon the suggestion of the court itself, without motion), and *without notice to the party who may be interested in opposing the amendment. Notice* is only necessary where the amendment is asked for upon affidavit or other evidence *dehors the record.* — 7 *Cush.* 282; 8 *Fos.* 473; 3 *Ala.* 470; *Ibid.* 281; 2 *Gilm.* 437; 24 *Ala.* 468; 7 *How. Miss.* 592; 6 *How. Miss.* 93; 2 *Wall. Jr.* 570.

10. *Clerical* errors may be amended either before or after error brought to reverse the judgment on account of the defect amended, and either by the court in which the proceedings were had or in the court of review. — 1 *Blackf.* 132; 4 *M. & S.* 93; 22 *Ohio*, 11; 22 *Vt.* 300; 7 *T. R.* 350; 7 *Gill. & J.* 78; 5 *Ala.* 223; 5 *Eng. L. & Eq.* 349; 7 *Cow.* 524; 6 *Cow.* 42; 6 *Pick.* 572.

11. Or pending an action founded upon the defective record, or asserting rights under it. — 2 *Gilm.* 437, 451; 8 *Ired.* 70; 6 *How. Miss.* 93; 5 *Ired.* 12; 1 *Cow.* 189; 9 *Ala.* 58.

12. Or after action brought, or motion made, to take advantage of the alleged defect, and when the effect of the amendment will be to defeat the action or motion — 19 *Me.* 111; 1 *Pick.* 351; 7 *Cush.* 282; 1 *Cai.* 9, 10; 6 *Greenl.* 48; 9 *Ala.* 335; 3 *Watts*, 87; 24 *Miss.* 188; 2 *Ham.* 246.

13. And where a defective record is offered in evidence on a trial before the same court in whose custody the defective record is, a merely clerical error may be amended upon the mere motion of the court upon the trial, and when the record is offered in evidence — 3 *Watts*, 87; 2 *Gilm.* 437, 451; 1 *Cai.* 9, 10; 6 *How. Miss.* 93.

14. And where the error in a record or process, which

is offered in evidence in a collateral action, either in the same or in a different court, is *clerical*, and therefore amendable as a matter of right from what appears upon other parts of such record, the record will be treated, and will have the same effect, as if amended, though no amendment is actually made; for, if the record is amendable, it is not wholly void, and it can not be impeached in a collateral action except for defects which render it a nullity.—3 *Watts*, 87; 4 *Dev.* 295; 1 *Pick.* 351; 7 *S. & R.* 178; 19 *Ohio*, 67, 104; 4 *Wend.* 462; 5 *Blackf.* 536; 2 *Pa. St.* 335; 10 *Ired.* 149; 8 *Wend.* 679; 11 *Humph.* 192; 6 *Humph.* 281.

15. It can not be objected to the amendment of a merely clerical error in a record, upon evidence contained in the record itself, that it may affect the rights of third parties, acquired subsequently to the judgment amended, and which are adverse to the rights claimed under the judgment; for, by the very theory upon which the court proceeds in making such an amendment, such parties are chargeable with notice of what the record ought to be, and what it was intended to be.—13 *Ired.* 425; 3 *Johns.* 526; 7 *Johns.* 217; 18 *Johns.* 81; 19 *Johns.* 449; 1 *S. & M.* 338; 14 *Pick.* 28; 7 *Cow.* 524; 9 *Ala.* 58.

A. Blair, for defendant in error:

This court will not review its former decision in this cause.—*Roberts v. Cooper*, 20 *How.* 268; *Oakley v. Aspinwall*, 3 *Kern.* 500.

If the former decision needs support, the following cases sustain it: *Wootan v. Manning*, 11 *Texas*, 327; *O'Connor v. Mullen*, 11 *Ill.* 57; *Goddard v. Coffin, Davies*, 381; *Lisle v. Rhea*, 9 *Mo.* 172; *Ibid.* 354; *Hill v. Fiernan*, 4 *Mo.* 316; *Evans v. Hind*, 1 *McMul.* 490; *Bayken v. State*, 3 *Yerg.* 426; *Wooster v. Clarke*, 2 *Pike*, 101.

MANNING J.:

This case is brought here by writ of error, to correct

alleged errors occurring on the trial, in the rejection of testimony. Whitwell and Hoover brought an action of ejectment against Emery, in the circuit court of Calhoun county, to recover the premises in dispute, and of which Emery was in possession, claiming title. It appears from the bill of exceptions that on the trial the plaintiffs, to prove their title, gave in evidence a patent from the United States for the land in question, to one Reuben Abbott, dated August 15th, 1833; a deed from Abbott and wife to one Samuel W. Abbott, dated February 25th, 1841; a deed from Samuel W. Abbott and wife to Martha Mathews, dated June 3d, 1842; and a deed from Martha Mathews and her husband to the plaintiffs, dated March 23d, 1844. And defendant having admitted he was in possession of the premises, the plaintiffs rested.

The defendant claimed title to the land under a sheriff's deed, given on a sale of the premises under an execution issued on a judgment obtained by defendant and his wife against Reuben Abbott, on the 6th of December, 1841, in the Circuit Court of Calhoun county. To prove the judgment, he offered in evidence the following entry on the journal of the circuit court, with the files and entries in the case:

"*Reuben Emery and Harriet L. Emery v. Reuben Abbott.* Dec. 6th, 1841.

"On hearing counsel in this cause, ordered, on motion of George Woodruff, plffs.' att'y, judgment for the plffs. on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in plaintiffs' declaration, and the clerk having computed the amount due by the condition of said bond, at $800, the penalty thereof, to be discharged on the payment of six hundred twenty-four dollars and eleven cents, with costs to be taxed (624.11)."

Also a transcript of a judgment, in this court, in the same cause, affirming the judgment of the circuit court

with ten per cent. damages and double costs, on 12th September, 1842. This evidence, with other evidence offered at the same time and in connection with it, was objected to by plaintiffs, and rejected by the court; and an exception was taken by defendant.

Admitting the journal entry of the circuit, with the files and entries in the case, did not prove a final judgment, there was proof of such judgment in the certified copy of the proceedings in this court, where the judgment was affirmed, which shows a formal record of the judgment attached to the writ of error removing the cause here.

By the Revised Statutes of 1838, and previous thereto, it was the duty of the clerk of the circuit court to make, in vacation, a complete record in a book, of all cases finally determined, and at the next term to present such book to the judge, who was required to compare the record so made by the clerk, and, if found to be correct, to sign it. — *Rev. Stat.* 1838, *p.* 410, § 10; *Laws of Mich.* 1827, *p.* 124, § 24. In 1839, judgment records were dispensed with in cases settled by the parties before final judgment. — *S. L.* 1839, *p.* 223, § 21. By the fee bill of 1840 (*S. L.* 1840, *p.* 183), the clerk was to have ten cents a folio for making a complete record in each case, when required to make it by a party, and not otherwise. And by the Revision of 1846, these several statutory provisions were repealed, and we now have no judgment record, properly speaking. The journal entries, files, and office entries, are the only records we have, since that Revision, of judgments in our courts of record. I mention these changes in the law to account for a formal record, signed by the clerk and judge of the circuit court, being in this court, while no record is to be found in the circuit court. Judgment was rendered in the circuit on the 6th of December, 1841, after the act passed in 1840, which act was virtually a repeal of the law requiring judgment records, except when one of the parties required a record to be made. That one

was made, and most probably at the request of the defendant Abbott, who sued out the writ of error, the transcript offered to be given in evidence shows. It was evidence both of such record and of the judgment of the circuit court, and the judge erred in rejecting it.

On the argument it was insisted by defendants in error, that the judgment of the circuit court should be affirmed without hearing the plaintiff in error, although in court, urging a right to be heard, and alleging error in the record, as the same questions had been decided in the court, in this same suit, against plaintiff in error, on questions reserved by the circuit judge on a former trial for the opinion of this court. When this is the case, the court will not, I think, be very likely to hear a second argument without some satisfactory reason for doing so, but will be governed by circumstances and a regard to the rights of the parties.

The questions before us are entirely different from the questions before the court in *Whitwell and Hoover v. Emery*, 3 *Mich.* 84. But one of the two questions decided in that case could possibly be made on the bill of exceptions before us, and that is one of no importance to either party, in the present aspect of the case. I allude to the amendment made on the first trial, by the circuit judge, of the journal entry of the 6th December, 1841. The judge permitted the entry to be amended, by inserting the following words between the words "at," and "$800," namely, "six hundred and twenty-four dollars and eleven cents, ordered final judgment for," so that the entry would read "the clerk having computed the amount due on said bond at six hundred and twenty-four dollars and eleven cents, ordered final judgment for $800, the penalty thereof, to be discharged on the payment of," &c. If it was necessary to decide whether such an amendment could be made, I should not, by reason of the decision in 3 *Mich.*, feel warranted in refusing to hear counsel upon it, as we

have facts before us touching the question that were not then before the court. The journal entry and subsequent proceedings, as the issuing of an execution and the like, were all the court then had to act upon. With all the prior proceedings in the cause before us, it is still my intention not to decide the point then decided, as from the views I have already expressed it is unnecessary.

There is a clerical error in the record of final judgment sent to this court on the former writ of error, in stating the judgment to be for the amount the clerk found to be due, instead of the penal sum of the bond, to be discharged on the payment of that amount. The error, however, is one so manifest from an inspection of the whole record, that it may not only be amended at any time without notice, but the same force and effect may be given to the record as if it had been amended. The authorities are very full and clear on these points. Instead of naming them, I refer to the brief of counsel for plaintiff in error, where the cases may be found arranged under different heads.

The court, therefore, erred in rejecting the certified transcript of the record of this court; and as the further evidence offered was doubtless rejected on the supposition there was no proof of a judgment, I deem it unnecessary to notice the other assignments of error.

The judgment should be reversed, with costs.

CHRISTIANCY J.:

I agree substantially in the opinion of my brother Manning in this case, though I do not rest my opinion so much upon the complete record returned to the Supreme Court in the case of *Abbott v. Emery*, or upon the affirmance of the judgment in that court. I come to the same result from the files and entries in that cause in the court below.

If, on the trial in the court below of the cause now under consideration, nothing had been offered in evidence

but the single entry of December 6th, 1841, I might agree in the result at which the Supreme Court arrived in this case, reported in 3 *Mich.* 84, as this entry showed nothing, of itself, upon which the judgment was based, and it could not be seen with certainty what the judgment ought to have been. But the defendant offered, in connection with this, the files and entries of the circuit court in the case in which that entry was made. From these files and entries it appeared that the declaration was in debt on a money bond, in the penalty of eight hundred dollars, the condition of which is set out on oyer. To this declaration the defendant pleaded *nil debet*, to which plaintiffs demurred; upon this, the defendant filed a new or amended plea (abandoning, of course, the first plea). This new or amended plea was clearly frivolous; the plaintiffs again demurred, and the defendant joined in demurrer. Then follows the entry in question of December 6th, 1841. This entry, though very informal, sufficiently shows, when taken in connection with the files and other entries, that the demurrer had been argued by counsel, and was sustained by the court; that judgment for plaintiffs was ordered on the demurrer, with costs to be taxed; and it was referred to the clerk to compute the amount due on the bond (evidently the condition), and, substantially, that he had computed the amount at six hundred and twenty-four dollars and eleven cents. It is true the entry literally states that he had computed the amount due on the condition of the bond at eight hundred dollars, to be discharged on the payment of six hundred and twenty-four dollars and eleven cents. And if we did not know what was the bond described in the declaration, or the nature of the pleadings, we could not know what the judgment on the demurrer ought to have been. But, when considered with reference to the declaration and the pleadings, we see that no other judgment could have been given on the demurrer than for the penalty of the bond; and this judgment, in such a case, is in its nature a final judgment.

If the defendant wished to plead anew, he should have applied to the court for leave to withdraw his demurrer, and this should, regularly, have been done before judgment upon the demurrer. This he does not appear to have done before or after the judgment. It is possible that this judgment, though final, might be opened or vacated on good cause shown; and so also may final judgments in other cases, under peculiar circumstances; but no court would be likely to do this after two successive insufficient pleas.

Judgment on demurrer, in such a case, is not like a judgment by default: the latter is the act of the party, and needs confirmation by the court; the former is the judgment of the court upon facts admitted by the pleadings; it is the deliberate judgment of the court itself. It is true, judgment against a defendant on demurrer, in an action for damages, is not practically final; as a computation or assessment must be made, to ascertain the precise amount of the judgment. But in this action of debt on the penalty of the bond, the judgment for the plaintiff for the debt, must be for the penalty of the bond, though the sum due were but one dollar; the assessment by the clerk could not alter it; it was not, therefore, necessary to precede the final judgment, as in a case for damages, or even in other cases of debt; but only became essential, if at all, to ascertain the amount to be collected on the execution, in discharge of the judgment for the debt. The reference to the clerk, therefore, furnishes no inference that the judgment was not intended to be final.

The clerk, in making the entry of judgment on the demurrer, and the reference, made a palpable blunder in stating the amount due by the condition of the bond at eight hundred dollars; yet he states it as the penalty, and finds the sum on the payment of which it is to be discharged, to be six hundred and twenty-four dollars and eleven cents, which is evidently the sum really computed to be due. No reference could authorize him to determine the penalty; that was fixed by the bond.

A similar blunder, or rather series of blunders, some of which are still more gross, appears in the judgment as stated in the transcript of the complete record in the same case, returned to the Supreme Court; as the judgment is there stated to be for six hundred and twenty-four dollars and eleven cents debt—a judgment different from that recited in the execution previously issued, which was for eight hundred dollars debt, as it should have been in fact.

It is not only evident that these are mere clerical errors, but a reference to the pleadings and files in the case, and a fair construction of the whole, make it equally evident what should have been inserted in the place of these errors. We can therefore discover what those entries should have been, and the true intent and meaning of the whole record, with as much certainty as if those errors had not occurred. We can not fail to see that a final judgment was intended, and should have been entered, for eight hundred dollars debt and the costs of suit, which was intended to be discharged on payment of six hundred and twenty-four dollars and eleven cents (the amount due by the condition) with those costs—the precise amendment made by the circuit judge on a former trial of the present cause, and which he doubtless made from an inspection of the same files and entries. I can not doubt it was entirely competent so to amend the record. But though such amendment may be made when the true intent appears from the construction, the actual amendment is not necessary, nor is it often in fact made; but the record will be treated as amended, or, rather, as if no such error appeared. A record must, like all other writings, always be subject to construction, for the purpose of ascertaining its intent, and its effect. In fact, the record is what its fair construction makes it. The question of amendment, in such a case, is therefore practically resolved into a question of construction; and this question may and must arise, whenever and wherever the record is brought in question; and the period of time which may have intervened is wholly imma-

terial. Nor can notice to any of the parties be necessary to authorize the court to make it. No one's rights are affected by it, as the effect of the record is not changed. All who may have consulted the record, or acted upon the faith of it, must be presumed to have notice of all which the proper construction of the whole record discloses; in other words, of the effect of the record.

If the nature of the error, and the appropriate amendment, depend upon matters not apparent on its face, but which require to be shown by evidence *aliunde*, notice should be given to the parties to be affected; and they should have an opportunity to be heard, before the amendment is made.

CAMPBELL J.:

This case, as now presented, differs from that presented to the late Supreme Court in this important particular: That the amendment then brought in question was not accompanied by any thing to amend by, and the court could not sustain it in the absence of a sufficient showing; whereas, in the present case, the whole record is before us. It appears from this that a declaration was filed upon a money bond in the sum of eight hundred dollars, and a single special plea interposed, whereby no issue was raised upon the making of the bond or the amount due, and the only question raised was one collateral to the merits. Upon a demurrer to this plea, judgment was given for the plaintiffs, and an order entered giving such judgment, and proceeding to recite a reference to the clerk, but showing that some clerical omission had taken place, whereby something else failed to be stated. An execution was issued for the penalty of the bond as the debt recovered, and the sale was had under it. The sustaining of the demurrer to such a plea as this was, unquestionably entitled the plaintiff to a judgment for eight hundred dollars, and perhaps was, in itself, a sufficient judgment, inasmuch as there

was no further reference needed. Upon a money bond under the statutes then in force, the judgment could be for nothing but the penalty. Whatever may have been the form of the entry, and whether such a judgment was regularly a final judgment or not, the entry was so treated, and execution issued. If any doubt could reasonably arise concerning the judgment the plaintiff was really entitled to, an amendment might not have been possible without some evidence to supply the defect, and then notice would be requisite. But where no question can arise as to what were the rights of the plaintiff upon the record itself, and where it would not have been in the power of the court to render a different decision without error, an omission to state that right, or to render that judgment properly upon the record, can be regarded as nothing but a clerical omission, and is not only amendable of course at any time, but in reading the record it should be considered as supplied, whether actually corrected or not. Whether we infer the judgment from the records of the court below, or whether we take the formal record from the return to the writ of error, which shows a regular judgment for too small a sum, we have, in either case, the pleadings and decision on demurrer to show what the true amount of the judgment should have been, and the execution upon its face is correct in accordance with that. The authorities are so conclusive upon the duty to amend when asked upon such a state of the record, and of the propriety of reading the whole record, when brought up collaterally, precisely as if the amendments due as a matter of right had been actually made, that as the case stands before us we are bound to sustain the execution title. Lapse of time can not enter into consideration, where the record is merely made to declare expressly that which is the only thing which could be legitimately expressed by it as it stands already.

MARTIN Ch. J., *dissenting:*

This court held when this case was formerly before it, that there was nothing in the journal entry of the circuit court from which it could be inferred that a final judgment was ever rendered therein.—See 3 *Mich.* 86. There was before us the journal entry, from which it appeared that a judgment had been rendered upon demurrer, and a reference ordered to the clerk to compute the amount due upon the condition of the bond, and an entry of such computation. From all this it was manifest that the court below did not intend that such judgment should be final, but interlocutory; and whether that court had power to render a final judgment at that stage of the cause, or not, so long as the intention not to do so was obvious we had not the power to transform it into a final judgment. But under the statutes of 1838, this reference was not only proper, but necessary before final judgment.—See *R. S.* 1838, *p.* 460.

That a clerical error may be amended at any time, I do not doubt, nor did this court then determine. That question was not before us, and the judgment was based upon the fact that the journal did not show that a final judgment was ever rendered, or was ever intended to be rendered, by the court below. The journal clearly enough showed that it might have been, but not that it ever was. This was not regarded as a clerical error in the entry of a judgment, but as a want of evidence of judicial action. There was, in short, an absence of a judgment—nothing to be amended.

But we have now before us a return to the Supreme Court, in 1841, showing the pleadings and proceedings in this case, and also what purports to be a judgment of the circuit court. To my mind it is a little remarkable, not to say suspicious, that on a trial in the same court in which the record is supposed to remain, if one was ever made, the plaintiff in error has been compelled to resort to this return, to show that there ever was a judgment rendered by the court below.

I can not believe that any such judgment record was ever made and signed, but I regard the whole thing as a return of the clerk merely, in a form which he supposed proper, and perhaps necessary. It is evidence of a return to a writ of error, but not of a judgment by the circuit court. If this is not so, why the necessity of ransacking the files of the Supreme Court for such evidence, when the original record would be found in the book of records of the circuit court — or how was it admissible in evidence without showing a loss or destruction of the original?

But it appears that the judgment, as certified by the clerk, is erroneous; it is not a judgment in debt for the penalty, but for the amount due by the condition of the bond. From this I also infer that it is the clerk's judgment, and not the court's. The same error crept into the judgment of the Supreme Court, but this latter was evidently rendered upon motion, and not after an argument, as the award of damages and double costs clearly shows.

Here is, therefore, evidence of two erroneous judgments — one of which is of another tribunal from that having original jurisdiction of the cause; the other of which I can not believe to have been any thing but a clerk's formal return, and not a copy of a record, and consequently no evidence of a judgment — offered to show that the circuit court determined to, and did, render a final judgment in the cause, and that for the penalty of the bond, and thus to correct an error claimed to exist upon the journal of that court, which is the vital one of an entire want of a judgment. We are indeed a court for the correction of errors if we make out of all this confusion a good judgment.

I adhere to the former decision of this court, notwithstanding the additional evidence now before us that there is no evidence that the circuit court ever rendered a final judgment in this cause, and consequently there is no error in its journal which can be corrected.

Judgment reversed.

The People v. William S. Getchell.

The act of procuring by falsehood the endorsement of a promissory note, is not, in itself, a false pretence within the statute, unless done with intent to defraud. And the prosecution, as evidence of the intent, must show something more than the falsehood and the procuring the endorsement thereby, before conviction can be asked under an indictment therefor.

Where an intent is made the gist of an offense, that intent should be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonable doubt.

Where defendant was put on trial for false pretences in procuring the endorsement of the prosecutor to a promissory note, by the falsehood that a former note for the same amount, endorsed in like manner, was destroyed, and after proof of the facts charged, offered to show in defense that he was a partner with the prosecutor; that the latter was bound by agreement between them to endorse for him to an amount considerably larger than the two notes, but had refused to perform the agreement, and that the money obtained on the notes was used in their business for their joint benefit, — *Held*, That the evidence should have been received as tending to disprove the presumption of an intent to defraud.

Heard June 11th. Decided June 15th.

On exceptions from the Recorder's Court of the city of Detroit, where the defendant was tried and convicted on an information charging him with obtaining by false pretences the endorsement of H. Norton Strong to a certain promissory note made by defendant.

At the trial in the Recorder's Court, the prosecution called said *Strong* as a witness, who, among other things, testified that, on the 10th of December last, the defendant brought to him a note, which the witness produced, and which was read in evidence, and a copy of which is as follows:

"$150. *Detroit*, Dec. 10, 1858.

"Thirty days after date I promise to pay to the order of H. N. Strong, Esq., one hundred and fifty dollars, value received, at the Peninsular Bank. "W. S. GETCHELL."

(Endorsed) "H. N. STRONG."

That witness endorsed the same at the request of defendant, and delivered the same to him.

That on the next morning, defendant came and asked

witness to endorse another like note, and told the witness that there was a mistake in the said first note—the marginal figures being $150, while in the body it was written as $100—that he had not been able to use it; and the defendant, on being asked by witness where the note was, answered that he had destroyed it—had torn it up; that witness told him he ought to have shown said first note to witness,—to which defendant replied that he thought his word ought to be good for $150; that witness then endorsed and delivered to defendant a second note, which he took away with him, and which witness produced, and the same was read in evidence, a copy of which is as follows:

"150. *Detroit*, Dec. 11, 1858.

"Thirty days after date I promise to pay to the order of H. N. Strong, Esq., one hundred and fifty dollars, value received, at the Peninsular Bank. "W. S. GETCHELL."

(Endorsed) "H. N. STRONG."

That witness was induced to endorse the second note solely by above statements of defendant, and should not otherwise have endorsed it.

On cross-examination, witness testified that defendant was doing business under the name of "W. S. Getchell, Agent"; that witness had previously endorsed his paper, both for defendant's business and for defendant's private purposes; that, by contract, witness had agreed to furnish defendant in his business four thousand dollars, in cash or endorsements, if the legitimate business of his concern required it; that he never refused to advance or endorse for defendant when his legitimate business required; that said contract was in force December 10th, and that witness' advances and endorsements at that time did not amount to four thousand dollars; that witness was never a partner with defendant; that the advances and endorsements of witness had not at any time amounted to four thousand dollars; that he was to be a participator in the profits of

the business carried on by the name of "W. S. Getchell Agent."

The defendant then offered to prove a partnership between Strong and defendant: That Strong was liable for losses; that he was to furnish moneys and endorsements to the amount of four thousand dollars; that the notes alluded to were used in payment of liabilities of said concern, and that defendant had a right so to use them; and that said Strong did acknowledge his liability as a partner by payment of accounts of said concern, of which said Strong and Getchell were members. This was objected to by the prosecution, and was ruled out by the court, and an exception was taken by the prisoner.

The attorney for the defendant then asked said witness the following question: "Have you paid any accounts of said concern within the life of the contract between you and defendant?" To which the prosecuting attorney objected, and the court sustained the objection, and the defendant excepted.

The defendant then asked witness the following questions: "Was defendant irresponsible on December 10th and 11th?" "Have you not refused to endorse for the defendant at any time during the lifetime of said contract?" "Have you not stated that you were unable to put in as much as you were obliged to by contract, in carrying on said business?" All of which were severally objected to by the prosecuting attorney, and the court sustained the objections, and the defendant excepted.

The witness then, on further cross-examination, testified, that on said December 10th the defendant ought to have been more responsible than when he signed the contract with witness. Defendant said when he went into the business he was worth nothing.

The defendant then asked the witness: "Had defendant told you during last summer that the concern was losing money, and he wanted to give up the business?" To

which the prosecuting attorney objected, and the court sustained the objection, and the defendant excepted.

The prosecuting attorney, further to maintain said issue, produced as a witness *W. H. Goodenow*, who, among other things, gave evidence tending to corroborate said Strong as to representations made by defendant.

The defendant then, to prove the issue on his part, recalled said Goodenow, who testified that defendant had been doing business for about three years as agent of Strong; that he had there the written contract between said Strong and defendant; which witness then produced to the court, and of which the following is a copy:

"*Memorandum of Agreement*, made this 1st day of July, A. D. 1857, between H. Norton Strong, of the city of Detroit, Wayne county, Michigan, of the first part, and William S. Getchell, of the same place, of the second part,—Witnesseth:

"*First.* That the said Strong authorizes the said Getchell to carry on for him, and as his agent, the business of merchandizing in the city of Detroit, at the store now occupied by him, for the period of one year, and on the following terms and conditions:

"*Second.* The said business shall be carried on in the name of Wm. S. Getchell, Agent.

"*Third.* The said Strong agrees to endorse notes and furnish moneys for and to the said Getchell, in the legitimate transactions of said business, from time to time, as may be necessary, but not to exceed the amount of four thousand dollars outstanding at any one time in notes and moneys.

"*Fourth.* Faithful accounts and complete books of account shall be kept, in which shall be entered all of the proceedings of said business of every kind, to be open at all times to the examination of said Strong.

"*Fifth.* Out of the said business shall be paid: First, To said Strong four hundred dollars per year for the rent

of the store room now occupied for said business, the same to be paid in equal quarterly installments; Second, All other debts and expenses of said business of every kind.

"*Sixth.* After the rent, debts, and expenses have been fully paid, the said Strong agrees to pay to the said Getchell one-half of the net profits of the business, as his compensation for serving as agent in carrying on said business; and said sum shall be in full for his compensation.

"*Seventh.* Said Getchell shall not, in said business, contract debts so that there shall be more than four thousand dollars of indebtedness outstanding at any time.

"*Eighth.* Nothing herein contained shall be construed to constitute a copartnership between the parties.

"*Ninth.* The said Getchell agrees to accept said agency, and to carry on the business contemplated by these articles, on the terms herein provided, and faithfully to keep, observe, and perform all and singular the same." (Signed) "H. N. STRONG. [L. S.]" (Signed) "W. S. GETCHELL. [L. S.]" Witness: "J. B. HINCHMAN."

"This agreement is hereby extended for the term of one year from the 1st day of July, 1858." "Detroit, July 2, 1858." (Signed) "H. N. STRONG. [L. S.]" (Signed) "W. S. GETCHELL. [L. S.]"

The defendant then offered the same in evidence; to which the prosecuting attorney objected, and the same was rejected by the court, and defendant excepted.

The defendant then gave evidence by *Jason Stebbins*, a witness produced by him, that he procured the first note to be discounted for defendant on the 10th of December, 1858, and that the discount did not exceed five per cent. a month.

The witness further said, that he met Strong on the day the note dated the 10th of December fell due, and told him that the note fell due that day. "He asked me if I had seen defendant. I said 'No, as I supposed he was

the man to pay the note, as he had defendant's assets.' He said the goods which had been in defendant's store were his, and he had taken them. He expressed surprise about the note, and said he supposed there was but one note out. In the afternoon of the same day I again saw Strong; he then said he had waived protest on the note, and expected to pay it."

The defendant then gave in evidence by *W. C. Skiff*, that on December 10th defendant paid N. P. Jacobs $75 on merchandise account, bought by W. S. Getchell, Agent: That defendant paid Jacobs nothing more until December 16th.

Defendant then offered to prove, that between the 10th and 20th days of December, defendant paid on debts of the concern of W. S. Getchell, Agent, three hundred dollars. The court rejected the testimony as to payments made other than on the 10th and 11th of December, but allowed proof as to payments made by defendant on those days; the prosecuting attorney, on behalf of the People, consenting thereto; and the defendant excepted.

The defendant then, by *H. S. Clapp*, gave evidence, that on the 10th day of December, defendant paid him one hundred and thirty-three dollars, on a note signed by W. S. Getchell, Agent, and endorsed by either N. P. Jacobs or H. N. Strong.

The defendant then produced as a witness, *M. M. Wells*, and offered to prove by him that the defendant paid him sixty dollars, somewhere from the 10th to the 15th of December. The witness stated that a payment was made him somewhere from the 10th to the 15th day of December, but he could not fix the day more accurately. The prosecuting attorney objected, unless the payment was made on the 10th or 11th of December, and the court rejected the evidence, and the defendant excepted.

THE PEOPLE *v.* GETCHELL.

W. Gray, and *S. Larned*, for defendant:

The most material ingredient of the offense charged is the *intent*. The evidence offered not only *might*, but *would*, preclude the criminal intent. If Strong was bound to advance the endorsement, there could be no fraud, and therefore no intent to defraud, in procuring it. — 3 *Arch. Cr. Law*, 471, 473, 474, 465; 7 *C. & P.* 354; 11 *Wend.* 18; 17 *Wend.* 540; 2 *Park. Cr.* 198; 2 *East. P. C.* 831; 1 *C. & P.* 661; 3 *Hill*, 169; 5 *E. C. L.* 20.

Even the arrest of a party on a false pretence, to induce him to pay an honest debt, is not false pretences. — *Commonwealth v. Thompson*, 2 *Pa. Law Jour.* 250; 3 *Arch.* 473, 474, *note*. There must be an intent to defraud in *fact*, not in *law*. — *Commonwealth v. Hickey*, 3 *Pa. Law Jour.* 86; 3 *Arch.* 473, 474. Courts go a long way in the reception of evidence tending to show the intent. — 1 *Hill*, 315, 316.

G. V. N. Lothrop, and *D. E. Harbaugh*, for the People:

Where the paper is such that the false making thereof would be forgery, and such that the use of it *might* prejudice the person whose signature is thus obtained *in his property, or in any right*, the offense is complete as soon as it is obtained. The obtaining of a signature to such paper, by false pretences, to be used for a purpose not known or consented to by the signer, is defrauding him.

In all cases a man shall be presumed to intend the natural consequences of his act; and where the act is an unlawful one, criminal intent is presumed. In the class of cases under consideration, it is not necessary to show any use of the paper obtained, or any loss or probable loss by reason of it. The crime is committed by obtaining such paper by false pretences, and with the view of any unlawful use of it. A man is defrauded by the fact that his paper is thus obtained, and may be unlawfully used for purposes without his consent or knowledge. — *People v. Stone*, 9 *Wend.* 190;

People v. Genung, 11 *Wend.* 19; *People v. Gates*, 13 *Wend.* 321.

In larceny, if the taking is fraudulent, against the will of the owner, and with the intent to deprive him of the property, the use intended is of no consequence, even though for the benefit of the owner. — *Rex v. Morfit*, 1 *Br. Cr. Cas.* 307; *Rex v. Cabbage*, *Ibid.* 292; *Regina v. Handley*, 1 *C. & M.* 547.

Here the prosecutor is defrauded by the obtaining and negotiating his negotiable paper; for thereby he is cut off from many legal defenses which he might have to the original claim.

The case of *People v. Thomas*, 3 *Hill*, 169, cited by defense, was considered not to be a case of obtaining the money by false pretences, on the ground that the money was due. It might quite as well have been put on the ground that the motive of paying the money was rather to discharge an admitted debt than because of the falsehood. The case of *Rex v. Williams*, 7 *C. & P.* 355, it is submitted, is not law. This case is, in effect, the device of a creditor to collect a debt from an unwilling debtor, and is placed on the supposed latitude which that fact justifies.

We can not find any sound principles of law to sustain it. We do not believe that because a man claims a debt of another, which that other refuses to pay, the creditor may, by falsehood or crime, obtain property or chattels from the debtor. By such an act he legally and morally *defrauds* him of the property in question. It will not do to say that this wrong balances the wrongful withholding of the debt. The two wrongs do not make a right.

MARTIN Ch. J.:

We think the Recorder erred in excluding the evidence offered by the defendant.

The indictment charges that on the 11th of December, 1858, he, by means of false pretences, obtained the en-

dorsement of Strong to a note of one hundred and fifty dollars made by himself. The statute under which the indictment was found provides that "every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, the making whereof would be punishable as forgery, or obtain from any person any money, personal property or valuable thing, shall be punished," &c.—2 *Comp. L.* § 5783.

The object of the defense in this case, in offering the rejected evidence, was to show that there was no intent to cheat or defraud—the untruth of the pretence being admitted. A falsehood does not necessarily imply an intent to defraud, for it may be uttered to secure a right, and, however much and severely it may be reprobated in ethics, the law does not assume to punish moral delinquencies as such. To defraud is to deprive another of a right, of property or of money, and this may be accomplished by falsehood, by withholding the right or property, or by force. In the present case, the prosecutor insists that he was defrauded because he was induced to endorse a note by the false representation of the defendant that a prior note for the same amount, endorsed by him, was defective, and had been destroyed; that he was thereby induced to lend his name for double the amount he otherwise would. The simple fact of procuring by falsehood the endorsement, was not an offense within the statute; it must have been procured with the intent to defraud, and, where an intent is made the gist of an offense, that intent must be shown by such evidence as, uncontradicted, will fairly authorise it to be presumed beyond a reasonable doubt. It is true that a man is presumed to intend the natural consequences of his acts, but, under this statute, it is not the consequence but the intention, which fixes the crime. There are no *natural* consequences, strictly speaking, to this act. It is itself an indifferent act, as the consequences will depend upon what he does with the paper, and this will depend

upon his will—in other words, his intent. It was, therefore, necessary for the prosecutor to show something more than the application, the falsehood, and the endorsement, before he could ask a conviction; he should have shown those facts which, in the absence of all other proof, would warrant the jury in finding an intent to defraud; unless such intent is fairly to be inferred from the circumstances attending the act itself. If the fact of negotiating both notes would justify such a finding, yet the presumption thus raised might be repelled by the defendant, by exhibiting in evidence such a state of facts as would show that fraud was not designed, or could not have resulted. This he attempted to do by showing the relations of himself and Strong, the obligation of Strong to endorse his paper, his refusal to do so notwithstanding his contract, the necessity for the money for their joint benefit, and the appropriation of the avails of the note in their business, and according to the terms of their agreement. All this was refused, and the evidence offered for that purpose ruled out.

We think this evidence would legitimately tend to disprove the presumption of an intent to defraud, and should have been allowed to go to the jury to enable them to determine *quo animo* the endorsement was procured.

These considerations render an examination of the other errors assigned unnecessary.

A new trial should be granted.

CHRISTIANCY and CAMPBELL JJ. concurred.

MANNING J.:

When, by false pretences, the signature of a person is obtained to a written instrument, where the signing of the name by a third person to such instrument would be punishable as forgery, the law implies an intent to cheat or defraud; and nothing more need be shown to warrant a conviction. But the fraudulent intent implied from the act itself is not

conclusive on the party. He may show there was in fact no intention to defraud.

The Recorder seems to have erred in supposing the implication of law was conclusive, and not *prima facie* evidence only, of the criminal intent. In this I think he erred.

New trial ordered.

Henry Coon and Another v. Jacob Fry.

Irregularities in the proceedings by an administrator for the sale of the real estate of the decedent, will not affect the title of the purchaser, where there has been a compliance with so much as the statute makes essential to the validity of the sale, and the good faith of the purchaser is not questioned.

Accordingly where, in such case, the application of the administrator for license to sell was not verified by oath, guardians were not appointed for the infant heirs, and the administrator's report of the sale to the probate court omitted to show the price at which the land was sold, — *Held*, That none of these omissions affected the title of the purchaser.

Submitted June 10th. Decided June 15th.

Case made after judgment from Kent Circuit.

Ejectment brought by plaintiffs, as heirs-at-law of Philip Coon, deceased. Having shown title in the decedent, and his death, the defendant, to maintain the issue on his part, gave evidence from the probate records of said county, that, on July 27th, 1851, after the death of the said Philip Coon, John W. Fish was duly appointed by the Probate Court of of said county, administrator on his estate, and gave bond, and took upon himself that trust: That on January 2d, 1852, on application by the administrator, not under oath, a license was granted by said court for the sale of the premises in controversy by said administrator, for the purpose of paying the debts of said deceased: That no bond was given on said sale, nor any required by the court in granting the license: That on January 27th, 1852, the administrator took the oath required by law to be taken

before sale, and filed the same in the Probate Court: That on March 13th, 1852, the administrator filed in said court his report of the sale of said premises to Joshua Field (under whom defendant claimed); which report was correct in form, except that it omitted to show the price at which the premises were sold: That on the same day last aforesaid, an order was entered by the Probate Court confirming the said sale; and a deed was given by the administrator in pursuance thereof.

It was further shown in evidence that, at the time of said proceedings in the Probate Court, the plaintiffs were minors; and it did not appear that any guardian was appointed for them.

On these facts the Circuit Court rendered judgment for defendant.

C. P. Calkins, and *C. I. Walker*, for plaintiffs.

G. V. N. Lothrop, for defendant.

CAMPBELL J.:

Plaintiffs, as heirs-at-law, bring ejectment for lands sold by administrator. They object to the title made under the sale, on the grounds, 1st. That it does not appear from the probate proceedings that any guardian was appointed for the heirs; 2d. That administrator's application for license to sell was not upon oath; and, 3d. That the report of sale omitted to show the purchase price.

The statute (2 *Comp. L. pp.* 913, 923), provides what defects shall avoid sales, and what acts shall secure the title to the purchaser. This statute received a construction in *Howard v. Moore*, 2 *Mich.* 227. As Philip Coon, the ancestor, was a resident of the county where the proceedings were had, and the grant of administration was had there, no doubt can arise as to the probate court of that county being the one which had jurisdiction. The case shows that a license was granted, that no bond was

required, but that the oath was duly taken, and notice given, and that the sale was made accordingly, and was confirmed. There was a literal compliance with so much of the statute as is necessary to give the sale validity, and the good faith of the purchaser is not assailed. Although some steps do not appear to have been taken which should have been, yet the statute provides they may be disregarded in deducing title; and we can not, therefore, hold that a sale is vitiated by their omission. The statute, however, has made this saving provision for the benefit of purchasers, and not to encourage carelessness in probate proceedings, where great attention is needed to prevent injustice to those who are unable to protect their rights. Judgment was properly rendered in favor of the holder of the probate title, and it should be affirmed.

MANNING and CHRISTIANCY JJ. concurred. MARTIN Ch. J. did not sit, having decided the case in the court below.

John J. Rosenbury v. Rensselaer T. Angell.

In trespass *de bonis*, the defense that the goods were taken under attachment against a third person alleged to be the owner, is not admissible under the general issue, without notice.

A special notice of such defense that "three several writs of attachment were issued out of the circuit court for the county of L., and under the seal thereof, in due form of law," giving the names of the parties, and the dates and command of the writs, and the taking of the property by virtue thereof, is sufficient, without alleging the making of the affidavits which authorized the attachments; and the attachments, as well as the writs, may be given in evidence.

A special notice of defense that apprises the plaintiff with reasonable certainty of the matter of defense, so that he may not be taken by surprise on the trial, is sufficient under the statute.

Where a party claiming property alleged to have been transferred to him for the purpose of defrauding creditors, was inquired of by a creditor as to his responsibility, and referred the creditor to the business men of a place where he had formerly resided to ascertain in regard to such responsibility,—*Held*, That this reference did not authorize the statements of the business men of such place, made in answer to the inquiries of the creditor, to be given in evidence on behalf of the officer who subsequently attached such property at the suit of the creditors.

Heard June 10th and 11th. Decided June 15th.

ROSENBURY *v.* ANGELL.

Error to Livingston Circuit.

The action was trespass by Rosenbury against Angell, for breaking and entering the plaintiff's storehouse in Howell, and taking, carrying away, and converting divers goods, the property of the plaintiff. The defendant pleaded the general issue, and gave notice that he would prove, on the trial, that, at the time of the alleged trespass, the storehouse and goods were the property of, and in the possession of, one Charles A. Wilber, and not of the plaintiff: That the defendant was sheriff of Livingston county: "That, on the said twenty-eighth day of June, A. D. 1855 (the time of the alleged trespass), three several writs of attachment were issued out of the Circuit Court for the county of Livingston aforesaid, and under the seal thereof, in due form of law, — one of them at the suit of Austin F. Williams, William W. Bruce, and Andrew J. Clark, plaintiffs; one of them at the suit of Andrew M. Arcularius, Peter R. Bonnett, and John W. Schenck, plaintiffs; and one of them at the suit of Charles Widderfield and Henry Cohen, plaintiffs, — each severally against the lands, tenements, goods, chattels, moneys, and effects of the said Charles A. Wilber, who was, and is, defendant in each of said writs respectively; that each of said writs respectively was, and is, directed to the sheriff of the said county of Livingston, and on the day of the issuing of the same as aforesaid was delivered to the said defendant as such sheriff aforesaid, in and by each of which said writs respectively the said sheriff was and is commanded, in the name of the People of the state of Michigan, to attach so much of the lands, tenements, goods, chattels, moneys, and effects of Charles A. Wilber, defendant in each of said writs, not exempt from execution, wheresoever the same may be found within the county of Livingston, as will be sufficient to satisfy the demand of the plaintiffs named in each of said writs respectively, and safely keep the same to satisfy any judgment that may be recovered

by the plaintiffs in such attachments; that in obedience to, and in pursuance of, the exigency of said writs, the said defendant did attach and take away the property in the said plaintiff's declaration mentioned, as and for the property of the said Charles A. Wilber, the defendant in said writs (if he ever took the same at all); and that, in pursuance of, and in obedience to, the exigency of said writs, he now safely keeps the same (if he keeps the same at all); and that all of the said several supposed wrongs, trespasses, and injuries, above in the said plaintiff's declaration mentioned and complained of, were committed (if committed at all) in the due execution of said writs, and in the performance of the said defendant's official duties, as such sheriff aforesaid."

On the trial before a jury, the plaintiff having introduced his testimony and rested his cause, the defendant offered in evidence the writs of attachment and affidavits upon which he claimed the same issued, and the return of said writs in the several cases mentioned in his notice, against Charles A. Wilber, in the Circuit Court for the said county of Livingston; to the introduction of which the plaintiff, objected, That the defendant's plea and notice does not set forth and allege the making and exhibiting of affidavits previous to the issuing of said writs of attachment. Which objection was overruled by the court; and plaintiff excepted; and all of the said writs, affidavits, and returns were then allowed to be read to the jury as evidence.

Thereupon the defendant offered as a witness one *Gilkinson*, who testified, among other things, that, in a conversation he had with plaintiff after the assignment, the plaintiff referred the witness to business men in the village of Penn Yan, in the state of New York, to ascertain in regard to his pecuniary responsibility.

The witness was then asked by the defendant whether he afterwards made inquiries of such business men in Penn

Yan concerning the plaintiff's responsibility, and, if so, what he there learned in answer to such inquiries about the plaintiff's responsibility; to which question, and the evidence sought to be obtained from the witness in answer thereto, the plaintiff objected, for the reasons, 1st. That said evidence would be immaterial and irrelevant, being evidence only of the statements of third persons not in any way parties to the suit; 2d. Because the evidence sought to be obtained was not evidence of general reputation, but merely statements of particular persons.

Which objection was overruled by the court, and the said witness testified: "I stopped at Penn Yan on my return, and inquired of business men as to his responsibility, and they told me that Mr. Rosenbury failed in business some fourteen or fifteen years ago, and that he had not paid his debts, and was insolvent, and had since that time been acting as a merchant's clerk for the support of himself and family. I was informed that there were yet old judgments hanging over him, and that if he had accumulated property they did not know it; that they regarded him as insolvent."

To which decision, admitting the same in evidence, the plaintiff excepted.

Verdict having been rendered for defendant, and judgment given thereon, plaintiff removed the cause to this court, for review on the exceptions.

S. T. Douglass, for plaintiff in error:

1. The justification under the writs was inadmissible under the general issue. — 1 *Chit. Pl.* 502; *Steph. Pl.* 160; 2 *Greenl. Ev.* § 625; 11 *Johns.* 132. The special notice should allege every fact essential to the defense. — 1 *Doug. Mich.* 306; 5 *Ohio*, 169; 13 *Johns.* 475; 16 *Ill.* 283; 5 *Fos.* 114; 2 *Duer*, 176; 22 *Me.* 160; 21 *Pick.* 404. The proceeding by attachment being special and statutory, jurisdictional facts will not be presumed (1 *Doug. Mich.* 384),

but must be averred.—3 *Mass.* 310; 19 *Wend.* 283; 2 *Blackf.* 429; 1 *Doug. Mich.* 199.

2. Gilkinson's evidence of what the business men of Penn Yan told him about the plaintiff's responsibility, was inadmissible. It comes within none of the exceptions to the general rule excluding hearsay testimony. The cases in which one party agrees to be bound by the statement or oath of the other—such as those in *T. Raym.* 153; *Peake's Cas.* 187; 1 *Camp.* 366, *note*; 1 *Esp.* 178; 1 *Bay*, 458; 18 *Johns.* 337—have no application, but proceed upon wholly distinct ground. See, especially, the last case.

G. V. N. Lothrop, for defendant in error:

1. It was not necessary to aver any thing but the process of a court of general jurisdiction. It will be intended that a lawful writ is meant. The particulars necessary to constitute a lawful writ are matters of evidence.—1 *Chit. Pl.* 221; 2 *Doug. Mich.* 507; 8 *Cow.* 314; 19 *Johns.* 33; 3 *Wend.* 268; 16 *Wend.* 38, *per Bronson J.*; 10 *B. & C.* 202. But the notices were mere surplusage. The whole evidence was admissible under the general issue.—1 *Chit. Pl.* 527; 1 *Hill*, 267.

2. The plaintiff in error having expressly referred the witness Gilkinson to the business men of Penn Yan, their statements may be given in evidence against him as much as if they were his own admissions.—1 *Greenl. Ev.* §§ 27, 182; 1 *Camp.* 364; 1 *Esp.* 178; 5 *Esp.* 145; 1 *Bay*, 458; 3 *C. & P.* 532; 1 *Cow. & Hill's Notes*, 180, 188, 209; 1 *Phil. Ev.* 100, 101.

The object was not to give evidence of *general reputation* at all, but, on the other hand, the statements of persons to whom the plaintiff had referred the witness.

CHRISTIANCY J.:

The first error relied upon in this case presents the question, 1st. Whether, under the general issue, without notice,

it was competent for the defendant to introduce in evidence the writs of attachment, with the affidavits annexed; and if not, 2d. Whether the notice which accompanied the plea was sufficient to authorize the evidence in question.

It is contended by the counsel for the defendant that, as the defense set up in the notice denied both the property and the possession of the plaintiff, it was admissible under the general issue without notice. Doubtless this defense did amount to the general issue, without reference to the writs of attachment; and, if found for the defendant, would render the writs entirely immaterial. But the proposition — that the writs were therefore admissible under the general issue — is circular, and its orbit and its fallacy may be readily demonstrated: Thus, if to authorize the evidence, it be necessary to look to the defense set up in the notice, then the notice itself must be necessary. The question whether the proposed evidence was admissible under the general issue, *without notice*, is not to be determined by the defense set up in the notice, but by the nature of the evidence proposed — in all respects, as if no notice had been given.

It is well settled that, at common law, a justification of this kind, in an action of trespass, must be pleaded specially; and by the practice before the statute, notice of it must have been given; and the statute (*Comp. L. ch.* 124, § 24) requires a notice in all cases where a special plea or notice would have been required before. It is therefore clear that the proposed evidence was not admissible under the general issue, without notice.

But, 2d. Was the notice sufficient to warrant its introduction?

The only objection to the sufficiency of the notice in this respect is, that it did not mention the affidavits required by law to be annexed, and which, in this case, were annexed, to the writs. And it is contended that, as the writs could be no justification without the affidavits, these were just as

essential as the writs, and notice of them should have been given, to warrant their introduction, or that of the writs themselves.

The rule generally laid down as a test of the sufficiency of a notice under the general issue has been, that the notice should contain all that would be necessary to sustain a special plea on general demurrer; and such was the rule laid down by the Supreme Court of this state in *Thompson v. Bowers*, 1 *Doug. Mich.* 321. But this decision was not made under a statute like that applicable to the present case; and most of the decisions cited by counsel in support of the rule, were under statutes, or rules of practice, differing somewhat from our present statute upon the subject. This statute, after having expressly abolished all special pleas in bar, enacts, that, to entitle a defendant to avail himself of such matter of defense, he "shall annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense."

The objects of a special plea were twofold: 1st. To apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet it, and to avoid surprise on the trial; and, 2d. That an issue of fact might be formed upon it, or growing out of it, if the plaintiff chose to do so; or of law, if he chose to admit its truth by demurrer; and, as judgment on demurrer must be a judgment upon facts admitted on the record, by the parties in their pleadings, it was necessary the matters of fact should be set out with such certainty as to enable the court to decide without the necessity of finding, or supplying by intendment, facts not necessarily included in those thus admitted.

But the Legislature, in abolishing special pleas, have entirely dispensed with this last object of such pleas, requiring by the notice only the first, viz. that the plaintiff, by the notice, shall be apprised of "the nature of such matter of defense," that he may not be taken by surprise on the trial, by a defense which he could not with reasonable certainty anticipate.

No issue is formed upon the notice; the only issue in the case is the general issue. The notice is of matters intended to be introduced *under that issue.*

Such being the only object of the notice, its sufficiency ought to be tested solely with reference to that object, rather than by reference to rules applicable to a demurrer to a special plea. The test of a general demurrer, it is true, may, and in most cases probably would, produce the same result (as it certainly did in *Thompson v. Bowers*), but not necessarily in all cases; and as in principle it is not the true test, we think it can not be allowed to prevail where it comes in conflict with the test above indicated.

Did, then, the notice in this case sufficiently indicate the nature of the intended defense? Did it apprise the plaintiff, with reasonable certainty, that the affidavits annexed to the writs would be offered in evidence? and was the plaintiff likely in any way to be misled by the omission to mention them in the notice?

We think he was notified with reasonable certainty, and that he could not have been surprised by this omission. It is true defendant justified the taking under the writ, as he must, and not under the affidavits. But the notice of the writs, and the justification under them, ought, we think, for all purposes of such notice, to be held notice of every thing necessary to make them writs of attachment; and without the affidavits made on the same day, and substantially contemporaneous with the writs, the writs would have been waste paper; they would have been in no sense writs of attachment.—See *Buckley v. Lowry*, 2 *Mich.* 418. When, therefore, the plaintiff received notice that the writs of attachment would be offered in justification, he must have anticipated the affidavits also, without which the writs could have no existence. To hold otherwise would be adopting a degree of technical nicety, calculated to defeat, rather than to promote, the ends of justice.

The second error relied upon is, that the witness Gil-

kinson was allowed to testify to the statements made by business men of Penn Yan, in reference to the responsibility of Rosenbury, the plaintiff.

We judge from the case, though it is not very clearly stated, that the property in question in the suit was a stock of goods formerly owned by a merchant, Wilber, who had failed, and assigned them to the plaintiff: That the creditors claimed the assignment to be fraudulent, and sought to show that the plaintiff was a man of no pecuniary responsibility, as a circumstance going to prove the fraudulent intent of the assignment. The witness Gilkinson, who was a partner of a firm who were attaching creditors, having testified that, in a conversation he had with plaintiff after the assignment, the plaintiff referred him to business men in the village of Penn Yan, in the state of New York, to ascertain in regard to his pecuniary responsibility, was then asked by defendant, whether he afterwards made inquiries of such business men in Penn Yan, concerning the plaintiff's responsibility, and, if so, what he there learned?

To this the plaintiff objected, but the court admitted the evidence, and allowed the witness to testify generally, as to what business men in Penn Yan had told him in reference to the plaintiff's former history and pecuniary responsibility.

It will be noticed, from this statement, that the assignment had already been made to the plaintiff; that his rights to the property, whatever they were, had already attached, and that there is nothing in testimony from which the slightest inference can be drawn that the plaintiff, when he referred the witness to the business men of Penn Yan, proposed or intended, or led the witness to suppose he intended, to make his rights to the property in any respect dependent upon the result of the reference; or that he thereby intended to make, or had made, the business men of a considerable commercial town, without distinction, his agents or referees, with authority to determine his rights, or to speak for him; or that any result was proposed by the reference:

the contrary intent is to be inferred from the whole transaction. Under these circumstances, we can discover no principle upon which the evidence could be admitted, without throwing open the door to mere hearsay evidence generally.

It is true there are some English *nisi prius* cases which go far towards sustaining the admission of evidence of this kind, though not, we think, far enough to sustain it in the case before us. And Mr. Greenleaf, *Vol.* 1, §182, under the head of Admissions, relying upon those cases, lays it down as a rule that "the *admissions* of a third person" are receivable in evidence against a party who has expressly referred another to him for information in regard to an uncertain or disputed matter. "In such cases" (he says) "the party is bound by the declarations of the person referred to, in the same manner, and to the same extent, as if they were made by himself." It is observable here that Mr. Greenleaf entirely ignores the idea of any agency of the party referred to, and yet he calls the declarations of the persons referred to "the *admissions* of third persons." Now, this term "*admissions*," in such a connection, would seem to imply that the person making the admissions must stand in some confidential relation to, or be interested for, or represent the interest of, the party making the reference;—in short, to have authority, in the nature of an agency, to speak for the party making the reference. Upon any other hypothesis, it would seem to be a confusion of ideas to call the declarations of such third person his *admissions*, or the *admissions* of the party referring to him.

Mr. Greenleaf seems to have been led into this loose mode of expressing the rule, by a supposed necessity of laying down the rule broadly enough to include all the *nisi prius* decisions to which he refers, without first determining the question whether all those cases could be reconciled with well established principles of the law of evidence.

The cases of *Daniel v. Pitt*, 1 *Camp.* 366, *note* (6 *Esp.*

74, *S. C.*); *Burt v. Palmer*, 5 *Esp.* 145; and *Hood v. Reeve*, 3 *C. & P.* 532, to which he refers, fall clearly within the principle of Agency; and the terms in which the references were made, show, beyond doubt, that the person referred to had authority to speak for the party, and his intention to be bound by the result.

In the case of *Burt v. Palmer*, Lord Ellenborough states the true principle of the rule with great clearness, that the statement of the person referred to was admissible, "his agency having been clearly made out and established." He refers to the trial of Hastings for the rule, saying it had been there solemnly decided by the twelve judges, "that when a person is referred to, to settle and adjust any account or business, what he says, if it is connected with the account or business which is referred to him, is evidence. "That (said his Lordship) was the case here; and Allen's admission of the debt is binding on the defendant."

Now, this is clear and intelligible; it is both good sense and sound law.

But in the subsequent case of *Williams v. Innes*, 1 *Camp.* 364, decided four years after (cited by Mr. Greenleaf), his Lordship, if we can rely upon the reports, seems to have mistaken, or more probably forgotten, the rule so clearly laid down by himself in *Burt v. Palmer*, as the rule established in the Hastings case, and, what was very unusual with that eminent judge, to have used language so loose and indefinite that it can only be attributed to the haste of a trial at the circuit. Thus he says: "If a man refers another, upon any particular business, to a third person, he is bound by what this third person says or does concerning it as much as if that had been said or done by himself. This was agreed to be law, by all the judges, on the trial of Mr. Hastings." It would seem, from this language, that his Lordship spoke from memory, and that his memory was at fault, or the rule in the Hastings case is capable of assuming very elastic proportions. Here the whole element of agency — the

only element which can sustain that rule—seems to be inadvertently overlooked; and a rule is laid down which will in all cases bind parties by the declarations of any third person to whom any man may refer another for mere inquiry, though the party referring had no idea or intention of giving to such third person any authority to speak for him, or of being bound by his declarations; and the person referred to had no reason to suppose any such intention.

Such a rule would operate as a trap upon parties, and render it wholly unsafe for a man ignorant of the nature of any facts or transaction in which he might be interested, and honestly desiring to put his neighbor in the way of ascertaining them, to advise him to inquire of any third person whom he might suppose could explain it. It would put an end to all honest mutual inquiries of this kind. Such can not be the law. The learned reporter adds a very significant note to this case of *Williams v. Innes:* that, "upon the recommendation of the Chief Justice, the case was afterwards compromised"; yet it might admit of a question whether the facts of the case did not bring it within the principle of agency; which, however, is not alluded to, and it would seem to require something more than is stated in the report to bring it fairly within the principle.

The case of *Brock v. Kent*, 1 *Camp.* 366, *note*, as there reported, is doubtless a clear departure from the principle of agency recognized in the Hastings case, and in *Burt v. Palmer;* and we can discover no ground upon which it can be maintained, without opening the door to the greatest abuse, and the most dangerous species of evidence. Whether this case was also compromised, does not appear. But neither of these cases ever reached the court in bank; nor, as far as we can discover, has any English court, sitting in bank, ever recognized the principle said to have been decided in these cases; and they do not appear to be recognized as law in England to the extent here claimed for them. Thus Mr. Phillips, in his excellent work on Evi-

dence, *Vol.* 1, *p.* 517 (4 *Am. Ed., by Edwards*), states the rule in question under the head of Agency, and places it upon that ground. I quote his statement of the rule: "So if one party refers another, on a disputed fact, to a third person, *as authorized to answer for him*, he is bound by what his referee answers upon the occasion, as much as if the answer had been given by himself." Here is the rule, with the reason for it; and we think it entirely correct; but the rule thus stated will exclude the declarations of the business men of Penn Yan, admitted in the case before us.

Indeed, there is no case, not even that of *Williams v. Innes*, nor *Brock v. Kent*, which would authorize the declarations given in evidence here; as in those cases the reference was to a single individual by name; and there is not in such case any palpable absurdity in supposing the possibility of an intention to make him the agent of the party making the reference. But where the reference is made to all the business men of a commercial town of several thousand inhabitants, without distinction of name or character, the idea of agency becomes too extravagant to be reconciled with the theory of sanity in the party making the reference.

There may be cases in which the circumstances, and the mode of reference, may be such as to make it a question of fact for a jury, under the charge of the court, to determine whether the reference was intended to make the third person an agent, with authority to speak for the party; but where, as in this case, the court can clearly see that there is *no ground* for such an inference, the declarations can not be admitted on this ground.

I have purposely omitted to speak of this case on the theory of a reference to arbitrators; because, as there is no pretence here that both parties proposed to be bound by the decision, it can not stand upon any such ground, as distinct from that of agency. In fact, the English authorities,

and Mr. Phillips, following those authorities, treat the decisions of arbitrators as falling within the principle of agency (*Phillips Ev. Vol.* 1, *p.* 517, *above cited*); and this is recognised in many American authorities; and, upon final analysis, the decisions of arbitrators, voluntarily chosen, would seem to rest upon this ground. I have also purposely omitted to notice that class of cases where a party has agreed to be bound by the oath of the opposite party, or of a third person, because these cases stand upon different principles, as will be seen by the case of *Brooks v. Ball*, 18 *Johns.* 337, *and cases there cited.*

There are two American cases (and perhaps ~~three~~ others) decided since the publication of Mr. Greenleaf's work, in which the rule laid down by him in section 182, above cited, is quoted with approbation. I refer to *Chapman v. Twitchell*, 37 *Me.* 59; and *Chadsey v. Greene*, 24 *Conn.* 562. But the reference in both these cases brought them clearly within the principle of agency, and showed a clear intent to authorize the person referred to to speak for the party making the reference (and, in the latter case, it would have operated as a fraud upon the opposite party to have held otherwise) The courts were not, therefore, called upon to examine the basis of the rule as laid down by Mr. Greenleaf.

The judgment in this case must be reversed, and a new trial granted.

MARTIN Ch. J. and MANNING J. concurred. CAMPBELL J. did not sit, having been of counsel in the cause.

William C. Baker v. Henry L. Pierson,

AND

Henry L. Pierson v. William C. Baker.

A, the holder of the first of five mortgages on a piece of land, took proceedings in chancery to foreclose it, making all the subsequent mortgagees parties, except D, the last. Decree for sale was obtained, and sale made, at which B, who was administrator of C, the second mortgagee, then deceased, became purchaser for a few dollars over the amount of the first mortgage. B bought in his own name, but stated at the time that he bought to protect the interests of the C estate. He then filed his bill against D, setting up all the facts, and praying that D be decreed to redeem by paying the amount of both the A and C mortgages, and the costs of the foreclosure and sale, or be foreclosed. D filed a cross-bill, claiming a right to redeem on paying the amount of B's bid and interest. The mortgaged premises were shown to be worth at least the amount of the A and C mortgages.—*Held*, That D could not be permitted to redeem without paying the amount of both these mortgages.

By MANNING J.

B, by his purchase, acquired the several rights in the land of all the parties to the foreclosure, and may use them to protect his interest in the land in the same way, and to the same extent that they could have been used by such parties had no foreclosure taken place. D's rights are neither greater nor less for the proceedings to which he was not a party, and he has a right to redeem from B only by paying to him the full amount of all the prior mortgages. But as B, by his bill, asks only that D be decreed to pay the amount of the first two mortgages and costs, he may redeem on those terms.

By CHRISTIANCY J.

The relative rights of D and the several prior incumbrancers were, in no respect changed by the foreclosure proceedings, except as B became entitled to the A mortgage by his purchase. D can redeem only on paying the amount of all the prior mortgages, but without costs of the former suit. The redemption moneys shall be apportioned by paying first to B the amount of the A mortgage, and costs and interest thereon, and by apportioning the balance between the holders of the second, third, and fourth mortgages, *pro rata*, according to the sums owing on them respectively, deducting from the second, and paying to B the amount received thereon from B's purchase.

By MARTIN Ch. J.

The liens of the third and fourth mortgagees were extinguished by the decree and sale in the suit to which they were parties, and can not be revived by the proceedings taken to foreclose D's equity of redemption. D should be permitted to redeem on the same terms as if he had been a party to the prior proceedings, and the intermediate incumbrancers had waived their right of redemption—that is, by paying the amount of the A and C mortgages, and interest and costs.

Questions reserved from the Wayne Circuit Court in Chancery, as follows:

"*To the Supreme Court of the State of Michigan:*

"At the hearing before me, on the 17th day of February, A.D. 1859, of the above named causes (both being ordered to be heard together), the following facts were admitted or proved:

"That one Lewis Ives, being the owner of certain lands known as the "Dry Dock property," executed two mortgages thereon: (1) One to David Moore, for $5,000; (2) One to George F. Turner, for $3,000.

"Ives afterwards conveyed the land to Sylvester Larned, who executed mortgages thereon as follows: (3) One to Lewis Ives, for $3,156.71; (4) One to Henry S. Turbell, for $2,000; (5) One to Henry L. Pierson, for $5,500.

"The mortgages had priority in the order in which they are named above, and are all past due and unpaid. The mortgage of H. L. Pierson was dated July 29th, 1856, but was not acknowledged till October 24th, 1856, nor recorded or delivered until the last of said October.

"On the 7th of October, 1856, Moore filed his bill to foreclose the mortgage to him, making all the then existing subsequent incumbrancers parties defendant. Pierson was not made a party, nor was any notice of *lis pendens* filed. Turner had previously died, and Baker was administrator of his estate, and, as such, held the Turner mortgage, and was made a party. Moore obtained a decree of foreclosure and sale, and under it the property was sold on the 21st of November, 1857.

"Subject to objection, it was testified that George F. Porter was attorney for Baker; that he bid off the property at the sale, in the name of Baker, and that at the time of purchase he said Baker's intention in purchasing was to protect the interests of Turner's estate. Under like objection, the witness stated that he had no personal knowledge, but heard that Ives was insolvent. The property was bid off for the sum of $6,372.76, being the amount of principal and interest of Moore's mortgage, together with costs, and a few dollars over.

"The property was proved to be worth the amount of the two first mortgages at least. The commissioner's deed conveyed the land to William C. Baker (in his own right, and not as administrator), and there was no proof that the money paid by Baker was advanced from funds of the estate of Turner.

"In the cause first named above, the bill set up substantially the foregoing facts, and contained a declaration that the land was held in trust for Turner's estate; and the bill prayed that Pierson might be required to pay the amount of principal and interest due upon the first (Moore) mortgage, and the costs of that foreclosure and sale, and also the principal and interest due on the second (Turner) mortgage, and the costs of this suit; and to pay the same within a short period, to be fixed by the court; and in default thereof, that he be debarred and foreclosed of all right to redeem the lands. And the bill further prayed, in case the defendant should be allowed to redeem on paying merely the Moore mortgage, that then the Turner mortgage should be decreed to be still subsisting, and a lien upon the land prior to all others.

"The defendant, in his answer, did not deny the said facts, save the allegation that the land was held in trust; as to which it left the complainant to his proofs; but claimed the right to redeem on paying merely the amount bid by Baker at the sale, together with the interest thereon.

"At the time of filing his answer, Pierson also filed a cross-bill (which is the second suit above named), making Baker, in his own right, the sole defendant; setting up the above facts substantially, except as to Baker's intentions in buying the land, and the character in which it is now held by him; and asking to redeem on the same terms claimed in his answer in the original cause.

"To which cross-bill Baker filed his answer, reiterating the facts and declarations of trust, as above set forth, and

insisting that Pierson could redeem only upon the same terms as those set forth in the original bill.

"Upon the facts and pleadings the following questions arise, to-wit:

"1. Upon what terms can Pierson be allowed to redeem the said lands from Baker? What sums must he pay, and to whom?

"2. If he can redeem by paying off merely the Moore mortgage and costs, can the Turner mortgage be declared to be a subsisting lien upon the land, and have priority over all others?

"These questions of law being new, and upon which I have doubts, and desire the opinion of the Supreme Court, I have reserved the same for that purpose, and hereby respectfully report them, and ask the advice and instruction of the said Supreme Court in reference thereto.

"All of which is respectfully submitted." "B. F. H. WITHERELL, *Judge of the Circuit Court for the County of Wayne.*"

"Dated, February 28th, 1859."

Towle, Hunt & Newberry, for Baker:

1. There is *no statute* authorizing redemption upon the terms claimed by Pierson, or upon any other terms. The only right which Pierson has is derived from general principles of equity.

2. According to general principles of equity, a subsequent incumbrancer can redeem lands from prior incumbrancers, only by paying the full amount due to them.—1 *Hill. on Mort.* 371-2; 4 *Kent*, 163; 12 *Ves.* 59. So strictly is this rule observed, that a party can not redeem even a part of the land without paying the whole mortgage debt.—*Ibid.*; 31 *Me.* 28. Even a dowress, in order to redeem her one-third, must pay all.—1 *Hill. on Mort.* 408; 8 *Barb.* 618. The fact that the prior mortgagee has assigned for less than the amount due, does not alter the rule.—28 *Me.* 336; 1

Vern. 476; *Ibid.* 336. Even if the mortgagor has surrendered the property to the mortgagee, and thereby extinguished the debt, an intermediate mortgagee must pay all.—2 *Conn.* 161.

Where a *second mortgagee has paid off* a prior mortgage, a third mortgagee, or the mortgagor himself, in order to redeem, must pay the full amount of the *first and second* mortgages.—9 *N. H.* 392; 7 *B. Monr.* 66; 14 *N. H.* 61; 7 *N. H.* 100. So one of several who are interested in the equity of redemption, paying off an incumbrance, can hold a lien on the land to the extent of his advances.—4 *Johns. Ch.* 370; 2 *Cow.* 118; 9 *Ibid.* 409; 3 *Wend.* 412; 5 *Hill,* 280; 5 *Pick.* 146; 8 *Ibid.* 497; 17 *Ibid.* 47; 19 *Ibid.* 231; 9 *Barr,* 341.

3. These general rules must apply in the present case. As regards Pierson, the proceedings in Moore's foreclosure suit are *res inter alios acta;* and are, as to him, a *mere nullity.* The case is the same as if Baker, without any foreclosure or other suit, had taken up or paid off the Moore mortgage, *or had taken an assignment of it.* As against Pierson, he still holds that mortgage, and also the Turner mortgage, as subsisting prior liens upon the land.

Now, if Pierson's rights as against them are not barred, then Baker's as against him are not; for estoppels must be mutual and reciprocal.—1 *Bouv. Law Dict.* 526; 5 *Bac. Abr.* 429; 3 *Rand.* 563; 2 *Johns.* 382.

The claim set up by Pierson rests solely on this ground: That he, by means of proceedings in which he had no part or lot, and without any act whatever of his own, is to be transferred to a position of priority over others which he did not have by virtue of his original contract. Such a claim, we insist, is contrary to all rules of equity and common sense.—4 *Paige,* 58; *Ibid.* 204; 1 *Paige,* 48, 78; 3 *Johns. Ch.* 459.

Pierson's right to redeem from the Moore mortgage on any terms, is founded solely upon the hypothesis for which

we contend, to wit: That that mortgage is, as to him, a *subsisting* mortgage. He can not redeem from *a decree and sale*, but only from a subsisting mortgage, and for the reason only that it is *a mortgage*.

But if the Moore mortgage is a subsisting one, the Turner mortgage is so likewise. It is so *a fortiori;* for there can be no pretense that it is merged in, or extinguished by, the decree. The latter, then, must be paid as well as the former, before Pierson can have the land clear.

4. The sale, where all incumbrancers are not made parties, is no criterion of the actual value.—11 *Paige*, 28; 3 *Barb. Ch.* 150; 5 *Conn.* 531; 4 *B. Monr.* 40; 2 *Conn.* 161.

5. We contend that Baker became subrogated to the rights of all the parties to the foreclosure suit, *to the extent of the amount paid by him;* and to the rights of those particular parties to whom his money would, by law, be distributed.—4 *Paige*, 531; *and the cases cited above.*

6. If we are correct in our views, then it follows that Pierson, in order to redeem the land entirely, must pay all the mortgages prior to his own.

7. If Pierson is allowed to redeem the land from the first mortgage alone, by paying to Baker the amount bid, and then to set up that mortgage as a subsisting one prior to the Turner mortgage, then Baker, as holder of the latter, must have at once the right, on his part, to redeem again from the Moore mortgage. And all he would be required to do, would be to pay back again to Pierson the very money he had just received; and thus the parties be placed back again just where they are now.

Such a proceeding would be mere child's play—a farce, to which this court will not lend its aid or sanction.

8. The question as to whether Baker holds the land now as administrator, or in his own right, is not material to the decision of the questions reserved. The evidence shows (and without that evidence the court would, under

all the circumstances, presume) that Baker's design in buying was to protect the interests of the estate which he represents; and that it was his design, and for his benefit, that the Moore mortgage should not be extinguished, but kept alive as a subsisting lien. In such a case, equity will keep the lien alive, in order to do justice. — 9 *N. H.* 392; 7 *B. Monr.* 66; 14 *N. H.* 61; 7 *N. H.* 100.

W. Gray, and *T. Romeyn*, for Pierson:

1. Baker is to be deemed the purchaser on his own personal account. He, in fact, made the purchase, and took the deed in his own name. It does not appear that he paid for the property with the money of the Turner estate; and unless he did, there can be no pretense of a resulting trust in favor of the estate. If he did use the money of the estate, or otherwise charge the estate for this purpose, he had no right or lawful authority to do so. His general power as administrator did not extend to the conversion into lands of the money of the estate; and it does not appear that his asserted action in this matter has ever been sanctioned by any competent party. Besides, this attempt to create a trust in this way is opposed to the provisions and policy of the statute of trusts. — *Comp. L.* §§ 2637, 2638, 2639.

2. Viewing Baker as a purchaser in his own right, there is no pretence for compelling Pierson to redeem the Turner mortgage, that does not apply equally to compel him to redeem those of Ives and Turbell.

3. Whether Baker bought on his own individual behalf or in trust for the Turner estate, still, *in the absence of any redemption*, all claiming under Turner's mortgage are now barred from further claims on the land under it.

4. The lien of this mortgage can not be *reinstated* by allowing Pierson to redeem. There is no natural equity in this claim of Baker. The premises are *presumed* to have brought at public sale their full value. Suppose the evi-

dence were proper which showed that they were worth at least the amount of the first two mortgages. Baker bought them for the amount of one only, and holds the other as a subsisting claim against the mortgagor, and has a lawful right to collect the whole against him.

Then, if Pierson do not redeem, Baker will hold the property with a clear title, for half its asserted value, and collect his mortgage *in addition.*

We can see no hardship in the application of the rigid rules of law to this case. And if there were, the court should not regard it in settling a general rule.—See *Kimmell v. Willard's adm'r*, 1 *Doug. Mich.* 221.

If the purchase at the foreclosure sale had been made by a *stranger*, it must be conceded that the lien of the Turner mortgage would have been for ever lost, unless it should be in some way re-created by Pierson's redemption. That the purchase was made in Turner's behalf, can make no difference in the principle.—9 *Cow.* 346.

A *subsequent* purchaser, either from Turner, or from a stranger, if such had bought at the foreclosure sale, would take a title free from all mortgages represented in the foreclosure suit. These consequences could not result if the mortgage had not been in fact and in law *separated from the land.*

There is nothing in the legal character or incidents of a redemption, according to equitable rules, to *re-construct* this union. By redeeming, Pierson succeeds to the estate of Baker in the lands; and Baker is left with his unsatisfied bond and mortgage, and all his claims and rights against Ives, and in the position which he voluntarily assumed.

If Pierson redeem, he must pay the entire purchase money, whatever be its proportion to the actual value of the property. Suppose that Baker had bid to the full amount of Turner's mortgage. He would then hold the property free from the other mortgages represented in the

foreclosure. But if Pierson redeem, he must pay Baker the whole amount bid; and he gets, it is contended, not Baker's title, as he held it, but a title subject to the lien of the two intervening mortgages. Surely, the law and logic tending to such a conclusion must be fallacious.

5. The statute evidently contemplates, in the case of a chancery sale or foreclosure, that the premises should be sold, and that the purchaser should buy them, *free from the liens of all the incumbrancers who are made parties; and that the purchase money, shall, as to all such, take the place of the land.*—*Comp. L.* §§ 3571, 3572, 3573.

The purchaser takes the *same estate* that would have vested in the mortgagee if the equity of redemption had been foreclosed. The deed passed to the purchaser all the title of the mortgagor and of Moore, free from all claims of the several parties to the suit. The surplus of the purchase money paid for this title and estate, on this sale, thus cutting off these parties, is brought into court for the use of those entitled to it. The sale, then, embraces the estate not only of the first mortgagee, but of the subsequent mortgagees who have been made parties; and they have their claims upon the surplus money thus bid for their estates. This right of these parties to the surplus moneys is entirely inconsistent with the notion of their retaining their mortgage estates or liens.

Their rights are terminated, while the rights of an incumbrancer not made a party are not affected.—See *Packer v. Rochester and Syracuse R. R. Co.* 17 *N. Y.* 283.

We, therefore, insist that Pierson should be allowed to redeem on paying to Baker the amount bid by him on his purchase, with interest.

MANNING J.:

Pierson claims a right to redeem on paying Baker what he paid for the premises at the sale in the Moore foreclosure suit. This he clearly has no right to do. The fore-

closure was in chancery, and not at law, under a power of sale in the mortgage, where the statute gives the mortgagor and his grantees a right to redeem at any time within a year after the sale. In chancery the sale is absolute, and the purchaser takes a good title against all parties to the suit. In other words, he takes the several interests of each in the land. It is this he purchases, and not a right in the land equal only to the money he pays; which would be the case if a subsequent mortgagee, not a party to the foreclosure, could redeem of him on paying that sum. Having acquired the rights of all, he stands in their place, and may use the rights so acquired to protect his interest in the land, and for his benefit, in the same way, and to the same extent, they could be used by such parties had no foreclosure taken place. To this extent the purchaser's interest in the land extends, and will be protected in equity, and no further. He acquires no other interest than this against a mortgagee who was not a party to the suit. Such mortgagee is not bound by the foreclosure, and his rights are neither greater nor less in consequence of it; and he may file his bill to foreclose his mortgage as if nothing had been done, except he would have to make the purchaser a party, who, in such case, would be the only necessary party, if complainant should state in his bill the previous foreclosure, and treat the purchaser as the assignee of the several interests of the parties to it in the land. —4 *Paige*, 58. If his object be a strict foreclosure, and not a sale, and there are prior mortgages to his own, the prayer of his bill should be that he may redeem such mortgages; and having done so, that they, together with his own mortgage, may be redeemed of him, or defendant be barred of the equity of redemption. Such a bill would be one of redemption and foreclosure—a bill of redemption as to the prior mortgages, and of foreclosure as to the equity of redemption. But, as with us a sale is nearly, if not always, ordered, it is the practice, instead of asking to

redeem prior mortgages, to pray a sale of the mortgaged premises, and that they be first paid out of the proceeds of the sale; or, if the holders of such mortgages should, for any good reason, object, that the mortgaged premises should be sold subject to their incumbrances.

If the cross-bill of Pierson, instead of being a bill to redeem of Baker as purchaser, was a bill to redeem the Moore mortgage only, it would not be sustained; for a subsequent mortgagee has no right to redeem a prior mortgage, unless it be in a suit to make his own mortgage available as against the mortgagor; and in such a proceeding, the mortgagor, and holders of all subsequent as well as prior incumbrances, should be parties. They should be parties; as each would be interested in, and have a right to be heard as to, the amount due on all prior mortgages; and that the purchaser under the decree might get a good title, and the rights of all parties be settled in one suit.

Baker states, in his bill, the Moore foreclosure, the parties thereto, and their several interests in the mortgaged premises, and his purchase at the sale under the decree. He thereby shows himself to be the owner of the equity of redemption, and of the several mortgages (so far as they relate to the land) of Moore, Turner, Ives, and Turbell. Instead of asking that the Moore and Turner mortgages only should be paid by Pierson, he might have asked that all four of the mortgages should be paid by him. Not having done so, and having filed his bill for a redemption by Pierson on the payment of a less sum, Pierson may redeem on the terms stated in the bill. It is not for the court to say he shall pay more than Baker asks.

The circuit judge asks, To whom shall the money be paid? I answer, to Baker, as there is no one else before the court claiming it. If any question should hereafter arise in regard to it between Baker and any of the parties to the Moore foreclosure, it will be time enough to decide such question when the court has the proper parties before it.

BAKER *v.* PIERSON.

CHRISTIANCY J.:

I am unable to agree in the result at which my brethren have arrived in these cases, from two opposite courses of reasoning. Two questions are reserved for our opinion. In the view which I have taken of this case, the second question reserved can not arise, as it will be entirely precluded by the answer to the first.

But the first, though enumerated as one, contains three distinct questions:

1st. Upon what terms can Pierson be allowed to redeem from Baker?

2d. What sums must he pay? and,

3d. To whom are the sums to be paid?

To give an intelligible answer to these questions it becomes necessary to discuss several other questions, upon which the answers to the questions asked must depend. But I propose to go into no discussion of this kind beyond what this necessity imposes.

As an essential preliminary, it becomes necessary to determine what was the effect of the prior foreclosure suit—first, as between the parties to that suit, and Baker, who purchased under the decree; and, secondly, as between those parties and Baker on one side, and Pierson, who was not a party, on the other.

Waiving, for the present, any separate consideration of the Turner mortgage, and treating Baker as a purchaser on his own account, as between him and the holders of the subsequent mortgages, who were made parties, the decree and sale in that suit were binding and conclusive, so long as that decree and sale should remain in force; and the liens of these subsequent mortgages were barred, and the equity of redemption under them foreclosed as against Baker, and all claiming the land under him, through that purchase.

But as between these subsequent mortgagees themselves,

or as between any of them and incumbrancers subsequent to them, the sale had no effect whatever, and left their rights in respect to the land, and to each other, as they stood before such foreclosure and sale.

Did the purchaser, by this sale, acquire the liens of the subsequent mortgagees in the land? I think not. A mortgage is but a security for a debt; independent of the debt, the lien can have no existence in equity. The debt is the principal, the lien the accessory, which can no more exist without the debt than the shadow without the substance; nor can it be a subject of separate ownership by one, while the debt is owned by another, unless, perhaps, as a mere naked trust for the benefit of the holder of the debt.

If the purchaser at the foreclosure sale became entitled to the debts secured by these subsequent mortgages, then he may have obtained the liens of these mortgages, which were collateral to the debts; and he would be entitled to an assignment of any notes or bonds secured by the mortgages, and to enforce them for his own benefit against the makers. But certainly no one will claim any such effect from the sale. All must admit that the sale left these debts in the hands of the subsequent mortgagees, with the same right to resort to the personal liability of the mortgagor as they had before. As between them and the purchaser, their debts have been separated from the liens; in other words, as against him, while that sale remains in force, they have lost their liens upon the land — but he has not acquired them. He has acquired nothing more by the purchase than if there had been no subsequent liens. Such, then, I think, was the effect of the decree and sale, as between the purchaser and subsequent mortgagees who were parties to that suit.

What was the effect as between the purchaser and those parties, on one side, and Pierson, the fifth mortgagee, who was not a party, on the other? Precisely nothing. As he is not to be prejudiced by the decree or sale, and his right

to redeem, and all his claim to relief by cross-bill, are, and must be, founded upon the invalidity of those proceedings as against him, it must be equally clear that he can claim no benefit from those proceedings. He can not bind others by the proceedings in a suit by which he refuses to be bound. He can not claim under, and repudiate, these proceedings at the same time. To claim an advantage from the sale is to ratify the sale. He can not affirm it as to those incidents which might operate in his favor, and repudiate it as to those which operate to his prejudice. He must repudiate the whole, or affirm and submit to the whole. He can not be permitted to reap any advantage from the effect of that suit upon the parties to it holding the subsequent mortgages, without putting himself on equal terms with those parties, and consenting to be bound by the decree and sale.

As to Pierson, the prior mortgage to Moore is still unforeclosed, and that mortgage, and all the junior mortgages prior to his own, remain precisely as if no foreclosure or sale had ever taken place. He can redeem upon the same conditions, and the like terms in all respects, as if no suit had ever been instituted, and in no other way.

A change has taken place, it is true, in the equitable ownership of the Moore mortgage, which might, or might not, have happened without that suit. By the payment of the mortgage money, Baker has become the equitable owner, or equitable assignee, of the mortgage, in the same manner as if he had done the same without suit. But as between him and Pierson, Baker did not obtain the *land* by the *sale*, but the *mortgage* by the *payment* of the *money*. But this in no way affects Pierson's rights; it is immaterial to him whether that mortgage be owned by Moore or by Baker, so long as it remains but a mortgage, and he is permitted to redeem upon the same terms. His rights have not been affected by the suit to his advantage or his prejudice, nor have any of their rights in relation to him;

nor, in fact, could *their* rights, in *relation to him*, be affected without affecting *his*, in *relation to them*. He has a right to demand the redemption of the Moore mortgage, without redeeming the intermediate mortgages, if he could demand that right had no suit been instituted upon it, and not otherwise. But if he would redeem that mortgage, he must redeem it as a *mortgage*, and not as a *sale*. As a sale, it is not redeemable; as a mortgage, it is. If he redeem it as a mortgage, he will acquire it as a mortgage, and be subrogated to the rights of a mortgagee, and not as a purchaser of the land under it.

Doubtless, if he choose to buy out the purchaser without the aid of the court, it is perfectly competent for him to do so on any terms he shall be able to make, and to hold the land clear from the liens of all the subsequent mortgagees who were made parties. But, in this event, his own mortgage, if not strictly merged, would become valueless as a lien upon the land. He can not, by means of the fifth and last mortgage, demand the aid of a court of equity to compel the purchaser to sell to him. This would be to give him a preference over prior mortgagees, who, as between him and them, have superior equities. Courts of equity do not sit to compel people to make bargains with each other by bill and answer, nor to clothe bargains voluntarily made in such a manner with the sanction of a judicial proceeding. The most the court can do for him is to enable him to redeem it as a mortgage unforeclosed, and to place him in the position of a mortgagee.

Subrogation is not a legal right, but a mere equity, which must, where it has any existence, spring from the relative equities of the parties; and it will be granted, denied, modified, or controlled, in accordance with the real equities of all the parties to be affected by it.

Pierson may have equities sufficient to place him in the condition of a mortgagee under the Moore mortgage, if he redeems it; but he has none which would enable him to

stand in the right of Baker, as purchaser. If, therefore, Pierson can redeem the first mortgage, without redeeming the intermediate mortgages, the holders of those mortgages may redeem from him in their turn, and that without paying his mortgage, which is last in date and least in equity. On the hypothesis that Pierson, the fifth mortgagee, would have a right to redeem the first mortgage, without redeeming all the intermediate mortgages, which would seem to be the hypothesis upon which the questions stated in the case are propounded, it might be important to determine whether Baker is to be considered as holding the Moore mortgage in his individual right, or in trust for the estate of Turner, the second mortgagee; and whether he stands substantially in the position of a second mortgagee purchasing in a prior mortgage to protect his own. If the latter be his position, he will be entitled to add the amount of the first mortgage to the second, and to require the redemption of both. Does it sufficiently appear that such is the position of Baker? The case finds but two facts from which to determine this question (for we can not notice mere evidence of facts not found). The two facts found are, 1st. That Baker was administrator of Turner, the second mortgagee; 2d. That the mortgaged premises were worth at least enough to pay both the Moore and Turner mortgages. Baker could not, therefore, be allowed to speculate out of the estate by purchasing the premises in his individual right, under the sale on the Moore mortgage, and then to set up that sale to cut off the Turner mortgage, which he held as administrator, even though we should treat it in any respect as a sale of the land. Had he attempted this with the funds of the estate, equity would decree him a trustee of the estate for the whole; if he purchased with his individual funds, he would still be treated as a trustee, for at least the amount of the Turner mortgage. It is not, therefore, material to the present case whether he used in the purchase the funds of the estate, or his own. The fact that

the deed was taken in his individual name would make him none the less a trustee, and can not, of itself, warrant an inference of any intention to use the purchase to the prejudice of the estate. The fair inference is that it was taken in his individual name to enable him to dispose of it, and convert it for the benefit of the estate, without the expense attending a probate sale under a license.—See *Little v. Lesix*, 5 *Mich.* 119. He would doubtless be at all times liable to account to the probate court in respect to the land or its proceeds.

The necessary result is, I think, that the administrator stands, in all respects, substantially in the position of a second mortgagee who has purchased in a prior mortgage to protect his own; and no subsequent incumbrancer could redeem the prior mortgage without redeeming the second, of which, under such circumstanees, it forms substantially a part. But whether he can file his bill as administrator, is a question upon which I give no opinion, as none has been asked.

But if it be admitted that Baker purchased on his own account, is Pierson entitled to redeem the Moore mortgage without redeeming all the mortgages subsequent to that, and prior to his own?

If I am correct in the conclusions at which I have already arrived, Pierson, with respect to all those prior mortgages, stands in the same position as if no suit had been instituted for the foreclosure of any of them. The question, therefore, is simply this: Can a fifth mortgagee sustain a bill in equity to redeem the first mortgage without redeeming the intermediate mortgages, which still remain a lien upon the land, paramount to his own? The only ground, I think, upon which a court of equity can be asked for a decree enabling a subsequent mortgagee to redeem a prior mortgage, is to enable such subsequent mortgagee to make the lien of his mortgage available as a means of satisfying his debt from the land. To this end, the court will

enable him, through the equity of his own mortgage, to extinguish all equities of redemption in the land, that a good title may be conveyed. But, for this purpose, he must generally, if not universally, pray for a foreclosure of his own mortgage in the same suit. If he can sustain a bill to redeem the first, without the others, he may equally sustain a separate bill for the redemption of each; and, until all were foreclosed, his remedy would be incomplete.

If he redeem the first, leaving the second, third, and fourth outstanding, the second may immediately redeem it from him, and leave him where he stood before; the third may redeem both; the fourth may redeem the three; and the fifth may redeem them all. His redemption of the first, therefore, settles nothing, and leaves the whole matter still at large. If he can thus redeem the first without the others, the fourth may equally redeem the first or second without the third; or the third may redeem the first without the second, and with the same fruitless result; and there would be no end to litigation. Courts of equity seek to adjust in a single suit, as far as practicable, the equities of all parties having liens upon the land, to prevent a multiplicity of suits, to check fruitless litigation, and the multiplication of costs. Can such last mortgagee claim a right to obtain the first mortgage—to hold it as an investment? The holder is as much entitled to keep it, as he is to demand it, for this purpose. Will he claim that, with this in his hands, he can foreclose and sell, and thus be able to purchase the property at a speculation sufficient to cover his own mortgage? The equity which would be required to sustain a bill to obtain the mortgage for this purpose is not visible; and if there be any such speculation to be made, the holder is as well entitled to it as he is. But if he had the mortgage, he could not tack it to his own, so as to give the latter a preference over the intermediate mortgages; and if he should foreclose and sell, to cut off these intermediate incumbrances, it would equally cut off his own.

For the reasons above stated, I think the questions propounded by the court below should be answered as follows:

1st. That Pierson can sustain a bill to redeem the Moore mortgage only on the terms of paying all the mortgages subsequent to that and prior to his own, without any deduction on account of any sum received upon any of them from the proceeds of the sale.

2d. That the sums to be paid by Pierson are the sums due (irrespective of what may have been received on any of them from the sale) on the four several mortgages prior to his own, with interest to the time of payment; but without any of the costs in the first foreclosure suit, to which he was not a party; and,

3d. That out of the aggregate amount of the sums thus to be paid, Baker should receive (subject to account to the Turner estate, as stated below) the amount of the Turner mortgage and interest, with the costs of the first foreclosure suit, and interest on those costs from the time they were paid. That the balance of the aggregate amount should be paid to the respective owners of the mortgages executed to Turner, Ives, and Turbell, *pro rata*, according to the sums due on the same respectively; deducting, however, from any of them, and paying to Baker, such portion of any of the last named mortgages as may have been received on them respectively from the proceeds of the sale made to Baker. This will return to Baker precisely the sum which he has paid, with interest, and make the holders of the Turner, Ives, and Turbell mortgages, represented in the original suit, pay the costs of that suit, which, as between them and Baker, the purchaser, they are equitably bound to pay. Baker, as administrator, will receive the sum equitably due on the Turner mortgage; and if he used the funds of the estate in the purchase under the Moore mortgage, he will be accountable to the estate in the probate court for the amount so used and interest.

This is the result at which I have arrived, after a most careful investigation of the very peculiar questions involved in the case; and whatever error may be found in the course of reasoning adopted, this result precisely adjusts all the equities of all the parties. This, to my own mind, is a strong confirmation of the correctness of the process by which the result is reached. In a matter of general equity like this, I can not but suspect some fallacy in any process of reasoning, however logically accordant with technical rules, which leads to a result inconsistent with the just rights and real equities of the parties.

If it be said that this result will deprive Baker of the profits of his purchase, I reply, every purchaser at a foreclosure sale is bound, at his own risk, to ascertain whether the proper persons have been made parties to the suit (especially when the registry of deeds discloses the facts), as much as a purchaser at private sale is bound to notice any defect in the chain of a record title. The court of chancery does not undertake, on a foreclosure sale, to give a better title than a mortgagor had, nor to cut off the rights of subsequent incumbrancers who were not parties. By neglecting to notice a defect of title, a purchaser at private sale often loses both the land and his money. But, in the result at which I have arrived, the purchaser gets what, both at law and in equity, is deemed a full compensation,—his money and his interest.

The party seeking to redeem can complain of no hardship in being compelled to pay all the mortgages prior to his own, as this is exactly in accordance with the view he must have taken of his own rights, and the equities of all the parties, when he invested his money, or took his mortgage, with full knowledge of the prior mortgages. Nor can he complain of the failure of any of those prior mortgagees to redeem the first mortgage on the foreclosure suit; since, if they had done so, each of them would have acquired the mortgage redeemed by him, and Pierson would still have had the same amount to pay to redeem his own.

But, it may be said, the rule is well settled that the foreclosure and sale are binding and conclusive upon all the subsequent mortgagees who were made parties. This is true as between any of the parties to that suit on one side, and the purchaser, and all claiming under him through that sale, on the other, but not as to strangers to the suit. Pierson's right to redeem at all depends upon this distinction; for, if that suit is conclusive as between the parties to it, and the rest of the world, then Pierson is also bound, and his right of redemption cut off. And even as between the parties and the purchaser, the foreclosure and sale are only binding and conclusive while they remain in force, not after they are superseded, set aside, or vacated. The redemption by Pierson of the mortgage foreclosed, vacates and nullifies the foreclosure and sale, and the rights of the subsequent mortgagees in respect to the land are no longer affected.

The mortgage upon which the sale was had being redeemed, the purchaser steps out, and his rights, and his relations to all the parties cease. The question is no longer between him and any of the parties to that suit, but between them and the person who has redeemed; who was no party to the suit, nor affected by it; who does not claim under that sale, but in opposition to it; whose only claim to relief consists in repudiating the sale, and treating it as a nullity, and whose right so to treat it grows out of a mortgage of later date than those he seeks to cut off by it, which, in equity and in date, precede his own.

The views which I have been compelled to take of these cases, if correct, may lead to the conclusion that all the necessary parties are not before the court, to enable it to make a proper decree. But as our opinion has not been asked upon this question, I have carefully avoided expressing any.

MARTIN Ch. J.:

Baker, as administrator of the estate of Turner, filed his

bill against Pierson, to compel him to pay the amount of the Moore mortgage, with interest, and the costs of foreclosure and sale, and also the amount of the Turner mortgage, with interest and costs, or be strictly foreclosed; or, if Pierson should be allowed to redeem on payment of the Moore mortgage, with interest and costs, only, that then the Turner mortgage should be declared still subsisting and a lien upon the land, &c. The defendant, in his answer, denies that Baker bought or holds the land as administrator, or in trust, and claims to redeem by paying the amount which was bid by Baker at the sale under Moore's foreclosure, with interest, and files his cross-bill against Baker in his individual character, setting up the same facts, substantially, as in his answer, and insisting upon the same rights of redemption.

This, then, is substantially a suit for a strict foreclosure; or, in other words, that Pierson be debarred from setting up his claim under his mortgage, unless he redeem from the two mortgages within a limited time; and the questions litigated are, what amount shall Pierson be required to pay, and to whom. Upon the first question, I have no doubt but that if the property had been purchased at the sale by a stranger to any of the mortgages, Pierson should only be required to pay the amount bid, with interest; while if Moore, or any one claiming under him, had purchased it in, he would have to pay the amount bid, if more than the mortgage, with interest; and, if less, then the amount of the mortgage, with interest and costs. But Baker does not appear to have purchased as a stranger. From all the facts in the case, I am satisfied that he acted in behalf of the Turner estate in making the purchase; while, if he had not, equity would hold him to have thus acted; for it was his duty to protect the estate, and he would not be permitted to purchase at the sale for the purposes of private speculation, and at the expense of the interests he was bound to protect from sacrifice or loss. In either case, he must be regarded as acting for the estate, and

the questions reserved are to be decided as arising between the estate and Pierson; and hence we are asked to determine whether Pierson shall pay one or both mortgages, or only the bid, and whether to Baker in his individual character, or to him as administrator. Whether he shall pay the amount of the first mortgage, with interest and costs, or the bid, is immaterial, as the bid was more than sufficient to satisfy the mortgage and costs, and the purchaser has always the right to have repaid the amount he paid, before he can be required to surrender the land. As Baker purchased the land, and holds the title, for the Turner estate, I have no doubt but that he may insist upon the payment of the amount of the Turner mortgage before he can be required to part with that title. It is true that, in a certain sense (and, had he not purchased, in every sense) the lien of that mortgage is extinguished; but so would be the lien of the first mortgage, and to the same extent, if the first mortgagor had purchased in the land for less than the amount of his decree. His lien would be merged in his title. Yet, in such case, if a subsequent incumbrancer sought to redeem, he would be required to pay the full amount of the first mortgage, and interest and costs, irrespective of the amount bid by the mortgagee at the sale, unless the balance had been otherwise satisfied. And why is this? Because equity regards the debt as the principal, and the land as the pledge; and, therefore, if by forfeiture and foreclosure the title to the pledge be transferred to the pledgee, no matter for what sum bid, the pledger must still satisfy the principal, before he can ask a court of equity to compel its restoration. He that seeks equity must do equity to him from whom he requires it; and it is equity that the mortgagor, or those claiming under him, shall not deprive the mortgagee of his pledge or security without payment of all sums of money due him for which the land was pledged. — See *Coote on Mort.* 391. As between the mortgagor and mortgagee, I apprehend there can be no doubt upon this question.

Now what was Turner's interest under his mortgage? Although in equity (and perhaps now at law) the "ancient estate in the land" remains in the mortgagor until after foreclosure, yet, to some extent, the common law yet characterizes it so that it is an estate upon condition as well—in fact, an anomalous estate, partaking, in many particulars, of the nature of one pledged, and in as many more, of one absolutely conveyed, subject to be destroyed by the performance of the conditions of its existence. Until after the foreclosure by Moore of his mortgage, the estate, whatever it was, may be conceded to have remained in the mortgagor; yet he had so far pledged and conveyed it that the equity of redemption alone remained in him. This only could be transferred by him, either by sale or mortgage. However his estate may be denominated, this, and the right to possession until after foreclosure, was most certainly all which was left to him. It follows that Turner, as the second mortgagee, had only a pledge or mortgage of that equity so long as Moore's mortgage remained a subsisting lien; but which might be transmuted into a mortgage of the land upon the satisfaction of the first. His right of redemption, then, was derivative, growing out of that of the mortgagor, and is to be determined by it. If the mortgagor could only redeem by paying the full amount of the Moore mortgage and costs, it follows that Turner could have no other or greater rights. Precisely to the same extent, and in strict analogy to this right of Moore, is that of Baker to insist that his (the Turner) debt should be paid by Pierson before he can be required to part with his title to the premises. He has acquired the pledge, and his principal remains unsatisfied; and there is no inequity in this. Had Turner taken an assignment of the Moore mortgage, no question could arise as to his or his administrator's right to insist upon the payment of both. By bidding in the land to protect this mortgage, Baker put himself in a situation where he may well insist

that he is entitled to the benefit of the rule which Moore could have insisted upon had he purchased, viz. that before he can be called upon to part with his title, he must be satisfied of all his mortgage liens prior to that of the defendant.

The amount of the bid in this case was some ten dollars over the amount of the Moore mortgage, interest, and costs; and this excess was applied upon the Turner mortgage. Pierson should, therefore, pay to Baker the amount of both mortgages, with interest, and the costs of the former, and of this suit, with interest upon the costs paid upon the former suit; or, in other words, he should pay the amount of Baker's bid, and the amount of the Turner mortgage, deducting the amount applied upon it, with interest, and costs of this suit; and the payment should be made to Baker as administrator, and not to him in his own right. In this result, I concur with my brother Manning; and this, I think, disposes of all the questions submitted for our opinion—certainly of all which I think the circuit judge had a right to reserve under the issues.

But my brethren have gone further, and discussed the rights of Pierson to redeem; and I can not suffer that subject to pass in silence, lest I may be understood as concurring in the views of either of them.

I do not regard it as connected in any way with this case, and I shall therefore discuss it precisely as though it was a question between Pierson and Baker individually, throwing out of question Baker's rights under the Turner mortgage. The effect of a foreclosure and sale by the first mortgagee is to vest in the purchaser an absolute title, divested of the equity of redemption of the mortgagor, and of all subsequent incumbrancers who were made parties to the suit. The purchaser acquires this title, and no more. He does not acquire the liens of the incumbrancers who were parties, for he does not acquire their debts, and a lien separated from the debt is extinguished; nor can he

be regarded as holding their liens as a trustee, for that would render his purchase valueless, as the beneficiaries might compel him, if he were their trustee, to enforce such liens for their benefit. When there is a trust, there is an interest and a right in the *cestui que trust;* and to hold that the liens are held in trust, and yet that no interest or right exists in the *cestui que trust*, is a solecism.

The truth is, the title stands to the purchaser as though the subsequent incumbrances of the parties to the suit had never existed. But as to a subsequent incumbrancer *not* a party to the suit, such is not the fact. Not being a party to the foreclosure proceedings, his lien is not cut off. The mortgage was foreclosed as to all parties to the suit, but as to no one else. Such incumbrancer not having been made a party, had no opportunity given him to redeem, nor was he required to until decreed against. Now the decree against the mortgagor, and the subsequent incumbrancers, is, that they redeem, or the property be sold. They may redeem; and the mode in which they may do this is precisely as though a strict foreclosure were decreed; and they may secure this by the decree, if they desire, and make application to the court to have their rights and the order of redemption fixed. If they omit to redeem, their lien upon the land is extinguished, and they can only protect themselves at the sale, by taking care that the land is sold for enough to satisfy their debts. They may then bid to protect themselves, or any one to protect himself. If enough is bid to satisfy all the mortgage debts, the money will be thus appropriated; if to satisfy only a portion, the money will be applied, so far as it goes, to their satisfaction in the order of their priority. If any remain unsatisfied, either wholly or in part, the lien being extinguished, the remedy of the mortgagee is personal against the mortgagor, and can never re-attach to the land. Now, if Pierson had been made a

party, and had redeemed before sale, the opportunity having been given to the prior mortgagees, and they making default, he would have been compelled to pay only the amount of the complainant's demand, with costs; and he would have taken the land, divested of their liens: if the property went to sale, he might purchase for such sum as he could, and he would hold the title equally free from their incumbrances. Wherein is Pierson's right or obligation different, by reason of the omission by Moore to make him a party to the foreclosure suit? In my judgment, he stands in this suit precisely where he would have stood in the former had he been made a party, and the intermediate mortgagees had refused to redeem, or to bid at the sale. After the foreclosure, his mortgage stood as the only lien upon the land, the others having been fully extinguished. The mortgagor and the intermediate mortgagees had had their day in court, and had neglected and refused to redeem or protect their liens; and the decree and sale was, as to them, final and perpetual. But Pierson did not have his day in court, and the foreclosure of the others' rights could not, therefore, affect his; and he can redeem the land from the sale, if he desires and the purchaser will not pay his demand. Hence the necessity for this suit. Moore had foreclosed the other incumbrancers, and extinguished their liens. The purchaser now pursues Pierson for the same purpose, and the same consequences will result to him unless he redeems from the purchaser. This he offers to do, and this is the whole matter. From what, then, is he to redeem, and how? Most assuredly from the sale, and not from the Moore mortgage, for that and all included in the foreclosure proceedings were extinguished. The purchaser no more acquired the first mortgage than the others, for he did not acquire the demand which it secured; and, as I have already shown, the security can not be acquired independently of the principal. Baker, by the purchase, became

the owner of the land, and nothing more; the mortgage of Moore was satisfied, and the debt it secured discharged; and Pierson, except for the Turner mortgage, could redeem by paying to Baker the amount of his bid, with interest; for Baker would have no other or further claim. This follows from a consideration of the nature and effect of a foreclosure and sale, and a purchase under them, in every case where the first mortgagee is not the purchaser.

In *Broome v. Beers*, 6 *Conn.* 198, it was held, in a bill of foreclosure, that it was not necessary to make other mortgagees, whose equity of redemption had been foreclosed, parties to the suit. And why was this? Most clearly, because this equity was, by the foreclosure, extinguished. If by any possibility, or for any purpose, it could be revived—if any vitality for any purpose remained in their foreclosed liens—then such incumbrancers should have been made parties. But they were unnecessary parties, because they had had their day in court respecting this identical equity of redemption of the mortgagor, to which all the liens attached, and respecting the lands upon which they all existed, and their rights had been adjudicated, and by their suffering foreclosure, for ever extinguished. But the liens of others, not parties to the former foreclosure, were not thereby discharged; and in these the foreclosed incumbrancers had no longer any interest, nor could they assert any right or equity over, or respecting them. So it is held that, with respect to incumbrances subsequent to the complainant's mortgage, but prior to the filing of the bill, the decree will bind all those who are parties to the suit, but not the rest; and, consequently, a second or subsequent mortgagee, or other subsequent incumbrancers, *who are not parties to the bill*, may, on payment of the *first mortgage debt and costs*, redeem the first mortgage, after the decree obtained.—See *Coote on Mort.* 522. The fact that no notice of *lis pendens* was filed in the case of Moore's foreclosure, brings Pierson, under our statute, within this rule; and I

confess that I can deduce from it only this principle: That, by the foreclosure of a prior mortgage, the equities of all the defendants to the bill are extinguished, and not only as against the first mortgagee, but as against all subsequent mortgagees not made parties. It matters not that the defendants, or any of them, are intermediate incumbrancers; if their equity of redemption has been foreclosed, the rule will be the same; and the mortgagee not made a party may redeem upon precisely the same terms as though no such intermediate mortgages had ever existed. But if a mortgagee who is made party to the bill redeems the first mortgage, then the incumbrancer not made a party must redeem from him as well, as will appear from a consideration of the rights of the subsequent incumbrancers to redeem, where they are made parties. Now what are they? In *Benedict v. Gilman & Couch*, 4 *Paige*, 58, the right of the last mortgagee to redeem by paying the first mortgage, when the intermediate incumbrancer neglects or refuses to redeem, is clearly recognized. "If," says the Chancellor, "Gilman does not elect to redeem as the senior incumbrancer, the other defendant may redeem by paying what is due *to the complainant, in the same manner that the senior incumbrancer might have done.*" And what would have been the result had Gilman refused, and Couch, the last incumbrancer, had redeemed from the complainant? Most assuredly Gilman's lien would have been extinguished, and Couch would have acquired the land free of it. So, in Seaton's Forms of Decrees (*pp.* 157, 161), it is said, "When parties are entitled to successive rights of redemption, the usual form of decree is as follows: Suppose A to be the first mortgagee, and B, C, and D to have successive rights of redemption, the right of redeeming A is given in the first place to B, C, and D in succession, each in default of the other. Suppose B to redeem, the right of redeeming A and B is given in the next place to C and D in succession, each in default of the other. Suppose C to

redeem in either of the above cases, the right of redeeming A and C in the former, and A, B, and C in the latter, is lastly given to D. In default of redeeming, *each party* is foreclosed, if defendant." I am aware that these are familiar rules; and yet there seems a necessity for recurring to them in the discussion of this subject. Chancellor Kent, in *Haines v. Beach*, 3 *Johns. Ch.* 459, says: "The necessity for making the subsequent incumbrancers parties, or holding their rights unimpaired, is indispensable to justice in cases of decrees for sales; for otherwise the mortgagor would take the surplus money, or the cash value of the equity of redemption, and defeat entirely the liens of the subsequent creditors. But their rights can not be destroyed in this way, and the purchaser will take only a title *as against the parties to the suit*, and he can not set it up against the subsisting equity of those incumbrancers who are not parties."

Now, what follows from these rules and principles? Most clearly it follows that in every case the equities of the incumbrancers who were parties are cut off from the land, and, more, are extinguished. The purchaser, in the case of a sale, takes the land freed of all equities of the parties to the proceedings, and if there be no other incumbrancers, he takes it by an absolute title. If there be other incumbrancers not parties to the decree, he has thenceforth to deal with them alone, and, as their rights are reciprocal, they have to deal with him alone. If it be true that, as between such purchaser and the incumbrancers who were made parties, the debts of the latter have been separated from the liens, and such liens have been extinguished, how is it possible that, by attempting to perfect his title by foreclosing a still subsequent mortgagee, he revives and reattaches to the land the foreclosed liens? or how can such subsequent mortgagee's rights be less or different from what they would have been had he been made a party to the former suit, and all his prior incumbrancers had made default to redeem, or protect themselves at the sale? Yet

such must be the effect, if the subsequent mortgagee is required to redeem all the mortgages prior to his own, under a bill like that in the present case. As to the purchaser, his title confers upon him the right to foreclose the subsequent mortgagee. In such case, the value of his title is determined by the sum he paid for it, and he can only ask the party he seeks to foreclose to repay to him such amount; and the converse of the rule must be equally true, that such party can redeem from him by paying that sum. Their rights and liabilities are co-extensive, and precisely the same under a bill to foreclose or one to redeem. What is the effect of the doctrine that the purchaser foreclosing a subsequent unforeclosed mortgagee, or that the holder of such mortgage asking to redeem, must make all those whose liens have been extinguished, parties? It is, virtually, to annul the foreclosure under which the title was obtained, to revive the destroyed liens, and to open the whole decree. This would render a decree of foreclosure, in case a subsequent mortgage should exist, a senseless thing—a judgment of court meaning nothing; and the numberless decisions of judges and chancellors, that such decree bound all the parties to it, and that a purchaser of the premises acquired a title as against the parties to the suit, utter nonsense. The truth is, neither a bill to foreclose such subsequent mortgagee, nor a bill by the mortgagee to redeem, vacates, or annuls, or in any degree affects, the prior foreclosure and sale; nor does it revive the rights of any party to it. The proceeding, if a foreclosure is by a stranger to the former suit, unless the purchase was made by a party; in either event by a purchaser; and if for redemption, is against a purchaser, whether stranger or party. It is based, in either case, upon a title acquired after, although through, the decree; and it is that title only which is to be affected. In only one case can the holder of the title ask more than the amount he paid, with interest; and that is when the first mortgagee bids in the property for a less sum than his debt, or when a subse-

quent incumbrancer bids it in for the protection of his lien, as in the present case; and then, as I have already shown, a new equity supervenes.

Pierson, in the case before us, stands as a stranger to the former foreclosure and sale. These proceedings are not invalid as to him, for upon their validity depends all the purchaser's rights against him, and his rights to redeem from such purchaser; but as he was neither a party nor privy to them, he claims, beyond this, no rights dependent upon them. He neither claims any benefit from them, nor does he repudiate them. His claim is founded upon his mortgage alone. It is true that his right is of an equity of redemption, which, before the foreclosure and sale, was subordinate to those of his prior incumbrancers; but those have been extinguished, and it is no concern of his, nor does it affect his rights, whether they were extinguished by payment or by foreclosure. It is enough for him that they no longer exist. If he reaps any advantage from this, it is one arising from the voluntary act or omission of his prior mortgagees; and they can not complain if a benefit incidently results to him, nor require him to surrender it up before he can assert his independent rights. If his equity is subordinate to all prior equities, and must always remain so, if he can only enforce his by discharging them, why may not the mortgagor himself, if he has voluntarily paid them, demand re-payment before Pierson can redeem? The truth is, his lien is subordinate so long as prior liens exist, but no longer. The moment they are removed, whether by a decree of court, or the voluntary payment of the debts they secure, his lien becomes the primary incumbrance; and this is what the courts mean when they say that in case of a foreclosure and sale the purchaser takes a title as against all the parties to the suit, but not as against the subsisting equity of those incumbrancers who are not made parties. The prior mortgagees acquired no rights by the subsequent mortgage, nor were their rights

either increased or diminished by it. They acquired theirs through the mortgagor, and the foreclosure of his equity foreclosed theirs, for they had a day in court with him, and refused to protect them; such refusal was an abandonment of them, and they can never again assert them. It would not only be inequitable, but it would destroy the force and efficacy of a foreclosure, to permit them, subsequently, to set them up against a party whose equity was not foreclosed, or to claim that such party must first revive and then satisfy and extinguish liens which they had already suffered to be extinguished, before he can make his own available to the satisfaction of his debt. I must confess, that, to my mind, the very proposition involves an absurdity.

Nor are there any equities between him and these prior mortgagees to be adjusted. Pierson holds the only living equity, and there can be no adjustment of dead and living equities. Those of his prior incumbrancers were destroyed by the decree and sale, and if we hold that the living equity of Pierson is valueless, unless the dead equities of such incumbrancers be resuscitated and interposed between his mortgage and the title, we must hold that the foreclosure of Moore's mortgage was a useless ceremony of the law, and that the title of the purchaser is still incumbered with all the equities which existed against that of the mortgagor before the sale.

I have already determined how, in my judgment, Pierson may redeem in this case; and upon such redemption—as would be the case had the property been purchased by a stranger to the mortgages—I think he will hold all the title of the purchaser, divested of all equities, and that the prior mortgagees ought not to be, and could not be, made parties to any proceedings between him and Baker, as they have no rights to protect, nor equities to adjust.

CAMPBELL J. did not sit, having been of counsel in the case.

Ordered certified, as the opinion of this court, that Pierson should be permitted to redeem on paying the amount of the Moore and Turner mortgages, with interest, and the costs of the former suit, and of these suits.

INDEX TO CASES REPORTED.

ADMINISTRATOR.

See PROBATE COURT; SALES BY ADMINISTRATORS.

ADMISSIONS.

See EVIDENCE, 8; PARTNERSHIP, 2.

AFFIDAVIT FOR ATTACHMENT.

See ATTACHMENT.

AGREEMENT.

See CONTRACT.

ALIMONY.

1. On an appeal from Chancery in a divorce case, the Supreme Court has power to allow the wife temporary alimony, and to compel the husband to furnish her with pecuniary means to prosecute or defend the appeal. —*Goldsmith v. Goldsmith*, 285.

2. That the decree in the court below was adverse to the wife *Held* not of itself sufficient ground for denying a motion for such allowance; which was accordingly made on the court being satisfied by certificates of counsel that the appeal had been taken on her behalf in good faith, and the allowance being shown to be necessary to enable her to prosecute such appeal. —*Ibid.*

3. Such order vacated on its being shown by affidavits that the appellant had been guilty of repeated acts of adultery pending the appeal. —*Ibid.*

AMENDMENTS.

1. Ejectment. Plaintiff claimed the premises under an execution sale. To prove a judgment on which execution issued, plaintiff gave in evidence the following journal entry entitled in the cause: "On hearing counsel in this cause, ordered, on motion of plffs.' att'y, judgment for plffs. on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in plffs.' declaration; and the clerk having computed the amount due by the condition of said bond at $800, the penalty thereof, to be discharged on the payment of $624.11, with costs to be taxed." He also offered in evidence the execution issued for $800 debt, with endorsement to collect $624.11 and costs, the files in the case, showing declaration on a money bond in the penalty of $800, plea thereto, demurrer to the plea, and joinder. Also writ of error brought by defendant, in the same case — the return thereto, giving a transcript of what purports to be a formal judgment record, and the proceedings in the Supreme Court thereon, where judgment was affirmed. The circuit court rejected all this evidence. — *Held*, erroneous. — *Emery v. Whitwell*, 474.

2. By the practice and statutes of this state, no formal judgment record need be made up unless required by one of the parties, but the judgment is evidenced by the files and journal entries. Admitting the journal entry in this case to be defective, the transcript sent up in return to the writ of error, showing a formal judgment record signed by the clerk and judge, is evidence both of such record and of the judgment of the circuit court. Per MANNING J. — *Ibid.*

3. Where the files in the case clearly show that judgment for a definite sum should have been entered, and was intended by the court to be entered, but the entry actually made was defective, it is entirely competent to amend the record to what it should have been, at any time thereafter. Per CHRISTIANCY J. — *Ibid.*

4. But in such case no actual amendment need be made; but the record will be treated as amended, or rather as though no such error appeared. Per CHRISTIANCY J. — *Ibid.*

5. A record, like other writings, must always be subject to construction, and is, in fact, what its fair construction makes it. The question of amendment in such a case is, therefore, practically one of construction, and must arise whenever and wher-

ever the record is brought in question. Per CHRISTIANCY J. — *Ibid.*

6. Notice of application to amend the record is not necessary in such case, because the effect of the record is not changed by it, and no one's rights are affected. Notice is only necessary where the nature of the error and the appropriate amendment depend on matters not apparent on the face of the record, but shown *aliunde*. Per CHRISTIANCY J. — *Ibid.*

7. Where no question can arise as what were the rights of the plaintiff on the record itself, and where it would not have been in the power of the court to render a different decision without error, an omission to state that right, or to render that judgment properly on the record, can be regarded as nothing but a clerical omission; and is not only amendable of course, at any time, but, in reading the record, it should be considered as supplied, whether actually corrected or not. Per CAMPBELL J. — *Ibid.*

8. The whole record should be read, when brought up collaterally, precisely as if the amendments due as a matter of right had been actually made. Per CAMPBELL J. — *Ibid.*

9. As either the record in the court below, or that sent up in return to the writ of error, shows the judgment that should have been entered, and the execution is correct in accordance with that, the execution title should be sustained. Per CAMPBELL J. — *Ibid.*

10. The journal entry in question shows that the court intended to enter, not a final, but an interlocutory judgment merely, and this court has no power to transform it into a final judgment. Per MARTIN Ch. J. *dissenting.* — *Ibid.*

11. A clerical error in entering judgment may be amended at any time. But where the record fails to show that a judgment was intended to be entered, though it clearly appears that it might have been, this can not be regarded as a clerical mistake in the entry of a judgment, but as want of evidence of judicial action Per MARTIN Ch. J. *dissenting.*—*Ibid.*

12. The return of the clerk to the writ of error is to be regarded as merely the formal return of the clerk; in a form which he supposed proper, and can not be used as evidence of a judgment in the same court in which the record should be, if one was ever rendered, when the record itself is not shown to be lost or destroyed. Per MARTIN Ch. J. *dissenting.* — *Ibid.*

See PRACTICE IN SUPREME COURT, 9, 10.

APPEAL.

See ONTONAGON; WAIVER.

APPEAL IN CHANCERY.

1. One of several defendants appealing from a decree in chancery, can not ask a reversal of the decree for error in a part of it in no way affecting the rights of such appellant. — *Martin v. McReynolds*, 70; *Warner v. Whittaker*, 133.
2. The Supreme Court has no power to require an appellant in chancery to give a new or further appeal bond, in addition to the one approved by the circuit court commissioner, and which is alleged to be insufficient. — *Moore v. Olin*, 328.
3. An appeal in chancery to this court, will only lie from a final decree or final order. — *Caswell v. Comstock*, 391.
4. A decree is not final which directs a reference to a master or other officer to do what the court, but for its power to make such reference, would itself have to do before it could decide the case. — *Ibid.*

See FORECLOSURE OF MORTGAGE, 6, 8; PRACTICE IN SUPREME COURT, 14.

ASSAULT WITH INTENT TO MURDER.

1. On an indictment for an assault with intent to commit the crime of murder, it is wholly immaterial whether the murder intended would, if consummated, have been murder of the first or of the second degree. — *People v. Scott*, 287.
2. The statute has not altered the common law definition of murder, but, recognizing it, has simply divided it into classes, or degrees of enormity, for the purpose of apportioning the punishment. Wherever, therefore, an assault with intent to kill is committed, and the circumstances are such that, if death had ensued, the killing would have constituted murder at the common law, the offense of assault with intent to murder, under the statute, is complete. — *Ibid.*
3. The degrees of murder under the statute considered, per CAMPBELL J. — *Ibid.*

ASSIGNMENT.

1. A schedule, detailing at large the property conveyed, is not necessary to the validity of an assignment for the benefit of creditors. — *Nye v. Van Husan*, 329.

2. The necessity or effect of a schedule, if one is referred to in an assignment, is to be determined by the intent of the parties as gathered from the whole instrument, and which, when ascertained, is to govern in the construction of assignments as in the case of other written instruments. — *Ibid.*

3. An assignment which clearly manifests an intention on the part of the assignors to transfer all their property to the assignees, and that it shall have immediate operation, will have that effect, though to the general terms describing the property are added the words "as the same is more particularly described in a schedule *proposed* to be hereafter annexed," and which schedule is not annexed. — *Ibid.*

4. The reservation to the assignors of a power to perfect the schedules attached to an assignment, will in no respect impair or restrict the assignment itself. — *Ibid.*

5. Where an honest intent can as clearly be inferred from the terms of an assignment as a fraudulent one, the courts are not at liberty to infer the latter. — *Ibid.*

6. A clause in an assignment authorizing the assignees to "sell and dispose of the" assigned property, "either at public or private sale, as they in their judgment may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interests of the creditors, converting the same into money," &c., will not be construed as conferring a power to sell upon credit. — *Ibid.*

7. A preference of individual debts in a copartnership assignment does not, of itself, independent of an actual intent to defraud, render the assignment void. — *Ibid.*

8. A clause in an assignment, by which the assignors nominate and appoint the assignees, "their executors, administrators, or assigns, their, or each of their true, and lawful attorneys, irrevocable, with full power and authority to do and perform all acts, matters, or things which can or may be necessary in the premises, as fully and completely as the said [assignors] might or could do were these presents not executed; and attorney one or more under them to make, nominate, and ap-

point, as they may deem necessary, with full power of substitution and revocation," &c., does not confer upon the assignees the power to delegate their trust, and is proper and unobjectionable. — *Ibid.*

ASSIGNMENT OF ERRORS.

See PRACTICE IN SUPREME COURT, 1, 2.

ASSIGNMENT OF MORTGAGE.

1. The assignment of a debt secured by mortgage, carries with it, in equity, the mortgage as an incident to the debt, and the assignee may proceed in equity to foreclose it. — *Martin v. McReynolds*, 70.

See HUSBAND AND WIFE, 1, 2.

ATTACHMENT.

1. The affidavit for attachment under chapter 140 of the Compiled Laws must be made on the day on which the writ issues. — *Fessenden v. Hill*, 242.

BAIL IN CRIMINAL CASES.

See RECOGNIZANCE.

BAY COUNTY.

See EVIDENCE, 7.

BILLS OF EXCEPTIONS.

1. The Supreme Court has no power to look behind the record transmitted to it from the circuit court, to amend or alter it. If complaint is made that the transcript is incorrect, all this court can do is to require, upon a proper showing, that the court below make a full return according to the facts. But where a copy of the bill of exceptions, instead of the original, was sent up from the circuit court, in return to the writ of error, and three terms have elapsed since the return of the writ, and issue in error has been joined without any notice being taken of the irregularity, and no explanation is made

of the delay, the court will not interfere to require the original bill to be sent up. — *Evans v. Norris*, 69.

BILLS OF EXCHANGE.

See PROMISSORY NOTES.

BONA FIDE PURCHASER.

1. To constitute a *bona fide* purchaser, there must be want of notice both at the time of the purchase and at the payment of the purchase money. — *Warner v. Whittaker*, 133.

2. Where land was purchased upon which was an unrecorded mortgage, of which the purchaser had no notice, but of which he was notified before a mortgage given by him for purchase money was paid; — *Held*, That any payment made by him on his mortgage after such notice, was made in his own wrong, and he was not protected, as to such payment, against the unrecorded mortgage. — *Ibid.*

3. The assignee of a chose in action takes it subject to all equities existing between the debtor and creditor. It is not necessary that the equities should have existed at the inception of the debt or contract — it is sufficient that they exist prior to the assignment, as the assignee has it in his power to protect himself against them, by inquiry of the debtor, before the assignment. — *Ibid.*

BOND ON APPEAL.

1. The Supreme Court has no power to require an appellant in chancery to give a new or further appeal bond, in addition to the one approved by the circuit court commissioner, and which is alleged to be insufficient. — *Moore v. Olin*, 328.

BOND OF SHERIFF.

See SHERIFF'S BOND.

BOOMING COMPANIES.

See LOG DRIVING AND BOOMING COMPANIES.

CARRIERS.

See COMMON CARRIERS.

CASES IN MICHIGAN REPORTS, CITED AS AUTHORITY, COMMENTED ON, OR OVERRULED.

Bailey v. Gould, Walk. Ch. 478; *cited* 74.
Beach v. White, Walk. Ch. 495; *cited* 466.
Bird v. Hamilton, Walk. Ch. 361; *cited* 312.
Cook v. Wheeler, Harr. Ch. 443; *cited* 73.
Cooper v. Ulmann, Walk. Ch. 251; *cited* 73.
Cote v. Dequindre, Walk. Ch. 64; *cited* 72.
Cutter v. Griswold, Walk. Ch. 437; *cited* 466.
Hollister v. Loud, 2 Mich. 309; *cited* 341, 348.
Howard v. Moore, 2 Mich. 226; *cited* 507.
Ives v. Kimball, 1 Mich. 308; *cited* 31.
Jenny v. O'Flynn, 5 Mich. 215; *cited* 75.
Little v. Lesia, 5 Mich. 119; *cited* 538.
May v. Specht, 1 Mich. 187; *cited* 189.
May v. Tillman, 1 Mich. 262; *cited* 189.
Mich. C. R. R. Co. v. Ward, 2 Mich. 538; *overruled* 243.
Morey v. Forsyth, Walk. Ch. 465; *cited* 73.
People v. Beaubien, 2 Doug. 256; *cited* 183, 184.
People v. Burns, 5 Mich. 114; *referred to* 456.
People v. Carpenter, 1 Mich. 273; *cited* 183.
People v. Dennis, 4 Mich. 609; *cited* 386, 387.
People v. Potter, 5 Mich. 1; *cited* 292.
People v. Rutan, 3 Mich. 42; *cited* 385.
Sill v. Ketchum, Harr. Ch. 423; *cited* 73.
Story v. Story, Walk. Ch. 421; *cited* 286.
Sweetzer v. Mead, 5 Mich. 33; *cited* 283.
Thayer v. Lane, Walk. Ch. 200; *cited* 219.
Thompson v. Bowers, 1 Doug. 321; *cited* 514, 515.
Thomas v. Graham, Walk. Ch. 117; *cited* 135.
Wells v. Scott, 4 Mich. 347; *cited* 363.
Whitwell v. Emery, 3 Mich. 84; *cited* 487, 489, 494.
Wilson v. Arnold, 5 Mich. 98; *cited* 242.
Wisner v. Farnham, 2 Mich. 472; *cited* 469.

CASES MADE.

See PRACTICE IN CIRCUIT COURT, 1; PRACTICE IN SUPREME COURT, 9, 13.

CERTIORARI.

See PRACTICE IN SUPREME COURT, 6.

CHANCERY, COURT OF.

See CITY OF DETROIT; MISTAKE; PRACTICE IN CHANCERY; SET-OFF IN EQUITY.

CHARGE TO JURY.

See PRACTICE IN CIRCUIT COURTS, 2, 3.

CHOSE IN ACTION.

See BONA FIDE PURCHASER.

CIRCUIT COURTS.

1. The circuit courts have no power in any case to issue writs of error. — *Teller v. Wetherell*, 46.

See PRACTICE IN CIRCUIT COURTS.

CIRCUIT COURT COMMISSIONERS.

See JURISDICTION, 2, 3; RECOGNIZANCE, 4, 5.

CIRCUIT JUDGE.

See RECOGNIZANCE, 4; STATUTES, CONSTRUCTION OF.

CITY OF DETROIT.

1. Where labor was performed under a contract with the city of Detroit before the Revised Charter of 1851 was adopted, and the Common Council, after the Revised Charter took effect, passed a resolution for the settlement of the contractor's claim therefor, such resolution does not require the mayor's approval. — *Chaffee v. Granger*, 51.

2. Under the charter of Detroit, claims for the construction of a sewer are to be paid only from a fund specially voted and

raised for that purpose. While a claim against a sewer fund (which the city disputes) is pending and unadjusted, the rights of the claimant can not be affected by a transfer to the sinking fund of the balance standing to the credit of such sewer fund. — *Ibid.*

3. Where a claim for extra work and alterations was made against the city of Detroit, by a contractor for the construction of sewers, and suit was brought for the recovery thereof, and the Common Council directed the City Attorney to permit judgment to pass therefor, which he did, and there could be no serious doubt of the legality of the larger portion of the demand, and the question as to the remainder was, at most, one of doubtful construction of the agreement under which the work was done, and the action of the Council appeared to have been taken in good faith; — *Held*, That there was no just ground for the interference of a court of equity, in behalf of a tax payer, to restrain the collection of the judgment. — *Ibid.*

4. If courts of equity have jurisdiction to interfere, by injunction, to restrain the action of a municipal corporation, on a bill filed by a tax payer on behalf of himself and other tax payers, the circumstances to authorize such interference must be such as to show that the proposed action will be inequitable, and injurious to the public interest. — *Ibid.*

5. The adoption, by the Governor and Judges of the territory of Michigan, of the plan of the city of Detroit, in 1807, did not, of itself, make public highway of that portion of the projected streets which was covered by private claims, and occupied as private property. — *People v. Jones*, 176.

6. The power of the Governor and Judges to convey lots in the town of Detroit, was not confined to a conveyance of lots in such forms and dimensions, as they should delineate them upon their plan. Under the acts of Congress empowering them to adjust claims to lots therein, and give deeds for the same, the claims to be adjusted were such as any person might have, legal or equitable. When satisfactory proof had been made, they had no right whatever to deprive a claimant of any portion of the land actually belonging to him under the acts of Congress, passed to protect ancient titles and settlements, whether it interfered with any projected plan or not. And no court has a right to go behind their conveyances, so long as they acted within the jurisdiction vested in them by Congress. — *Ibid.*

7. The adoption by the Governor and Judges of the plan of Detroit was not intended by them to be a final and absolute act, which could not be reviewed or explained. It was liable to modification by interfering claims and reserves; and, when circumstances might render it necessary to adapt the plan to these contingencies, they had the power to do so. — *Ibid.*

8. That portion of Shelby street between Jefferson Avenue and Woodbridge street, as projected on the plan, being at the time of the adoption of the plan claimed and occupied as private property, and so continuing to be claimed and occupied thereafter; and the corporate authorities of Detroit having, many years after the adoption of the plan, under their authority to lay out streets through private property, caused a street to be opened along it, but of less width than the street as originally projected, paying the occupants of the land for the strip so taken; — *Held*, That this was a waiver of any rights of the corporate authorities, if any they had under the plan, to that portion of the projected street outside the lines of the street so opened. — *Ibid.*

COMMON CARRIERS.

1. A common carrier can not limit his common law liability by a mere notice endorsed upon the receipt given the consignor, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence *aliunde* — it can not be presumed from the terms of the receipt alone, or be implied from the posting of notices or the delivery thereof to the consignor. — *Michigan C. R. R. Co. v. Hale*, 243.

2. A common carrier has no power to *restrict*, in any manner, his common law liability, but is bound to transport the property intrusted to him under this liability, if it be not waived, or changed by contract. But he may make any contract with an individual relative to the transportation of his property which the latter may deem conducive to his interest, and enter into upon a consideration satisfactory to himself, though a diminution of the carrier's common law liability results therefrom. — *Ibid.*

3. The law does not compel persons dealing with common carriers to rely and insist upon the liability which, in the absence of special contract, it imposes in their favor, but recognizes their competency to manage their own affairs, and to

make such contracts with respect thereto as they may deem most conducive to their interests. — *Ibid.*

4. A corporation which is made a common carrier by its charter, and required to "transport merchandise and property without showing partiality or favor," has the same power to contract for a limitation of its liability as any other carrier, and no consideration of public policy is contravened by the exercise of such power. — *Ibid.*

5. The case of *The Michigan Central Railroad Company v. Ward*, 2 *Mich.* 538, overruled. — *Ibid.*

CONSIDERATION.

See FRAUDULENT CONVEYANCES; MISTAKE.

CONSTITUTIONAL LAW.

See LOG DRIVING AND BOOMING COMPANIES, 1; RECOGNIZANCE, 4, 5; WRIT OF ERROR.

CONSTRUCTION OF STATUTES.

See STATUTES, CONSTRUCTION OF; STATUTES CONSTRUED, &c.

CONTRACTS.

1. By a contract between plaintiffs and defendants, the latter bound themselves to convey, from Saginaw to Chicago, six vessel loads of lumber, at a specified price, as follows: One in August, two in September, two in October, and one in November. Defendants carried but five, as follows: One in August, one in September, one in October, and two in November. Freights rose slightly in October, and largely during November. In an action brought by plaintiffs for neglect to carry the sixth cargo, there being no evidence of any agreement of the parties, or election by defendants, to apply the extra cargo carried in November to the default in September or October, — *Held*, That defendants had a right to have the extra cargo carried in November, stand as a substituted performance for the cargo which they failed to carry in October, and that plaintiffs would be entitled to such damages only as they had sustained by the failure of defendants to carry one

of the cargoes which they were bound to carry in September. — *Lord v. Strong*, 61.

2. By a written contract between plaintiff and one R., R. agreed to work for plaintiff in the sale of merchandise, in the store in which R. formerly carried on the same business; to take charge of said store, and do or cause to be done all the work necessary to the profitable conducting said business; to sell such goods as should be placed there by plaintiff, keep books, be always ready to render an account; to contract no debts against plaintiff without special permission; to be liable personally to plaintiff for all bad debts he might contract in said business; to give up possession of the goods and store whenever required, and pay over the avails of sales; and plaintiff agreed to pay to R. all the profits on the sales of goods over and above ten per cent.; or, in other words, the plaintiff to receive from R. the cost and transportation, and all expenses that should accrue in placing the goods in the store, and, in addition, ten per cent. on the cost of the goods and expense of placing them in the store, and at any time when plaintiff should wish to close the business, it should be at his option to take any remaining goods out of the store, or hold R. personally liable for the cost thereof and transportation; and the goods, and all sales, and credits given in the sale, were to be at the risk of R., and plaintiff was to be at no trouble or expense in any way growing out of the business, except the purchase of the goods; and should receive back in money from R., if he should require it, the cost and expense or transportation, and ten per cent. thereon. In an action of replevin by plaintiff for goods taken from the store under an execution against R., the circuit judge charged the jury that, by the terms of this contract, all the goods purchased by plaintiff under the same became the property of R. as soon as they were delivered into his possession, and that the legal effect of the contract was to constitute a sale from plaintiff to R. of the goods purchased by plaintiff and delivered to R. pursuant to the contract, and rendered the goods subject to the claims of R.'s creditors; — *Held*, That this charge was erroneous, and that, independent of any question of fraud, the contract did not have the effect to vest in R. the goods purchased and placed in the store by plaintiff. — *Snook v. Davis*, 156.

3. The court can not say that this contract was fraudulent upon its face against the creditors of R., or conclusive evidence of fraud. Whether it was made in good faith, or intended to defraud, and whether any thing done or claimed to have been done

under it was fraudulent or not, were questions of fact for the jury, depending upon the evidence outside of the instrument itself. — *Ibid.*

4. A mortgage given by an infant *feme covert* to secure the debt of her husband, is absolutely void, and not merely voidable. — *Chandler v. McKinney*, 217.

5. Under the present statutes of Michigan, contracts of sale by a married woman are to be treated as if made by a *feme sole*. — *Durfee v. McClurg*, 223; *Starkweather v. Smith*, 377.

6. By the terms of a lease of a hotel, the rent was made payable in monthly installments, and the lessor agreed to take one-half the same "in board, as the same falls due"; — *Held*, That it was not optional with the lessee to pay in money or board, but that he was under the same obligation to pay the board, if demanded, as the lessor to receive it. — *Evans v. Norris*, 369.

7. The lessee in such case was under no obligation to call upon the lessor, and demand that boarders be sent, but the lessor was bound to call for the board within the term, and substantially as the same came due. — *Ibid.*

8. By a contract between P. and H. C. K. of the one part, and T. of the other, the former agreed to sell to the latter certain mill premises at $7500; and there being a mortgage upon a portion of said premises, and a decree in chancery obtained for the sale of said portion to satisfy another mortgage, for which mortgage and decree the holder had proposed to take $6000 in certain payments, the K.s authorized T. to pay that amount therefor towards the $7500 to be paid for said premises, and T. agreed to pay the same, but was to be at liberty to make any other arrangement with the holder he saw fit, but only $6000 to apply on the purchase; and if said mortgage and decree could not be obtained for $6000, then T. was to attend the sale to be made under said decree, and bid off the premises, and if obliged to bid more than $6000, to prevent any other person becoming the purchaser, then the K.s were to provide for the overplus — and $1500, the balance of the $7500, was to be paid by T. to the Michigan Insurance Company, within six months after he should acquire title to said premises to satisfy a subsequent mortgage on said premises held by said company. By said contract, it was further provided that T. should be put into immediate possession of the said premises, and should deposit $300 with a third person, to be forfeited in case of non-performance on his part — both of which were done. The K.s, on T. performing, were to convey to him the premises. On a bill filed

by the Insurance Company to foreclose their mortgage, and a cross-bill filed by the K.s setting up these facts, it appearing that T., jointly with others, but in his name, had bought said first mortgage and decree, paying therefor over $6000, but without apprising the K.s of the necessity of paying more, or giving them an opportunity of negotiating for said claims, and T. had taken up the $300 so deposited by him, on the supposition, as he states in his answer, that the sale would be completed according to the contract, and the K.s, at the same time, with his assent, deposited quit-claim deeds of the premises, to be delivered to him when the mortgage and decree were discharged, and the persons buying with T. had knowledge of this contract at the time; — *Held*, That, although they went on afterwards and caused the premises to be sold to themselves, under the decree, for an amount that, with said mortgage, would make $6000, leaving about $1200 still back on the decree, the mortgage of the Insurance Company was still a lien on the premises, and T. and his associates were liable for the payment of the amount thereof, and that they should be enjoined from collecting the balance of the decree against the K.s. — *Kibbee v. Thompson*, 410.

9. T. was at liberty, under this contract, to negotiate for the first mortgage and decree as he saw fit, with the privilege of applying them at $6000, and no more, on his purchase — whatever might be the amount paid. If he saw fit, or thought it for his interest, to pay more, rather than allow sale to be made under the decree, the loss or the speculation — whichever it might prove — was his own. — *Ibid.*

10. In their answers to these bills, T. and his associates set up, as a defense, that the K.s had title only to an undivided two-fifths of the premises. The evidence as to the state of the title was not satisfactory; but this objection appearing to be now taken for the first time, and being inconsistent with the acts of the defendants, and with their answers, which averred a willingness and readiness to perform T.'s engagements therein, claiming only that the whole amount paid for the first mortgage and decree should be applied on the purchase price of the premises, — *Held*, That this defense could not avail defendants. — *Ibid.*

11. The undertaking of T., in this contract, to pay the $1500 to the Insurance Company, was independent, except in point of time, of the engagement to take up the other mortgage and

decree, and did not depend upon the amount he might have to pay to obtain such other mortgage and decree. — *Ibid.*

See COMMON CARRIERS; DAMAGES; EVIDENCE, 1; LOG DRIVING AND BOOMING COMPANIES, 3, 4; PARTNERSHIP; REPLEVIN, 2; SPECIFIC PERFORMANCE, 1, 2.

CONVEYANCES.

1. The record of a deed not executed and acknowledged in accordance with the recording laws is notice to no one. — *Galpin v. Abbott*, 17.

2. Where, under the Code of 1833, a deed of lands within the territory of Michigan was proved or acknowledged in the state of New York, it was not necessary, to entitle the deed to record within the territory, that the acknowledgment be accompanied by a county clerk's certificate, proving the official character and signature of the officer taking the acknowledgment. — *Ibid.*

3. Under the Code of 1833, to entitle a deed acknowledged or proved out of the territory to be recorded within it, it was necessary that it be *executed and witnessed* in the same manner that deeds acknowledged within the territory were required to be, though the *proof or acknowledgment* might be in accordance with the laws of the state or territory where it was taken. — *Ibid.*

See MISTAKE.

CORPORATIONS.

1. Independent of statutory provisions, chancery may, on behalf of the creditors of corporations, compel stockholders to pay in any amount that may be unpaid on their stock. — *Pettibone v. McGraw*, 441.

See LOG DRIVING AND BOOMING COMPANIES; MICHIGAN CENTRAL RAILROAD COMPANY; PLANK ROAD COMPANIES.

CRIMINAL LAW.

See ASSAULT WITH INTENT TO MURDER; FALSE PRETENCES; MURDER.

DAMAGES.

1. In an action for the non-delivery by defendant, at the time agreed upon, of an article purchased and paid for by plaintiff,

the jury may, without proof of special damage, award the plaintiff, as damages, interest on the price of the article from the time it should have been, until it actually was, delivered. — *Edwards v. Sanborn*, 348.

See CONTRACT, 1.

DECREE.

See INFANT, 2.

DEDICATION.

1. If the owner of land do such acts as show, unequivocally, an intent to dedicate his land to the public for a highway, such dedication, if properly accepted, will make the land dedicated a public highway, without reference to any particular period of time. — *People v. Jones*, 176.

2. In determining whether there has been a dedication, all the acts of the owner bearing upon the question are to be considered together. One act may be explained or qualified by another. — *Ibid.*

3. A dedication can not be made without an intent to dedicate, clearly manifested. — *Ibid.*

4. It is essential to a dedication that it be accepted by the public. In the case of city streets, the acceptance should be manifested by some act of the authorities, either formally confirming the dedication and ordering their opening, or exercising authority over them in some of the ordinary ways of improvement or regulation. — *Ibid.*

DEEDS.

See CONVEYANCES; FRAUDULENT CONVEYANCES; MISTAKE.

DEMAND.

See CONTRACT, 6, 7.

DETROIT CITY.

See CITY OF DETROIT.

DIVORCE.

See ALIMONY.

DOWER.

1. Where the holder of a mortgage given by husband and wife became owner of the husband's equity of redemption, and, subsequently, conveyed the lands with warranty, — *Held*, That, in a proceeding for recovery of dower brought after the husband's death by the wife against the grantee, the amount of the mortgage must be deducted from the whole value of the premises, and such portion of the land set off to the widow's use as is worth one-third of the residue. — *Snyder v. Snyder*, 470.
2. Such deduction may be made when the proceeding for the recovery of the dower is by action of ejectment. — *Ibid.*
3. The conveyance of the equity of redemption to the assignee of the mortgage is, in such circumstances, such a merger as authorizes him to stand in the position of an assignee of the mortgagor satisfying it, under § 2777 Compiled Laws. — *Ibid.*

EASEMENTS.

See DEDICATION.

EJECTMENT.

1. Where, in ejectment, a claim is filed under the statute (*Comp. L.* §4603) for the value of improvements made by defendant on the premises in controversy, the case may be tried by the court without a jury, if a jury be not demanded by one of the parties. — *Rawson v. Parsons*, 401.
2. Where such claim is filed by defendant, and the plaintiff filed none for an estimation of the value of the land had no improvements been made, the jury must estimate the increased value under defendant's claim, and if the verdict be for the plaintiff for the land, the latter will be entitled to judgment for the recovery of the premises, but will be deemed, under the statute, to have abandoned all claim thereto, unless he shall pay the sum so estimated for improvements within a year after the judgment. If the plaintiff would have the jury estimate what would have been the value of the land had no improvements been made, he must file a claim for that purpose before the trial. — *Ibid.*

3. Such claim of plaintiff, when filed, is an essential part of the record, and must appear therein. It is not sufficient that there be a recital in the entry of judgment that one has been filed. — *Ibid.*

4. Where, in such case, trial is had before the court without a jury, the finding of the judge is in the nature, and stands in the place, of a special verdict, and must be filed in writing before any judgment can be rendered. — *Ibid.*

5. The plaintiff in such case, when the finding of the judge in his favor upon the title, and also upon the respective claims of the parties, has been filed, may elect to take judgment either for the possession of the premises, subject to the obligation to pay for the improvements, or for the value independent of the improvements. But he can not be permitted, after taking judgment for possession, to abandon that and elect to take judgment for the value. — *Ibid.*

See DOWER.

ELECTION.

See CONTRACT, 6.

EQUITABLE SET-OFF.

See SET-OFF IN EQUITY.

ERRORS OF FACT.

See WRIT OF ERROR, 1, 3, 4.

ERROR, WRIT OF.

See WRIT OF ERROR.

EVIDENCE.

1. The declarations of a person since deceased, can not be made evidence on behalf of his representatives, any more than on his own behalf while living, for the purpose of showing what were the terms of a parol contract made by him for the conveyance of lands, and which is sought to be enforced against such representatives. — *Wilson v. Wilson*, 9; *Jones v. Tyler*, 364.

2. The record of a deed not executed in conformity with the recording laws is notice to no one. — *Galpin v. Abbott*, 17.

3. The acts and declarations of a partner actually engaged in an adventure in his own name, can not be proved for the purpose of fixing a liability upon the partnership in respect to such adventure. — *Lockwood v. Beckwith*, 168.

4. A common carrier can not limit his common law liability by a mere notice endorsed upon the receipt given to the consignor, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence *aliunde* — it can not be presumed from the terms of the receipt alone, or be implied from the posting of notices, or the delivery thereof to the consignor. — *Michigan C. R. R. Co. v. Hale*, 243.

5. Where defendants are sued in trespass, by the husband, for the taking of personal property which is proved to belong to the wife, evidence of request on her part that they would remove it from plaintiff's possession, is competent on their behalf. — *Starkweather v. Smith*, 377.

6. Where defendant, after plaintiff has closed his case, recalls one of plaintiff's witnesses and proves by him facts which are material to the defense, and it does not appear that defendant has been surprised or induced to call the witness by statements he had previously made different from the facts to which he has testified, and he was not a witness the defendant was compelled to call, like the subscribing witness to an instrument, defendant has thereby made the witness his own, and it is error in the court to permit him afterwards to impeach such witness. — *Craig v. Grant*, 447.

7. The question of the organization of Bay county having, as before decided by this court, been submitted to a popular vote in the proposed county, and defendants claiming that the return of votes did not show the number cast within such limits, and that Bay county never in fact became organized, — *Held*, That the question of such organization was one of fact for the jury, and an offer of the plaintiffs to show that the attachments were levied in Bay county involved this question, and should have been allowed. — *Ibid.*

8. Where a party claiming property alleged to have been transferred to him for the purpose of defrauding creditors, was inquired of by a creditor as to his responsibility, and referred the creditor to the business men of a place where he had

formerly resided to ascertain in regard to such responsibility, —*Held*, That this reference did not authorize the statements of the business men of such place, made in answer to the inquiries of the creditor, to be given in evidence on behalf of the officer who subsequently attached such property at the suit of the creditors. — *Rosenbury v. Angell*, 508.

See DEDICATION; FALSE PRETENCES; HUSBAND AND WIFE, 1; PARTNERSHIP, 3, 4, 6, 7, 8, 9; PLEADINGS, 2; PLEADINGS IN CHANCERY, 3.

EXCEPTIONS, BILL OF.

See PRACTICE IN SUPREME COURT, 3, 4.

EXEMPTION.

See HOMESTEAD.

FACT AND LAW, QUESTIONS OF.

See CONTRACT, 2, 3.

FALSE PRETENCES.

1. The act of procuring by falsehood the endorsement of a promissory note, is not, in itself, a false pretence within the statute, unless done with intent to defraud. And the prosecution, as evidence of the intent, must show something more than the falsehood and the procuring the endorsement thereby, before conviction can be asked under an indictment therefor. — *People v. Getchell*, 496.

2. Where an intent is made the gist of an offense, that intent should be shown by such evidence as, uncontradicted, will fairly authorize it to be presumed beyond a reasonable doubt. — *Ibid.*

3. Where defendant was put on trial for false pretences in procuring the endorsement of the prosecutor to a promissory note, by the falsehood that a former note for the same amount, endorsed in like manner, was destroyed, and after proof of the facts charged, offered to show in defense that he was a partner with the prosecutor; that the latter was bound by agreement between them to endorse for him to an amount considerably larger than the two notes, but had refused to perform the agreement, and that the money obtained on the

notes was used in their business for their joint benefit, — *Held*, That the evidence should have been received, as tending to disprove the presumption of an intent to defraud. — *Ibid.*

FEME COVERT.

See FRAUDULENT CONVEYANCES, 2, 3; HOMESTEAD; HUSBAND AND WIFE; INFANT; MARRIED WOMAN.

FINDING OF FACTS.

See EJECTMENT, 2, 5.

FORECLOSURE OF MORTGAGE.

1 Where one of several assignees of a mortgage dies, his interest in the mortgage, and in the mortgage debt, survives to the others, and his personal representative is not a necessary party to a bill for the foreclosure of the mortgage. — *Martin v. McReynolds*, 70.

2. One holding the equitable title, only, to a mortgage, may foreclose it in chancery. — *Ibid.*

3. The assignment of a debt secured by mortgage, carries with it, in equity, the mortgage as an incident to the debt, and the assignee may proceed in equity to foreclose it. — *Ibid.*

4. Where one holding only the equitable title to a mortgage, files his bill to foreclose it, the person holding the legal title should be made a party. — *Ibid.*

5. An allegation in a bill for foreclosure, by the assignee of a bond and mortgage, that the bond and mortgage were "duly sold, assigned, and set over by the said mortgagees" to complainants, and that complainants are "the owners and holders thereof, and entitled to have and receive all moneys due thereon, as by reference to an instrument of assignment under the corporate seal of the said corporation [mortgagees], and now in possession of complainants," will appear — is an allegation of a legal assignment and transfer at law of all the rights of the mortgagees to the complainants. — *Ibid.*

6. Where complainant, in a foreclosure suit, dismissed his bill, as against one made a party under the general allegation that he claimed some interest in the premises, as subsequent incumbrancer, or otherwise, the mortgagor, appealing to this

court from the decree in the case, can not complain of such dismissal, since it, in no respect, affects his rights. — *Ibid.*

7. An allegation in a foreclosure bill that no part of the mortgage debt has been collected or paid, when the bill sets out fully the mortgage, and shows the amount of the several installments, and when they became due, sufficiently shows the amount due on the mortgage. — *Ibid.*

8. Where, after overruling a demurrer in a foreclosure suit, the bill was taken as confessed by defendant, and the case referred to a commissioner to compute the amount due, the case heard on the commissioner's report, and decree of foreclosure made without notice of hearing to the defendant, who had appeared, but all the other proceedings in the case were regular, and no exception was taken by the defendant to the commissioner's report, and no application made to the court below for relief, — *Held*, That the Supreme Court would not, on the ground of want of notice of hearing alone, reverse the decree of the court below. — *Ibid.*

See REDEMPTION.

FRAUDS, STATUTE OF.

See MISTAKE.

FRAUDULENT CONVEYANCES.

1. As a general rule, a deed which is fraudulent as to existing creditors, is fraudulent as to subsequent creditors also. — *Herschfeldt v. George*, 456.

2. Where one who was considerably indebted, caused his real estate to be conveyed to his wife, and soon thereafter contracted large debts, representing himself to be still the owner of this real estate, and within a few months failed, and made an assignment, but showing assets to less than half the amount of his debts, and there was no explanation of these facts, — *Held*, That the settlement upon the wife was fraudulent and void as to the subsequent creditors. — *Ibid.*

3. Where one makes a settlement upon his wife under such circumstances as, if voluntary, would render it void as to creditors, and receives from her a small and inadequate consideration, such settlement will be sustained, in equity, only so far as to secure to her the re-payment of that sum. — *Ibid.*

See ASSIGNMENT; CONTRACT 2, 3; EVIDENCE, 8; MISTAKE.

GARNISHEE PROCESS.

See PROMISSORY NOTES, 2.

GIFT.

See SPECIFIC PERFORMANCE, 3, 4, 5.

GOODS SOLD AND DELIVERED.

See DAMAGES.

GOVERNOR AND JUDGES OF MICHIGAN TERRITORY.

See CITY OF DETROIT, 5 to 8.

GUARDIAN AD LITEM.

See INFANT, 2.

HIGHWAYS.

See DEDICATION.

HOMESTEAD.

1. The homestead exemption is to be claimed, under the statute, at the time of, or after, a levy, and before sale. And when it consists of a town lot, its value is to be estimated at that time. — *Herschfeldt v. George*, 456.

2. One can not claim, under the homestead exemption, a lot which he has caused to be conveyed to his wife, on the pretence that such conveyance was for the purpose of vesting the title in her as a homestead. — *Ibid.*

HUSBAND AND WIFE.

1. Where complainant, a married woman, made an unconditional assignment of a mortgage to defendant, and delivered it to her husband, who delivered it over to defendant, and the latter gave the husband a receipt, stating that the mortgage was received of the husband as collateral security for a debt owing by him to defendant, and there was no evidence of any ne-

gotiations between complainant and defendant, or of any understanding on her part that the transfer of the mortgage was to be upon any condition, or of any instructions by her in reference to it; — *Held*, That the court could not say from these facts that the assignment was intended by complainant as security only, and not to be passed absolutely to defendant. — *Durfee v. McClurg*, 223.

2. Complainant's husband having made an arrangement of the debt secured by the assignment, and agreed with defendant that the latter should have and retain an absolute title to the mortgage, — *Held*, That this arrangement was binding upon complainant, and that she could not require defendant to reassign to her the mortgage. — *Ibid.*

3. Under the present statutes of Michigan, contracts of sale by a married woman are to be treated as if made by a *feme sole*. — *Ibid.*

See FRAUDULENT CONVEYANCES, 2, 3; HOMESTEAD, 2; INFANT; MARRIED WOMAN.

IMPEACHMENT.

See EVIDENCE, 6.

INDIAN RESERVATIONS.

See TREATY.

INFANT.

1. A mortgage given by an infant *feme covert*, to secure the debt of her husband, is absolutely void, and not merely voidable. — *Chandler v. McKinney*, 217.

2. Where an infant *feme covert* gave a mortgage to secure the payment of a note against her husband, and a bill in chancery was filed to foreclose it, and a guardian *ad litem* was appointed for the mortgagor in the foreclosure suit, who accepted the appointment, but neglected to answer, and was defaulted, and decree of foreclosure and sale made on such default, giving the infant no day in court after coming of age, and the infant did not come of age until after the time for appealing from the decree had expired; — *Held*, That the decree, as against the mortgagor, was absolutely void, and she might

recover possession of the premises in ejectment against persons who derived title through the sale made under the decree. — *Ibid.*

INTENT.

See FALSE PRETENCES.

JUDGMENTS AND DECREES.

See AMENDMENT; EJECTMENT, 6; INFANT, 2.

JUDICIAL POWER.

See RECOGNIZANCE, 4, 5.

JURISDICTION.

1. Defects of jurisdiction can not be waived by the parties. — *Farrand v. Bentley*, 281.

2. Though the law presumes a ministerial officer to *know the law*, it makes no such presumption, in ordinary cases, as to matters of *fact*, of which the *law* gives *no information*, and which are not disclosed by the process or order which he is commanded to obey. And where the jurisdiction of the subject-matter, in the tribunal issuing process, depends upon matter of fact, the existence of which can not be determined from the law, and which is not of public notoriety, the ministerial officer will not be held bound to ascertain it at his peril, unless the law has clearly given him the right to demand the information, and to determine the fact. — *People v. Rix*, 144.

3. Where, therefore, the statute conferred jurisdiction of certain proceedings only, as was claimed, upon the circuit court commissioner of the county holding the senior commission, and did not provide a period when the term of either should commence, or what should be the date of the respective commissions, but the governor might appoint, and issue commissions, at any time; and no provision was made for making public the fact of the priority of either, or by which it could be ascertained in any county office, and no power given to the sheriff to demand inspection of the commissions, or to require the information from the proper state office; — *Held*, That the sheriff who had obeyed process issued in such proceedings by the commissioner who, *in fact*, held the junior commission

(though the sheriff was not shown to have known that fact), and delivered up, in pursuance of such process, property which he had attached, was not liable on his official bond for so doing. — *Ibid.*

See SALES BY ADMINISTRATORS; WAIVER.

JURISDICTION OF CHANCERY.

See CITY OF DETROIT; MISTAKE.

JUSTICES' COURTS.

See WAIVER.

LACHES.

See PRACTICE IN SUPREME COURT, 13, 15.

LAW AND FACT, QUESTIONS OF.

See CONTRACT, 2, 3.

LOG DRIVING AND BOOMING COMPANIES.

1. The act to provide for the formation of Rafting Companies (*Laws of* 1855, *p.* 55; *Comp. L. ch.* 66), in so far, at least, as it provides for the formation of companies, and their power to make contracts, is constitutional and valid. — *Ames v. Port Huron and Lapeer L. D. & B. Co.* 266.

2. The affidavit to be made by two directors of the company, under section two of said act, is sufficient if made strictly according to the terms of said section, and it need not contain any detailed statement of the proceedings had in the formation of the company. — *Ibid.*

3. The delivery by a person of a list of his log-marks to a company formed under the said act, does not operate as a contract for the running by the company of all logs so marked that he may have upon the stream, within the limits of the company's operations. The object of the provision requiring such list was to entitle the person furnishing it to notice of sale in case, by any casualty, his logs should be-

come so placed as to authorize the company to assume their management. — *Ibid.*

4. In the absence of any contract, such company is only authorized to assume control of the logs of others, and acquire a lien for services with respect thereto, where, by reason of the logs having been put into the stream without adequate provision for running them without obstruction, some obstruction has actually been created. — *Ibid.*

MARRIED WOMAN.

1. Since the act of 1855 (*Comp. L.* § 3292), a married woman has the same power, in all respects, over her property that she had while unmarried. — *Starkweather v. Smith*, 377.

2. Where defendants are sued in trespass, by the husband, for the taking of personal property which is proved to belong to the wife, evidence of request on her part that they would remove it from plaintiff's possession, is competent on their behalf. — *Ibid.*

See HUSBAND AND WIFE; INFANT, 1, 2.

MERGER.

See DOWER; MORTGAGE.

MICHIGAN CENTRAL RAILROAD COMPANY.

1. Section fifteen of the charter of the Michigan Central Railroad Company provides that "it shall and may be lawful for the said Company, from time to time, to fix, regulate, and receive tolls and charges taken for transportation of property and persons on said railroad aforesaid, and for the storage of property remaining in the depots of said Company, if not taken away as hereinafter provided," &c.; and the sixteenth section provides that "the said Company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them, upon delivery thereof at any of their depots, and which shall have remained in any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally, or by notice left at his place of business or residence, or by notice sent by mail, of the receipt of such property, at least four days before any storage

shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged; but such storage may be charged, after the expiration of said twenty-four hours, upon goods not taken away: *Provided*, That in all cases the said Company shall be responsible for goods in deposit in any of their depots, awaiting delivery, as warehousemen, and not as common carriers. And if said Company shall charge or take any remuneration for storage of goods otherwise than aforesaid," a penalty is imposed therefor. Under this last proviso of the sixteenth section, property in deposit in the depots is to be considered as "awaiting delivery" as soon as it is in condition to be delivered over to the consignee when demanded, and not merely from the time when the right to charge for storage has accrued. — *Michigan C. R. R. Co. v. Hale*, 243.

2. The office of the notice contemplated by the sixteenth section is only to fix the right to charge for storage, and not to continue the liability of the Company as common carriers. If the necessity of notice to terminate the carrier's liability did not exist without, it was not created by, this section; while, if it did exist, it is removed by the limitation of liability to that of warehousemen where goods are in deposit and in situation to be delivered, whether such notice be or be not given. — *Ibid.*

See COMMON CARRIERS.

MINISTERIAL OFFICER.

See JURISDICTION, 2, 3.

MISTAKE.

Bills by the purchasers from the grantee against the heirs and administrator of the grantor, to re-form a deed, by correcting the description of the lands, which, by reason of the omission of four out of fourteen courses and distances, embraced but a small portion of the lands intended to be conveyed. Defense (which was fully proved), that the deed was made without consideration, and for the purpose of defrauding the creditors of the grantor. There was no proof of debts existing against the estate of the grantor at the time the bills were filed, but the administrator was taking proceedings in the probate court for the sale of the lands — for what purpose, did not appear. The deeds to complainants described the re-

spective parcels purchased by them correctly. Both parties to the fraudulent conveyance were dead before the mistake was discovered. A full consideration was recited in this deed; the grantee assumed possession and control of the premises under it; and the grantor, who died before complainants purchased, had always, after giving the deed, represented, and twice made oath, that the land belonged to the grantee.—*Quirk v. Thomas*, 76.

1. That one is a purchaser for a valuable consideration without notice, is not of itself an equity on which a bill may be sustained for relief. It is a shield to protect a party, but can not be made a basis of attack. Per MANNING J. —*Ibid.* 95.

2. The reason of this rule is, that the effect which the law gives to a purchase without notice, is not a perfect right in itself, and, therefore, will not sustain an action at law or a bill in equity, but may, in certain circumstances, be used by a defendant to stay the interposition of the court, on the ground that he is equally entitled with the plaintiff to its protection. Per MANNING J. —*Ibid.* 96.

3. Complainants, as purchasers from the fraudulent grantee, have all his rights, at law and in equity, and no more. As the court could not have corrected the mistake in favor of the grantee, who was a party to the intended fraud of the grantor, neither can it in favor of complainants. Per MANNING J. —*Ibid.* 98.

4. It is immaterial, in such case, whether there are or are not creditors of the fraudulent grantor now to be injured. It is the corrupt intention — the illegal object had in view — the wrong intended, and not the wrong done — that stays the hands of the court from giving effect to the illegal contract. Per MANNING J. —*Ibid.* 98.

5. A court of equity will not decree the specific performance of a voluntary contract, nor will it correct a mistake in a defective execution of it, where there is no intervening equity. In this case, the most complainants can claim, is, that they are, in equity, the assignees of such voluntary contract. As such assignees, they would take it subject to all its vices, and to all equities existing between the parties to it. Per MANNING J. —*Ibid.* 99.

6. The deed in question having been recorded before complainants bought, they are chargeable with notice of every thing that appears on the face of the record, and can not, in law, be said to

have been ignorant of the mistake. And, independent of the registry laws, they are chargeable with notice of whatever is in the deeds through which they claim. They are not therefore, in law, *bona fide* purchasers without notice. Per MANNING J. —*Ibid.* 99.

7. What complainants were informed, by third persons, of the declarations of the grantor, that he had conveyed the whole premises to the grantee by this deed, was mere public rumor; and there is no equity growing out of it in their favor. Per MANNING J. —*Ibid.* 99.

8. The Statute of Frauds, declaring a conveyance to defraud creditors void as against creditors only, is merely declaratory of the common law, by which all contracts, made in violation of law, or contrary to public policy, are illegal, and consequently void, and, when executory, will not be enforced, or relieved against when executed. When such a contract has been executed in part, the law gives effect to it so far as executed, and holds it void so far as it remains unexecuted. Per MANNING J. —*Ibid.* 99.

9. If the grantee in the fraudulent deed had any rights outside of the land therein described, they arose from the equity to have a new deed, conforming to some right which was not perfectly assured by the deed as executed. The deeds to complainants would be operative to pass no more than their grantor possessed, which would be the legal estate in the lands actually covered by his deed, and any claim he might have to the lands not covered by it, and to which, consequently, he did not have the legal title. Per CAMPBELL J. —*Ibid.* 102.

10. The ground of relief in case of mistake is placed upon the same basis as that of specific performance, and the mistake is corrected by establishing the original right to a conveyance, or other instrument, under some agreement, which by reason of the mistake, has not been fully carried out. To make out the mistake, it is necessary to make out the contract, that the court may see how far it has failed in the performance. Per CAMPBELL J. —*Ibid.* 102.

11. As a general rule, rights which exist against an ancestor, will equally exist against his heirs. But the ancestor having died before complainants acquired their interests, they could have no rights against him, and can, therefore, have none against his heirs, by reason of his acts or representations not made to complainants, or to any one through whom they claim. Per CAMPBELL J. —*Ibid.* 103.

12. The heirs of a grantor stand precisely in the condition of their ancestor, and can avail themselves of no defense which would not have been equally available to him. And there being no evidence of debts against the estate, and nothing to show that the administrator is seeking the property at the instance of creditors, the administrator stands in no better position than the heirs. Per CHRISTIANCY J. — *Ibid.* 106.

13. Contracts are treated as void, at common law on the ground of public policy only, and the rule *ex turpi causa non oritur actio* is subject to all the limitations and qualifications which sound public policy may dictate. Courts may sustain, or refuse to sustain, an action upon such contracts, as may be most consistent with sound policy, and best calculated to discourage and suppress such violations of the law. The rule itself can not be made an engine of wrong and injustice in the hands of the wrong-doer against innocent parties, nor set up to the prejudice of any party guiltless of all participation in the wrong, or whose rights have been acquired without notice of it. Per CHRISTIANCY J. — *Ibid.* 109.

14. Where, in case of a transaction merely illegal as against public policy, the party seeking relief is innocent of the fraud intended, the case is to be considered, in all respects, as if there had been no fraud, and the contract between the original parties, under one of whom complainant claims, had been made in good faith, and for good consideration. Per CHRISTIANCY J.— *Ibid.* 110 to 113.

15. To enable a party to such a transaction to show his own fraud in his own defense, the complainant must not only be *in delicto*, but *in pari delicto;* for though he may to some extent have participated in the illegal transaction, yet, if not equally guilty with the defendant, or, at least, if there be strong mitigating circumstances in his favor, the defendant will not be allowed to avail himself of this defense. Per CHRISTIANCY J. — *Ibid.* 111.

16. Where a consideration is expressed in a deed, and complainants have purchased from the grantee on the faith of it, the grantor, as against them, is estopped from denying such consideration. Per CHRISTIANCY J. — *Ibid.* 113.

17. On a bill to correct a mistake in a written instrument, no proof of any actual previous agreement need be given; but what was the understanding of the parties, and what the instrument was intended to be, may be inferred entirely from

the instrument itself, the subject-matter, the surrounding circumstances, and the subsequent acts of the parties. Per CHRISTIANCY J. — *Ibid.* 113, 114.

18. The reason of the rule that the assignee of a chose in action must be presumed to have notice of what the rights of the parties to it really were, substantialy fails where the one party understands that he is selling, and the other that he is purchasing, *land*, and not a mere *contract* respecting land. The rights of the purchasers, in such case, should be governed, as to notice of every thing affecting the rights of prior parties, by the same rules which apply to conveyances of lands. Per CHRISTIANCY J. — *Ibid.* 114.

19. The purpose of the registry laws is not to give notice as between the grantor and his grantee, immediate or remote, for the protection of the grantor, but as between prior and subsequent purchasers and incumbrancers from the same grantor, and for the protection of purchasers. Per CHRISTIANCY J. — *Ibid.* 116.

20. The deed sought to be corrected, or the record thereof, was no more notice to complainants of the mistake, than to the grantee at the time of taking it. And where the question arises without intervening equities, and the mistake is one eminently calculated to mislead, and the parties can not be charged with gross negligence, the rule that the purchaser is bound, at his peril, to take notice of the defects in the conveyances through which he claims, can not apply, since, otherwise, the very fact that such a mistake has occurred would be a bar to its correction. Per CHRISTIANCY J. — *Ibid.* 116, 117.

21. The acts of the grantor in giving a deed, the description in which was calculated to mislead, and did mislead, in reciting in the deed a full consideration, and in putting and continuing the grantee in possession with all the *indicia* of ownership, were continuing representations which did not end with his death, and that event took nothing from their effect. They operate, as to those who have been deceived by them, as equitable estoppels upon his representatives. Per CHRISTIANCY J. — *Ibid.* 118.

22. The rule of equitable estoppel by representations, is not confined to such as are made directly to the parties acting upon them. Whether direct or indirect, in the presence or in the absence of the parties, is immaterial, so that they be calculated and intended to produce, and do produce, the end. Per CHRISTIANCY. — *Ibid.* 120.

23. Where one has been induced to become a purchaser by the misrepresentation of another ignorant of his own right, but where he ought, as a prudent man, to have had notice of it, equity will grant relief to the purchaser. But the cases at bar are much stronger, and stand upon the ground of that class of cases where the party, knowing his rights, willfully conceals them, encourages another to purchase, and when the purchase has been made on the strength of the representation, seeks to take advantage of his own wrong, to the injury of the purchaser. The fraud of the party can not shield him where his ignorance would not. When others have been induced to purchase on the strength of his representations, he shall not be allowed to excuse himself on the plea that he only meant to defraud creditors, when the allowance of the excuse would defraud purchasers also. Per CHRISTIANCY J. — *Ibid.* 122.

24. A purchase for a valuable consideration is ground for affirmative relief in equity, where the equities of the complainant are superior to those of the defendant. Per CHRISTIANCY J. — *Ibid.* 122 *to* 129.

25. As a general rule, courts of equity will not interpose to enforce a fraudulent contract, nor to assist the parties to it in any manner; but they will protect *bona fide* purchasers against all equities not superior, and assist them against all which are inferior. By MARTIN Ch. J. — *Ibid.* 131.

26. The equities of these complainants are altogether independent of, and superior to, those of their grantor, and depend upon no contract between him and his grantor, but upon the facts of an attempted and supposed conveyance, possession under it, the purchase by complainants for value, and the inducements to such purchase held out by the acts and representations of the original grantor. In the case of a mere voluntary conveyance, accompanied by delivery of possession, a subsequent purchaser would be entitled to the remedy here sought, though no contract had ever existed. By MARTIN Ch. J. — *Ibid.* 132.

27. The contract of conveyance, if any ever existed, must be held, in this case, to have been executed, so far as these complainants' interests are to be affected. In their behalf, the maxim of equity, that what was intended to be done will be considered as done, will have its full force. By MARTIN Ch. J. — *Ibid.* 132.

MORTGAGE.

1. The holder of a mortgage shall lose no substantial rights by becoming owner of the equity of redemption. — *Snyder v. Snyder*, 470.

See ASSIGNMENT OF MORTGAGE; DOWER; FORECLOSURE OF MORTGAGE; INFANT; REDEMPTION.

MUNICIPAL CORPORATIONS.

See CITY OF DETROIT, 3, 4.

MURDER.

1. On the trial of an indictment for murder, a verdict of guilty of murder generally, without specifying whether of the first or second degree, is erroneous. — *Tully v. People*, 273.

See ASSAULT WITH INTENT TO MURDER.

NEGOTIABLE PAPER.

See PROMISSORY NOTES, 2, 3.

NEW TRIAL.

See PRACTICE IN CIRCUIT COURT, 3.

NON-RESIDENT DEBTORS.

See ATTACHMENT.

NOTICE.

See COMMON CARRIERS, 1; MISTAKE, 6, 7, 18, 19, 20.

NOTICE OF DEFENSE.

See PLEADINGS.

NOTICE OF HEARING.

See PRACTICE IN SUPREME COURT, 11, 12.

OCCUPYING CLAIMANTS.

See EJECTMENT.

OFFICER.

See JURISDICTION, 2, 3.

ONTONAGON.

1. The act of Congress "for the Relief of Citizens of Towns upon the Lands of the United States, under certain circumstances," approved May 23d, 1844, was intended to apply exclusively to actual and existing towns, and not to such lands as may have been selected by non-resident claimants as the site for a city or town. — *Matter of Selby*, 193.

2. Said act was intended for the protection of citizens of villages and cities that had grown, or might grow, up on government lands, for commercial and mechanical purposes, and to secure to them severally, at the minimum price, all lands actually occupied by them respectively for village or city purposes; and to them, collectively, for the use of the village or city, such other lands as might be embraced in the government subdivisions included within the limits of the village or city. — *Ibid.*

3. In providing that the trust under said act should be "conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory," said act intended to leave it with the local legislature to define and fix the limits and objects of the trust internally, and to carry out in detail what Congress had only given an outline of. Such rules and regulations are to relate to the determination of claims to possession, and the extent of possession that may fairly be considered as falling within an occupancy for town purposes, as well as to the disposition of the part of the land not actually occupied for town purposes by individuals. — *Ibid.*

4. The act of the Legislature of Michigan, approved February 29th, 1853, which authorized the district judge of the Upper Peninsula, after entering the lands embracing the town site of Ontonagon, to give "first to James K. Paul a deed of such lots as he holds, or may hold, free from the claim of any other person, by virtue of an equitable pre-emption claim thereto, and to all other occupants, deeds to each severally of the lots held by them by virtue of contracts made with said James K. Paul," — thus un-

dertaking to dispose of the whole trust to the person named and his grantees, and authorizing no one else to be considered or receive any relief — is in direct violation of said act of Congress, and therefore void. — *Ibid.*

5. Said legislative act is inoperative and void also, because not prescribing any such rules and regulations for the execution of the trust as the act of Congress contemplates. — *Ibid.*

6. A claimant under said act of Congress, whose petition shows that the land claimed had not been actually occupied at the time the state legislation designed to carry out said act, was adopted, and that it was afterwards occupied only as a farm, does not come within the provisions of said act, and is entitled to no relief under the trust. — *Ibid.*

7. Where land has been entered by the county judge under said act of Congress, and the trustee is proceeding to adjudicate upon a claim made to a portion thereof, a person who sets up a right to such portion as a pre-emptioner for agricultural purposes, and claims that the same was never occupied for town purposes, and was not legitimately entered by the trustee, has a right to appear before the trustee, and be heard in opposition to such claim. — *Ibid.*

8. On the hearing by the county judge of a claim under said act of Congress, a citizen and tax-payer of the town, who objects that the claimant is not entitled to the land claimed, but that it is a part of the common fund to be disposed of for the benefit of the town, is entitled to appear and oppose such claim. — *Ibid.*

OVERRULED CASES.

Michigan C. R. R. Co. v. Ward, 2 Mich. 538; *overruled* 243.

PAROL CONTRACT.

See EVIDENCE, 1; SPECIFIC PERFORMANCE, 1, 2.

PARTIES.

See APPEAL; APPEAL IN CHANCERY; FORECLOSURE OF MORTGAGE, 1, 4; PLANK ROAD COMPANIES, 1, 2; SHERIFF'S BOND.

PARTNERSHIP.

1. If one member of a copartnership enter into a transaction on his own behalf which is within the scope of the partnership business, his copartners may insist that it is a fraud upon them, and claim the benefits resulting from it. But this is a right which partners alone can assert, and is not available to third persons, for the purpose of fixing a liability upon the partnership, when such claim has not been asserted. — *Lockwood v. Beckwith*, 168.

2. The acts and declarations of a partner actually engaged in an adventure in his own name, can not be proved for the purpose of fixing a liability upon the partnership in respect to such adventure. — *Ibid.*

3. One partner can not bind his co-partner by any contract not within the immediate scope of the partnership, unless with such co-partner's knowledge and consent. — *Barnard v. Lapeer & Port Huron P. R. Co.* 274.

4. Such knowledge and assent must be established by evidence affirmatively showing it, or from which it may be clearly inferred. — *Ibid.*

5. That a plank road will be of incidental benefit to a copartnership engaged in the lumber business, will not authorize one partner, without the consent of the other, to bind the firm by a subscription to the stock of a corporation organized for constructing such road. — *Ibid.*

6. Where one partner has subscribed in the name of the firm to stock in a corporation, without the assent of the copartner, the latter does not recognize his relation as stockholder in the corporation, and become liable to pay the subscription, by failing to express his dissent when demand of payment is made of the firm. — *Ibid.*

7. An agreement for the formation of a limited partnership, executed under the laws of New York, but not recorded so as to become effectual for the purpose designed, has no tendency to prove an actual general partnership between the parties named in it, in the absence of extrinsic evidence to show that they had actually entered into business as partners. — *Gray v. Gibson*, 300.

8. Where plaintiffs sue as partners, not upon any contract made or dealings had by them, as such, with defendant, nor upon

negotiable paper, and the partnership is put in issue, the real question to be submitted to the jury is, whether plaintiffs are partners *as between themselves*, and not whether they have, in any way, made themselves liable as partners to third persons. And it is erroneous for the court to charge the jury that if the evidence shows the plaintiffs have made themselves partners as to third persons, they have in fact become general partners, and as such are entitled to maintain the action. — *Ibid.*

9. Whether persons, are partners *inter se*, is to be determined by the understanding and intention of the parties as between themselves; and they can not be made such without the assent of every member, and his actual intention to become a partner. — *Ibid.*

PLANK ROAD COMPANIES.

1. Stockholders in a plank road company organized under the General Plank Road Act of 1851, are severally liable for demands against the company (not for labor) to the amount of the stock held by each in the company when the debt accrued. And it is not therefore indispensable that a judgment-creditor, who, after return of execution against the company unsatisfied, files his bill to compel the payment of his judgment by stockholders, should make all the stockholders defendants. — *Pettibone v. McGraw*, 441.

2. Nor is it necessary that all be made parties to such a bill when the demand for which the judgment was rendered was for labor. — *Ibid.*

3. Independent of statutory provisions, Chancery may, on behalf of the creditors of corporations, compel stockholders to pay in any amount that may be unpaid on their stock. — *Ibid.*

4. Under the Plank Road Act of 1851, stockholders in a plank road company are liable to its creditors for demands, other than for labor, to the full amount of their stock, and not merely for the amounts which remain unpaid on their stock. — *Ibid.*

See PARTNERSHIP, 5, 6.

PLEADINGS.

1. A replication to a notice of special defense, under the old rules, was not necessary where the matters set out in the

notice were admissible in evidence under the general issue.— *Craig v. Grant*, 447.

2. Where replevin was brought for the unlawful *detention* of property at Hampton, in Saginaw county, and defendants justified under attachments issued out of the circuit court for that county, — *Held*, That plaintiffs were not estopped by this issue from showing that the *taking* of the property under the attachments was at Hampton in Bay county. — *Ibid.*

3. In trespass *de bonis*, the defense that the goods were taken under attachment against a third person alleged to be the owner, is not admissible under the general issue, without notice. — *Rosenbury v. Angell*, 508.

4. A special notice of such defense that "three several writs of attachment were issued out of the circuit court for the county of L., and under the seal thereof, in due form of law," giving the names of the parties and the dates and command of the writs, and the taking of the property by virtue thereof, is sufficient, without alleging the making of the affidavits which authorized the attachments; and the attachments, as well as the writs, may be given in evidence. — *Ibid.*

5. A special notice of defense that apprises the plaintiff with reasonable certainty of the matter of defense, so that he may not be taken by surprise on the trial, is sufficient under the statute. — *Ibid.*

See Ejectment, 3, 4; Promissory Notes, 1; Replevin, 1.

PLEADINGS IN CHANCERY.

See Foreclosure of Mortgage, 5, 7; Practice in Chancery, 1, 3.

POTTAWATOMIE RESERVATION.

See Treaty.

PRACTICE IN CHANCERY.

1. Facts shown by the evidence, but not put in issue by the pleadings, can not be regarded at the hearing. — *Warner v. Whittaker*, 133

2. One of several defendants appealing from a decree in chancery, can not ask a reversal of the decree for error in a part of it in no way affecting the rights of the appellant. — *Ibid.*

3. Where an answer on oath is waived, complainant may use the answer as an admission by defendant of any facts stated in it necessary to establish his case. But he can not use one part and exclude other parts relating to the same subject that would be responsive to the bill had the answer been under oath. — *Durfee v. McClurg*, 223.

See CONTRACT, 10; FORECLOSURE OF MORTGAGE; INFANT, 2.

PRACTICE IN CIRCUIT COURTS.

1. A case agreed upon by the parties and submitted to the circuit court, for its decision under § 3421 of Compiled Laws, must be signed by the parties or their attorneys. — *Farrand v. Bentley*, 281.

2. The language of a judge's charge to the jury must be construed with reference to the facts in evidence, upon which it is given. — *People v. Scott*, 287.

3. Where the charge of the judge to which exception is taken was not strictly correct, but the court can clearly see that the jury could not have been misled by it, to the injury of the party excepting, a new trial will not be granted for that error. — *Ibid.*

See AMENDMENT; EJECTMENT.

PRACTICE IN SUPREME COURT.

1. Errors of fact may be assigned on the common writ of error. — *Teller v. Wetherell*, 46.

2. Uncertainty and informality in the assignment of errors are no ground for quashing the assignment, or for dismissing the writ. — *Ibid.*

3. The Supreme Court has no power to look behind the record transmitted to it from the circuit court, to amend or alter it. If complaint is made that the transcript is incorrect, all this court can do is to require, upon a proper showing, that the court below make a full return according to the facts. — *Evans v. Norris*, 69.

4. When a copy bill of exceptions, instead of the original, was sent up from the circuit court, in return to the writ of error, and three terms have elapsed since the return of the writ, and issue in error has been joined without any notice being taken

of the irregularity, and no explanation is made of the delay, the court will not interfere to require the original bill to be sent up. — *Ibid.*

5. An affidavit of the regular service of notice of hearing, and of the filing of proof thereof with the clerk, is sufficient evidence of those facts until denied by affidavit, though the proof so filed can not now be found in the clerk's office. — *Matter of Robinson Estate*, 137.

6. An order of the probate court, requiring an administrator to account, having been brought into the circuit court by appeal, and there reversed, and the proceedings in the circuit court (where no issue of fact was joined) being then removed to this court by certiorari, and no motion having being made to dismiss the case for want of jurisdiction, the court will not consider an objection that this is not a proper case for certiorari, made, for the first time, in a brief submitted by defendant in error, by leave of the court, after the hearing. — *Ibid.*

7. Where, on writ of error, an objection is taken which goes to the jurisdiction of the court below, and is fatal to the judgment brought up for review, the court will not pass upon the other questions made upon the record. — *Fessenden v. Hill*, 242.

8. In preparing the case for the argument in this court, on appeal from chancery, the counsel must exercise his own judgment and discretion as to whether he will print the whole evidence, or omit the formal, and what he may deem the unimportant, portions. And the court, on taxation of costs, will not interfere with the exercise of this discretion, unless it clearly appears to have been abused. — *Wilson v. Wilson*, 272.

9. Where one of the parties caused a case to be filed in this court which he claimed was a case settled after judgment, but it did not conclusively or necessarily show on its face that it was so intended; and the circuit judge who tried the suit and signed the document, certified to this court that, in so signing it, he did not suppose he was settling a case under the statute, and that the one signed does not set forth the whole facts as they existed; — *Held*, That the papers should be remitted to the circuit court for such action as that court may deem proper under the circumstances. — *Farrand v. Bentley*, 281.

10. The power to allow amendments to records, for the purpose of correcting mistakes and errors of haste and inadvertence, considered. — *Ibid.*

11. In computing time on notice of hearing, the day on which the notice is served is to be excluded, and the first day of term included. — *Anderson v. Baughman*, 298.

12. An intervening Sunday is not to be excluded in such computation. — *Ibid.*

13. Where, after judgment in the circuit court, a party caused a case to be made and settled for review in this court, but neglected for more than two years to cause the same to be certified to this court by the clerk, — *Held*, That, by analogy to the statute limiting the time for bringing writs of error to two years, the case must be deemed to have been abandoned, and will be dismissed — at least, unless the delay is sufficiently accounted for. — *Van Blarcom v. Ætna Insurance Co.* 299.

14. The Supreme Court has no power to require an appellant in chancery to give a new or further appeal bond, in addition to the one approved by the circuit court commissioner, and which is alleged to be insufficient. — *Moore v. Olin*, 328.

15. Motions to dismiss for irregularity must be made at the earliest opportunity. — *Steward v. Dixon*, 391.

See ALIMONY; FORECLOSURE OF MORTGAGE, 8; WRIT OF ERROR.

PRE-EMPTION OF TOWN SITES.

See ONTONAGON.

PROBATE COURT.

1. An application to a probate court to call an administrator to account, averring that the applicant is heir of the deceased, and showing the proper facts entitling her to an account if she is such heir, is sufficient to justify action by the probate court thereon, though verified only by the oath of the attorney of the applicant, who swears to the facts averred on information and belief, and without giving any reason why the oath is not made by the applicant herself. — *Matter of Robinson Estate*, 137.

2. Though the probate judge may properly require an absolute verification of any thing whereon his action is required upon

the merits, yet when the party complained of is cited to appear, and has an opportunity to controvert the facts, there is no rule which renders it imperative on the probate court to decline receiving an unsworn petition. — *Ibid.*

3. Where, in such case, the respondent opposes the relief asked on the ground that the petition is not properly verified, and makes no issue of fact, there is nothing for the court to pass upon but the sufficiency of the allegations in petition. — *Ibid.*

PROBATE SALES.

See SALES BY ADMINISTRATORS.

PROMISSORY NOTES.

1. As against the maker of a promissory note payable at a particular place, the plaintiff is not required to allege or prove presentment or demand of payment at the place specified. — *Reeve v. Pack*, 240.

2. Negotiable paper is not liable to be reached by garnishee process against the maker before maturity. — *Littlefield v. Hodge*, 326.

3. A note payable to order, and without contingency, on a day certain, is not the less negotiable because purporting to be according to the condition of a mortgage, when the terms of the mortgage correspond with those expressed in the note. — *Ibid.*

PURCHASERS, BONA FIDE.

See BONA FIDE PURCHASERS.

RAILROAD COMPANIES.

See COMMON CARRIERS; MICHIGAN CENTRAL RAILROAD COMPANY.

RECOGNIZANCE.

1. In a criminal recognizance, the description of the offense which defendant is held to answer as "the crime of incest" is sufficient, and the facts constituting the offense need not be set out. — *Daniels v. People*, 381.

2. So also where the description is "the crime of attempt to procure an abortion." — *Ibid.*

3. Where defendant has been committed for want of bail by the examining magistrate, and, subsequently, on his own application, is let to bail by a commissioner, it is not necessary that the recognizance should show upon its face that the offense was committed within the jurisdiction of the magistrate. The entering into such recognizance being a voluntary act of defendant, of which he can only avail himself on his own showing of a legal commitment, the presumptions are in favor of its validity. — *Ibid.*

4. Circuit judges have power, independent of statutory provisions, to take bail in criminal cases out of court, and the Legislature may therefore confer the same power upon circuit court commissioners, even if the power to take bail be a judicial power within the meaning of that clause of the Constitution conferring the judicial power of the state upon specified courts. — *Ibid.*

5. But such power is not a judicial power within the meaning of the clause in question. — *Ibid.*

RECORD.

See AMENDMENT.

RECORDING LAWS.

See CONVEYANCES, 1, 2, 3; MISTAKE, 6, 19.

REDEMPTION.

1. A, the holder of the first of five mortgages on a piece of land, took proceedings in chancery to foreclose it, making all the subsequent mortgagees parties, except D, the last. Decree for sale was obtained, and sale made, at which B, who was administrator of C, the second mortgagee, then deceased, became purchaser for a few dollars over the amount of the first mortgage. B bought in his own name, but stated at the time that he bought to protect the interests of the C estate. He then filed his bill against D, setting up all the facts, and praying that D be decreed to redeem by paying the amount of both the A and C mortgages, and the costs of the foreclosure and sale, or be foreclosed. D filed a cross-bill, claiming a right to redeem on paying the amount of B's bid and interest. The mortgaged premises were shown to be worth at least the amount of the A and C mortgages. — *Held*, That D could not be permitted to redeem without

paying the amount of both these mortgages. — *Baker v. Pierson*, 522.

2. B, by his purchase, acquired the several rights in the lands of all the parties to the foreclosure, and may use them to protect his interest in the land, in the same way and to the same extent that they could have been used by such parties had no foreclosure taken place. D's rights are neither greater nor less for the proceedings to which he was not a party, and he has a right to redeem from B only by paying to him the full amount of all the prior mortgages. But as B, by his bill, asks only that D be decreed to pay the amount of the first two mortgages and costs, he may redeem on those terms. By MANNING J. — *Ibid.*

3. The relative rights of D and the several prior incumbrancers were, in no respect, changed by the foreclosure proceedings, except as B became entitled to the A mortgage by his purchase. D can redeem only on paying the amount of all the prior mortgages, but without costs of the former suit. The redemption moneys should be apportioned by paying first to B the amount of the A mortgage and costs, and interest thereon, and by apportioning the balance between the holders of the second, third, and fourth mortgages, *pro rata*, according to the sums owing on them respectively, deducting from the second, and paying to B the amount received thereon from B's purchase. By CHRISTIANCY J. — *Ibid.*

4. The liens of the third and fourth mortgagees were extinguished by the decree and sale in the suit to which they were parties, and can not be revived by the proceedings taken to foreclose D's equity of redemption. D should be permitted to redeem on the same terms as if he had been a party to the prior proceedings, and the intermediate incumbrancers had waived their right of redemption — that is, by paying the amount of the A and C mortgages, and interest and costs. By MARTIN Ch. J. — *Ibid.*

REPLEVIN.

1. In replevin, the defense that the property was taken under legal proceedings against a third person, claimed to be the owner thereof, is admissible under the general issue without notice. — *Snook v. Davis*, 156.

2. Where plaintiff had a contract with a firm engaged in sawing lumber, by which they were to receive certain saw logs belonging to him, manufacture the same into lumber, ship the

lumber to parties to whom the same had been contracted, receive the payment therefor, and pay over to him a certain amount per thousand feet, retaining the balance for their services, and the contract provided that the logs and lumber were at all times to be the property of plaintiff until he received the amount so to be paid him, and the logs were levied upon in the hands of the firm and as their property, — *Held*, That as against the officer making such levy, plaintiff was entitled to immediate possession of the logs, and might maintain replevin therefor. — *Bassett v. Armstrong*, 397.

REPLICATION.

See PLEADINGS.

SALES BY ADMINISTRATORS.

1. Irregularities in the proceedings by an administrator for the sale of the real estate of the decedent, will not affect the title of the purchaser, where there has been a compliance with so much as the statute makes essential to the validity of the sale, and the good faith of the purchaser is not questioned. — *Coon v. Fry*, 506.

2. Accordingly where, in such case, the application of the administrator for license to sell was not verified by oath, guardians were not appointed for the infant heirs, and the administrator's report of the sale to the probate court omitted to show the price at which the land was sold, — *Held*, That none of these omissions affected the title of the purchaser. — *Ibid.*

SET-OFF IN EQUITY.

1. A party seeking to make a set-off in equity beyond that given by the statute, must affirmatively show the existence of all those facts necessary to raise the equity. — *Lockwood v. Beckwith*, 168.

2. A court of equity will not allow a set-off in a case where the law would not, unless there be special equities, growing out of the transaction itself, requiring it. — *Ibid.*

3. Where a partnership became insolvent, and made a general assignment for the benefit of creditors, including therein a note past due, and the maker of the note held the acceptance of the partnership not then due, — *Held*, That the insolvency of

the acceptors was not, of itself, sufficient to authorize a set-off in equity of the acceptance against the note in the hands of the assignee, in the absence of evidence that the acceptance was based upon the note, or that the maker of the note trusted to it, at the time, as a means of discharging his obligation. — *Ibid.*

SHELBY STREET, DETROIT.

See CITY OF DETROIT, 5 to 8.

SHERIFF.

See JURISDICTION, 2, 3.

SHERIFF'S BOND.

1. By statute, the party for whose use a sheriff's bond is sued, is to be deemed the plaintiff in the action. Where one of two persons jointly entitled to prosecute died, and action was brought in the name of the People, for the use of the survivor, and of the administrator of the one deceased, and judgment taken against defendants, by default, — *Held*, That, on the death of one of the parties, the cause of action survived to the other, who alone could enforce it by suit; and that, as the declaration showed no joint right of action in the plaintiffs, the judgment must be reversed on error. — *People v. Jackson*, 154.

SPECIFIC PERFORMANCE.

1. On a bill for the specific performance of a parol contract for the conveyance of lands, the contract must be proved in the clearest manner, and must be substantially the same set forth in the bill. — *Wilson v. Wilson*, 9.

2. Accordingly where wife and husband filed their bill on behalf of the wife, alleging a parol agreement on the part of the devisor of defendant to convey certain lands to the wife, and asking its specific performance, but, from the testimony, it appeared that the agreement was to convey to the husband; — *Held*, That the bill must be dismissed, notwithstanding there was evidence in the case that the husband afterwards directed the conveyance to be made to the wife, and the other party assented to its being so made. — *Ibid.*

3. Bill by the widow and heir-at-law of A against the widow, heirs-at-law, and administrator of B (who was the father of A), to compel the conveyance to complainants of certain premises alleged to have been given by B to A, in consideration of natural affection, but not conveyed, — *Held*, That in such a case conveyance would be decreed only on the most conclusive proof of the gift, and of some satisfactory reason why it was not consummated by a conveyance. — *Jones v. Tyler*, 364.

4. Possession of the premises by A, subsequent to the alleged gift, can not avail complainants when it is sufficiently explained by the relationship of father and son existing between the parties. — *Ibid.*

5. A mortgagee of B, subsequent to the alleged gift, but not charged with notice of it, could not, in any event, be affected thereby. — *Ibid.*

STATUTES, CONSTRUCTION OF.

1. The statute requiring the circuit judge who tries a cause without a jury to give his decision on or before the first day of the term succeeding that in which the cause was submitted, is directory merely. — *Rawson v. Parsons*, 401.

STATUTES CONSTRUED OR COMMENTED ON.

Affidavit for Attachment. Comp. L. §4743 242
Appeal in Chancery. Comp. L. §§3597, 3598 328
What decrees may be appealed from 391
Assault with intent to Murder. Comp. L. §5724 . . . 287
Cases Made. Comp. L. §§3421, 3438 281
Conveyances. Territorial Statutes, respecting execution of . 17
Decision by Circuit Judge. Comp. L. §3436 401
Detroit City, Revised Charter of 51
Acts of Congress for laying out, and adjusting claims to lots in 176
Dower, Ejectment for. Comp. L. §2777 470
Ejectment. Proceedings when claim is made by defendant for for value of improvements under Comp. L. §4603 . . 401
Garnishees. Comp. L. ch. 141 326
Homestead, Exemption of 457
Log Driving and Booming Companies. Act of 1855 for formation of (Comp. L. ch. 66) 266
Married Women, Acts relative to individual property of, 223, 377

Michigan Central Railroad Co., Charter of 243
Murder. Comp. L. § 5713 . . . . . 278, 287
Pre-emption Acts of Congress, considered 193
Private Land Claims. Acts of Congress of 1804, 1805, 1806, and 1807 relative to adjustment of 176
Replevin, Defense in. Comp. L. § 5030 156
Sheriff's Bond, Action upon. Comp. L. § 4918 154
Stockholders in Plank Road Companies, Liabilities of. Comp. L. §§ 1916, 1918, 2161 441
Towns upon Public Lands. Act of Congress of May 23, 1844, and of Michigan of February 29, 1853, relative to . 193

STOCKHOLDERS IN CORPORATIONS.

See PLANK ROAD COMPANIES.

STREETS.

See CITY OF DETROIT, 5 to 8; DEDICATION.

SUBROGATION.

See REDEMPTION OF MORTGAGE.

SURVIVORSHIP.

See FORECLOSURE OF MORTGAGE, 1; SHERIFF'S BOND.

TIME, COMPUTATION OF.

See PRACTICE IN SUPREME COURT, 11, 12.

TOWNS UPON GOVERNMENT LANDS.

See ONTONAGON.

TREATY.

1. When a treaty has been made by the proper federal authority, and ratified, it becomes the law of the land, and no courts have the power to question, or in any manner look into, the powers or rights recognized by it in the nation or tribe with whom it was made. — *Maiden v. Ingersoll*, 373.

2. By a treaty made in 1807 between the United States and the Chippewa, Ottawa, Pottawatomie, and Wyandotte tribes of Indians, certain lands near Detroit, among others, were reserved to these tribes. The treaty did not show on its face what tribe was in the occupancy of these lands. By another treaty with the Pottawatomies in 1827, these lands, therein stated to have been before "reserved to the use of the said tribe," were ceded to the United States. — *Held*, That this treaty having recognized the right to this reserve to have been in the Pottawatomies, the courts are bound so to regard it, and must consider the treaty of 1827 as extinguishing the reserve. — *Ibid.*

TRESPASS.

See PLEADINGS, 3, 4.

VOID AND VOIDABLE.

See INFANT; JURISDICTION; SALES BY ADMINISTRATOR.

WAIVER.

1. Where plaintiff, in his declaration in justice's court, claims damages beyond the jurisdiction of the court, but the defendant pleads to the merits, and after trial and judgment against him, appeals to the county court, where the cause is again tried on the merits, he can not afterwards take advantage of the excessive claim on writ of error in this court.— *Tower v. Lamb*, 362.

2. Where process in trespass was taken from a justice against three, but discontinuance entered as to one, and the declaration against the others claimed damages beyond the jurisdiction of the court, but defendants joined issue upon it, and judgment was rendered by the justice against both, and one defendant appealed to the county court, where the others both appeared, and trial was had, and judgment again rendered on the merits against the two who were convicted before the justice, — *Held*, That on error to this court, by the defendant who appealed, he could not object either to the judgment of the justice, or to the joining of the other defendants in the proceedings of the county court. — *Ibid.*

3. Defects of jurisdiction can not be waived by the parties. — *Farrand v. Bentley*, 281.

WAYS.

See DEDICATION; CITY OF DETROIT, 5 to 8.

WITNESS.

See EVIDENCE, 6.

WRIT OF ERROR.

1. The Supreme Court has jurisdiction of errors of fact as well as errors of law. — *Teller v. Wetherell*, 46.

2. The Constitution, in granting to the Supreme Court the power to issue writs of error, and to hear and determine the same, impliedly gives all the common law means of executing that power. If necessary, a venire may be issued for a jury to try in this court the issue joined on assignment of error of fact, or it may be sent to the proper circuit for trial. — *Ibid.*

3. The circuit courts have no power, in any case, to issue writs error. — *Ibid.*

4. Errors of fact may be assigned in the Supreme Court on the common writ of error. — *Ibid.*

5. Uncertainty and informality in the assignment of errors are no grounds for quashing the assignment, or for dismissing the writ. — *Ibid.*