MICHIGAN REPORTS.

REPORTS OF CASES

HEARD AND DECIDED IN THE

SUPREME COURT OF MICHIGAN,

FROM

OCTOBER 31, 1866, TO JULY 11, 1867.

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Supreme Court of Michigan.

GEORGE MARTIN, Chief Justice.

ISAAC P. CHRISTIANCY,
JAMES V. CAMPBELL,
THOMAS M. COOLEY,
} Associate Justices.

WILLIAM L. STOUGHTON, Attorney General.

Judges of Circuit Courts.

FIRST CIRCUIT,
F. JOHNSON.

SECOND CIRCUIT,
NATHANIEL BACON.

THIRD CIRCUIT,
CHARLES I. WALKER.

FOURTH CIRCUIT,
EDWIN LAWRENCE.

FIFTH CIRCUIT,
GEORGE WOODRUFF.

SIXTH CIRCUIT,
JAMES S. DEWEY.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
FLAVIUS J. LITTLEJOHN.

TENTH CIRCUIT,
J. G. SUTHERLAND.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
CLARENCE E. EDDIE.

THIRTEENTH CIRCUIT,
J. G. RAMSDELL.

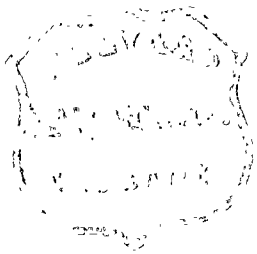
FOURTEENTH CIRCUIT,
MOSES B. HOPKINS.

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OCTOBER TERM, 1866, AT DETROIT

Charles Rice and another v. The People.

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Informations in Criminal Cases: When more than one filed: Rights of prisoner: Practice. The Prosecuting Attorney put on file two informations in the same case, one of which did not contain certain words supposed to be essential in charging the offense, whilst the other was deemed correct. The party was tried on the latter, but the former was copied into the record by the Clerk, in making his return. It was proposed to establish these facts by affidavits. *Held*, that it does not rest with the Prosecuting Attorney to say which shall be considered as the record in the case, but that all doubts on the subject should be solved in favor of the prisoner, *Held*, further, that the return filed in this Court was the proper record on which the argument must be had.

Jurat signed by initials. Statutory offense, how described. The information in this case charged defendants below with an assault "with intent to kill and murder," omitting the words "feloniously, wilfully, and of malice aforethought." It was sworn to before the County Clerk, who in signing the jurat gave the initials only of his christian name. *Held*, that the signing by the Clerk was sufficient, and that the decisions in this State under certain election cases, declaring that when such initials were used it was no name, would not be extended to embrace other cases. *Held*, further, that the offense being a statutory one, was sufficiently charged in the words of the statute.

Heard October 25th. Decided October 30th.

Error to Oakland Circuit.

The information in this case charged plaintiffs in error with having assaulted, with intent to kill and murder, one Charles Parsons. The information was sworn to before the Clerk who signed his name as follows: "J. D. Bateman, Clerk."

A plea of not guilty was entered. The jury brought in a verdict of guilty, and sentence was passed.

The following errors were assigned:

"*First*, That the information is insufficient in this, that it does not charge that said Charles Rice and Harlow Woodard, aforesaid, *wilfully, and with malice aforethought*, intended to kill and murder Charles Parsons, the person upon whom the assault is charged to have been by them, the said Rice and Woodard, committed.

"*Second*, That the said information does not charge them, the said Charles Rice and Harlow Woodard, with the commission of any offense for the commission of which they could or should be, by the laws of the State of Michigan, sentenced to imprisonment in the State Prison; the said information in law being an information for assault and battery only.

"*Third*, That the said information is insufficient in this, to wit: the verification thereto is not authenticated with the name of the Clerk, the person by whom the oath purports to have been administered."

O. F. Wisner and W. B. Jackson, for plaintiffs in error.

1. The Statute under which plaintiffs in error were convicted is, "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." — 2 *Comp. L.* § 5724.

Indictments (informations) for the "crime of murder," must charge that "defendant did wilfully, and of his malice aforethought, kill and murder." — 2 *Comp. L.* § 6047.

We submit that under the statutes, an information for assault with intent to commit the crime of murder, must contain the necessary averments to show that had death ensued, the killing would have been murder.

Malice aforethought is an essential ingredient of the offense of assault with intent to commit murder, hence necessary to be averred in the information. — 2 *Mich.* 212.

In prosecutions for assault with intent to murder, the actual intent to kill must be found, and that under circumstances which would make the killing murder. — *Ibid.*

Now if this be so, it was necessary to prove that plaintiffs in error wilfully and of their malice aforethought intended to kill and murder Charles Parsons; and if necessary to prove it, it must be necessary to aver it. An indictment must aver everything necessary to constitute the offense. — 5 *Denio*, 76; 13 *Wend.* 311; 31 *Me.* 401; 5 *Ohio State R.* 280; 11 *Humph.* 167.

The information in this case is manifestly insufficient.

In the case in Indiana, this very question arose upon an indictment precisely like the information in this case, and the Court held it properly quashed. See also — 3 *Eng.* (*Ark.*) 400; 19 *Miss.* (4 *Bennett,*) 212; *Am. Cr. Law*, 399; 1 *Archb. Cr. Law.* 301; 3 *Eng.* 400; 1 *Scam.* 285.

In every precedent to be found of indictments for assaults with intent to commit murder, the words "wilfully," and of "malice aforethought" are contained. — 2 *Archb. Cr. Law*, 1, 19; 3 *Chit. Cr. Law*, 828; *Wharton's Prec.* 119, 125, 126, 127.

2. The information is simply one for assault and battery. — 4 *Park. Cr. R.* 61; *Id.* 187.

3. The information is insufficient, for the reason that the verification thereto is not authenticated with the name of the clerk, the person by whom the oath purports to have been administered. "J. D. Bateman" is not the clerk.

A. Williams, Attorney General, for the People.

1. The judgment cannot now be set aside or reversed for either of said errors assigned upon the information.

a. The punishment of said offense being declared by statute, and the information describing it in the language of the statute, it is, after verdict, sufficient. — 2

Comp. L. § 6059; 1 *Doug.* 42; *Archb. Cr. Pl. and Ev.* 51-2-3-4; 6 *McLean R.* 56; *Laws* 1849, *p.* 391-2.

b. The respondents' objections relate to the form, and not to the substance of the information. — 5 *Wend.* 10, 19, 20; *Id.* 425; 3 *Denio*, 212, 213; 8 *Barb. Sup. Ct.* 548, 550, 551; 1 *Archb. Cr. Pl. p.* 118, 2, *Note* 2; *See Form, Bouv. Law Dic.;* 2 *Seld.* 50.

c. The objections being to the form of the information, apparent upon its face, it must have been taken by demurrer, or motion to quash the same before the jury were sworn, and not afterwards. — *Comp. L.* § 6055.

Therefore, when the jury were sworn the objection aforesaid, not before having been made by the respondents, as required by the statute, were then waived forever. *Comp. L.* § 6055; 1 *Chit. Cr. L.* 423 *to* 437; 1 *Chit. Pl.* 440, 441; 10 *Mich.* 372.

2. Nor could the information, at any stage of the proceedings, or in any way, in the court below, have been quashed or deemed invalid, or the trial, judgment, or other proceedings thereon be affected by reason of the omission of the following words, to wit: "wilfully and with malice aforethought;" because,

a. They are "words of similar import" with the following, to wit: "feloniously" and "with force and arms." *Comp. L.* § 6043; 9 *Met.* 268, 270; 5 *Whart.* 427; *See Webster's Dic.; Bouv. Law Dic.; Burrell's Law Dic.*

b. And, also, because they are, at most, "defects or imperfections in matters of form, which" do "not tend to the prejudice of the defendants." Not having been, as they could not be, by reason of their absence, surprised, misled, left in doubt, or lost advantage, either as to the people's case, or the preparation of their defense, their absence constitutes neither a "defect or imperfection in matters of form" which did tend to the prejudice of the defendants. Hence, in nowise was or is there, for

the defendants, advantage to be now taken. — *Comp. L.* § 6043; 2 *Seld.* 50.

3. The word "murder," having acquired a peculiar meaning of its own, is an artistic word; and signifies, and only signifies, the act of unlawfully killing a reasonable creature, with premeditated malice, by a person of the age of discretion. — 2 *Archb. Cr. Pl.* 206, *Note;* 5 *Bl. Com.* 195.

The information charges the respondent with an "assault * * * with intent * * * to kill and murder." It will be seen that every word in the statutes declaring the punishment of said offense, which has acquired any artistic or peculiar meaning, is used in the information. Thus following the language of the statute is sufficient. — *Comp. L.* § 6059; 1 *Doug.* 42; *Archb. Cr. Pl. and Ev.* 51 *to* 53; 1 *Wharton's Cr. L.* § 364, 469; 1 *Comst.* 379, 382.

4. But in cases where the offense is created, or its punishment declared by statute, the information need not necessarily follow the exact language of the statute. If a word, substituted in the information for one word used in the statute, is equivalent to, or of more extensive signification than the statutory word, and includes it, the information will be good. Indeed, it is sufficient that the information, with reasonable certainty and precision, charges the defendants to have committed or omitted the acts under the circumstances and with the intention mentioned in the statute. — *Archb. Cr. Pl. and Ev.* 51 *to* 54; 1 *Whar. Cr. L.* § 364, 366, 369; 1 *Chit. Pl.* 237, 238, 239.

As a further test, we submit that the information in this case is so full and certain, both as to its form and subject matter, that the respondents might plead their trial and conviction upon it, in bar to any information which might afterwards be filed against them, charging them with the same offense, or simple assault. — 1 *Chit. Cr. L.* 451; 1 *Comst.* 379, 381.

The foregoing positions also answer, if any be needed, the objection contemplated by the third assignment of error touching the verification of the information.

5. The Circuit Court being a court of general jurisdiction (*Sec.* 8, *Art.* 6, *Const. of Mich.*), the respondents did, as was their privilege to do, by their plea in bar of not guilty, and going to trial without objection, waive their right to any and all advantage to this, or any other objection that might have been pleaded in abatement, or constituted ground for quashing the information, thus giving the Court ample jurisdiction both as to persons and subject matter.—*Comp. L.* §§ 6043, 6055; 2 *Seld.* 50; 1 *Bishop's Cr. L.* §§ 650, 649, 672.

6. As nothing to the contrary appears on the record, certainly the presumption for this Court is that the verification of the information was "authenticated with the name of the clerk, the person by whom the oath purports to have been administered;" for courts will always take judicial notice of its own officers and records, and be bound by them. Till duly amended the record will be conclusive. 1 *Greenl. Ev.* §§ 5, 6.

Finally, after verdict, the court is *ex-officio* bound to give such judgment as appears upon the whole record to be proper, without regard to the issue found or confessed, or any imperfection in the prayer of judgment on either side; for the rule seems to be, that, after verdict, an expression must be construed in such a sense as will sustain the verdict.—(1 *Chit. Pl.* 237, 238, 239.) Enlarged upon as this general rule is by our statutes—(*Comp. L.* §§ 5724, 6043, 6055, 6059,)—we fail to see sufficient cause for reversing or setting aside the said judgment.

COOLEY J.

A preliminary question is raised in this case whether the return sent up by the Clerk of the Court below embodies the true record.

It appears from the statement of the Prosecuting Attorney that to protect the people against the consequences resulting from the loss of important papers, he has sometimes placed duplicate informations on file, that if one was lost he might make use of the other; that he did so in the present case, but that while one of them was correct, the other omitted certain words which are supposed to be essential to its validity; that the plaintiffs in error were tried and convicted on the correct information, but that the other was copied into the record by the clerk in making his return; and these facts it is proposed to prove by the affidavits of the Prosecuting Attorney and Clerk.

It can hardly be seriously contended that there can be two informations properly on file in any case; and a prosecuting officer who adopts the practice stated, must be prepared to support his case upon either. It certainly can not rest with him, at any particular stage of the case, to say which shall and which shall not constitute the record; much less can that question be made to rest upon the oral testimony, which must always necessarily be uncertain, as to which of the two happened to be taken up by the prosecuting officer when the prisoner was arraigned or tried. Under the general rule relating to criminal proceedings — that doubts are to be solved in favor of the accused — he has a right to point out and rely upon the defects in either; and the clerk was right in this case in sending up with the return the information supposed to be defective.

This information is in the following words:

"THE STATE OF MICHIGAN, }
COUNTY OF OAKLAND } ss.

"The Circuit Court for the County of Oakland. Michael E. Crofoot, Prosecuting Attorney for the County of Oakland aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court in the March term thereof, A. D. 1866, and gives it here to understand

and be informed, that Charles Rice, Harlow Woodard and George Hughes, late of the township of Pontiac, in said county, heretofore, to wit, on the twenty-first day of December, A. D. 1865, at the township of Pontiac aforesaid, and in the county aforesaid, with force and arms in and upon one Charles Parsons, then and there being, did make an assault, and him, the said Charles Parsons, then and there did beat, wound and bruise, with intent, him, the said Charles Parsons, then and there, to kill and murder, and other injuries to him, the said Charles Parsons, then and there did, contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

"MICHAEL E. CROFOOT,

"*Prosecuting Attorney for the County of Oakland.*"

"THE STATE OF MICHIGAN, } ss.
COUNTY OF OAKLAND. }

"Charles Parsons being duly sworn, deposeth and says that he knows the contents of the above information, and he verily believes the same to be true, as therein set forth.

"CHARLES PARSONS."

"Sworn and subscribed before me, at Pontiac, this sixth day of March, A. D. 1866.

"J. D. BATEMAN,

"*Clerk.*"

One objection to this information is, that no name is attached to the jurat.

This objection is based upon certain decisions in this State — *People v. Tisdale*, 1 *Doug. Mich.* 59; *People v. Higgins*, 3 *Mich.* 233 — which have laid down the rule in election cases, that ballots which contain only the initials of the person voted for cannot be counted as they are, nor aided by parol evidence. We have no disposition

to make these decisions embrace other cases, nor should we be warranted by authority in doing so.

The principal objection, however, is that the information does not charge the offense to have been committed "feloniously, wilfully, and of malice aforethought," after the common law forms. If the case were to be disposed of exclusively upon the common law authorities, we should find it necessary to examine them with some care before making a decision; but we have no doubt that if the information would be defective as a common law pleading, there is still no necessity for the omitted words under our statute.

The information charges the defendants with an assault with intent to murder. *Murder* is an offense which the law defines; one of the essential ingredients of which is *malice aforethought.* To charge an intent to kill and murder, is to charge an intent to kill under circumstances which would make the killing amount to murder; that is, with premeditated malice. No further words are necessary to inform the accused of the nature of the charge against him; and if more are essential for any purpose, it can only be for technical reasons. The statute, *Comp. L.* § 6043, in express terms has dispensed with the necessity of employing the word "feloniously," or "with force and arms," or "any words of similar import;" by which last phrase we must understand, words employed for similar technical reasons as the words mentioned, and which are not essential to a clear understanding of the charge. But it is not necessary to decide whether this statute would dispense with the use of the words "with malice aforethought," since another statute — *Comp. L.* § 6059 — provides that, "When the offense charged has been created by any statute, or the punishment of such offense has been declared by any statute, the indictment shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offense in the words of the statute."

The offense as described in the statute is, an assault "with intent to commit the crime of murder;" and this is the offense as set out in the information. It is not essential that, in describing the offense, the precise words employed in the statute should be used; other words of equivalent meaning are sufficient — *People v. Kent*, 1 *Doug. Mich.* 42 — except perhaps in cases where certain words of art may by long usage have become indispensable to a description. But in this case the statutory words are employed, and we have no doubt the description of the offense is sufficient as it stands in the information.

We think the judgment of the Court below was correct, and it must be affirmed.

The other Justices concurred.

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Andrew Climer v. Daniel Hovey and another.

Mistake in contract, when Court of Equity will correct. In this case a bill to correct a mistake, by making a contract apply to lands which had been omitted from it, instead of those which were mentioned in it, and to enforce the contract when corrected, was dismissed; the parties not having acted upon the contract, and there being no equitable circumstances requiring such correction.

Heard October 9th. Decided October 30th.

Appeal from Berrien Circuit, in chancery.

This was a bill for specific performance.

The cause was heard on the pleadings and proofs, and the bill was dismissed.

The facts of the case, and the allegations in the pleadings, so far as may be necessary to an understanding of the questions decided, are stated in the arguments of the counsel, and the opinion of the Court.

Muzzy & Knox, for complainant.

The bill alleges that under the contract the complainant took possession, cut and sold timber, and contracted for the sale of more wood and timber. That he offered to pay the amount due, and more, and requested a deed for the two-ninths, which was refused. Also, that the defendant, Hovey, had conveyed the premises to defendant, Curtis.

The answer admits the making of the contract, the sale to Curtis, the taking possession by complainant, and cutting and selling timber, and the mistake as to the range set forth in the bill; and sets up that the contract was not signed by the complainant at the time of its delivery, and was not stamped; denies that complainant tendered money or requested a deed, and insists that the contract was made at the dictation of complainant, merely to be shown to evil disposed persons, and to restrain them from trespassing.

1. The proofs show that the contract was written by defendant Hovey, and we believe the preponderance of the evidence is, that it was signed by both parties at the same time. It is immaterial whether the contract was ever signed by Hovey. — 14 *Johns.* 484; 16 *Me.* 92; 4 *Mich.* 570, 572.

2. The proofs show that a stamp was afterwards placed on the contract, which was sufficient. — *Act of Congress of June* 30, 1864, § 163.

3. There is a conflict in the testimony, whether complainant offered to pay the amount due, or demanded a deed. We think the averments that complainant offered to pay and requested a deed, are supported by the proofs.

It appearing that defendant Hovey had conveyed the land to Curtis, and had signified his intention not to convey to complainant, a tender was not necessary; especially, as by the terms of the contract, Hovey was to

notify Climer when he would deed. A failure of complainant to tender performance only affects the question of costs. — 1 *Mich.* 9.

E. Bacon, for defendants.

1. The complainant cannot have specific performance if the contract is unsettled. The contract is unsettled in this, that no price is fixed for Hovey's present interest in the land, also as to who the heirs were and who might give the notice; also as to what was to be done in case Hovey failed to get the heirs' title; also as to what youngest heir is meant, and when he would become twenty-one years of age. — 14 *Peters*, 77; 5 *Munf.* 296; *Harrington Ch.* 373, 124; 3 *Hawks*, 628.

2. The complainant cannot have specific performance if the contract is uncertain. The contract is uncertain because it puts no obligation upon Hovey to convey except such as should entirely depend upon his will and convenience. He was not to convey and there was to be no sale until he should see fit to give Climer a notice of his readiness. Climer was in no event to purchase unless it suited his convenience to do so. — 2 *Story Eq. Jur.* § 767; *Benedict v. Linch*, 1 *Johns. Ch. R.* 370; 1 *McLean*, 120; *Fitzpatrick v. Beaty*, 1 *Gilm.* 454; *Montgomery v. Norris* 1 *How. Miss. R.* 499.

3. The complainant cannot have specific performance if the contract is not mutual. Climer is not bound to take, purchase or pay for anything unless it suited his convenience to do so. Nothing is said or intended in the contract about Climer taking or purchasing Hovey's present interest or the six-ninths of the land on any terms. There is no mutuality, because at the time this bill was filed Climer could have refused to do anything under the contract, and yet on the existing state of things Hovey could neither file a bill for specific performance or have any other remedy, for no notice of Hovey's readiness to convey

exists, and nothing about any heir becoming twenty-one years of age appears, and a refusal to purchase would be all Climer needed to free himself from all obligations under any contract to take the land as soon as convenient. — *Harrington, Ch.* 420 ; 1 *Johns. Ch.* 281.

4. The complainant cannot have specific performance where his right is dependent upon a condition precedent, which is unfulfilled.

By express terms of the contract, Hovey's obligation to sell and convey are conditioned according to his future will and decision as to the convenience of conveying, and he has decided not to convey.

By express terms of the contract there was to be no sale, purchase or payment until after Climer was notified that Hovey was ready to give a deed. No such notice has been given. By express terms of the contract Hovey was not to convey anything until as soon as convenient, after the youngest heir became 21 years of age. Nothing is said in pleadings or evidence, tending to show that any heir has become twenty-one years of age. — 1 *Black. Com. p.* 154 ; 1 *Ham.* 14.

5. The complainant cannot have specific performance because the contract is voluntary and without consideration. There was no payment and no legal obligation upon anybody to make any payment, nor did Hovey gain anything by the contract, it has only been a means of serious loss to him by having the land stripped of timber. — 1 *Story Eq. Jur.* § 987; 3 *Cow.* 445; 6 *Ham.* 383 ; 1 *Leigh*, 36.

6. The contract did not give possession. Stripping the land of timber gave no equity. At law Climer could recover no damages, and if compensation would put him in *statu quo* he cannot have a specific performance. — 7 *Cow.* 229 ; 3 *Wend.* 104 ; 3 *A. K. Marsh.* 554 ; 2 *Litt.* 124.

CAMPBELL J.

Complainant filed his bill for the specific performance

of a contract for the sale of certain lands. The contract was in writing, and describes certain parcels, specifically, but the bill alleges that in reducing it to writing the parties made a mistake, and described the wrong land. Hovey is the party who is charged with having contracted to convey. The bill charges the land to have been conveyed to Curtis since the contract, with knowledge of complainant's rights. No payments are alleged, and no act of part-performance.

Both defendants rely upon the Statute of Frauds, and Hovey sets up that the contract was not intended or delivered as a complete contract of sale, but was given merely to enable Climer, his agent, to keep off trespassers.

The statute (*Chap.* 104, § 3179, *Comp. L.*) provides that every contract for the sale of lands shall be void, unless the contract or some note or memorandum thereof be in writing, and signed by the party by whom the sale is to be made.

In this case the contract and its terms are signed by the vendor in due form, but there is no reference in it to the lands in controversy. It is sought by parol evidence to substitute one set of lands for another. But it is quite evident that no amount of parol evidence can bring any written contract into being, which will cover the lands in question. We are, therefore, brought down to the simple inquiry whether mere mistake, where neither party has parted with or done any thing beyond signing an executory contract for one description of land, can authorize a Court of Chancery to enforce a parol contract, by applying the terms written concerning one estate, to another not referred to in writing.

Where fraud, or part performance, or other recognized equities create an equitable estoppel, that may in many cases authorize the correction of instruments upon which parties have acted in good faith. But the jurisdiction in these cases does not spring from mistake alone, but from a mistake that has been acted on. And where there are

none of these collateral circumstances, it is difficult to perceive wherein the correction of a contract by parol evidence differs from the enforcement of an agreement resting entirely in parol. For where a contract is partly written and partly verbal, it has always been regarded as within the prohibitions of the statute. Where a defendant resists the specific performance of an agreement on the ground that some mistake has arisen concerning its terms, a court will sometimes make it a condition of giving relief to a complainant, that he accept the variation; but even then it will not usually compel him to do so, but leaves it optional whether he will have that relief or be left to his legal remedy. For it is always proper to refuse relief on a bill for specific performance, where equitable circumstances prohibit it. The American cases, going somewhat beyond the English authorities in this direction, have in some instances given relief to a party complainant who set up a case of mistake, requiring terms or subjects *to be stricken out of his contract*, because the whole residuary agreement as enforced is comprehended within the written provisions, and therefore the statute is not violated by the enforcement of parol provisions. But every parcel of land or interest imported into a contract, which does not refer in any way thereto, must be thus affected by unwritten stipulations; and the attempt to do this is nothing else than an attempt to put parol agreements on the same footing with writings.

Where equitable circumstances are made the basis of action, the Courts, if they give relief, do it on the ground that the case is thereby taken out of the statute. But where the case stands on no such equities, the statute must apply, or must become of very little service. In the present case the mistake goes to the entire contract, and there is no portion of the written agreement which could stand alone if the subject matter on which the error arose should be stricken out.

In the learned American note to *Woollam v. Hearn*,

2 *Lead. Cas. in Eq. Pt.* 1, *p.* 541 *and seq.* (*Ed. of* 1852) the subject under consideration is very clearly discussed. It is said that the Statute of Frauds does not declare that parol evidence shall be inadmissible, but only "that it shall have no effect in *passing or creating* a trust or estate in land." And the case of *Elder v. Elder*, 10 *Maine R.* 80, is referred to as containing a very satisfactory elucidation of the whole difficulty. The English cases are also referred to, which unquestionably have been very consistent in refusing relief in cases like the present. And the few American cases which have been supposed to sanction a less certain rule are mostly, if not entirely, cases where there was something beyond a bald case of mistaken description. It is possible that the distinction has been sometimes lost sight of, between refusing to enforce a mistaken contract, and creating by parol a substituted agreement in lieu of a writing. But usually there have been such acts in reliance upon the supposed, but mistaken, state of things as would raise independent equities. But it would not be singular if the law had been sometimes overlooked, in the anxiety of courts to place parties where they had reason to expect they would be.

As we find nothing in this case to show that any act has been done or left undone, which can be regarded as having been authorized or expected under the contract as it should have been, to the detriment or loss of the party relying on it, we think it must stand as an agreement within the express terms of the statute, and that complainant is not entitled to relief.

We have not deemed it necessary to pass upon the facts, upon some of which the witnesses are directly in conflict. The case is one by no means free from suspicion, and there is very strong reason to believe that Hovey did not suppose he was making a definite bargain.

But as the objection taken under the statute disposes of the entire case, the testimony becomes immaterial.

The decree must be reversed, and the bill dismissed, with costs of both Courts.

MARTIN Ch. J. concurred in the result.

COOLEY J.

I do not think that on the facts appearing, a case sufficiently clear is made to warrant specific performance. As to the power of the Court to correct a mistake in a contract, in a suit to enforce it, I express no opinion.

CHRISTIANCY J. concurred.

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Allen v. Carpenter.

Tenancy: Notice to quit: Under what circumstances a person holding over after foreclosure of a mortgage of the premises, will be entitled to notice to quit, *Quaere*, the Court being equally divided.

Discussion of the extent to which irregularities and errors in summary proceedings for possession of land render the proceedings void, and inadmissible as evidence.

Heard July 10th. Decided November 8th.

Error to Lenawee County Circuit.

This was an action of trespass *quare clausum*, for entering upon the premises of plaintiff and removing certain crops and committing certain other injuries.

Defendant plead the general issue, and gave notice of special matter.

The cause was tried by a jury, and a verdict rendered for defendant.

The plaintiff removed the same by writ of error.

The facts are stated in the opinion.

ALLEN *v.* CARPENTER.

A. L. Millerd, E. H. C. Wilson and A. F. Bixby, for plaintiff.

1. The Court below erred in ruling out the evidence of the proceedings before the Circuit Court Commissioner, Hogaboam.

The appearance of the defendant, and pleading and going to trial on the merits, waived any objection to the complaint on account of the mistake in the date of the jurat, and the other objections taken thereto.

And even if the proceedings should turn out to be technically irregular, it was competent for the plaintiff to show that he took such proceedings, in good faith, to obtain what was lawfully his own, and which the defendant was wrongfully withholding from him. The proceedings, even if irregular, were equivalent to a demand of the possession. They were notice to the defendant that his remaining was against the will of the plaintiff, and his resistance to them was equivalent to a refusal to yield the possession.

The fact that the plaintiff commenced such a proceeding in 1863, and prosecuted it until he was stopped by the injunction, and then commenced again as soon as the injunction was removed, effectually negatived the idea, and rebutted any presumption that Prior's remaining there and putting in the crops in question was with the assent or tacit permission of the plaintiff.

2. The Court erred in receiving evidence that Prior did not know of the foreclosure of the mortgage until after the plaintiff purchased the farm.

This was wholly immaterial.

3. Prior did not acquire a tenancy, either at will or by sufferance, by the omission of Clark, after the foreclosure of his mortgage, to take immediate steps to dispossess him, and the charge on that point was erroneous.

He or his assignee was entitled to take the proceedings at any time after the time of redemption expired,

without further notice, unless he had *done something or said something* that should amount to a consent for the mortgagee to remain, or to put in crops. No such consent could be implied from his mere omission to take immediate steps to obtain possession.

If such consent could be implied from the fact of his standing by and allowing the mortgagor to put in crops without objection, knowing that he was doing so, it certainly could not without proof of knowledge on his part. There was no such proof, and if there had been any tending to show it, or from which it might be inferred, it should have been submitted to the jury.

The mortgagee is entitled, as against the mortgagor or his lessee, to the crops growing on the premises at the time of the foreclosure, and may maintain trespass against him for taking them away. — 8 *Wend.* 58; 1 *Leigh*, 297; 14 *Pick.* 238; 2 *Denio.* 174.

If he is entitled to the crop put in by the mortgagor before the foreclosure and while the latter is in rightful possession, certainly he is no less entitled to a crop put in after the foreclosure is complete, and while he is kept out of possession wrongfully by the mortgagor.

A mortgagor is not entitled to notice to quit, nor to emblements. — 1 *Hill. on Mortgages*, 120; 4 *Cow.* 266.

The statute gives a mortgagee this remedy by summary proceeding to recover possession against a mortgagor holding over. — 2 *C. L.* § 4985.

A mortgagee who purchases under a foreclosure sale may treat the mortgagor who holds over, either as a tenant or a trespasser, at his option. — 2 *B. Monr.* 158; 1 *Hill. on Mortgages*, 126.

The notice of sale on the foreclosure was equivalent to three months notice to quit. — 17 *Johns.* 300; 4 *Cow.* 266, 279.

And a delay to take these proceedings, though it were much longer than in this case, would not be a waiver of the notice. —2 *Cow.* 547.

No tenancy can arise by implication, under a party who has not the legal estate. — *Taylor's Land. and Ten.* § 25; 2 *Man. & Ry.* 303.

Prior's possession has been adverse to Clark and his assignee, ever since Clark's title accrued. He has all the time disputed and contested the right of the latter, and himself claimed the ownership. This estops him from claiming, now, that he was in as a tenant to Clark, being utterly inconsistent with such a claim. — 3 *Johns.* 422.

The possession of the plaintiff was rightful, whether the summary proceedings by which he obtained it were technically regular or not. He was legally entitled to the possession of the farm and of the crops growing on it, and having obtained it, he was entitled to retain the same, and to maintain trespass against any one not having a superior right, that should enter and disturb his possession.

This would be so even if he had entered forcibly, and under such circumstances as would render him criminally liable for a breach of the peace. — 36 *Maine*, 436.

C. A. Stacy, and A. Howell, for defendants.

The plaintiff claims right to possession, and power to evict under the proceedings before the Commissioner. We claim those proceedings are void because,

1. There was no complaint, such as is required by the statute. The jurisdiction of the Commissioner depends absolutely upon a complaint being made as required by law, on oath, setting forth certain particulars — and being delivered to the officer. — 2 *C. L.* 1324, § 12, 1325, § 13 *and* 14.

a. Here the complaint showed that on the 29th of September, 1861, certain facts existed, on which they asked process in 1864. — 10 *Mich.* 229, 235; 4 *Id*, 339.

b. The statute contemplates that the complaint and oath shall be made by the same person — *see* § 13 — either by the party or attorney or agent.

ALLEN *v.* CARPENTER.

In this case the complaint is made by Allen, the oath by Bixby — and the oath is only to his belief, though he swears that he is fully acquainted with the truth of the facts stated in the complaint.

2. But even if the complaint and summons are good under the statute, still the judgment is bad because it only finds the possession of Prior and his unlawful holding over against the just rights of the complainant, and does not find that the complainant was entitled to the possession of the premises. — *See cases above cited.*

If these proceedings were properly ruled out, if in fact there had been no proper foreclosure, then it follows that the plaintiff had no right to the possession of the lands, but was in possession by force, and therefore as a wrong doer. — 23 *Vt.* 630, 645.

The statute in Vermont is like ours, and the principles of this decision applies to our statute.

3. But we contend that even if the foreclosure is valid, and the proceedings before the Circuit Court Commissioner good, and the judgment a legal one, which authorized the issuing of the writ of possession, still the defendant Prior was entitled to possession until he received three months' notice to quit, because,

a. Estates at will or at sufferance can only be determined by three months' notice. — 2 *C. L. p.* 857, § 34; 17 *Mass.* 282, 287; 1 *Pick.* 43; 2 *Gray*, 226, 336; 2 *Id.* 70; 6 *Id.* 339.

b. By our statute, estates for years seem to have been abolished. — 2 *C. L.*, 818, §1.

c. At common law it was held that so long as the mortgagor remained in possession with the acquiescence of the mortgagee, and without any covenant for the purpose, he was a tenant at will. — 4 *Kent's Com.* 155, 156; 5 *Barn. and Ald.* 604; 1 *Term R.* 383; 2 *Doug. Mich.* 377.

d. In New York, notice to quit is necessary. — 2 *Johns.* 76; 4 *Id.* 215; 18 *Id.* 487.

e. After the time of redemption has expired, the mortgagor remains lawfully in possession as tenant at will or by sufferance, against the mortgagee who permits him to remain without objection.

This was the case before redemption, before the passage of the act of 1843, prohibiting actions of ejectment before foreclosure and the expiration of the time of redemption. The legal rights of the mortgagor is the same in both cases.

His equitable rights before foreclosure and redemption entitled him to redeem. — 1 *Mich. R.* 68.

His position, then, after expiration of time of redemption, was that of tenant at will, modified, of course, by the provisions of the statute. — 2 *C. L. p.* 1324, §12, *Clause* 3; *Id.* 1365, § 10.

The advertisement and filing of the papers in Register's office were only constructive notices so as to bar redemption. — 2 *C. L. Chap.* 157.

There was no actual notice of the foreclosure. The testimony shows that Prior had no notice until after the sale from Clark to Allen.

Prior, then, after March 22d, 1863 — the date of the expiration of the time of redemption — remained in possession lawfully, and not as a wrong doer, when Clark, knowing the fact of the foreclosure and expiration of the time of redemption allowed Prior, ignorant of both, to go on and put in crops, and continue to occupy the premises. He put him in the position of a tenant at will, or at least tenant by sufferance, and he was entitled to notice to quit by the terms of the statute.

COOLEY J.

The facts in this case are briefly the following:

One Clark being the owner of a mortgage given by Henry Prior on a farm owned by the latter, took proceedings for its foreclosure under the power of sale, and

caused the premises to be struck off to himself for the amount of the mortgage and costs. The time for redemption under the foreclosure expired March 22, 1863. Clark does not appear to have had any communication with Prior in regard to the foreclosure, either before or after the sale, and Prior testifies that he was not aware of the proceedings until the last of June or first of July, 1863. In the spring of that year he put in crops upon the farm as usual. On June 25, 1863, Clark, for a nominal consideration of about the foreclosure moneys and interest, conveyed the farm to Allen, who, within a few days thereafter, demanded and endeavored to obtain possession, but his proceedings for that purpose were resisted by Prior on the ground of irregularity and fraud in the foreclosure. In this contest, Prior proved unsuccessful, and Allen obtained judgment for the possession of the land September 2, 1864, in proceedings before a Circuit Court Commissioner under Chapter 150 of the Compiled Laws. The defendants in this case, who were Prior's neighbors, then turned out and assisted him to remove from the premises the crops which he had grown thereon, and which were ripened, and a part of them harvested at the date of the Commissioner's judgment. For this assistance the present action was brought.

The questions which become material for us to consider upon this record, are: *First*, whether the proceedings before the Commissioner are conclusive upon Prior, and determine for all collateral inquiries the right of Allen to possession of the land at the time those proceedings were commenced? and if not, and we are at liberty to go back of them, then *Second*, whether Prior, under the statute, was entitled to notice from Allen before he could be lawfully dispossessed by him?

1. The Circuit Judge held the proceedings before the Commissioner void for want of jurisdiction. It appears from the Commissioner's record — which was put in evidence — that the proceedings were commenced August 29th,

— in what year is not stated — and that they resulted in a judgment for the complainant September 2d, 1864. The complaint averred in the usual form that Allen was entitled to the possession of the premises, and that Prior held them unlawfully and against the right of complainant. It was not dated at all; but it was sworn to as required by the statute, and the jurat was dated August 29th, 1861. On its face, therefore, the complaint showed a right in Allen to the possession of the premises three years before the proceedings were commenced, but did not show or allege his right at any subsequent time.

There was a plea to this complaint, and it is argued that this is a waiver of any errors. Jurisdiction over the person may be given by voluntary appearance and plea; but jurisdiction of the subject matter cannot be given by consent. Even in those cases where parties are authorized to appear and enter a voluntary confession of judgment, it has been several times held in this State that the proceedings were void if any of the statutory requisites were omitted.— *Clark v. Holmes*, 1 *Doug.* 390; *Beach v. Botsford*, 1 *Doug.* 199; *Spears v. Carter*, 1 *Mich.* 19; *Wilson v. Davis*, 1 *Mich.* 156. But the present case is not one in which jurisdiction can be obtained by mere consent or confession, or in any other manner except through the complaint which the statute prescribes; and the fundamental rule, that the jurisdiction of special and limited tribunals must affirmatively appear on the face of the proceedings or they are void — (*Chandler v. Nash*, 5 *Mich.* 409,) — has always been applied to these summary trials with great strictness. In the two cases of *Bush v. Dunham*, 4 *Mich.* 339, and *Bryan v. Smith*, 10 *Mich.* 229, the defect in the proceedings was precisely the same as in this case: a failure in the complaint to show a right to possession in the plaintiff at the time it was presented to the Commissioner; and in both, the judgment was held void. In the case last named the complaint averred that

the complainant became entitled to the possession of the premises at a time mentioned, which was some fourteen months before the date of the complaint; but it was held that an express allegation of the existing right of the complainant could not be dispensed with. Under these decisions it seems to me impossible to sustain these proceedings, and that the appearance and plea of the defendant are immaterial. No consent of parties could vest the Commissioner with power to try the rights of the parties at any period anterior to their commencement, as that would be as clearly beyond his statutory powers as the trial by consent of an action of ejectment.

It was suggested, however, in the Court below, that the date to the jurat was a mistake of 1861 for 1864; and the Circuit Judge at first admitted evidence to show this mistake. This evidence seems to me clearly inadmissible. A record must be its own interpreter—*Rood v. School District, etc.* 1 *Doug.* 502; and if it fails to show jurisdiction on its face, it is impossible to sustain it by proof of facts which rest in the recollection or intentions of witnesses. I say nothing now of any amendment or motion to amend; for here there was no attempt of the kind: the naked case was a record offered in evidence which failed to show jurisdiction, and an attempt to sustain it, not by correction, but by parol evidence of a mistake made in drafting it. If this can be done, it is evident that the validity of the record must depend upon the parol proof; and this same proceeding might be held valid one day, and void the next, if the witness in the mean time had deceased, or his testimony for any other reason become unattainable. It seems to me very clear that such evidence is at war with the fundamental rules which govern the examination of judicial records; and that the Circuit Judge was right in his final conclusion.

2. The second question is of more general importance, and arises under §2807 of Compiled Laws, which provides

that "All estates at will and at sufferance may be determined by either party, by three months' notice given to the other party." If Prior, at the time Allen acquired his right, was tenant either at will or at sufferance within the meaning of this statute, he was entitled to the notice specified, and he could not lawfully be deprived of the possession of the premises, or of the crops grown by him upon them, until such notice was given.

A tenant at sufferance is defined to be one who, having come into possession by right, holds over without right. *Co. Lit.* 57 *b.*; 2 *Bl. Com.* 150. A mortgagor whose estate has been terminated by foreclosure proceedings, is strictly within this definition.—*Kinsley v. Ames*, 2 *Met.* 31. At common law such a tenant was not entitled to notice, but the owner might enter at any time, and having regained possession, sue the tenant in trespass for his occupation.—*Dorrell v. Johnson*, 17 *Pick.* 266; *Butcher v. Butcher*, 7 *B. & C.* 399; *Hey v. Moorehouse*, 6 *Bing. N. C.* 52; *Pearce v. Ferris*, 10 *N. Y.* 283. The possession of the latter being wrongful, continues only by the latches of the owner, since, if assented to, the tenancy ceases to be one at sufferance, and becomes a tenancy at will or from year to year.—1 *Washb. on Real Pr.* 394.

It is apparent that the term *tenant at sufferance* cannot be used in the statute in a sense which would entitle any one holding over wrongfully to the statutory notice, since that would put it in the power of any occupant to prolong a wrongful possession indefinitely. It may, therefore, be well to look at the decisions under similar statutes for aid in giving these words their proper construction.

In *Kinsley v. Ames*, 2 *Met.* 29, a mortgagor who had held over for a month after his right was terminated by foreclosure, before possession was demanded from him, was held not entitled to notice, on the ground that the statute which required notice to tenants at will and at sufferance had been so amended as to apply to tenants at will only.

In *Rowan v. Lytle*, 11 *Wend.* 620, Savage Ch. J. in giving a construction to a similar statute says: "For the purpose of giving this statute a fair construction and beneficial operation, no notice should be held necessary unless the landlord has unnecessarily delayed his proceedings; and the object of the legislature will be best promoted by holding that such notice is not necessary unless the landlord has permitted the tenancy at sufferance to continue for such a length of time as to imply assent." In that case a tenant for years who asserted some adverse right in himself had held over for two months during some negotiations for a new lease, and was then told he must either take the lease on his landlord's terms or quit the premises. He did not do either, and proceedings were commenced against him six months later. It was held — and it seems to me correctly — that he was not entitled to notice.

The landlord could not fairly be chargeable with laches while the negotiations were pending, and the retention of possession after they had ceased was in the face of the landlord's prohibition. In *Livingston v. Tanner*, 12 *Barb.* 481, a construction was placed upon the statute which seems to me to speak its real intent, and to accomplish the beneficial purpose for which it was enacted. There a tenant *per autre vie* had held over for nearly four months without, so far as appeared, any knowledge that his estate had terminated; and stress was laid upon this fact in holding him entitled to notice. The decision places the right to notice not upon the ground of the owner's assent to the posession, but upon the circumstances existing in the case which rendered it unjust that the tenant should be dispossessed as a wrong doer without warning, when he was not guilty of intentional wrong, and might not even be aware that he was not holding in his own right.

The case last mentioned was reversed by the Court of Appeals — 14 *N. Y.* 64 — on the ground that another

statute of that state had in express terms, made one who held over after the determination of a life estate a trespasser; thereby changing what would otherwise be a tenancy at sufferance into a trespass. The reasoning of the Supreme Court is not only left untouched by the court of last resort, but the Judge delivering the opinion of that court pointed out, very clearly, as I think, that but for the statute last mentioned notice would have been necessary. We have no corresponding statute in this state; nothing that assumes to change the common law relation of a mortgagor holding over after foreclosure perfected.

I think I am safe in saying, under the decisions and on general principles, that whenever the occupant continues to hold by the consent of the owner, he becomes entitled to notice as tenant at will; and that where the owner suffers him to remain in possession without objection, and to make such use of the premises as would render it unjust to demand and enforce possession against him without warning, this laches of the owner entitles him to the statutory notice as tenant at sufferance. There is no wrong and no hardship in this to any one, and it seems to me to accomplish the purpose of the statute.

This construction does not appear to me to conflict at all with the statute which authorizes summary proceedings under chap. 150 of the Compiled Laws, to dispossess a mortgagor who holds over after the foreclosure has become absolute. There is nothing in that provision which warrants us in holding that the position of the mortgagor thus holding over by wrong can not be afterwards changed by the acts or omissions to act of the purchaser. Notwithstanding the statute, it seems very clear to me that if the mortgagor should continue to hold with the purchaser's assent, he would become tenant at will and entitled to notice as such; and it seems equally clear that without actual assent, he may be suffered to remain in

possession under such circumstances as would make the occupancy cease to be wrongful. There is no doubt of the right of the purchaser to enforce possession under this statute; but to hold that that right continues indefinitely, without regard to laches, or the implications that might arise from suffering the possession to continue, does not strike me as in harmony with the purposes of the statute. The provision for notice to tenants at will and at sufferance is general in its terms, and meant, I think, to include all cases where those relations exist, within the meaning of the statute, and without regard to the nature of the prior relation.

In the present case the truth of Prior's statement, that he was entirely ignorant of the foreclosure proceedings until redemption had expired and Clark had deeded to Allen, is not disputed. That he was grossly negligent in thus failing to look after his interests is very clear, and he could not be allowed to set up his want of notice as a defense to the foreclosure. The statutory notice is conclusive upon him in any question of title. But different considerations present themselves when the question is made whether he shall be treated as a wrong doer. Prior had in the mean time gone on to put in his spring crops, and this labor was fully completed before demand was made upon him for the land. While the law charges the mortgagor with notice of the foreclosure proceedings, and will not allow him to dispute it as a defense to the sale, it is no hardship to the purchaser to hold him constructively notified of the use which is being made of the land, by the expenditure of money and labor, after the sale has become absolute. If without objection he allows the occupant to go on and sow crops on the supposition that he is to be suffered to reap them, he must be held impliedly to assent to the cultivation; or, at least, to be guilty of such laches as equitably to entitle the occupant to the statutory warning before he can be dispossessed.

The precise question before us is this: Whether the purchaser at a mortgage sale, who for three months after his title has become absolute, has suffered the mortgagor to go on without objection in the planting of the land with crops, is entitled then to enforce possession without prior notice, and to reap the benefit of the mortgagor's labor? I think this question must be answered in the negative; and that if the mortgagor, under such circumstances is neither tenant at will or at sufferance, within the statute, it will be difficult to give the statute any construction that will render it of value.

Allen obtained possession from Prior by threats of employing force. The possession thus obtained cannot be regarded as surrendered voluntarily, and would not deprive Prior of his right to the ripened crops. It is suggested that the bill which was filed to set aside the foreclosure for fraud must be regarded in the light of a bill to redeem, and that when that was dismissed, there was an adjudication against Prior's rights. No question of the right to redeem arises here, or of any other right springing from the relation of mortgagor and mortgagee. All such rights are undoubtedly extinguished. The question now is, whether by the implied assent of Allen, a new relation has not been created, under which Prior is protected in the possession until notified to surrender it.

I think the judgment of the Circuit Court should be affirmed.

CHRISTIANCY J. concurred.

CAMPBELL J.

The principal questions arising in this cause are dependent upon the relations existing between plaintiff in error and one Henry Prior, springing out of a mortgage foreclosure and legal proceedings subsequent thereto.

On March 22, 1862, a mortgage made by Prior to one

Elihu L. Clark was foreclosed by advertisement, and a deed executed, the redemption whereon was to expire in one year thereafter. On June 25, 1863, Clark conveyed the land to plaintiff, who, in the beginning of July, 1863, commenced summary proceedings to eject Prior. Before these proceedings could be heard, Prior filed a bill to avoid the foreclosure for alleged frauds and irregularities, and obtained an injunction to stay the legal process. This bill was finally dismissed, July 12, 1864.

Evidence was introduced of a complaint, under the statute regulating proceedings to obtain possession of lands, and a summons issued upon it,—the summons bearing date August 29, 1864,—while the complaint, by a clerical mistake, was stated to have been sworn to, August 29, 1861; the mistake being explained by the oath of the agent who verified it. The Court rejected the docket of the Commissioner, showing proceedings to judgment on this complaint, and a writ of restitution issued thereon, and served, on the ground that the docket did not show the year when the proceedings were instituted. The writ of restitution having been used by the proper authorities to put plaintiff in possession, defendants are alleged to have entered with force and removed the standing as well as gathered crops. The Circuit Court, among other rulings, held the legal proceedings void; and held, further, that Prior was entitled to notice before he could be required to surrender possession.

Evidence was introduced tending to prove the premises had been sold on the mortgage, and also by the purchaser at the mortgage sale, for less than their value, but the testimony has no bearing upon any legal question now before us, and was probably introduced with a view to its effect on the jury. There are circumstances which, if we were at liberty to be moved by such considerations, might induce a belief that Prior's land had been sold at a great sacrifice; but, if sold on his mortgage according to law, to the highest bidder, the law

cannot save him from the loss; and his rights of tenancy can in no way be enlarged, because his property brought one sum instead of another. When a party gives a mortgage, whether ample or slender security, he has no right to calculate on any delay beyond its maturity; and cannot set up, against a foreclosure for its breach, any defense arising out of an expectation or hope of lenity, not based on some distinct understanding to that effect. Whatever may be the general disposition of creditors to procrastinate, it would hardly be safe to say that any one must stay proceedings to accommodate such expectations. And when a foreclosure is actually had, the law is very explicit, that the redemption must be made within the appointed time, or the title will become absolute. If there are any elements in the case which affect injuriously the plaintiff's possessory and proprietary rights, this is not one of them.

The principal inquiries, therefore, relate to the question whether, after obtaining an absolute title against Prior by the expiration of the statutory period for redemption, plaintiff or his grantor lost the right to have possession of the estate which they so acquired.

I do not think there is any such defect in the proceedings to oust Prior as renders them invalid. So far as the alleged defects in the docket dates are concerned, I do not regard that record as fatally imperfect. While the date of August 29th is not set opposite any year, the docket shows that a summons was immediately issued upon the complaint, returnable September 2d, 1864; and the summons, produced and proved in connection with it, is dated August 29th, 1864, and is so returnable. The complaint is certified to have been sworn to on August 29th, 1861, but this is explained to have been a mistake. Had there been no appearance before the commissioner, or had there been any objection taken in the proceedings, it is possible this might have been a fatal

error; but I do not deem it necessary to consider this, because Prior appeared on the return day of the summons, and joined issue on a plea of not guilty, without raising any objection to the legality or regularity of the proceedings. The date of the attestation became thereupon entirely immaterial.

Pleadings are always understood to date, as to their allegations, from their actual filing, and that is the only date material upon an issue, and may be shown by parol. *Lester v. Jenkins*, 8 *B. & C.* 339; *Wilton v. Girdlestone*, 5 *Barn. & Ald.* 847; *Granger v. George*, 5 *B. & C.* 149; *Michaels v. Shaw*, 12 *Wend.* 587; *Lyttleton v. Cross*, 3 *B. & C.* 317. Judgment having been rendered against him, he took no steps to remove it, either by appeal or *certiorari*. I do not understand upon what principle he can now attack the judgment collaterally. There is no authority for saying that such proceedings, when a party has gone to trial without objection, are voidable, except in a court of review. And, until reversed, I think the proceedings conclusive.

But I think the rights of the plaintiff would stand equally well without reference to these proceedings.

The Court charged the jury expressly that it was not a trespass in the defendants to enter upon the land and remove the crops, within a reasonable time after plaintiff obtained possession; and that plaintiff had no right in them. And the reason for this broad charge is probably found in the next instruction to the jury, that Prior was not called upon to leave, until, as tenant at sufferance, he had received three months notice to quit, if he was allowed to remain and put in crops until June 23d, 1863, without objection, or any steps to obtain possession. The case shows there was no acquiescence except a mere inaction, without proof of personal knowledge or notice of Prior's operations. The case then, upon this hypothesis—if there were no other facts modifying it — would present

the question whether a mortgagor, holding over three months after his redemption expires, is entitled to notice to quit.

At the common law, inasmuch as a tenant at sufferance was not entitled to notice to quit, it did not become very material what classes of unlawful holding over were called by that name. And there are some authorities which classify mortgagors holding over, as such tenants. But since it has been found expedient to allow notice to tenants at sufferance, it has been found necessary to be somewhat more accurate, and as the law now stands with us, as well as elsewhere, there are either tenants at sufferance not entitled to any notice, or else there are holdings over after the expiration of lawful tenancies, which are something else than tenancies at sufferance. It makes very little difference in the present case which of these results is accepted.

Our statute, allowing tenancies at will and by sufferance to be terminated by notice, inasmuch as it nowhere defines either of these tenures, must be presumed to adopt the common law definition, which, where applicable at all, reaches all cases where a person once having a lawful tenure "*continues after his estate is ended and wrongfully holdeth against another.*" — 1 *Inst.* 57. There is no difficulty in learning when tenancy at sufferance begins. There is no gap between the lawful and unlawful holdings; and when the legal estate ends, the estate at sufferance at once succeeds, if the tenant remains in possession. It is also well settled, that a tenant at sufferance is not a trespasser, unless he attempts to hold over after the landlord re-enters and terminates that peculiar occupancy. — 2 *Bl. Com.* 150; *Dorrell v. Johnson*, 17 *Pick.* 263; *Butcher v. Butcher*, 7 *B. & C.* 399. The wrong is not criminal, but it is nevertheless by construction of law a wrongful act to retain possession of land a single moment after the right terminates; and there is no middle ground between a

rightful and a wrongful occupancy. If Prior became a tenant at sufferance at all, he became such as soon as his redemption expired; and if entitled to notice at all, it must be that he was so entitled from the beginning, or else it must depend upon the mere arbitrary opinion of a court or jury, unguided by any common law or statute rule, how long the continuance of an unlawful holding, not assented to, must last, before the common law tenancy passes into something else.

In New York, there is one case which undertook to furnish a rule upon the subject. The statute, there as here, contemplated a notice to terminate a tenancy at sufferance. There, as we shall see is also the case here, the statute in another place used language inconsistent with any right to notice, where certain tenants held over after their terms expired. In *Rowan v. Lytle*, 11 *Wend.* 616, where such a holding over had continued three months and twelve days from the termination of a lease, it was held the delay had not entitled defendant to notice. The court, in attempting to decide what delay would be long enough, lay down this rule. "The object of the legislature will be best promoted by holding that such notice is not necessary, unless the landlord has permitted the tenancy at sufferance to continue *for such a length of time as to imply assent.*" *p.* 620. This language is equivalent to holding, what under the statutes is I think the true rule, that when a tenant, in the cases specified, holds over beyond his term, he can never be entitled to notice unless he has become a tenant at will. For such tenancy always becomes tenancy at will the moment consent can be inferred. And such is Mr. Taylor's interpretation of this very decision. — *Taylor Land. & Ten.* § 65. In other words, until such assent removes the wrong, such a tenant has no rights whatever against the land owner.

Our statutes seem to remove any ambiguity on the subject. The provision concerning notices to terminate

estates at will or by sufferance is permissive in its form, and only declares that all such tenancies *may* be thus terminated. — § 2807 *Comp. Laws.*

The utmost that can be claimed for this is that it covers all such tenancies as are not otherwise provided for. In the chapter concerning summary proceedings for the possession of land, it will be found that certain classes of holding over (including the one now in controversy), are expressly distinguished from such tenancies at sufferance as require notice. — 2 *C. L.* § 4985. Those excepted classes are *first*, cases where persons hold over after the term for which premises are demised is ended, or contrary to the conditions of any lease or agreement; *second*, cases where rent is in arrear after demand of possession; and *third*, where a person continues in possession of premises sold under mortgage or execution, after the redemption has expired. And, after providing for an immediate right of possession in these cases, the statute embraces in a fourth and distinct class, cases "*where any tenant at will, or by sufferance, shall hold over after the determination of his estate by a notice to quit, as provided by law.*"

Here, then, we have the case of a mortgagee holding over, distinguished from such tenancies at sufferance as require notice, in the most unequivocal terms. And even if we could under other circumstances be allowed to regard the tenant's ignorance in fact of the termination of his tenancy, as any reason for affecting the rule, we can have no right to do so under this statute, which is evidently designed to protect all who cannot be supposed to have the means of knowing where their rights end.

The cases excepted from the necessity of notice are all cases where the tenant has full means of information. A man must be supposed to know the terms of his tenure, and therefore a lessee who violates his lease must be held to a knowledge of its violation. A mortgagor must

know, or ought to know, when he is in default; and, if he does not know when his land is sold, he knows where to examine and inquire; and an inquiry once a year, at the registry, can always enable him to find out when he must redeem or vacate possession. Those cases where a tenant cannot be expected to be able to ascertain the determination of his tenancy without notice, are left to be governed by the provisions requiring such notice.

But a court can not, on any safe principle, even where the rule of law is severe, undertake to change it on any imagined ground of hardship. Still less can it be permissible to change a certain and simple rule of law into one dependent on the fluctuating notions of a jury. If we hold that a mortgagor retaining possession is entitled to notice, under any circumstances short of his being a tenant at will, we have no authority of law for holding that he is not entitled to it at once.

There can be no dispute as to when the rightful holding ceases, and none therefore as to the time when the wrongful holding begins. The expiration of redemption is the only point of time when the tenure changes, and then, if ever, the holding by sufferance commences.

In the case of *Livingston v. Tanner*, 12 *Barb.* 481, where a tenant for the life of another held over innocently, after the life estate had, without his knowledge, been terminated, the Supreme Court, moved by the apparent hardship of the case, after a delay of four months before possession demanded, undertook to bring the party within the statute providing for terminating tenancies at sufferance by notice, although there was another statute which declared such persons trespassers. But this decision was reversed by the unanimous opinion of the Court of Appeals; who held that, while the defendant was undoubtedly a tenant at sufferance by the common law, the fact that a statute made special provision for his case showed that this tenancy was thereby removed from its

common law designation, and required no notice to terminate it. — *Livingston v. Tanner*, 14 *N. Y.* 64. And the delay in bringing suit was regarded as entirely immaterial, so long as the landlord had not given his consent to the new occupation, so as to make it a tenancy at will. It was the tenant's duty to leave, whether the landlord desired personal possession or not.

It seems to me clear that under our statute, whether this be technically a tenancy at sufferance, or any other species of wrongful deforcement, it is not such a tenancy as requires notice to terminate it.

It may also be remarked that even if there had been any doubt about Prior's position under the first foreclosure, and after the delay referred to, there can be none as to his duty on the dismissal of his bill. It is a well settled rule that a mortgagor can file no bill for relief, which will not be regarded as a bill to redeem; and it is equally settled that the dismissal of a bill to redeem operates as a foreclosure. Prior certainly had notice of the dismissal of his own bill; and there has been no laches since. This confirmed the validity of the first foreclosure. And he could not at once rely on it and repudiate it.

I think, however, as before intimated, that his tenancy was one that required no notice to terminate it, and also that the Commissioner's proceedings to oust him cannot be assailed collaterally.

As these points dispose of the case, it is not necessary to refer to the other errors assigned.

MARTIN Ch. J. concurred.

The court being thus equally divided, the judgment below was affirmed.

John J. Beeker and others v. Hastings and others.

Sale of chattels: Caveat Emptor. Complainant being owner of certain real estate in Detroit, sold the same to defendant, and received in payment therefor certain copper stock and defendant's note. Defendant directed complainant before taking the stock, to make inquiries as to its value and not to rely upon his, defendant's, estimation of it. The stock proved worthless. *Held*, that in such a case, where parties stand upon equal terms as to their opportunity of obtaining information concerning the subject matter of sale, each is bound to rely upon his own judgment and means of knowledge.

Heard October 23d. Decided November 8th.

Appeal in Chancery from Wayne Circuit.

The bill in this cause was filed to set aside a conveyance on the ground of fraud and inadequacy of price. It was dismissed in the court below.

The facts are stated in the opinion.

J. P. Whittemore, for complainants.

The bill in this case seeks to rescind the deed given to the defendants as obtained by fraud and through a bargain, "such as no honest or fair person would accept on the one part, and such as no person, not under delusion or imposed upon, would grant on the other; a transaction which shocks the conscience, and produces an exclamation."

Land, which the defendants admit in their answers was worth $1,600 cash, was sold for nothing, and the title warranted to the extent of the consideration of $2,000.

1. The consideration was so inadequate as, from that fact alone, to raise the presumption of fraud.

2. The parties were unequal. The grantees were sharp, shrewd speculators; the grantors, an ignorant German woman and her daughter, a child of sixteen years, and her son, scarcely arrived at full age, whose occupation entirely unfitted him for such a transaction. They were all but slightly acquainted with the English language and entirely ignorant of business transactions.

3. The defendants show that they have abandoned the contract on their part, which, as they claim it to be, required them to proceed and perfect the title at their own expense.

The excuse for so doing, which they allege, i. e., the non-fulfillment by Beeker, on his part, though a good answer to an action of damages on the contract, amounts to an election to rescind the contract for breach of it by the other party. It places the parties where each can recover back what has been paid, or, if nothing has been paid, simply annuls the contract.

The warranty deed can not be allowed to stand on the defendant's own showing. The prayer of the bill to annul it, and that defendants reconvey, so as to place the complainants in the same position they were before its execution, must be granted; and then, if there is any legal or equitable remedy for defendants in the case, after this deed is annulled, let them seek it where it is to be found.

Cleveland Hunt, for defendants.

1. There is no claim made in the bill that the grantors of the deed were idiots — even were they permitted to stultify themselves — nor more ignorant or incompetent than the average of that class of uneducated foreigners; nor does complainants' testimony show that degree of ignorance that unfits men for the transaction of ordinary business. So that no extraordinary case of incapacity being made out, this court will not take the time to weigh any nice questions of capacity or incapacity.

A Court of Equity will not measure the size of people's understandings and capacities, there being no such thing as an equitable incapacity where there is a legal capacity. — 1 *Story Eq. Jur.* § 236 *to* 238; 1 *Johns. Ch.* 351; *Redfield on Wills*, 105 *to* 133.

Capacity will be presumed, and the burden of proof

is on the complainant to show the want of it. — *Redfield on Wills*, 39, 40, *and Note.*

If the question of fraud is disposed of, the adequacy or inadequacy of the price paid for the land is also disposed of. "For courts of Equity as well as courts of Law act upon the ground that every person who is not from his peculiar condition or circumstances under disability, is entitle to dispose of his property in such manner and upon such terms as he chooses, and whether his bargains are wise and discreet, or profitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon." — 1 *Story Eq. Jur.* 244, 5, 6; 1 *Cox.* 383; 5 *Vesey* 845.

Inadequacy of consideration is not then of itself a distinct principle of relief in equity.

The burden lies with the appellant on appeal, and this being a question of fact, and the testimony being conflicting, the appellant must make out a clear case of mistake in the court below. All presumptions are against him. — 1 *Barb. Ch. Pr.* 395; 4 *Eng. L. & E. p.* 3.

CHRISTIANCY J.

The decree of the court below declaring the deed void as to complainant Maria E. Braun, on the ground of her minority, not having been appealed from by her or the defendants, we are only to consider the case so far as it relates to the complainant John J. Beeker.

Complainants and their mother, since deceased, believing themselves to be the owners, and being in possession of a lot on the plat of a part of the Louis Moran farm, undertook, through complainant John J. Beeker, to sell the same. He employed an agent by the name of Gee to make the sale, but having for some time been unable to find a purchaser, he at length introduced said John J. Beeker to defendant Hastings, as a person likely to purchase. Hastings went two or three times to see the property, and the price talked

of to him was two thousand dollars, which from the evidence, we think was its full value with a good title. Before anything was concluded, Hastings got defendant Shepard to join him in the proposed purchase, and Shepard having examined the record, found complainants had no title; the deed from one Damm to the father of complainants, through which they claimed having apparently, by some mistake, entirely unexplained, described lot four instead of lot five, he or his grantor having owned the latter, but not the former. The mistake is in no way explained, nor do the circumstances appear upon which to form any opinion, whether the mistake was one of which a correction could be compelled. The father had purchased in 1850, lived upon it until his death in 1854; and complainants had continued to live thereon until 1856, when the sale to defendants was made; and it does not appear that any person had claimed title against the complainants or their father; but this is all that appears in reference to the title.

Complainants and their mother had never known or suspected any defect of title until informed of it by defendant, and were very naturally somewhat alarmed, and, as it seems became all the more anxious to sell; but defendants, after this discovery would not of course make the purchase and pay the value of the property for so uncertain a title: but (through Hastings) they offered certain copper stocks and their note or agreement to pay three hundred dollars, payable when a good title should be perfected. The result was that the complainants consented to and did receive the copper stock and this note or agreement, and executed to the defendants a deed of the property.

The bill claims the sale to be void on the ground of the fraud and imposition of Hastings, by which, as they allege, they were induced to take the stocks. But in this we are not satisfied that the bill is sustained by

the evidence. The stock, it is true, turned out to be utterly worthless. But whether the title conveyed to defendants was of much greater value, is left quite problematical upon the evidence. The complainant John J. Beeker, who did the business for himself and mother and sister, was doubtless deceived as to the value of the stocks, and probably acted imprudently in making the trade; but though a young and inexperienced German who understood and spoke the English language imperfectly and entirely ignorant of copper stocks and their value, he does not seem to have been particularly deficient in natural capacity. He was doubtless easily imposed upon, and it may be that defendant Hastings neglected the performance of a duty which strict morality may have imposed, when he failed to explain to him all he knew about the uncertain value, or want of value of the stock. Strict morality might have required him even to caution the complainant against parting with anything he considered valuable in exchange for such stock, and we may feel that he has made a bargain which a purely conscientious man ought not to insist upon; yet he stood in no confidential relation to complainants or any of them. They stood upon equal terms, except that one was more intelligent than the other. The one was seeking to sell, and the other to purchase, and each should have relied upon his own judgment or taken such advice as he deemed proper; and there was no sufficient reason why complainants should rely upon the opinions or representations of the other, either as to the value of the title conveyed by the deed on the one side, or that of the copper stock given for it upon the other. Hastings may have recommended the stock to be of greater value than he really believed it to be; yet he did not ask complainant to take it upon his estimation of its value. He handed to him these stocks (with several others which were in fact of some value)

to go and make inquiries of its value for himself. Complainant, it seems, only inquired of his own agent, Gee, who he says merely told him that he could rely upon Hastings, and that Hastings would not cheat him.

It does not appear that this was communicated to Hastings, nor is there any evidence showing combination or concert between him and Gee. It was complainant's own folly to take the stock without further inquiry. He had fair notice that he was to ascertain the value of the stock for himself. And though we may feel that defendants have made a bargain which a conscientious man ought not to insist upon holding, we can discover no ground on which we can set the sale aside for fraud in procuring the complainants to take the stock, without laying down a principle which might disturb many titles, and which would be likely to do more injury in other cases, than we should remedy in this.

But there is another branch of the case of which we have been compelled to take a different view. The deed executed by complainants and their mother on the sale was a warranty deed, containing covenants of seizin in fee, against encumbrances, and warranty, and it purports to have been made for the consideration of two thousand dollars. Yet the answers of the defendants and their own testimony leave no room to doubt that by the understanding and agreement between them and the complainants, the defendants were to take the property at their own risk with the single exception that the amount they might pay to remove the small mortgage of about eighty dollars and the expenses of perfecting the title were to be deducted from the three hundred dollars for which their note or agreement was given. It is entirely clear that this was the understanding of the parties to the transaction, and no satisfactory reason is given, nor do we see how any could be given consistent with the testimony of the defendants themselves for the execution

of the deeds with the covenants mentioned. It is evident the complainants did not understand the deed to contain these covenants, or that they were any of them to be accountable for any defect of title. They understood the English language very imperfectly and complainant, J. J. Beeker, upon whom the others seem to have relied was unable to read writing; they were ignorant of the modes of doing business of this kind. Hastings was an intelligent business man. They did not read the deed, nor does it appear to have been read or explained to them; it was prepared by Hastings himself, and they doubtless executed it in full reliance upon his fidelity and in the belief that he had drawn it in accordance with the understanding. Whether Hastings intended it, or whether it was the result of his mere carelessness, (which we are inclined to believe), the effect was a fraud upon the complainants. And if the bill had been properly drawn, making this a specific ground of complaint, the complainant John J. Beeker might we think upon the evidence have been entitled to a decree for the release of the covenants of seizin and warranty. But the bill is silent as to this fraud or mistake; it is not, therefore, properly in issue, and we cannot therefore grant him this particular relief in this case. The decree of the court below dismissing the bill must be affirmed, with costs, without prejudice to complainants' right to bring a bill for the correction or reformation of the deed, and for a release of the covenants.

The other Justices concurred.

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City of Grand Rapids v. Henry Hughes.

Municipal corporations — Encroachments on streets. Under the laws of Michigan, relating to streets and public ways, obstructions which cumber the open way and render passage and travel more difficult and dangerous, and encroachments which undertake to appropriate a portion of a street, by fences, walls or buildings, have always been carefully distinguished, and different proceedings and penalties provided therefor; the power therefore given to a municipal corporation to impose penalties for cumbering streets, would not warrant imposing them for encroachments upon streets.

Enforcing by-laws by penalties. Where a city charter specifically enumerates various powers which the Common Council may render effectual by penal prosecutions, such enumeration is an implied exclusion of the right to impose penalties in other cases.

Heard October 18th. Decided November 8th.

Error to the Recorder's Court of the City of Grand Rapids.

This was an action to recover a penalty for encroaching upon the public highway in the City of Grand Rapids.

It was brought under the following ordinance adopted by the Common Council of said city, to wit:

"In case any building, fences or other improvement which now is or may hereafter be erected within the City of Grand Rapids, shall extend into or in any manner encroach upon or obstruct any highway, street, alley or public square, the City Superintendent may serve or cause to be served a written notice on the owner or occupant thereof, if residents, and if not residents by posting the same in a conspicuous place, therein specifying the location and extent of such encroachments, and requiring such owner within thirty days, to remove the same from off such highway, street, alley or public square, and if such owner shall not, within the time specified in such notice, remove such obstruction or encroachment, such owner shall be liable to a penalty of ten dollars for every day thereafter, until such encroachment or obstruction shall be removed."

The plea was the general issue. Judgment was rendered in favor of the defendant.

The case involves the power of the Common Council to impose a penalty in such a case.

W. A. Robinson and *C. I. Walker*, for plaintiff in error.

Gray & Thompson, for defendant in error.

1. The Common Council had no right to pass the ordinance under which this action is brought.

a. The declaration implies, that the ordinance in question was adopted under and by virtue of the power conferred upon the Common Council, by clause 8, sec. 10, of the charter (*S. L.* 1857, *p.* 285). This clause relates to the "cumbering" of streets, etc. We claim that "cumbering" and "encroachment" are two entirely different matters, and that the defendant was not guilty of "cumbering."

Section 21, clause 7, of the charter of the city of Detroit, provides for an ordinance to prevent and prohibit the encumbering of public docks, etc. — *Laws of* 1857, *p.* 95. Clause 8, p. 96, prohibits the erection of buildings on them. Clause 13, p. 97, authorizes the Common Council to prohibit and prevent the encumbering of streets, etc. Clause 24, p. 99, provides for an ordinance to prohibit and remove from streets and highways, encroachments by buildings, fences, etc. — 1 *Comp. L. p.*, 366, §§ 1086, 1087, made an evident discrimination between "obstructions" and encroachments.

The same distinction is found in plaintiff's charter. — *Laws of* 1857, *p.* 285, 287.

b. No power is given to pass any ordinance to prevent and remove encroachments. It does not come under sec. 10, p. 284, which defines the general subjects, relative to which the Council may adopt "ordinances, by-laws, and restrictions." Many other sections are found, in which

this power is granted:—*p.* 287, *sec.* 12; *p.* 313, *sec.* 34; *p.* 322, *sec.* 63; *p.* 323, *sec.* 1, 2, 3; *p.* 325, *sec.* 11; *p.* 326, *sec.* 13. But sec. 11, p. 287, does not grant it. The right of the Council to enact this ordinance must come under this section, if any.

Such power cannot be taken by implication, since this is not necessary to enable the Council to carry out the powers which are expressly given it.

Sec. 34, *p.* 313, makes this body, Commissioners of Highways for the city. Their duties and powers are defined by the laws of the state, except so far as increased or restricted by the charter. For these powers and duties, *see* 1 *Comp. L. p.* 340. Their mode of action, in cases of obstructions or encroachments, is laid down on *p.* 366. The Legislature have deemed these provisions ample and sufficient.

c. By § 14, *p.* 288 *Laws of* 1857, the Council have no power to direct a penalty, except where *it has authority by the charter* to pass an ordinance. The authority must therefore be *express*, and cannot be taken by implication. The language is too distinct to admit of any other construction.

COOLEY J.

The exceptions which were argued in this case relate to the exclusion of evidence; but the declaration is before us, and if it appears from that, that the action could not be sustained upon any evidence which could be given under it, it would be idle to pass upon the exceptions.

The action is brought under an ordinance of the city of Grand Rapids, which provides that in case any building, fence or other improvement, which now is or may hereafter be erected within said city, shall extend into or in any manner encroach upon or obstruct any

highway, street, alley or public square, the City Superintendent may serve or cause to be served a written notice on the owner or occupant thereof, if a resident, and if not a resident, by posting the same in a conspicuous place, therein specifying the location and extent of such encroachment, and requiring such owner within thirty days to remove the same, from such street, &c., and if such owner shall not, within the time specified, remove such obstruction or encroachment, he shall be liable to a penalty of ten dollars for every day thereafter, until such obstruction or encroachment shall be removed.

The particular encroachment complained of in this case, is, the enclosing a portion of the Grandville road, so called, with a board and post fence, and the erection of a dwelling house within the enclosure. This appears to have been done in 1851, six years before the ordinance was passed, and before the amended city charter under which the power to pass the ordinance is claimed.

The charter empowers the Common Council of the city to pass ordinances for a great variety of purposes, and to prescribe a penalty not exceeding one hundred dollars for their violation. Among the purposes specified is, "To prevent the cumbering of streets, side-walks, cross-walks, lanes, alleys, bridges, aqueducts, wharves or slips, in any manner whatever."—*Laws* 1857, *p.* 285. From the record it is to be inferred that the Common Council deduce their authority to pass the ordinance in question from this provision. If so, we do not think it can be sustained as applicable to cases like the present.

Our laws have always made a distinction between cumbering or obstructing a public way, and encroaching upon it. The former term has been applied to impediments to travel and passage placed in the open street, and tending to make its use difficult or dangerous; while the latter has embraced the actual enclosure of a portion of the street by fences or walks, or occupation by

buildings. The mode of dealing with the two offenses has almost always been different, and the penalties also. We need only to refer to *Code of* 1827, *p.* 396 – 7, § 25 *and* 26; *Code of* 1833, *p.* 111; *R. S. of* 1838, *p.* 128; *R. S. of* 1846, *p.* 138; *Comp. Laws*, *p.* 366; *Laws of* 1861, *p.* 153. The city charters have made the same distinction, and we are not at liberty to overlook it. An encroachment upon a street may, in one sense, be said to "cumber" it, but as the legislature has never employed the two words as synonymous terms, we cannot hold that a power to impose penalties for cumbering or obstructing the streets will authorize proceeding in the same manner for encroachments.

The charter, however, empowers the Common Council to prevent and remove all encroachments upon the streets; and it may perhaps be thought that this would authorize them to impose penalties as one means of preventing or removing such encroachments. But where the charter specifically enumerates various powers which the council may render effectual by means of penal prosecutions, we think this enumeration is an implied exclusion of the right to impose penalties in other cases. — *Child v. Hudson's Bay Co.* 2 *P. Wms.* 207; *State v. Ferguson*, 33 *N. H.* 424. We think, therefore, that while the legislature has fully authorized the council to impose penalties for obstructions, it has carefully withheld the power in case of encroachments.

Many reasons may have operated upon the legislative mind to induce them to make this distinction. Obstructions which "cumber" a street or walk are commonly the result of carelessness, negligence or mischief, and require prompt remedies; while encroachments usually proceed from a claim of legal right to the land occupied, and the ordinary legal remedies are sufficient for the trial of this right. The merchant who allows his boxes and barrels needlessly to cumber the street after notice to

remove them, may properly be fined for his neglect; but we doubt if any legislature would intentionally authorize ordinances under which one who many years before had erected a building upon what he claimed to be the line of the street, might be ruined by the accumulation of penalties against him at the rate of ten dollars a day if he failed to acquiesce in the public right, and destroy or remove the building when the notice was served upon him. And as the council have the same power to impose continuing penalties of a hundred dollars a day as of any smaller sum, it is easy to see that cases may arise where one acting in perfect good faith may be severely and needlessly punished for the simple assertion of what he believed to be his rights, and under an ordinance which, if not strictly *ex post facto* in the legal sense, is so at least to the common apprehension as well as in its consequences.

Under the general law of the state the penalty for an obstruction to a public highway is twenty-five dollars, while that for an encroachment is limited to fifty cents a day. — *Laws of* 1861 *p.* 153. It is not probable that the legislature supposed they were authorizing the imposition of penalties to two hundred times this amount in the city of Grand Rapids. On the contrary, it is to be inferred that when they had empowered the city authorities to proceed themselves to the removal of encroachments, they had conferred all the power over the subject that they thought was needed in addition to that which the public authorities possessed by means of the ordinary remedies.

As this disposes of the case, we do not discuss the other questions which arise upon the ordinance. The judgment of the Recorder's Court must be affirmed, with costs.

The other Justices concurred.

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Elizabeth Tong, by next friend, v. Percy Marvin and others.

Fraud, when allegations of, sufficient: What facts necessary to state. The bill in this case alleged that the mother of complainant being seized of certain real estate in Michigan, died in 1857, leaving her husband, Proctor Tong, and the complainant (who was then seven years old) her sole heir at law; that a mortgage upon said premises had been foreclosed by advertisement during said year, and the land sold, for about $700; that one Daniel Marvin, father of defendants, desiring to own said land, obtained a quit claim deed thereof from complainant's father, by false and fraudulent representations, and afterwards procured the appointment of his son Lucius Marvin as guardian for complainant, to have her interest in the premises sold; that he then loaned said Lucius sufficient money to redeem said premises from said foreclosure; that said land was afterwards sold at guardian sale and bid off by said Daniel for the sum of $925; the real value being $2,000 and over; and that the acts of said guardian originated with, and were directed by said Daniel Marvin for the purpose of enabling him to become the purchaser of said land below its true value. *Held*,

1. That said allegations, if sustained by evidence, made out a case of legal fraud.

2. Equity must have regard to the effect of false and fraudulent statements, rather than to the person to whom they are made.

3. Where allegations of fraud are stated in a bill, it is not necessary that the facts and circumstances which tend to establish the fraud should be detailed. Where the facts which constitute the fraud are set forth with an averment of the injurious result, the case is sufficiently made by the pleadings, and a detail of the circumstances which tend to establish a dishonest intent in defendant's action is more properly left to the evidence.

Tenancy by the Curtesy, repeal of. The acts of 1844, 1846 and 1855 relative to the protection of the rights of married women, together with the constitutional provision on the same subject, entirely abrogate the existence of prospective tenancy by the curtesy. Every quality and incident that is necessary to constitute such a tenancy is destroyed by the provisions of these acts.

Heard October 19th, 20th. Decided November 8th.

Appeal from Huron Circuit in Chancery.

The bill in this cause was filed by complainant, through her next friend, against her guardian, Lucius Marvin and other defendants, charging fraud in the sale of certain real estate, and praying that the same might be set aside.

The bill also prayed that a certain deed of the premises obtained from her father by the purchaser at a certain guardian sale through fraudulent representations might

be set aside, and the title thereto declared to be vested in her.

Defendants demurred to the bill.

The demurrer was sustained, and the bill dismissed.

The facts necessary to an understanding of the cause appear in the opinion.

Wm. L. Webber for complainant.

1. The deed of Proctor Tong of June 1st, 1857, conveyed no title. He had not an estate by the curtesy in the land.

a. The statute of 1855, for the benefit of married women, in connection with the constitutional provision and other legislation on the subject, has repealed the old statute which gave an estate by the curtesy. The real estate of the wife continues to be hers, and may be disposed of, as if she were unmarried. Under the old statute she could not devise it so as to prevent curtesy. If she may do so now, the old statute is changed in that respect; and there can be no curtesy *initiate* before the death of the wife, nor *consummate* on her death; but her estate descends, in the absence of a will, free from curtesy, the same as her devise would do, if she had made a will. By the former law, as the wife could not sell without her husband's consent, so she could not deprive him of his curtesy, but now it is at her option whether she will convey in her life time or devise the same, and it would be strange indeed, if the estate by the curtesy should depend on the mere accident of will or no will.

b. The mortgage was made April 16th, A. D. 1839, and was due April 16th, A. D. 1842. By the law as it then stood the mortgagee held the title. When in 1845 Timothy L. Howe died, Thaddeus, and after him in 1855, Olive B. his mother inherited a mere right to

redeem; she was not seized of the land, and the mortgage was in full force, and the title remained in the mortgagee until after her death in 1857. To Elizabeth descended a mere right to redeem, to which curtesy could not attach. 2 *Comp. L.* § 2803.

c. If Proctor Tong had an estate by the curtesy, by making the deed to Daniel Marvin, he forfeited his entire estate, and Elizabeth had an immediate right of entry. — 21 *Me.* 372; 1 *Greenlf. Cruise, Tit. V. Chap.* 2, § 31.

2. But even if the deed of Tong did convey a life estate to Marvin, it affords no reason why this bill should be dismissed. It goes only to the extent of the relief. The guardian's deed should be set aside, in order that when the life estate shall cease, the complainant's estate in fee may be clear from any and all incumbrance.

Mitchell & Farrand, for defendants.

1. It appears by the bill, that Proctor Tong, the guardian, had the actual right to the present possession of the land, as tenant by the curtesy; and if so, the complainant has no present right that she can enforce by bill or otherwise. He being tenant by the curtesy, her right must remain in abeyance, until his death; and until then she has no more right with, or control over the land, than a mere stranger, and certainly no possessory right. — *Comp. L.* § 2803 *and* 3291.

The husband, Proctor Tong, being tenant by the curtesy, had a full right to convey, as the bill states he did, his life estate to the ancestors of the defendant. — 2 *Mich.* 93.

Proctor Tong, the tenant by the curtesy, having conveyed his rights to the ancestor of the defendants, neither the complainant or any one else can interfere with their possession, or possessory rights during his life.

He alone can take advantage of any fraud in that conveyance.

2. While the bill assumes fraud, it makes no statement of facts showing fraud, or out of which fraud may be presumed. The mere charge or statement of fraud, or fraudulent intent, without a statement of facts of themselves, showing fraud or fraudulent intent, is not sufficient. There must be something more than assumption or presumption.

The mere allegation that the deed was procured from Proctor Tong, fraudulently, is of no avail, without showing in what the fraud consisted. But even if it was fraudulent, as to him, the complainant cannot take advantage of it.

There is no fraud alleged in procuring the guardianship, and no intent of fraud charged in executing the guardianship. — 3 *Mich.* 531.

COOLEY J.

The demurrer in this case is supposed to be sustainable on two grounds: 1. That the bill, in charging fraud, merely sets forth conclusions, without giving such facts as would warrant the conclusions: 2. That even admitting the case made by the bill to be true, the complainant is not entitled to relief, inasmuch as the outstanding life estate of Proctor Tong, as tenant by the curtesy, has become vested in the defendants by means of the quit claim deed to Daniel Marvin.

The bill, in order to show fraud, recites the following facts: That the mother of complainant, being seized of the title to the land in controversy, died in 1857, leaving surviving her, Proctor Tong her husband, and this complainant, her sole heir at law, both residing in the state of New York; that the premises, which are situate in Huron county, were at that time subject to a mortgage, which was foreclosed by advertisement June 9, 1857, and the land sold for $675 93; that Daniel Marvin was

desirous of becoming the owner of said land, and of depriving complainant thereof, and for that purpose procured an order from the Probate Court of Tuscola county — to which Huron was then attached — appointing his son, Lucius S. Marvin, guardian for complainant; that he then loaned said Lucius the money to redeem the premises from said foreclosure sale; that thereupon said Lucius petitioned the Probate Court for license to sell said lands, representing that complainant had no other property out of which he could be reimbursed said redemption moneys; that license was granted for that purpose, and a sale made August 7, 1858, to said Daniel Marvin for the sum of $925; that a report of sale was made, showing the expenses to have been $204.19, which, together with the redemption moneys, exceeded the sum for which the land was sold; that the premises at that time were worth more than $2,000, and that the proceedings of said Lucius S. Marvin, pretending to act as guardian for complainant, were originated and directed by the said Daniel Marvin for his own benefit, and for the purpose of enabling him, the said Daniel, to become the purchaser of said land at a price much less than its true value, and thus to defraud complainant. The bill also alleges that said Daniel, before he caused such appointment to be made, applied to said Proctor Tong, represented to him that said land was of little value and not worth redeeming from said mortgage, and by means of these and other false and fraudulent representations, procured from him a quit claim deed of said premises, bearing date June 1, 1857. The complainant at this time was seven years of age.

We have no doubt that these allegations, if sustained by the evidence, make out a case of legal fraud. The false representations made to the father, by means of which a release of his supposed interest was obtained, had a direct tendency to induce the natural guardian of

complainant to abandon all care for her interest in the land, and are equivalent, in the situation in which she then was, to false representations made directly to the person to be defrauded, when such person is capable of managing his own affairs. Equity must have regard to the effect of false and fraudulent statements, rather than to the person to whom they are made; and in most cases where a minor of this tender age is defrauded, it is only accomplished by operating upon friends and natural protectors.

But if the original transaction was, as is alleged in the bill, originated and carried through by Daniel Marvin for the purpose of obtaining complainant's land, at an inadequate price, and the guardian was a mere instrument in his hands for that purpose, not acting at all in the interest of complainant, but solely in that of Daniel Marvin, we think a fraud both upon complainant and upon the law has been committed, which requires the intervention of equity. It is not, however, necessary that the facts and circumstances which tend to establish the fraud should be detailed in the bill. Where the facts which constitute the fraud are set forth, with an averment of their injurious result, the case is sufficiently made by the pleadings, and a detail of the circumstances which tend to establish a dishonest intent in defendant's action, is more properly left to the evidence. — *Story Eq. Pl.* § 252 *and cases cited.*

The principal question in the case, however, is whether Proctor Tong, the father of complainant, had an estate by the curtesy which was conveyed to Daniel Marvin by his deed of June 1, 1857. This question depends mainly upon the proper construction of the statutes of 1844, 1846 and 1855, relative to the property and rights of married women, and the constitutional provision on the same subject.

And in approaching this subject we have earnestly endeavored to arrive at the true meaning of the Legislature and of the people in adopting these several provisions, that

we may give effect to their intention if possible. We have not felt ourselves at liberty to question, with any speculations of our own, the wisdom of the policy adopted in this state relative to the rights of married women, and we should feel conscious of usurping powers which properly belong to another department of the government, if, instead of giving effect to a plain declaration of legislative will, we should endeavor to apply arbitrary rules of construction, and thereby put upon the laws a forced and unnatural meaning with a view to making them correspond to some standard of our own, instead of that which has been adopted by the law-making departments.

The control which a husband has over the person and estate of the wife at the common law is so great and so liable to abuse that it has for a long time been the subject of complaint, and of frequent interposition by courts of equity. He had, 1. The control of her person, and the right to appropriate her earnings to his own use; 2. He became by the marriage the owner of such personal estate as she then possessed, and of all that she should thereafter acquire during coverture; 3. He had a right to reduce her choses in action to possession, and to dispose of her chattel interests in lands to his own use; 4. He became vested with her estates of inheritance during the coverture, and if he survived her, and issue capable of inheriting it had been born to them, he had a life estate therein; and 5. In case of their separation, he had the better right to the control and custody of the children of the marriage. The corresponding rights of the wife were, 1. A right to support, and to have her debts before marriage paid by the husband; and 2. A life interest in the one-third part of his estates of inheritance if she survived him. To these equity added, 3. An equity to a reasonable settlement, to be made from the property brought by her to the husband, for the support of herself and her children.—*Udell v. Kenney*, 3 *Cow.* 590; *Van Duzer v. Van Duzer*, 6 *Paige*, 366.

TONG *v.* MARVIN.

The act of March 11, 1844, "To define and protect the rights of married women," made an important change in the rights acquired by the husband by the marriage, without at the same time diminishing his obligations. By this it was provided, "That any estate, real or personal, which may have been acquired by any female before her marriage, either by her own personal industry, or by inheritance, gift, grant or devise, or to which she may at any time hereafter be entitled by inheritance, gift, grant or devise, and the rents, issues, profits and income thereof, shall be and continue the real and personal estate of such female after marriage to the same extent as before marriage, and none of said property shall be liable for the husband's debts or engagements, but such property shall be liable for all the debts of the wife contracted prior to the marriage."

It will be seen that this statute took away entirely all present right of the husband to the property, real or personal, of the wife, and to the rents and profits thereof. It did not, however, interfere with his common law right to the custody and control of her person, and to her earnings, nor did it expressly vest her with power to dispose of her property without his co-operation. Whether it left him to succeed to any rights in it at her decease is another question.

The provisions of the act of 1844 were incorporated in the Revised Statutes of 1846, in a modified form. Section 25, of Chapter 85, embodies the original act, with a proviso added, "that nothing in this section contained shall be construed to authorize any married woman to give, grant or sell any such real or personal property during coverture, without the consent of her husband, except by order of the Judge of Probate, or the proper court of the county; and provided further, that upon a separation between such husband and wife, saving by an adjudication of court, such married woman shall in no

case be authorized to remove any such property from the premises of her husband without his consent."

The next section (26) gave to the Circuit Court of the proper county concurrent jurisdiction with Chancery in cases arising under § 25, and § 27; provided that "If any married woman shall die without disposing of any such real estate, the husband surviving her shall have a life estate therein by the curtesy." That this section was adopted in reference to § 25, and with a view to restraining what would otherwise be its operation, or at least to put at rest any question on that subject, is apparent from the connection. Another section in the statutes of 1846, — *Ch.* 68, § 1 — empowered married women to dispose of real or personal property by will, with the written consent of their husbands, and still another defined curtesy as follows: "When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by the curtesy: *Provided*, that if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy." *Ch.* 66, § 30. This section, in requiring a joint seizure in husband and wife, was less broad than Section 27 of Chapter 85, and would seem to be idle and futile if curtesy was given by that section in all cases where the wife was seized of an estate of inheritance, and the husband survived her.

It will be seen that thus far no power is in terms given to the wife to dispose of her property, or of the issues thereof, except with the consent of the husband, or under the order of some court of competent jurisdiction; and the main purpose of the statutory provisions which protected her in the title, would seem to have

been to preserve the property for the benefit of the family against its being squandered by the husband or seized by his creditors. But the Constitution of 1851 went further, and added to a provision in substance the same as the act of 1844, the words, "*and may be devised or bequeathed by her as if she were unmarried.*" *Art.* 16, § 5.

We come now to the act of 1855, "relative to the rights of married women," *Comp. L.* § 966; which not only embodies this constitutional provision, but in brief and comprehensive words gives to the wife full and absolute control of her real and personal estate, with power to contract, sell, transfer, mortgage, convey, devise and bequeath the same, in the same manner and with the like effect as if she were unmarried. It is difficult to read this statute without coming to the conclusion that it was designed to cover the whole subject embraced in the provisions of sections 25, 26 and 27, of chapter 85, above quoted. We have no doubt such was its purpose. And not only does it totally abrogate all control of the husband over the wife's property, and authorize her to dispose of it without the intervention of any court; but it also fails to re-enact the provisions of section 27, and thereby by implication, as we think, repealed them. *Dash v. Van Kleeck*, 7 *Johns.* 497; *Giddings v. Cox*, 31 *Vt.* 609. And we have now to see whether the general provision on the subject of curtesy above quoted from the Revision of 1846 (*Ch.* 66, § 30,) is consistent with this act of 1855, and the constitutional provision quoted, and can stand with them.

At the common law the incidents to curtesy were, marriage, seizin in the wife of an estate of inheritance, birth of living issue, which by possibility might inherit it, and death of the wife. *Co. Lit.* 29, *b;* 4 *Kent*, 29. The husband's right became initiate the moment the issue was born. The husband and wife were said to be *jointly* seized; *Melvin v. Proprietors, etc.* 16 *Pick.* 161;

Weisinger v. Murphy, 2 *Head*, 674; and this is the idea of our statutes of 1838 (*p.* 265), and of 1846 as above quoted; though the actual *right* for the life of the husband was in him, and might be taken and sold on execution. *Mattocks v. Stearns*, 9 *Vt.* 326; *Roberts v. Whiting*, 16 *Mass.* 186; *Canby's Lessee v. Porter*, 12 *Ohio* 79.

That the common law estate by the curtesy cannot exist in this state under the statutes now in force, is too apparent for argument. But the estate, under the Revised Statutes of 1846, was quite different from that at the common law. It required no birth of issue, and it did not become initiate in the life time of the wife. *Hathon v. Lyon*, 2 *Mich.* 93. But in many of its provisions it was as inconsistent with the constitutional provisions and the act of 1855, as was the estate at the common law.

It required joint seizure in husband and wife, in the right of the wife; which has not existed in this state since the act of 1844, except in those cases where the wife's title had accrued prior to that act, and the husband's right had then become initiate. It gave from the wife's fee a life estate to the husband at her death, while the act of 1855, gives the full power to devise the same, "in the same manner and with the like effect as if she were unmarried."

Its effect was to make the inheritance subject to the "debts, obligations and engagements" of the husband, if he survives her, though the act of 1855, in carefully chosen words, expressly declares that none of her property shall be so liable.

And we should be required to hold, in order to support the statutory estate by the curtesy, that the statute, when it declares that the wife's real estate shall be and remain hers the same as if unmarried, means only that it shall be and remain hers in a qualified and usufructory sense, but subject to have a freehold estate

carved out of it, for the benefit of the husband or his creditors, to the exclusion of her heirs, although, had she remained unmarried, it would have been subject to no such contingency.

And it would also be necessary for us to hold that the words employed by the Legislature of 1855, apparently chosen with skill to carefully exclude any construction that the wife's estate in or control over the land is to be any other or different from what it would have been had she remained single, are notwithstanding to be qualified by some implied understanding which attaches to it certain incidents growing out of the marriage relation.

Great as are the changes made by the act of 1855, it does not take from the husband the right to the joint earnings of himself and his wife, by means of which the accumulations during coverture come exclusively to him. *Glover v. Alcott*, 11 *Mich.* 470. And it expressly exempts him from liability on any contract by the wife in relation to her sole property. These facts are not to be overlooked when we are endeavoring to arrive at the legislative intent.

The purpose of the act of 1855 to protect the family against the consequences of the husband's dishonesty or improvidence, is still more apparent than in the case of the preceding provisions on the same subject. It not only preserved to the wife all her rights in her own property as if she had remained sole, and gave her full power of control and disposition, but it also supplemented the exemption laws by authorizing her to sue in her own name for property of the husband which the statute had made exempt from levy, sale or mortgage by him without her consent. The homestead provisions, with the like intent, avoid any conveyance of the homestead by the husband without the wife's signature. But these exemptions are from the husband's own property; and we should hardly expect to find other provisions in force

at the same time, which, on the death of the wife, would vest a life interest in her own real estate in him, to the exclusion of the children, if any, and without any check upon his power to dispose either of that or of the personal means of support which the statute so carefully protected against his acts during his wife's life time.

The question before us we think is disposed of by the positive and unambiguous terms employed in the statute; but it may be well to refer to the few cases which bear upon it. In *White v. Zane*, 10 *Mich.* 333, which was a suit between the husband on the one side and the wife's administrator on the other, for personal property of the wife left in the husband's possession at her death, this court in effect decided that under the statute the wife's personalty is not simply to "be and remain" her's during her life time, but that the husband's common law interest therein was altogether excluded. Decisions upon kindred questions elsewhere are not uniform, and it is perhaps not important to refer to them except as they relate to the particular estate in question. In *The Junction Railroad Co. v. Harris*, 9 *Ind.* 184, it was held that a statute which declared the wife's real estate her "separate property," free and clear of all claims of the creditors and legal representatives of her husband, as fully as if she had never been married, but which, so far as the case shows, did not in terms authorize her to sell or devise the same, did not cut off an estate by the curtesy which had become initiate, and could not constitutionally be made to do so. The statute, it will be perceived, is quite different from the one we are called upon to construe, and the question was as to its retroactive effect. In *Hurd v. Cass*, 9 *Barb.* 366, arising under a statute very nearly like ours of 1855, though perhaps not quite so comprehensive, Judge Mason, sitting in the Supreme Court at special term, held the estate by the curtesy not affected by the statute. To arrive at this conclusion the old rule was applied, that a statute in dero-

gation of the common law is to be strictly construed; a most excellent rule when rightly applied, but which has often been employed to torture words into expressing a meaning which was not in them. The case of *Hurd v. Cass*, was followed by *Clark v. Clark*, 24 *Barb.* 581, which was also the decision of a single judge at special term. No case in New York has undertaken to consider the question at length, except *Billings v. Baker*, 28 *Barb.* 343, which holds curtesy abolished. In the subsequent case of *Thurber v. Townsend*, 22 *N. Y.* 517, a decision is made by the Court of Appeals which, as we understand it, overrules the two cases of *Hurd v. Cass, and Clark v. Clark supra*, and settles the law of New York in accordance with the views we have expressed.

The present case does not call for any opinion as to the effect of the constitutional provision we have quoted upon estates by the curtesy which had become initiate before the act of 1844, nor as to the state of the law between 1844 and 1855. The descent of the land in question to the wife was in 1855, and her death took place in 1857. We are entirely satisfied that Proctor Tong had no estate by the curtesy in the land, and that on neither point was the demurrer well taken. We think it legally impossible that a woman's estate should remain unaffected by her marriage, and the husband at the same time acquire by the marriage an estate, either vested, initiate or contingent, in it.

The decree of the court below dismissing the bill must be reversed, the demurrer overruled, and the cause remanded with leave to defendants to answer on payment of the costs of this court and ten dollars costs in the court below.

CAMPBELL and CHRISTIANCY JJ. concurred.

MARTIN CH. J. I concur in the result.

Fort Street and Elmwood R. R. Co. v. John Schneider.

Contract, construction. Under an ordinance of the city of Detroit, the complainants contracted "to pave their railway track (on a certain street) and two feet and four inches on either side thereof, at their own expense—if the city should pave said street cotemporaneously with the construction of complainants' railway." The city did so, and having assessed said complainants for the cost of the excavation, as well as the paving, of said portion of said street, it was held that under said ordinance and contract, the complainants were only liable to pay for their proportion of the paving.

Heard November 9th. Decided November 10th.

Appeal from the Wayne Circuit in Chancery.

The bill in this case was filed to restrain the defendant, as City Collector, from collecting a certain assessment made against the complainants, for the expenses of making certain excavations in Croghan street, in the city of Detroit, preparatory to paving the same, and prayed for an injunction.

The complainants were authorized by a city ordinance accepted by them, to construct a railway on Croghan street. By an amendment to that ordinance, also accepted by them, complainants were obligated as follows, to wit:

"If the city of Detroit pave Croghan street cotemporaneously with the laying of the track on said street, said Railway Company shall pave their track on said street, and two feet four inches on either side thereof, at their own expense."

This cotemporaneous paving, the city resolved to do, and did do. The assessment which was made against the complainants embraced an item for grading and excavating, as well as for paving said portion of said street; and the bill was filed to enjoin the collection of that portion of the tax which was for the grading and excavating.

The injunction was refused, and the cause was brought to this court by appeal.

C. I. Walker, for complainant.

Wm. Gray, for defendant.

The Court held, that by the terms of said amended ordinance the obligation to pave, assumed by the complainants, did not include an obligation to excavate with reference to grade, but that the city was to provide for all the work preliminary to the actual paving, and that the injunction should have been granted.

The decree below was reversed, and a perpetual injunction granted in accordance with the prayer of the bill.

Volney A. Ripley v. Ira Davis and another.

Trover: conversion: damages. Where one co-tenant was bound to the other by contract, to deliver and divide joint property at a certain place, but appropriated it to his exclusive use, and under circumstances which rendered a division and delivery in the manner agreed upon impracticable: *Held*, that it amounted to a conversion, and that trover would lie. *Held further*, that in the absence of special circumstances requiring a different measure of damages, it was proper to award to the plaintiff the value of the property at the time of conversion, with interest from that time.

Amendment of pleadings in the Circuit Court, when discretionary. On the trial in the Circuit Court, the defendant applied for leave to interpose the defense of the Statute of Limitations, after having plead the general issue. *Held*, that this was a matter of discretion in the court below, and its denial could not be reviewed by this court.

Heard October 11th and 12th. Decided November 10th.

Case made after judgment from St. Clair Circuit.

This was an action of trover brought to recover the value of two-fifths of a certain quantity of logs cut by defendants on plaintiff's premises, and which said logs were to be boomed at a certain point and divided. Defendants took the logs to a point far beyond the place agreed upon, and also set up a claim on them, under an alleged agreement.

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During the trial, the defendants' counsel objected to a portion of plaintiff's evidence, as it tended to show that the alleged conversion, or at least a part of it, occurred more than six years before the commencement of the suit.

The declaration alleged the conversion as having taken place within the six years.

The court overruled the objection, and also refused permission to defendants to add to their plea, a notice of the statute of limitations.

Judgment was rendered for plaintiff.

Wm. T. Mitchell and *A. B. Maynard*, for plaintiffs.

The proof of conversion was sufficient.

The logs were to be placed in a boom, at Port Huron, and there retained. It was their place of delivery, and where the division was to be made. Any removal from that place was a conversion by the defendants. Ripley frequently demanded his share of the logs, and could not get them, and was met with the reply that he had been credited for them in the defendants' account. This fully implied their absolute use and sale by the defendants, and was of itself a conversion. And it is in proof, by both Leighton and Loughrey, that all the D. T. 6 logs, were taken by them, as defendants' agents, from the boom at Port Huron, and run to defendants' mill at Trenton.

It was a disposition of the property, which put it out of the power of the defendants to deliver it on demand.

This constitutes a conversion. — 3 *Mich.* 139; 33 *Maine*, 347; 20 *Ala.* 212; 21 *Pick.* 559.

Trover lies by one tenant in common, of a personal chattel, against his co-tenant, for the appropriation of the chattel to his exclusive use, when the chattel is of such a nature as to be necessarily destroyed by the use thereof. 3 *Gratt.* 205; 17 *Penn.* 373; 12 *Mich.* 328.

The question as to the application to append the notice of statute of limitations was clearly within the discretion of the court below, and the refusal, if made, is not a subject of review for this court.

B. C. Farrand, E. Hall and *C. A. Kent*, for defendants.

1. There is no evidence of conversion.

It will be admitted that plaintiff and defendants were tenants in common of the saw logs in question. A division was to have been made at Port Huron, but this was never done.

There is no evidence of any sale or any destruction of the logs.

There is some evidence tending to show a demand by plaintiff of his portion, and a refusal on the part of defendants to deliver the same. This is the only evidence of conversion.

The law is settled that, as between tenants in common, this is not sufficient. — 2 *Greenl. Ev.* § 646, *and notes;* 2 *Hilliard on Torts*, 293, *et seq.;* 1 *Chitty on Pl.* 156; 1 *Taunt.* 241; 9 *Wend.* 338; 7 *Id.* 449; 1 *E. D. Smith*, 217; 27 *Conn.* 355; 40 *N. H.* 403; 26 *Ala.* 686; 21 *Penn.* 90; 14 *Ill.* 466.

This Court has qualified this doctrine somewhat in the case of 12 *Mich.* 328. It was there held that one tenant in common of wheat threshed, and in one pile, can recover in trover of his co-tenant for refusing to deliver the portion due and claiming the whole.

This decision does not affect the doctrine we seek to maintain. Saw logs are far from being of the same size and quality. An equitable division must be a work of difficulty. No delivery could have been made by defendants to plaintiff until a division had been made. Plaintiff never asked for such division.

We submit that, under this state of facts, plaintiff is

not entitled to recover. The court below, in giving judgment in his favor, violated a principle of law settled by a concurrence of all of a great number of authorities, and founded on principles necessarily derived from the nature of tenancy in common.

2. Some portion of the evidence tended to show that the alleged conversion, or at least part of it, took place more than six years before the commencement of suit. The declaration alleged the conversion to have taken place within the six years. When the evidence referred to was offered, defendants objected, and when the objection was overruled, asked leave to add to their plea a notice of the statute of limitations. The request was refused.

The court below erred in this refusal, and we ask that defendants now have all the benefits to which such plea would have entitled them. — 21 *Pick.* 404.

3. It is impossible to tell, from the case, by what rule of law the damages were computed; but as plaintiff may contend that he is entitled to the highest price of logs at any time since the alleged conversion, we cite the authorities sustaining the true rule, as we deem it, that the measure of damages is the value of the article at the time of the conversion, and interest. — *Sedg. on Dam.* 505; 13 *Gray*, 313; 26 *Conn.* 389, 483; 29 *Id.* 479; 18 *Md.* 468; 26 *Barb.* 648; 19 *Maine*, 361; 35 *N. H.* 226.

COOLEY J.

We are not satisfied from the evidence in this case that there was an agreement between the parties under which the logs in controversy were to be charged to the plaintiff in account. The weight of evidence is the other way. We will, therefore, proceed to dispose of the legal questions raised.

1. The application of the defendants for leave to interpose the defense of the statute of limitations, after having

pleaded the general issue, was one addressed to the discretion of the court below, and its denial can not be reviewed by this court. While liberality should be exercised by the Circuit Courts in granting amendments for the furtherance of justice, yet as each application must depend upon its own circumstances, and can best be disposed of by the court which has had the case before it from the commencement, the practice has wisely vested such court with a power of final disposition with which we have no inclination to interfere.

2. The proof of conversion by the defendants was ample, and we have no doubt of the right of the plaintiff to maintain the action on well settled principles. The logs were to be boomed at Port Huron, and divided there. Instead of complying with their contract in this particular, the defendants took the logs to Trenton, from whence their return to Port Huron for the purpose of delivery to the plaintiff was impracticable. Moreover, they set up a claim to them as their own exclusively, under a contract of purchase, and assumed to give the plaintiff credit for them on their books. The case, therefore, is not simply one where a tenant in common has excluded the co-tenant from a joint possession, but it is the case of a co-tenant, bound by contract to divide the joint property at a certain place, appropriating it altogether to his own exclusive use, under a claim of exclusive right and under circumstances which render a division and delivery in the manner agreed upon practically impossible. The case is within the principle of *Fiquet v. Allison*, 12 *Mich.* 328, *and Webb v. Mann*, 3 *Id.* 139, and we have no disposition to narrow or limit those decisions in any way. The greater difficulty, which was suggested on the argument, of dividing logs by the quantity over that of dividing wheat, is one of degree only, and can not affect the principle.

3. There is nothing upon this record to show precisely what rule of damages was adopted by the Circuit Judge,

and while we do not feel called upon in this case to say that there is any inflexible rule applicable to all cases of wrongful conversion, we think that where there are no special circumstances which require a different measure of damages to be applied, it is proper to award to the plaintiff the value of the property at the time of conversion, with interest from that time; in other words, to award to him a sum of money which, at the time he is wrongfully deprived of his property, would enable him to procure an equal amount of the same value.—*Kennedy v. Whitwell*, 4 *Pick.* 466; *Sargent v. Franklin Insurance Co.* 8 *Id.* 90; *Pierce v. Benjamin*, 14 *Id.* 356; *Greenfield Bank v. Leavitt*, 17 *Id.* 1; *Johnson v. Sumner*, 1 *Metc.* 172; *Barry v. Bennett*, 7 *Id.* 354; *Fowler v. Gilman*, 13 *Id.* 267; *Watt v. Potter*, 2 *Mason*, 76; *Banks v. Hatton*, 1 *Nott and McCord*, 221; *Lillard v. Whittaker*, 3 *Bibb*, 92; *Sproule v. Ford*, 3 *Lit.* 25; *Outton v. Barnes*, *Lit. Sel. Cas.* 137.

We have applied this rule to the evidence in the case, and testing by it the result arrived at by the Circuit Judge, we are inclined to think his conclusion as near correct as any to be deduced from this record. The defendants had credited the plaintiff with 475,054 feet of logs, got out under the contract in 1855–6. Leighton's testimony shows 261,000 feet got out in 1857–8, of which only 26,463 were credited. While this last amount would be subject to a deduction for loss in running them down, we may fairly offset to this a probability of the evidence, all of which comes from the defendants or their witnesses, not showing the full amount. At any rate, where defendants fail to give account of the quantity obtained, and the plaintiff is obliged to rely upon uncertain oral evidence, it is not proper that legal intendments should be stretched to favor the party in default. We assume, therefore, that the whole amount obtained from the land was 436,054 feet, which is very far below the estimates of those who judged by the

standing timber or the stumps, but probably much nearer correct. Plaintiff would be entitled to two-fifths of this amount, or 174,422 feet. The logs should have been divided during the season of 1858, when their value was about $7.75 per thousand feet. Taking the 1st of January, 1859, as the time of conversion, and the calculation is as follows:

174,422 feet, at $7.75, ...	$1,351 77
Interest to Nov. 18, 1865, (date of judgment)	647 16
The total is	$1,998 93

Or $1.07 less than the estimate of the Circuit Judge. If we fixed upon either an earlier or a later period as the time of conversion, this sum would be slightly increased; as, if fixed earlier, there must be a computation of interest for a longer period, and later, the price of logs advanced.

The judgment must be affirmed, with costs.

MARTIN Ch. J.

After a careful examination of this case, we find no error in the judgment of the Circuit Judge. If any exists, it is rather to the favor of the defendants than adverse. The case is one resting almost entirely upon facts, and a review of them would be of no value. It is sufficient to say that we are satisfied with the judgment, and not inclined to disturb it.

The evidence of conversion is ample. The fact of the logs being run by the defendants from Port Huron to Trenton for their own purposes, and without the knowledge or consent of the plaintiff, sufficiently settles this question. By so doing, the property was placed beyond the reach of the plaintiff. They had disenabled themselves to perform their contract, and thus deprived Ripley of his proportion of the logs. The fact of

removing them from the boom at Port Huron, and running them to defendants' mill, at Trenton, is conclusive of this. There could be no other intention than of conversion. *See Webb v. Mann*, 3 *Mich.* 139; *Weld v. Oliver*, 21 *Pick.* 559; *Lowe v. Miller*, 3 *Grattan*, 205; *Agnew v. Johnson*, 17 *Penn.* 373; *and Fiquet v. Allison*, 12 *Mich.* 328.

The question as to the application to amend the notice, so as to substantially plead the statute of limitations, was one clearly within the discretion of the court below; and over such we have no power.

For myself, protesting, as I have often heretofore, against the jurisdiction of this court over questions of this kind, I concur with my brethren that there is no error in the judgment of the court below, and that it must be affirmed, with costs.

The other Justices concurred in the foregoing opinions.

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William Case v. Wellington R. Burt and others.

Drawee of bill of exchange: Time allowed to examine his accounts before accepting: Protest. Where a drawee of a bill of exchange does not refuse acceptance, but desires time to examine into the state of his accounts before deciding, he is entitled to twenty-four hours for that purpose.

Where the person presenting a bill agreed to present it again, no protest can be made without a new demand.

Heard October 25th to 31st. Decided November 10th.

Case made from Saginaw Circuit.

Plaintiff sued defendants for damages arising out of their failure to deliver lumber under a contract. The defense set up was that plaintiff made default himself, and that subsequently a new contract was entered into materially variant

from the first, which had been superseded by the new arrangement. The court below adopted this view and gave judgment for the defendants. The case was brought into this court for review upon the facts and upon the law, and the court found that there had been no default on the part of the plaintiff, and that no new contract had ever been made. As the case rested mainly upon questions of fact, it has not been thought desirable to report the opinion at length. But one ground whereon defendants relied as proof of a default involved a question of law, and so much of the decision as bears upon this question is therefore appended.

Among other things, it was provided by the contract that upon each shipment of lumber defendants were entitled to draw upon plaintiff who was to accept their paper on time not exceeding ten days' sight. Plaintiff resided at Norwalk, Ohio, and the drafts were usually drawn and negotiated at East Saginaw (where defendants did business), to be presented and paid at Norwalk. Lumber having risen in price, and defendants being anxious (as found by the court) to get rid of the contract, determined to manage, if possible, so as to get plaintiff into a default, and procured a protest of a draft, which they thereupon set up, (among other pretexts decided by the court to have been unfounded), as an excuse for declaring the contract forfeited. The questions of law arising out of this transaction are the only ones presented in the case, and so much of the opinion as explains them is subjoined.

G. V. N. Lothrop and *W. L. Webber*, for plaintiff.

A. S. Gaylord and *C. I. Walker*, for defendants.

CAMPBELL J.

On the second of November a vessel called the Jesse took on board a cargo of lumber for plaintiff. On the 4th Gilbert, the managing man of the defendants, presented

a draft to plaintiff for this cargo, and plaintiff told him to forward it to Norwalk, as he had done the rest. Gilbert said "very well" and deposited it in bank. Herman Gelpeke, who was President of the company, and also an active manager, subsequently, on the same day, directed Gilbert to get the draft from the bank, for the purpose of getting a protest on it. Gilbert did so and procured John J. Wheeler, a notary, to present it to plaintiff that evening after business hours at his hotel. Plaintiff informed the notary that he was not certain as to the correctness of the amount of the draft, and desired to examine the shipping bills, which he could do in the morning, and would then accept the bill if correct. The notary agreed to call again in the morning for that purpose. But that evening Gilbert and Gelpeke went to him, and induced him to protest the draft for non-acceptance, and return it to them. The next day plaintiff was notified that no more lumber would be delivered to him on the contract, and although he made application, none was delivered to him until after November 16th, when defendants allege a new agreement was made, which plaintiff denies. Defendants alleged to plaintiff as a reason for refusal, the non-acceptance of this draft, and the alleged accumulation of lumber on the docks previously, beyond the amount fixed by the contract.

It appears that plaintiff neither refused nor intended to refuse acceptance of the draft of November 4th. The notary left him, promising to present the paper the next morning, when plaintiff would have had an opportunity of learning whether the amount was correct. Where a drawee does not refuse, but merely requires time to examine his accounts he is entitled to twenty-four hours. *Chitty on Bills*, 306, 311. And here, the consent of the notary would preclude a protest until revoked by a new demand, even were there no such rule in existence.

The defendants, therefore, in at once refusing to deliver more lumber, themselves broke their contract.

[Having examined the various questions of fact, and estimated the damages upon the evidence at $14,888.44, the opinion concludes as follows.]

The judgment below must be reversed, and a new judgment entered in this court in favor of plaintiff against defendants for this amount of damages, with costs of both courts.

The other Justices concurred.

The People ex rel. Anson E. Chadwick v. County Officers of St. Clair.

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Board of Supervisors: Removal of County Seat: Delegation of authority: Where the Board of Supervisors, by a vote of two-thirds, resolved that the county seat of St. Clair should be removed to Port Huron, provided "suitable guarantees" should be given within ninety days for the erection of county buildings free of cost to the county, but submitted to the popular vote the simple resolution of removal, without including the proviso, that submission was held void, as the statute contemplates that the people and the Supervisors shall vote on precisely the same questions.—*L.* 1863, *p.* 30.

No subsequent action by less than a two-thirds vote could lawfully modify the first resolution, and accordingly a majority vote referring it to a committee to examine and approve the proposed security, and an approval by such committee before election, could not make the original resolution cease to be conditional.

The Board of Supervisors cannot delegate such powers as the law requires to be submitted to their corporate discretion and judgment.

Heard November 9th. Decided November 10th.

Appeal in Chancery, from St. Clair Circuit.

The bill in this cause was filed to test the legality of certain proceedings for the removal of the county seat from St. Clair to Port Huron, and praying for an injunction.

The Board of Supervisors of St. Clair County, on the 13th day of October, 1865, passed a resolution providing for the removal of the county seat from St. Clair to Port Huron, subject to the following proviso, to wit:

that "suitable guarantees should be given for the erection of the necessary buildings for county purposes, free of cost to the county, and that said guarantees should be given within ninety days from the date of this resolution."

That on the following day, said board by resolution directed that the question of said removal be submitted to the qualified electors of said county, in the manner provided by law, and which was done.

That said board then appointed five of their number as a committee to examine, and, if found satisfactory, to approve the bond required to be given on account of the removal of said county seat.

That no further or other action was had or taken by said Board of Supervisors on the subject of said removal, and no provision was made with respect to the guarantees required by the powers of the first named resolution, relative to the nature or sufficiency of such guarantee, or the receipt or approval of the same, if any should be offered, except the resolution last above set forth; but that subsequently a bond was deposited in the clerk's office of said county, with an endorsement of approval by said persons named in said committee.

That the question of said removal, but not the proviso, having been voted upon by the electors of said county, the board met, and by resolution declared that the county seat be removed from St. Clair to Port Huron, with the records, property, etc.

The bill was demurred to, the demurrer sustained, and the bill dismissed.

A. E. Chadwick for complainant.

(No brief was furnished the reporter.)

Mitchell & Farrand for defendants.

1. The Board of Supervisors have power to designate a place to which a county seat shall be removed,

whenever such removal is proposed by a two-thirds vote of all the members elect, and after a majority of the electors of such county shall have voted in favor of the proposed location, they also have the power to make and establish such county seat at such place. — *Comp. L.* § 352; *Sess. Laws of* 1863, *p.* 30.

In this case a removal was proposed, and a two-thirds majority of the members elect designated Port Huron as the place, but with a proviso that suitable guarantees should be given for the erection of the necessary buildings free of cost to the county, and that such guarantees should be given within ninety days.

The only question raised by the bill of any importance or seriousness, is, whether the Board of Supervisors had the authority to pass such a resolution; whether the proviso makes it something that they were not authorized to pass.

The board had expended all their authority when they by resolution designated the place. The next thing to be done is to obtain a vote by the electors, and the resolution of designation is necessarily a conditional one, that needs confirmation by a vote of the people.

The proviso must be regarded as applicable to the removal, or designed so to be after the submission to the electors; and there is no way in which it could become operative until that time, and whether they could make a proviso that would hinder its being removed after such designation and vote, is an objection that can scarcely be made, especially as the proviso has been complied with. To remove the county seat needs a proposal, a resolution of removal passed by two-thirds, and a vote of a majority of the electors, and then the removal.

These things have taken place in the only order they could, and all is accomplished except the removal; a large majority having voted for the removal.

If the proviso would render nugatory the resolution,

then the proviso should be disregarded. The legislature gave the Board of Supervisors power to designate the place to which the removal shall be made. They do that. They designate, but by their provisos provide for the expenses of constructing. They have power over the whole matter. Do they exceed their authority? If it is thought that such a proviso ought not to be attached to a designation, is there a necessity for regarding it as attached or intended to be, to the designation. Why not consider it as intended to be a condition of removal.

But an unlawful proviso does not necessarily imply an unlawful resolution, any more than an unlawful proviso in an act of the legislature renders the act void. Such provisos do not render acts void. Laws may be unconstitutional in some of their provisions and valid as to the remainder. — *See* 1 *Mich.* 485; 6 *Id.* 266; 11 *Id.* 139; 13 *Id.* 481.

2. The only other objection of the least importance is that the resolution of designation was not passed by a two-thirds majority of the members of the board elect.

The meaning of this must be two-thirds of the members then constituting the board. If otherwise, one section of a county (being more than one-third) could by resignation before any meeting of the board prevent a vote being taken upon the question of removal.

The resolution was actually passed by a two-thirds vote of all the members elected originally by the change of vote of Julius Granger from no to aye.

The resolution had been declared as passed by a two-thirds vote the previous day, and on the second day, at the opening of the session, Julius Granger asks and obtains leave to change his vote from no to aye, which is granted, and this makes up, with the nineteen votes that had before been given, twenty out of twenty-nine members. There was no need of reconsideration of the previous vote

passing the resolution; it is enough that a body having power over the matter allow a change of vote, so that the record shall stand twenty instead of nineteen in favor of the passage of the resolution. A board of supervisors is not a body bound by any particular formula or set rules by which they were bound to reconsider their vote of the previous day and vote on it again — nineteen had voted for it, and on the second day, before any further action was had upon the matter, one more votes for it, making twenty that voted for it. It is enough that the record of the vote expresses the voice of twenty ayes out of twenty-eight or twenty-nine, as the case may be, in favor of the designation and removal.

The direction of the proposition to be submitted to a vote of the people, did not require a two-thirds vote — only the designation required that vote.

3. The approval of the bond was made by three out of five of the committee.

The guarantee required by the resolution was that it should be suitable; not that it should be approved at all by any body. If it had been "suitable," though all the committee had rejected it, it would be all that was required. Suppose the chairman had been a man in interest with the south end of the county. The committee would not have approved of the bond if John Jacob Astor had signed it. Therefore, it was only necessary that suitable guarantee should be given. Who would say that the guarantee was not suitable? There is no allegation in the bill that the bond or guaranty was not "suitable."

4. The Board of Supervisors did subsequently recognize the bond as suitable, by making provisions for and ordering the removal. The whole question then reverts, had the board power to pass the resolution of designation, as it was passed, and did the condition of suitable guarantees render inoperative the vote, by a two-thirds majority,

designating the place to which the removal should be made.

We submit that the whole action of the Board of Supervisors has been in strict compliance with the requirements of the Constitution and of the statutes enacted to carry out those requirements, and that in view of public policy, and the declared will of the electors of St. Clair county, the injunction should not be granted, but that the removal of the county seat should be perfected, and the will of the people, as declared by their vote, accomplished.

CHRISTIANCY J.

This bill is filed by the prosecuting attorney of St. Clair county, upon the relation of two citizens of that county, for the purpose of testing the legality of the proceedings for the removal of the county seat from St. Clair to Port Huron, and asks an injunction to prevent the several defendants from removing their offices to Port Huron.

The case comes before us upon appeal, the bill having been demurred to, and certain facts agreed upon by stipulation, which we shall consider as if stated in the bill.

The propriety of bringing a bill in this form by the prosecuting attorney, in the name of the people, and upon the relation of individuals, has not been questioned in this case; both parties being desirous of obtaining a decision of the case upon the merits. Assuming, therefore, the right to bring the bill in this shape, but without intending to preclude the question in other cases, or to have this assumption drawn into precedent, we shall proceed to consider the merits of the case.

Waiving the question whether the resolution of the board in reference to the removal of the county seat was passed by the requisite majority of the Board of Supervisors, or

whether the statute requires a majority of two-thirds of all the members elected — a point we deem it unnecessary to decide — we are to inquire what was the nature and effect of the resolution, and whether it has been properly carried into effect.

The resolution is not a direct and absolute determination to remove the county seat, or an absolute designation of the place to which it should be removed. It is expressly made subject to the proviso that "suitable guarantees" should be given for the erection of the necessary buildings for county purposes, free of cost to the county, and that said guarantees should be given within ninety days from that date. Being thus conditional, it could not operate as an absolute resolution for removal or for the designation of the place, until the condition specified in the proviso should be fulfilled. This proviso was an essential part of the resolution, and can no more be rejected than any other portion of the resolution. For though the board had power to adopt a resolution for such removal and designation, they had also the power to refuse it absolutely, or until the circumstances, and the inducements offered, should, in their opinion, render it expedient. And a guarantee for the erection of the necessary buildings, without cost to the county, was a very proper subject of consideration, in determining upon the expediency or propriety of the removal — a consideration which in its nature, was calculated to influence the minds of the members in voting for or against the resolution. No one can be authorized to say that it did not have that effect, or that the resolution could have passed by the requisite majority, without the proviso.

The authority to submit the question to the electors rested upon this resolution. Whether it would have been competent to have submitted the question to the vote of the electors in this conditional form, we are not called upon to decide, as there is no pretence that it was

thus submitted. So far as appears from the record, as well as from the statements of the counsel upon the argument, the question of removal actually submitted to the vote of the electors was without any condition whatever. We think it entirely clear that the question submitted to the electors should have been the same as that voted upon by the board. Here the resolution of the board was conditional; the vote of the electors absolute.

But it is urged that this resolution had in the meantime become absolute by the adoption of the resolution of the next day, and the action of the committee under it, which, it is claimed, operated as a performance of the condition prior to the vote by the electors. Whether, if it had thus become absolute in the meantime, this would have cured the defect, we express no opinion, because, in our view, the record does not show that the resolution had become absolute by the performance of the condition. The condition or proviso was somewhat vague and indefinite. It was that "suitable guarantees" should be given. Who was to judge whether any guarantees were suitable. This was clearly a question which this resolution left for the future decision of the board, unless, perhaps, by a subsequent resolution, passed by a two-thirds majority, they had determined to leave its decision to some other person or persons, which possibly might have been competent. For having the power to pass the resolution for a removal, etc., without any condition, they might, perhaps, have passed it subject to the condition that a guarantee should be given, which should be satisfactory to any person they might choose to name. But in such a case, the second resolution would operate thus far to modify the original resolution. But the resolution adopted by the board on the next day, for the purpose of carrying the proviso of the original resolution into effect, appointed the chairman and four other members a committee "to examine and, if found satisfactory, to approve

the bond required to be given on account of the removal of the county seat"—in other words, to determine whether the guarantees that should be offered *were* "suitable." This resolution does not appear to have been passed by a two-thirds majority of the board, and consequently can not have the effect to modify the effect of the original resolution passed, and required to be passed by such two-thirds majority. Hence, this second resolution referring the matter to a committee, must stand, if it can stand at all, as a mere naked delegation of the authority of the board, given by a simple majority. This was not a committee appointed for the mere purpose of inquiring and reporting to the board for its future action, but for the purpose of definitely and finally exercising upon this question the whole power possessed by the board itself. We think it clear that it was incompetent for the board thus to delegate this power; (*Hascall et al. v. Madison University*, 8 *Barb.* 174 *Thompson v. Schermerhorn*, 2 *N. Y.* 92), and that no action which the committee could take under the resolution could determine the question of the sufficiency of the guarantees under the original resolution. Hence, notwithstanding the approval and acceptance of the bond by them, the original resolution remained still conditional as when it was first passed, and that nothing short of a resolution, passed by a two-thirds majority of the board, could decide the question, or dispense with the condition. There was no subsequent action of the board upon the question.

Hence, the resolution for removing the county seat, or designating the place to which it was to be removed, remained conditional at the time the question was submitted to the vote of the electors without any condition. The vote of the electors was, therefore, unauthorized, and of no validity.

The decree of the court below, sustaining the demurrer

and dismissing the bill, must be reversed, and the defendants have leave to answer.

The record must be remitted to the court below for further proceedings.

The other Justices concurred.

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Jabez H. Jackson and others v. Joseph H. Cleveland and others.

Voluntary deed: Resulting trust, when not created. A husband and wife being about to separate, certain property was, at the husband's instance, (in order to avoid questions of dower,) conveyed to a third person by a deed in fee simple, absolute in form, and purporting to be upon a valuable consideration. *Held*, that the absence of consideration in fact was not sufficient without fraud, mistake or contrivance, to raise any resulting trust in favor of the grantor.

A voluntary deed, intentionally and deliberately made, is good against the grantor and his heirs, and can only be avoided by creditors or others having superior equities to the grantee. The rule which has been sometimes applied, raising trusts in favor of the grantor in a voluntary deed, was technical, and could not apply when a valuable consideration was recited, or beneficial uses in favor of the grantee were expressed in the deed.

Where a deed has been recorded, and acted upon by the mutual concurrence of grantor and grantee, that amounts to a delivery, and the fact that it was originally made without the knowledge of the latter, and not manually delivered to him, is of no importance.

Heard April 21st and 24th. Decided November 10th.

Appeal in Chancery from Lenawee Circuit.

This was a bill filed by complainants as heirs at law of Jacob Jackson, deceased, to obtain a re-conveyance of certain premises conveyed by said Jackson, in his life time, to Joseph H. Cleveland, and by him conveyed to other defendants.

The bill was dismissed, on the hearing.

The facts are stated in the opinion.

G. V. N. Lothrop, for complainants.

1. The evidence shows, beyond any fair controversy, that Jackson, for his own convenience, use and benefit, made the deed to Cleveland, and that no gift or benefit to Cleveland was intended. And if oral declarations are admissible, it is clear that it was only long after Jackson's death that Cleveland formed the knavish plan of claiming the land for his own use.

The heirs of Jackson claim that this is a constructive trust, or one by operation of law. It is certainly such, morally. What is there to prevent it from being so regarded and enforced in a court of equity?

By our statute of uses and trusts, "trusts arising or resulting by implication of law," are left as they stood before the statute, except, that in the case of a deed on a consideration paid by a person other than the grantee, no trust arises in favor of the person paying the consideration.—*Comp. L.* § 2636.

So our statute of frauds, requiring interests in land to be created by writing, expressly excepts trusts arising "by implication or operation of law."—*Comp. L.* § 3178.

There is, then, nothing in these statutes which affect this case.

2. From the text books, I think no one would suspect that there was any doubt on this question. They state it as a settled proposition that where a conveyance is wholly voluntary, and the cotemporaneous facts clearly show that no gift or other benefit to the grantee was intended, but only a benefit to the grantor, then a trust to the grantee would be implied.

Some of the writers state the law in stronger terms; but they are all authority for the position as above stated. 1 *Cruise, Dig.* 468, 2 *Am. Ed.*

Judge Story declares it "firmly established."—2 *Story Eq. Jur.* §§ 1198, 1196, 1197, 1200, 1201; 2 *Bl. Com.* 330; *Hill on Trustees*, 163, 3*d Am. Ed.;* 2 *Spences Eq. Jur.* 449.

The current of English cases is the same way.—*Birch v. Blagrave, Amb.* 265, 3 *Swanst.* 585; *Cases cited, Hill on Trustees.* 164 *et. seq.*

And the following cases in this country recognize that such constructive trusts may arise under voluntary conveyances—12 *Pet.* 241; 2 *W. & M.* 168.

In England there are but two cases that can be cited against this doctrine.

The first is not a decision on the point, but a remark of Lord Hardwick, in which, mentioning two cases of resulting trust, he is reported to have said that he knew of no other.—2 *Atk.* 150.

Now, this is, probably, an error of the reporter, for it is incontrovertible that a trust did result on a feoffment without consideration.—2 *Atk.* 256; 2 *Atk.;* 4 *Russ.* 422.

This latter was a case where a son, wishing to raise money on mortgage of property, under advice that his father's better credit would facilitate this, conveyed without consideration to his father. The latter died, leaving a general devise of all his property, and it was held that parol evidence could not be received under the statute of frauds to show a resulting trust.

As to American authorities, see 6 *Paige,* 358; 20 *N. Y.* 39; 29 *N. Hamp.* 129; 36 *Id.* 86; 38 *Id.* 382; 2 *Grant's cases,* 450; 29 *Me.* 410; 2 *Clark* (*Ia.*) 60; 9 *Wis.* 379; 5 *Ohio, St.* 196.

Some of these cases, it will be seen, do not sustain the defendants; others, it is conceded, do. But the latter rest chiefly on the ground, that parol evidence can not be admitted in a court of equity to show that a deed does not express the true and the whole intention of parties. But this is certainly not the general rule, and not the rule in this state.

The references already made show that there is no difficulty in our statutes in establishing constructive or resulting trusts by parol.

Now it is certainly the rule in this state, and generally in a court of equity, that a deed absolute on its face may be shown to have been intended as a mortgage, though this contradicts the very terms of the deed.—12 *Mich.* 314; 1 *John's Ch.* 582; 4 *Seld.* 419; 2 *Fairf.* 9; 4 *Han. & I.* 555; 7 *Leigh*, 566.

These and a multitude of other cases, show that there is no difficulty in a court of equity in showing, by parol, such facts as will raise an implied or constructive trust, even against the express terms of a deed.

If the facts offered in evidence tend to show such a trust as equity will recognize and enforce, then they are admissible, though offered by parol. They can only be excluded by taking the broad ground, that if proven they would not make a case of trust by operation of law.

What we insist upon, is that parol evidence of facts, which will show a trust or confidence in the transactions, may, in cases like the one before the court, be given in evidence. These stand on an entirely different ground from subsequent admissions or declarations.—*Hill on Trustees*, 165, *and cases cited*, 3*d Am. Ed.*

3. The defendant Williamson claims that he was a *bona fide* purchaser without notice. But the complainants held actual possession through Nichols, claiming their equities. Williamson purchased subject to the equities of complainants.—*Walk. Ch.* 79, 260.

And mere notice before actual payment is enough.—*Walk. Ch.* 117; 5 *Mich.* 408; 6 *Id.* 134; 12 *Barb.* 605; 29 *Id.* 505; 2 *Sumn.* 486.

I am aware that this court has held this rule not to apply where the grantor himself remained in possession. 8 *Mich.* 405. But I submit that this limitation is *personal* to the grantor himself. And it does not apply to those in possession claiming by subsequent grant or by descent.

The following authorities, though not directly in point, have a bearing.—4 *Barr.* 173; 6 *Maine*, 256; 7 *Id.* 464.

Brown & Geddes and *C. I. Walker*, for defendants.

1. The recording of a deed raises the presumption of delivery, and the evidence that it was recorded, by the direction of the grantee, is sufficient proof of delivery. — *Greenlf. Cr.* 4, *b. Title* 32, *Chap.* 2, § 64, *note*; 2 *Wash. Real. Prop.* 580, 582.

2. But the main question in the case is, whether Cleveland holds the property in trust for the heirs of Jacob Jackson; that is, any *such* trust as can be enforced under our statute of uses and trusts. — 2 *C. L.* § 2631. It is not a trust in favor of creditors, for there was no fraud, nor are complainants creditors. — 2 *C. L.* § 2638. Nor is it an express trust under the statute. — 2 *C. L.* § 2641. It is not a trust arising or resulting from implication of law, under section 2636. Some of the books assume, in a very general way, that in a case of conveyance *without consideration* to one not related to the grantor, an implied trust for the benefit of the grantor arises, subject to be rebutted by parol. — *Shep. Touch.* 501; 4 *Kent*, 306, *note*; *Cruise's Digest*, *b.* 1, *Title* 12, *Chap.* 1, § 52; *Story's Eq. Jur.* § 1197; 2 *Bouv. Inst.* 327.

This may be true where, *upon the face of the deed*, it is a voluntary one, and there is no use expressed to the grantee, but the rule laid down is criticised in *Hill on Trustees*, (106) 147; 2 *Spence's Eq.* 198.

But whatever may be the rule where the deed purports to be a voluntary one, where the deed is expressed to be for a pecuniary consideration and for the use of the grantee, parol evidence is *not* admissible to prove the want of consideration, or that it was intended to be in trust for the grantor; in other words, there is no implied trust in such cases saved by our statute, and no express one can be raised *by parol*. — *Greenlf. Cruise*, *b.* 4, *Title* 32, *Chap.* 20, § 52, *note*; 4 *Kent's Com.* 306; *Shep. Touch.* 222–3; 2 *Story's Eq. Jur.* § 1199; 2 *Atk.* 150; 6 *Paige*,

535; 20 *N. Y.* 39; 29 *M.* 410; 29 *N. H.* 129; 36 *Id.* 86; 38 *Id.* 382; 2 *Grant's Cases*, 460; 2 *Clark*, 59; 9 *Wis.* 379; 5 *Ohio St.* 194; 4 *Russ.* 422; 6 *Conn.* 284; 14 *Gray*, 278.

Many of these cases are closely analogous to the present in their facts, and identical in the principles involved.

We think the question too well settled to admit of a single doubt.

3. But in this case the title is held by Williamson, who is a *bona fide* purchaser without notice. The occupation of the premises by the heirs of the grantor, at the time of his purchase, was not constructive notice of an adverse claim. — 8 *Mich.* 405.

A. L. Millerd, on the same side.

1. The facts, even taking them as set out in the bill, do not create a trust. In other words, the trust cannot be made out by parol. By the statute of frauds, no trust in lands can be created or declared, unless by act or operation of law, or by a deed in writing. — 2 *Comp. L.* § 3177. And by chapter 63 of the Revised Statutes of 1864, uses and trusts are abolished, with the exception of such trusts as arise or result by implication of law. — *Id.* §§ 2631, 2636.

As there is no express trust in this case, and no writing, creating or evidencing a trust, is there a trust arising or resulting by implication of law?

See the enumeration of the classes of cases in which the law raises or implies a trust, by Judge Lomax. — *Tiffany & Bullard's Trusts and Trustees*, 22.

If the case at bar comes under either of these classes, it is the third — *i. e.*, "where a conveyance of land is made without any consideration or declaration of the use." See, also, the enumeration of cases of implied trusts, by Judge Story. — 2 *Story's Eq. Jur.* §§ 1195, 1197, 1199.

But here there is a valuable consideration expressed in the deed, and the *habendum* is to *the use of the grantee*,

his heirs and assigns. Parol proof cannot be admitted in such a case to establish a trust in opposition to the express terms of the deed. — *Tiffany & Hurd's Trusts*, 41, 42; 6 *Barb. S. C.* 99; 1 *Paige*, 494; 2 *Story's Eq. Jur.* § 1199.

But the complainants cannot have a decree declaring a trust in this case, for another reason. It would be entirely inconsistent with the case made by their bill. It charges that there was no delivery of the deed, and consequently no title passed to Cleveland, but that the claim made by him is a cloud on the title of the complainants, which they ask to have removed. It is a bill to quiet the title.

On such a bill they can not have an entirely different relief, based on a different state of facts. They can not now abandon the case made by the bill, and claim that the deed was delivered and the title did pass. — 6 *Barb. S. C.* 99.

CAMPBELL J.

Complainants file their bill as heirs at law of Jacob Jackson, deceased, to obtain a reconveyance of certain lands conveyed by Jackson and wife to Joseph H. Cleveland, and by him subsequently conveyed to defendant, James H. Williams, who gave back a purchase money mortgage which, with the negotiable promissory note accompanying the same, was assigned before maturity to the other defendants, Wheeler & Bros. The bill claims that the deed was made under a separation arrangement between Jackson and his wife, and without any communication with Cleveland, upon the expectation that Cleveland would deal fairly and honorably with him, and follow his directions in regard to disposing of the land; and that it was never actually delivered to Cleveland, but was, some time after its execution, recorded upon the occasion of selling a parcel, which was conveyed by Cleveland, at Jackson's request — the latter, as alleged, receiving the

money. It is also claimed that Jackson remained in possession until his death.

Relief was based, by the argument, upon the alleged non-delivery of the deed, and upon the ground that the transaction raised a resulting trust in Jackson, which has descended to his heirs. It is not claimed that any contract was ever made between the parties, and no written declaration of trust is set up.

There is no foundation for the claim that the deed was not delivered. Whether Cleveland or Jackson left it for record is not very material, for it was recorded with their concurrence, and Cleveland assumed to convey the land which was sold at the time of the record, as owner under the deed. The only question involved, so far as he is concerned, arises upon the operation of the deed as involving or not involving a trust in favor of Jackson. The rights of the other defendants rest upon a further claim of being *bona fide* purchasers.

Before considering the legal questions, it may be desirable to understand the facts. It is shown that Jackson and his wife were about separating, and that it was arranged between them, on a sufficient pecuniary consideration, that she should release her dower in her husband's lands. It was, upon consultation, suggested by some person among the counsel, that the property might be deeded to some third person, and Cleveland was fixed upon, and the deed executed without consulting him. Two witnesses are sworn upon this transaction, and it does not appear from their testimony that there was anything said at the time, or subsequently, about what was expected to be the nature of Cleveland's holding. There is no reason to believe that there was any agreement on the subject, and Jackson evidently relied upon Cleveland to do what was to be done, if anything, without making specific terms with him. There is no admission of Cleveland that any one had rights which could be enforced against him, but he has offered to

convey the property upon the terms of making provision for an illegitimate child of Jackson's, which the heirs refused to accept.

The case stands upon the simple question whether such a deed, because made without any consideration in fact, involves a resulting trust in favor of the grantor. This deed contains a recital of consideration, and declares the uses in the ordinary form in favor of the grantee, his heirs and assigns in fee. It is in the form which would have been used had the land been bought and paid for, and it is designed upon its face to represent the grantee as an ordinary purchaser. The object, in fact, was to vest in him an indefeasible legal estate, whatever may have been the equities. And the intention to do this was not left subject to revocation, as the recording of the deed was made with an express purpose of having Cleveland enabled to convey, as he did convey to the first person who became a purchaser of a portion of the estate. The equity, therefore, which is relied on in this cause, depends upon the establishment of a principle that a voluntary deed, where no consideration, in fact, passes to the grantor, is subject to a trust in his favor, and no beneficial title vests in the grantee.

This claim is not sustained by any authority. A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off — as creditors and the like. The only case approaching it is that where an equity is raised against a grantee in favor of the person who paid the purchase money. This trust is now abolished by our statutes, where the person paying the money has consented to the deed being thus made. And it could always be rebutted by showing that the land was intended to vest

beneficially. — *Philips v. Crammond*, 2 *Wash. C. C. R.* 441, 445–6; *Benbow v. Townsend*, 1 *Mylne & K.* 506; *Maddison v. Andrew*, 1 *Ves. Sen.* 58. And in *Delane v. Delane*, 4 *Bro. P. C.* 258, it was held that a person paying purchase money, and allowing the deed to be made to another, precluded himself from setting up any such trust by holding such person out as the real owner, and witnessing a lease made by him as such. Upon this principle the action of Jacob Jackson, in procuring Cleveland to deed the parcel sold, would have rebutted such a trust, had this been the case of a purchase by one person in the name of another, and had the statute left such trusts to be enforced. The presumed intention to claim the title is rebutted by acquiescence in the assertion of ownership.

This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these. — *Young v. Peachy*, 2 *Atk.* 256; *Lloyd v. Spillet*, 2 *Id.* 148; *Leman v. Whitley*, 4 *Russ.* 423; *Sturtevant v. Sturtevant*, 20 *N. Y.* 39.

There is a class of cases which were referred to upon the argument, which depend upon the common law rule that a feoffment without consideration, and which declared no uses, created a resulting use to the grantor — or, in other words, was practically no conveyance. But this doctrine has been held to be merely technical at law and in equity, and not at all dependent upon any question of consideration. It rests upon the principles underlying the second great class of resulting trusts, where a trust results in the residue of all estates after the uses or trusts upon which they are conveyed are exhausted. And accordingly, either the mention of a consideration, although nominal, or the declaration of uses, will prevent any trust resulting, and confirm the title in the feoffee. — *Lloyd v. Spillet*, 2 *Atk.* 148; *Saund. on Uses and Trusts*, 334–5; 2 *Fonblanque's Equity*, 133; 1 *Spence Eq.* 449, 450, 451, and

cases cited. A court of chancery has never ventured against the expressed will of the donor, appearing on the face of the deed, to "take the use from the donee, and give it back to the donor. *In other words, uses annexed to a perfect gift, however gratuitous, were enforced.*" — 1 *Spence*, 450.

We have found no authority which would justify us in raising a trust in the present case. Jackson saw fit to leave Cleveland untrammeled by any obligation. Whether he has abused confidence, as there is great reason to believe, or whether he was, as he claims, made a beneficiary to cut off others, is not material.

The other questions need not, therefore, be discussed. The bill was properly dismissed, and the decree should be affirmed, with costs.

MARTIN and CHRISTIANCY JJ. concurred.

COOLEY J. did not sit in this case.

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John Woodward v. Stephen Clark and others.

Chancery practice: Party, amendments. Surrender of contract, effect of. Possession, constructive notice. One Woodward made a contract with Clark, in 1862, for the purchase of four tracts of land, to be paid in instalments. In 1863 he made an agreement with Fisher and Corning by which said premises were to be divided: Woodward taking two lots, and Fisher and Corning each one. To effect this, Woodward assigned his contract to Fisher, with the proviso that he would not assign it without his consent, and Fisher gave him back a contract to deed the two lots on his making the proportionate payment, and also Corning a similiar contract for his. Fisher soon after made an arrangement with Clark by which the original contract was surrendered up and cancelled, and Clark then sold Woodward's two lots to Bradley and Sprague: Woodward being in possession at the time. *Held*,

1. That as Woodward must claim his rights through his contract with Fisher, the latter was a necessary party to the bill, but that the bill should not have been dismissed on that ground, where only a general demurrer was interposed, but that complainant should have had leave to amend.

2. That when Clark took from Fisher a surrender of his contract, he took it subject to all the obligations which Fisher had assumed, and was consequently bound to perform Fisher's contracts with Woodward and Corning, and Woodward was entitled to a decree declaring his rights under the Fisher contract, unaffected by the surrender, and for an injunction as prayed.

3. That Bradley and Sprague having made their purchases while complainant was in possession, were constructively notified of his rights, and can not stand in any better position than Clark did.

Heard November 8th. Decided November 10th.

Appeal from Allegan Circuit in Chancery.

This was a bill for specific performance and injunction. Defendants demurred to the bill for want of equity, and on the hearing it was dismissed. The facts are stated in the opinion.

Theodore Romeyn, for appellant.

It appears from the averments of the bill in this case (admitted to be true by the demurrer,) that the complainant and his assigns have complied with the agreement made with Clark, so that, as between them, if he had retained the contract, there would have been no ground for forfeiture, or for refusing relief.

What are the complainant's rights in equity, in view of the present facts?

1. When the contract had been executed, the vendor became in equity a trustee of the lands for the purchaser, and the vendee became a trustee of the purchase money for the vendor.

2. The purchaser might enter into a sub-contract for the disposition of his equitable interest therein; and, upon such an agreement to sell the same, would become a trustee thereof for the person with whom he should so contract, who would thereby acquire a right to the performance thereof, and to call on the original vendor.

Such interest of the purchaser is devisable, and descends to his heirs if he dies intestate. — *Jeremy's Eq.* 446, 447.

3. The assignment of this contract to Fisher, of June

1st, 1863, and the taking from Fisher of a contract for the sale back to Woodward of $149\frac{66}{100}$ acres, was in fact and in law but the assignment to Fisher of a part interest in the original agreement, with a reservation of the residue to the complainant.

Such was the manifest intention of the parties, and the reason for the form of the securities is disclosed by the bill.

The contract was assigned to Fisher on his request, and for his security and accommodation. And he agreed to let Woodward have the latter's retained share, on exactly the same terms as to price and time of payment as in the original contract.

4. Of this state of things, Clark had legal notice. The assignment of the contract to Fisher provided that it should not be re-assigned without Woodward's written permission; thus declaring on its face that Woodward retained an interest.

Clark, by taking such assignment without such assent, was put on inquiry, and chargeable with notice. Besides, the continued possession of Woodward was notice.

Sprague and Bradley were chargeable with notice in like manner.

5. By the assignment to Clark, Fisher divested himself of all interest in the matter; if the complainant elected not to look to him, and Clark became subrogated to Fisher's rights, and subject to his liabilities.

His original position, as trustee for Woodward, remains to the extent of Woodward's remaining interest. As to that portion of Woodward's interest, assigned to Fisher, it may be considered extinguished. At all events, it is not involved in this suit.

6. Fisher is not necessarily a party to this suit. No decree is sought against him.

It might have been well enough to make him a party;

but he is not a necessary party, and the demurrer was general, and not for want of parties.

Clark has taken his place, and, with full notice, has succeeded to Fisher's rights and liabilities.

We ask no relief against Fisher, but only against Clark, and the subsequent assigns of the latter. — *Story's Eq. Pl.* § 238; 3 *Paige*, 466.

G. V. N. Lothrop, for defendant.

1. The bill of complaint is premature. The complainant has not performed, nor offered complete present performance. He avows intention of future performance, and wants a decree that after performance, some years hence, defendants may be decreed to convey.

To claim a specific performance, complainant must show a present right to it. A contingent right, depending on acts future and altogether uncertain, will not do to sustain specific performance.

He does not show a present title. — *Story's Eq. Pl.* § 23; 1 *Daniell Ch. Pr.* 363.

2. But it is quite clear that complainant has no color of right or interest in any of the lands except those for which he holds Fisher's sub-contract. By his assignment he put all the legal right under the original contract into Fisher. Fisher then sold complainant a part of the lands, sold another parcel to Corning, and kept the residue himself.

Now, clearly complainant has no interest in the Corning parcel, nor in that which Fisher kept. If complainant has any equities, they are limited to the lands which are described in his contract from Fisher. Hence he has no right to call for a conveyance of the other parcels.

A specific performance is, of course, impracticable. — 2 *Story Eq. Jur.* §§ 769, 771.

Besides, there is no charge in the bill that Clark, when Fisher surrendered the contract, knew that complainant

claimed any interest. His possession was no notice, for Clark knew that this possession was under the contract which complainant had sold and assigned. — 8 *Mich.* 403.

3. Without going further, it is clear that Fisher had a right to release to Clark all his interest in that portion of the lands which complainant had turned over to him (Fisher) for his own.

As to this, Clark had put it out of his own power to set up any claim or title to. After his assignment of the original contract, he had no sort of right or equity to that part of the land.

How now can it be pretended that he can demand a decree which will vest this land in him? He shows that by his voluntary and deliberate act he had alienated it.

By this act he gave up his right of ownership in the original contract, and all right to enforce it. He can not enforce it as a whole; and as there is no way of apportioning it without the consent of the other party, he has lost all right to a specific performance.

There is no way by which a substantial performance can be devised. In one word, by his own acts, complainant has put himself where he cannot claim this peculiar remedy of equity.

4. If the bill were not without equity, yet it would be fatally defective for want of parties. Corning is interested, and he is not here. And Fisher, too, by his contract relations, is entitled to be heard. He, also, is not a party.

COOLEY J.

The facts in this case, as shown by the bill, may be briefly stated as follows:

On or about the first day of July, 1862, the defendant, Clark, entered into a contract with complainant to convey to him four half-quarter sections of land in Allegan and Barry counties, for the price of $2,012.79, to be paid in four annual instalments, the first payable Nov. 1, 1864,

with annual interest; the complainant paying all the taxes after 1861, and breaking up and fencing fifty acres each year. Complainant moved upon one parcel of the land, where he still remains. About the first of June, 1863, complainant assigned this contract to John L. Fisher, but with a provision in the instrument of assignment that Fisher should not sell or dispose of the contract without the consent of complainant, in writing. At the same time, Fisher gave back to complainant a contract of sale of two of the eighty acre lots, and made a similar contract with Milo N. Corning for a sale to him of another of said lots. These two contracts, together with the assignment, were intended as a division of these lands among complainant, Fisher and Corning; the title to be taken accordingly after they jointly performed the original contract by making ratable payments. The breaking up and fencing to be done under the original contract, in the season of 1863, was done on the parcel of land which, by this division, was assigned to Fisher. In the fall of that year Fisher moved off from the land, and afterwards, by some arrangement with Clark, surrendered up to him the original contract, and Clark deeded to Bradley one of the two lots assigned to complainant in said division, and gave to Sprague a contract of sale for the other.

Complainant then filed his bill, setting forth these facts, and also that he had paid all the taxes for the year 1862 upon the aforesaid lands, and a part of those for 1863, and intends to pay the balance thereof before the month of October, 1864, when the lands would be liable to sale for non-payment: and averring, also, a wish and intention to fulfill the first contract with Clark. He prays that Clark may be decreed to convey to complainant "the aforesaid parcels of land," upon and after the performance by the complainant of all the acts and conditions by him to be done and fulfilled by said first contract; that Bradley and Sprague may be decreed to release to

him, and that all the defendants may be enjoined from entering into the possession of, or in any way occupying or controlling "the aforesaid parcels of land," and from selling, mortgaging, or in any way incumbering or disposing of the same; and for other and further relief.

To this bill there was a general demurrer for want of equity, and the court below dismissed it, on the grounds, *first*, of defect of parties, and *second*, that complainant having assigned the contract to Fisher, had lost all right to enforce it against Clark, and had a remedy against Fisher only.

That Fisher was a necessary party defendant to this bill is quite manifest. The rights of complainant now depend upon his contract from Fisher, and are enforcible against Clark, if at all, on the ground that he has succeeded, by assignment, to the interest possessed by Fisher at the time the contract was given. Fisher occupies the position of assignor of both parties; and the bill being filed to enforce rights under a contract which contains personal covenants on both sides, Fisher is a necessary party, inasmuch as his rights will necessarily be affected by the decree.

But it is not usual, nor do we think it proper, for the Court of Chancery to dismiss a bill for want of parties defendant, without allowing complainant leave to amend when the bill is not demurred to upon that ground, and the defect is only pointed out on the argument. Where amendment is not of right under the rules, the granting of leave to amend is usually a matter of discretion; but it is so much a matter of course in a case of this description, and so manifestly just and proper, that we cannot suppose it would have been denied, and the bill dismissed on this ground alone, had the court been satisfied that an amendment would have been of any avail. And if the bill makes a case warranting relief, we think the decree should be reversed, and the cause remanded, to give opportunity for the amendment.

The Circuit Judge held that complainant was not entitled to relief, because he had assigned the original contract to Fisher. But he seems to have overlooked the fact that Fisher had given back to complainant a contract of sale of two of the lots, and had afterwards transferred his own interest in these lots to Clark, which the latter must have received burdened with Fisher's obligations. — *Converse v. Blumrick*, 14 *Mich.* 109. Under the arrangement made between complainant, Fisher and Corning, each of them retained an interest in the original contract; Fisher being the medium through which the title was to be conveyed from Clark to the other two, when they had made their proportionate payments. Whoever should receive from Fisher a transfer of the contract, would be bound to the others for the performance of his undertakings; and Clark, on obtaining a surrender of the contract from Fisher, stood in no different light from any other assignee, except as he had it in his power to perform Fisher's agreements without first compelling another person to deed to him. When, therefore, Fisher had surrendered the contract to Clark, the position of the several parties was as follows: Clark, as assignee of Fisher's rights in the original contract, was bound specifically to perform Fisher's contract with complainant for the two eighties; or, what would come to the same thing, to specifically perform the original contract so far as those two lots were concerned; and he was under a like obligation to Corning as to the lot assigned to him. As to the fourth lot, the original contract must be considered as cancelled by the surrender.

The bill which has been filed in this case is somewhat ambiguous in its prayer for relief, and it is not quite clear whether the pleader considered himself entitled to relief by a performance of the original contract, or only in respect to the two lots sub-contracted by Fisher. The first he could not claim; but there is no reason

apparent in the bill why he can not have the second. There can not be specific performance at the present time, because the period for performance has not yet arrived; but complainant is entitled to have protection against such acts of the parties as might wrongfully deprive him of all remedy.

There can be no claim that if the allegations of the bill are true, all the defendants in this case are not chargeable with notice of complainant's equities. He was in possession of the land; which, of itself, was notice. The case of *Bloomer v. Henderson*, 8 *Mich.* 403, which holds that possession of lands is not notice of a claim of right in opposition to the party's own deed, has no application to the present case, since the assignment by complainant to Fisher of itself contained a notification to whoever should become assignee of Fisher's rights, that complainant still retained some interest; and no one, under the circumstances, could become a purchaser from Clark without constructive notice of complainant's equities. If the complainant should be able to substantiate at the final hearing the case made by his bill, he will be entitled to a decree that Clark received a surrender of the contract subject to the performance of Fisher's contract with complainant, and for an injunction restraining the defendants from disturbing his possession so long as he is not in default, and from transferring or incumbering the title, except subject to his rights under the contract.

The decree of the court below must be reversed, and the cause remanded with leave to complainant to amend.

Neither party to recover costs against the other.

The other Justices concurred.

Uri Raymond v. Samuel Hinkson and another.

Circuit Courts: Jurisdiction in actions ex contractu. In a suit commenced by attachment, the declaration set forth a justice's judgment amounting with interest to less than $100, and contained no other counts and no *ad damnum* clause. *Held*, inasmuch as the Constitution gives to Justices of the Peace exclusive jurisdiction in suits arising *ex contractu*, where the amount claimed is less than $100, that the Circuit Court had no jurisdiction of the cause, and the judgment was void.

Heard November 8th. Decided November 10th.

Appeal from Sanilac Circuit in Chancery.

The bill in this cause was filed by an execution creditor, who had purchased lands at sheriff's sale, to avoid a deed alleged to have been executed to defraud creditors.

A decree was rendered in favor of complainant.

The facts are stated in the opinion.

Mitchell & Chadwick, for complainant and appellee.

The want of the *ad damnum* clause, in the declaration, did not affect the validity of the judgment, as, if it was a defect, it is cured by judgment under the statute of Jeofails. The declaration could have been amended by supplying the defect at any time before judgment, and if so, the judgment would not have been set aside, even on error, for that reason.

But we insist that the *ad damnum* clause is immaterial, and may be omitted, and the declaration would not be demurrable for want of it, except as a matter of mere technical form.

But it is insisted that the *ad damnum* clause was necessary to give the court jurisdiction; we say the court obtained jurisdiction by the writ and affidavit, and if they showed an amount claimed, within the jurisdiction of the court, then the failure to state the same in the declaration is mere irregularity, and good by intendment. — 3 *Mich.* 466.

J. C. Wyllis, for defendants and appellants.

The judgment in the attachment proceeding is void, for the reason that the plaintiffs' declaration claims but $72.67, and of this claim Justice Courts have *exclusive* jurisdiction under the Constitution. *Article* 6, *section* 18. See, also, 2 *Comp. Laws*, §§ 3418, 3463.

CAMPBELL, J.

The bill in this cause was filed by an execution creditor, who had purchased lands at sheriff's sale, to avoid a deed alleged to have been executed to defraud creditors.

The suit on which execution issued was commenced by attachment. The declaration set forth no cause of action but a justice's judgment, and did not contain any common counts nor any *ad damnum* clause. The defendant, Samuel Hinkson, was personally served with the writ, but did not appear. The judgment sued on, with interest, was less than one hundred dollars, as set forth in the declaration, at the time of commencing suit.

The Constitution gives to Justices of the Peace exclusive jurisdiction in suits *ex contractu* up to one hundred dollars. As the cause of action, and the amount claimed must be set up in the declaration, it follows, as a matter of course, that when that shows less than one hundred dollars to be claimed, it shows that the Circuit Court has no jurisdiction. No presumption can be raised in favor of a plaintiff against his own express allegations.

It follows that the judgment rendered upon this declaration was void, as the court had no jurisdiction over the cause. The other questions become of no importance. The decree below must be reversed, and the bill must be dismissed, with the costs of both courts.

The other Justices concurred.

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Rebecca A. McKee v. John Owen and others.

Common carriers of passengers: Liability for money stolen from passenger in room.

Plaintiff took passage on the steamer of the defendants, and paid her fare, which included her board on the passage, a stateroom and lodging. She was assigned to the room by the proper officer of the boat; and another lady, a stranger to the plaintiff, was afterwards also assigned to the same room. Plaintiff, when she retired to bed, left her dress, in the pocket of which was her portemonnaie, with some personal jewelry and money for her traveling expenses, on an upper unoccupied berth. During the night, while the plaintiff was asleep, the money and jewelry were claimed to have been stolen, but whether by some one from without, or by the other lady within, did not conclusively appear, though the evidence tended to show that it was stolen from without, through a window, which the steward of the boat knew to be broken.

Whether the defendants were liable for the property if stolen, *Quaere?* The court being equally divided in opinion.

CHRISTIANCY J., COOLEY J. concurring, holding the defendants liable as carriers to the same extent as an innkeeper would have been for a similar loss by a guest occupying a room at his inn.

CAMPBELL J., the Ch. J. concurring, denying the liability.

The respective liabilities of carriers and innkeepers fully discussed.

Error to Wayne Circuit.

This was an action brought by plaintiff to recover of the proprietors of the steamboat "City of Cleveland" the value of certain personal property, alleged to have been stolen from her stateroom during a trip from Cleveland to Detroit. It appeared from the evidence that plaintiff took a cabin passage on defendants' boat from Cleveland to Detroit, and paid her fare.

She was assigned to a stateroom about 8 o'clock in the evening; whereupon she went into it, left some of her apparel there, and came out and locked the door.

Soon after, a lady passenger, unknown to the plaintiff, was also assigned to the same stateroom.

The plaintiff, before retiring, called the attention of the stewardess to a broken window, which looked out on the deck. The stewardess then placed a pillow in the broken part.

There were two berths in the stateroom. The foot of

the upper one could be reached through the window from the outside.

The plaintiff undressed, rolled up her dress — in the pocket of which was her portemonnaie, containing $31.76, and a gold chain, worth $20 — and placed it on the upper berth, near the foot; the stranger sleeping on the inner side of the bed.

Plaintiff, on being awakened during the night, by the wind blowing through the window, arose, found the pillow out of the window, and her dress unrolled and upon the floor. On moving the curtain, her portemonnaie fell from the edge of the upper berth, and was empty; money and chain being gone.

Plaintiff testified that the stranger could not have taken it without disturbing her.

On the part of the defendants, there was evidence given, tending to show that the boat had a full and competent crew, and that a proper watch was kept during the night; and that the freight was so piled against the window that no person could have committed the theft through the window without detection.

At the close of the trial, the counsel for the plaintiff requested the court to charge the jury as follows:

"1st. The defendants are common carriers, and are liable without any proof of negligence, and if the jury find that plaintiff took passage and paid her fare, and that fare included a stateroom, and plaintiff's money was stolen from the stateroom, where she had deposited it by placing it off from her person, in her own dress pocket (her dress being off during the passage), while off her person it is immaterial whether stolen by a person without or within the stateroom, and plaintiff may recover.

2d. Common carriers are liable for the loss of all money carried by the traveler for necessary or reasonable expenses of the journey, and if they find this amount was

reasonable or necessary, and that it was stolen from the stateroom, she can recover.

3d. The purchase of a ticket for the passage, and the assignment of a stateroom to the plaintiff, was a notification to the person in charge of the boat of the intention of plaintiff to take passage, and this was a constructive delivery to and acceptance by defendants of the property of plaintiff, and plaintiff can recover."

The court refused to charge either of these points, and to such refusal the plaintiff's counsel then and there excepted.

The court then charged the jury, as follows:

"1st. That the defendants are common carriers, and are liable without proof of negligence, but that if the money and chain were retained in the personal possession of plaintiff, in the pocket of her dress, on or off, as in this case, the defendants had no such possession as would make them liable as common carriers.

2d. Common carriers are liable for a loss of a sum of money necessary for the expense of the journey, when carried with, and as a part of baggage; but when carried, as the evidence in this case shows it was carried, if stolen, the carrier is not liable.

3d. The purchasing of a ticket for the passage, and the assignment of a stateroom to plaintiff, was a notification to the person in charge of the boat, of the intention of plaintiff to take passage; but it was not such a constructive delivery to, and acceptance by, the defendants, of the money and chain of the plaintiff, under the facts in this case, as would entitle the plaintiff to recover for it, if stolen from her."

To each of which three charges, the plaintiff's counsel then and there excepted.

The counsel for the plaintiff then requested the court to charge that if the jury find defendants contracted to carry plaintiff from Cleveland to Detroit, the contract

implies a safe conduct for the person, and baggage, and money, to a reasonable amount, for traveling purposes; and, if they find the room was unsafe, and there was not due and reasonable diligence on the part of defendants, that plaintiff is entitled to recover.

The court refused to charge as requested, and plaintiff's counsel excepted to such refusal, but the court did charge:

"4th. If the jury find the defendants contracted to carry plaintiff from Cleveland to Detroit, the contract requires a safe carriage and delivery of the baggage of plaintiff, and a sum of money necessary for the journey, if carried as baggage in the custody of the carrier; but if it was carried, as this case shows it was, it was not in the custody of the carrier so as to entitle plaintiff to recover."

To which charges plaintiff's counsel excepted.

And thereupon, at the request of defendant's counsel, the court charged the jury as follows:

"1st. That if the jury should find from the evidence that defendants were common carriers of passengers and baggage, and that the money and chain were stolen from plaintiff, as alleged, then they must find the further fact, that the plaintiff delivered the money and chain to defendants or their agents, or they should not find defendants liable as common carriers.

2d. That if the jury find, from the evidence, that the plaintiff retained possession of the money and chain upon her person, and did or said nothing by which the defendants or their agents, were informed of any delivery to them of the money and chain, then there was no such delivery to the defendants of the money and chain as to make them liable as common carriers."

The jury found a verdict for defendants.

H. M. Cheever, for plaintiff in error.

1. It is admitted that defendants were common carriers;

owners of the steamboat "City of Cleveland," a vessel duly enrolled and licensed for the coasting trade.

No question is made, as we understand, upon the liability of defendants for lost or stolen baggage, delivered to them by a passenger; but it is contended that the property lost in this case was not properly *baggage*, and that there was not such a delivery to defendants as to make them liable.

The liability of the innkeeper and common carrier seems in many respects identical, though varying in extent. — *Story on Bailm.* § 472; 19 *Wend.* 259.

With regard to the custody of goods, their liability is to be regarded identical. Both are insurers of the property or baggage committed to them. — 3 *Hill*, 485; 10 *Barb.* 612; 4 *Sandf. S. Ct.* 136; 19 *Geo.* 203; 29 *N. Y.* 115; 31 *Maine*, 478; 8 *Blackf.* 535; 21 *Wend.* 282; 9 *Pick.* 280; *Jones on Bailm.* 107.

The money was "reasonable in amount for traveling purposes," and the chain was "baggage," or part of the wearing apparel.

Baggage is held to be such articles of personal convenience or necessity as are carried for personal use of the passenger. It has been held to include books, a gun, fishing tackle, a watch, a pair of pistols, etc. — 22 *Ill.* 281; 2 *Harris*, 129; 10 *Ohio*, 145.

So, also, it includes personal jewelry. — 3 *Barr.* 451; 4 *Bosw.* 226.

2. There was a sufficient delivery to defendants to make them liable.

The court erred both in charging that in this case there was no delivery to, or possession by defendants, as well as in refusing to charge as requested — that, if stolen from without or within, was immaterial as to defendant's liability.

a. There was, we contend, such a delivery to defendants as the law required; and the property was sufficiently in

the possession of defendants, so as to make them liable in this case.

The case shows that the cabin fare included a stateroom, and was more than other passage; that plaintiff paid this fare, and was assigned a stateroom, and that she placed the money and chain in the stateroom, off from her person, and that it was taken from such place.

No *actual* delivery is necessary; no *special* custody required. Rigorous as this rule may seem, public policy requires it. Such delivery is sufficient as to innkeepers. — 27 *Miss.* 658; 2 *Met.* 439; 14 *Johns.* 175; 5 *Barb.* 560; *Story on Bailm.* § 479.

So if money or baggage is stolen from the room of a guest, they are liable. — 2 *Barn. and Adol.* 803; 7 *Cush.* 417; 1 *Yates*, 35; 6 *E. L. & Eq.* 349.

Nor are they released from liability though the guest has the key of his room, or has left his door open. — 19 *Wend.* 259.

Now, we contend that when defendants demanded and received a fare for the use of the stateroom, by such demand, and receiving such fare and the assignment of the room to plaintiff, they assumed an increased responsibility; and their contract implied that the room should be safe for sleeping, and the deposit of such baggage as travelers usually carry in their hands, and money to a reasonable amount for traveling purposes; and that they consented that plaintiff should so regard it, and the placing of such baggage and money in such stateroom, off from the person of said plaintiff, was a sufficient constructive delivery of the same to defendants. It was saying in effect: that is the customary place of depositing such baggage, and satisfactory to us. — 19 *Wend.* 249, *before cited;* 7 *E. L. & Eq.* 519; 20 *Conn.* 354.

b. It was error to refuse to charge that "if stolen from without or within, defendants were equally liable."

They are responsible for loss by theft, whether committed by strangers or their own servants. — *Story on Bailm.* §§ 488, 507*a;* 10 *Johns.* 1; 7 *Bing.* 217; 2 *Wend.* 327; 327; 6 *Id.* 335.

c. The carrier is liable for money carried by the passenger for traveling purposes; and it need not be carried in a trunk. It may be carried wherever most convenient, whether in trunk, bag, box, satchel or bundle, and may be most of the time about the person of the traveler; and that though carried about the person for convenience or from necessity most of the time, when deposited in the stateroom (as this case shows), off the person, it was a sufficient delivery to hold defendants liable, — 3 *Gibbs,* (*Mich.*) 51; 25 *Geo.* 61.

We submit the judgment should be reversed, and a new trial granted.

Moore & Griffin, for defendants in error.

Defendants are not liable as common carriers, for the reason that the evidence shows that the articles alleged to have been lost were, at the time of the alleged loss, in the exclusive custody of the plaintiff, and were not delivered to, and accepted by defendants.

In this and analogous cases, the law recognizes two modes of delivery.

a. Actual delivery.

b. Constructive delivery.

Actual delivery is a delivery in such a manner as brings home to the party sought to be charged, personal knowledge that the property for which he is holden responsible, is within his control or custody, at the place at which he accepts it, in the capacity in which he is sought to be charged; or, in case of small articles, a transfer from one person into the hands or tangible possession of another.

Constructive delivery is a delivery in accordance with

some usage or custom adopted by the parties sought to be charged, and known and recognized by the public as such.

That delivery and acceptance is essential to bind the carrier, is an elementary principle of law. — *Edwards on Bailm.* 446; *Angell on Car.* §§ 129, 140, 143; 1 *Pars. on Con.* 650.

In the case at bar, it is not asserted that there was any actual delivery of the articles, or that the possession of them by plaintiff was known to defendants.

But it is claimed that there was somehow a constructive delivery.

a. If the above definition of a constructive delivery is correct, the evidence fails to show any usage or custom adopted by the defendants and known to the public, of a nature to bind them in this case.

b. From the sixth assignment of error, it would seem that counsel for plaintiff contends that the purchase of a ticket, and the assignment of a stateroom, was a constructive delivery to, and an acceptance by the defendants of the property of plaintiffs.

In and of itself, this latter proposition is so anomalous, that it does not seem to admit of discussion. We can see neither any principle, authority, nor even *dicta*, which seems to support it.

What is the liability of a common carrier of passengers?

The law is now well settled, that he is liable for the baggage of the passenger entrusted to his custody. And this without additional compensation. The passenger fare, in contemplation of law, covers and includes a compensation for the conveyance of his baggage. The care of the baggage, when in the custody of the carrier, is part of the service for which fare is paid. — *Story on Bailm.* §§ 498 – 9, 595; *Edwards on Bailm.* 580.

But to bind the carrier, there must be a delivery of

the baggage in the same manner as of other goods. It must be entrusted to the custody of the carrier, and not retained in the possession and under the control of the passenger. — *Story on Bailm.* §533; *Edwards on Bailm.* 451; *Parson's Mer. L.* 226; *Angell on Car.* §§ 113, 140.

But the articles alleged to have been lost were not baggage, even if they could be so considered if carried in a trunk. They were not carried as baggage in this case, but on the person. — *Angell on Car.* § 115; *Parson's Mer. L.* 225, *and notes.*

The following authorities bear a strong analogy to the case at bar — 1 *Car. and P.* 638; 8 *Id.* 207; 9 *Lou.* 80; 3 *Barb.* 388; 6 *Cow.* 757; 7 *Hill*, 47.

Common carriers are not innkeepers, as was sought to be maintained in the court below, and is probably contemplated by the sixth assignment of error.

Both belong to the class of bailments termed *Locatio.* Innkeepers are a subdivision under the head *Locatio operis faciendi.* Common carriers under the head *Locatio operis mercium vehendarum.* The chief business of the innkeeper is entertainment. That of the common carrier, transportation.

The liability having once *attached*, the result of the authorities, we think, establishes the rule that the liability of the one is co-extensive with that of the other. It seems, upon principle, there can be no good reason assigned why this should not be so.

But the same acts on the part of a stranger, will not charge a common carrier as will render liable an innkeeper. The innkeeper is liable for whatever is deposited in his house by the guest as such. The fact that they are *infra hospitium*, is sufficient to charge him. This is stated to be the general rule by Mr. Edwards. — *Edwards on Bailm.* 398–9.

But no such rule applies to a common carrier. He does not become liable as carrier, from the mere fact that the goods are transported by him. — *Pars. Mer. L.* 226.

The demand for increased accommodations has rendered it expedient and profitable to provide suitable rooms for passengers to occupy; but this is incidental to the principal contract, and can not and ought not to enhance their liability, or add the liability of innkeeper to that of common carrier.

Christiancy J.

The defendants below (defendants in error), proprietors of the steamboat "City of Cleveland," were common carriers of goods and passengers between Detroit and Cleveland. On the evening of the 17th of April, 1865, the plaintiff took a cabin passage on this boat at Cleveland for Detroit, and paid her fare ($3.50), which included passage, breakfast and a stateroom and, of course, ordinary traveling baggage, if she had it. A stateroom (letter "H") was assigned to her at the time of paying her fare, and was shown to her by the stewardess about 8 o'clock in the evening, when she went in and left her hat, muff, cloak and basket containing some wearing apparel, and then came out and locked the door. Shortly after this, another lady, a stranger to the plaintiff, was assigned to the same room. Plaintiff gave her the key and went to the door of the stateroom, while the stranger went in and left her apparel.

At this time plaintiff first noticed that the window looking out on the deck was broken; and she called the stewardess, showed her the window and, as she says, asked the stewardess if it was safe, but the stewardess says she spoke only of the wind, and not about its being safe. The stewardess took a pillow about fourteen inches wide and sixteen inches long, and placed it in the window. The steward knew that it was broken some days before, though less than it was now found to be. The stewardess, at the time the plaintiff called her to see about the window, said she heard glass breaking during the evening while she was in the cabin.

There were two berths or beds in the stateroom. The foot of the upper berth could be reached through the window from the outside.

The plaintiff undressed; rolled up her dress, in the pocket of which was her portemonnaie containing $31.76 and a gold chain worth $20, and placed it on the upper berth near the foot; she and the stranger occupying the lower berth together, the stranger sleeping on the back side of the bed. About 2 o'clock in the morning, the plaintiff was awakened by the wind blowing in the window. She arose, found the pillow out of the window, her dress unrolled and upon the floor, and her portemonnaie fell from the edge of the upper berth as she moved the curtain, and was empty; money and chain being gone. Plaintiff testifies that she did not sleep sound, that the stranger lady could not have taken the money and chain without awakening her. The captain was at once notified, but the money and chain were not found.

On the part of defendants there was evidence tending to show that the boat had a full and competent crew, that a proper watch was kept during the night — the watchman being able to see the window on the outside every five or ten minutes; that the freight was so piled against the window that it would have been very difficult for any person to have committed the theft through the window from the outside, and that this could not have been done without detection.

Many exceptions were taken on the trial; one to the admission of evidence and several to refusals to charge and to the charge as given.

The court charged in substance that though the defendants would be liable as common carriers, without proof of negligence, for baggage actually delivered to them, yet "if the money and chain were retained in the personal possession of the plaintiff, in the pocket of her dress, on or off, as shown in the present case, the defendants had

no such possession as would render them liable as common carriers. That as common carriers they would be liable for the loss of a sum of money necessary for the expenses of the journey, when carried with, and as a part of, the passenger's baggage; but when carried, as the evidence in this case shows it was carried, if stolen, the carrier is not liable."

The court refused to charge in substance that the defendants would be liable for the theft if the jury should find that the room was unsafe, and that there was not due and reasonable diligence on the part of the defendants; but did charge, in answer to this request, that the defendants would not be thus liable, because as shown by the evidence, the money and property were not in the custody of the carriers, so as to entitle the plaintiff to recover.

The above charge and refusal cover the whole merits of the case so far as relates to the cause of action, and it will be unnecessary to notice the others which embrace the same questions in a different form.

The question involved in this case has been spoken of as a new one, though it has not seemed to me, in the examination I have been able to make of it, that it involved any new principle, or any principle not already well settled in the law of common carriers. As it is, however, a case of some importance as respects the principle involved, and the facts upon which it arises are somewhat different from those in any adjudged case which has come to my knowledge, I think it proper to consider it somewhat at length, though I think it presents no difficulties which may not be readily solved by a resort to fundamental principles; the reasons and analogies of the law, fixing the liability of carriers and innkeepers, so far as the liabilities of the two are analogous.

As a preliminary point, I think there can be no reasonable doubt, that the gold chain, being an article of

personal ornament, and so much of the money as should be found reasonable for the plaintiff's journey (which every passenger must be supposed to carry, either in his clothing or his baggage), were properly carried by the plaintiff about her person, and that she is chargeable with no imprudence or fault in thus carrying them, instead of having them placed in her baggage and delivered into the hands of the carriers. And admitting, as the court below charged, that if thus carried as baggage the defendants would have been liable, it by no means necessarily follows that they may not be also liable for the theft shown in the present case though carried in the pocket of her dress. She does not appear to have had a trunk nor other baggage in which the money and chain could have been properly placed.

As to money carried with, and as a part of the baggage, the weight of authority is in favor of holding the carrier responsible for it when thus carried; but the propriety of thus carrying money even for expenses has been questioned by the courts, and has not been uniformly admitted. See on the one side *Weed v. Sch. & Sar. R. R. Co.;* 19 *Wend.* 534; *Cole v. Goodwin, Id.* 251; *Orange County Bank v. Brown,* 9 *Id.* 85; *Jordan v. Fall River R. R.,* 5 *Cush.* 69; *Bomar v. Maxwell,* 9 *Humph.* 622; *Johnson v. Stone,* 11 *Id.* 419. On the other, *Hawkins v. Hoffman,* 6 *Hill,* 586; *and Davis v. Mich. S. & N. I. R. R. Co.* 22 *Ill.* 278. In the latter case it was intimated that a trunk is not a proper place to carry money for traveling expenses unless it be in gold and silver. In no case has it yet been held that it was improper or imprudent for a passenger to carry his money for such expenses in his pocket; nor will any court, I think, be likely to adopt so unreasonable a rule under the modern practice of checking baggage, which seems to have become almost universal, both by railroad and steamboat, by which it is rendered practically inaccessible to the

passenger on the way, and he is compelled to carry, at least, a large part of his traveling expenses on his person; and the same reasoning will apply to articles of jewelry and personal ornament which a passenger may have occasion to use on the way. And though it may be held optional with the traveler to carry the money for his traveling expenses either in his baggage or in his pocket, I can not resist the conviction that the latter is the most proper and prudent course, as well as most in accordance with general usage, and better for the interests of the carrier, even though he should be held liable for a loss by theft, like that in the present case.

It is clear that the defendants could not be held liable as carriers generally for money stolen from the persons of passengers on their boat. Passengers by steamer while up and awake, or when or where they ought, and are expected to be awake, like passengers by railroad or stage coach, must be expected to rely upon their own vigilance for protection against larceny from their persons; and it is well understood by all, that in such cases the property carried upon the persons of passengers is in their own keeping. And it would be equally clear that if a passenger while in a general cabin or elsewhere about the boat in any place (or at a time), not specially intended or designated for sleeping (but where the other passengers are indiscriminately admitted, or passing and repassing), suffer himself to fall asleep, he does so at his own peril. Because, having intelligence and a will of his own, and moving about from point to point at his own pleasure and choosing his own associates, he is generally fully capable of protecting himself; and no degree of vigilance on the part of the carriers could afford him that protection, if he will neglect to make use of his own faculties for that purpose, or allow himself to fall asleep at an improper place or time, or carelessly put himself in contact with improper persons.

But when a steamer is fitted up with regular sleeping apartments, and all the appliances for boarding and lodging her passengers as at an inn, and the owners or managers hold themselves out to the traveling public as furnishing such accommodations, and by these superior advantages induce travelers (as they naturally must) to prefer this to the less comfortable mode of traveling by railroads and stage coaches, or even by vessels without such accommodations, when they receive the fare of a passenger, which includes not only his passage but his board and sleeping room and bed, and when that room is assigned to him and he retires to it for the night, the whole transaction, it seems to me, carries with it an invitation to make use of the room and the bed for the purposes and in the manner for which they were obviously designed; in other words to lay aside his clothing and to go to sleep there. And unless he is expected to sleep with his eyes open, and his faculties upon the alert, he is invited to lay aside all the vigilance he would be expected to exercise when awake, and to trust himself and his clothing and such money and property as he may have about him, and, as it is usual for passengers to carry in their clothing, to the protection afforded by the room, and the vigilance to be exercised by those in charge of the boat. And the latter must, in the absence of any usage, request or notice, to the contrary, be held to assent that the passenger shall leave such clothing and contents at any convenient place in the room, instead of having to call the steward, clerk or other officer or servant of the boat, to take it into his actual or manual custody—a proceeding which (as it must take place after the passenger is undressed) would be somewhat awkward in the case of a lady passenger at least. And, having been thus invited to rely upon the protection of his room, and their vigilance instead of his own, the invitation, it seems to me, carries with it an assurance that they will be responsible

in the meantime for all losses of such clothing and contents, from which he might by his own vigilance, have protected himself when up and awake. If they do not thereby assume this responsibility, then it is no "figure of speech," but a literal truth, to say that by their invitation the passenger has been *lulled into a false security.*

I express no opinion upon the question whether the liability of the defendants in respect to the loss of such money and property in other modes or from other causes would be commensurate or identical with that of an innkeeper. The facts of this case do not call for an opinion upon a question as broad as this. But so far as relates to the facts of this case, the loss of this money and chain in the manner and under the circumstances the evidence tended to prove, I think the assurance held out by the defendants to the plaintiff, is the same as that held out by the innkeeper to a guest occupying a bedroom at his inn; and that the responsibility of the defendants for the loss of the chain and so much of the money as should be found reasonable for the expenses of the journey, is the same as that of the innkeeper for a loss occasioned in the same way; and that the responsibility rests upon precisely the *same*, and *all* the *same reasons* in both cases; and this, whether the money and chain were stolen through the window from without, or by the stranger lady who had been assigned to, and occupied the room with the plaintiff, without any choice or agency of her's, but by the act of the proper authorities of the boat. Had the lady been a traveling companion of the plaintiff, the case, as to this point, would have been different, and so, probably, if she had been assigned to the same room at the plaintiff's request.

The officers of the boat, in assigning the same room to more than one passenger, must, I think, be understood virtually to say to each: "If you choose your own roommate or companion, you exercise your own judgment, and

run your own risk that he shall not steal from you. But if you leave the choice to our judgment, we will be responsible for its exercise, and for the consequences, if we select a thief and he shall steal your purse." This is substantially the rule as to innkeepers. — *Calye's case*, 8 *Coke R.* 32; *Bacon's Abr. Inns & Innkeepers C.* 4; *Comyn's Dig. Action on the Case for negligence, B.* 2; and whether the theft was committed by some person on the boat from without, or the other lady within the room, every ground and reason upon which the law holds the innkeeper liable for a like theft applies with equal force to the carriers in the present case. Both are recognized as public servants. The liability of each, instead of resting upon contract, is imposed by the law from motives of public policy: the necessity of trusting such persons and their servants, the danger of combination or collusion with thieves and robbers, their peculiar opportunities for concealment, and facilities for avoiding detection, and the consequent difficulty of proving negligence or fraud, should they be guilty of either. See as to carriers, *Coggs v. Bernard*, 2 *Ld. Raymond*, 909, 918; *Orange County Bank v. Brown*, 9 *Wend.* 114; *Jones on Bailm.* 103–107; *Story on Bailm.* 419, 491; *Merritt v. Earle*, 29 *N. Y.* 115. As to innkeepers, *Jones on Bailm.* 95, 96; *Story on Bailm. sec.* 471; 2 *Kent's Com.* (3*d ed.*) 592 *to* 594; *Mason v. Thompson*, 9 *Pick.* 280; *Shaw v. Berry*, 31 *Maine*, 478; *Carter v. Hobbs*, 12 *Mich.* 52; *Smith's Lead. Ca., notes to Calye's cases.*

Their obligations to receive passengers or travelers for whom they have room is the same in the one case as in the other, and both have the like means of judging of the characters of those they admit as passengers or guests; and the carrier has at least an equal right to exclude improper characters. As to innkeepers, see *Rex v. Ivens*, 7 *C. & P.* 213; *Howell v. Jackson*, 6 *C. & P.* 723; *Kent v. Shuckard*, 2 *B. & Ad.* 803. As to carriers of passengers, *Ansell v. Waterhouse*, 2 *Chitty R.* 1; *Jencks v. Coleman*, 2 *Sumner* (*C. C.*) *R.* 221; *Bennett v. Dutton*, 10 *N.*

H. Rep. 481; *Markham v. Brown*, 8 *Id.* 523; *Commonwealth v. Power*, 7 *Metc.* 596; *Angell on Carriers*, 525. If the innkeeper possesses a certain degree of control over his guests and their conduct, the officers of a steamboat have at least an equal control over their passengers, who are more completely in their power, and compelled to rely more unreservedly upon their vigilance and good faith.

As the liability of both rests solely upon grounds of public policy, it cannot properly be made to turn in either case upon any narrow technical or arbitrary rule. The common law upon this subject does not consist of arbitrary rules, but of principles founded upon reason and enlightened views of what is required for the public welfare — principles which are not to be confined in their application to the facts involved in the few cases heretofore decided, but are to be equally applied to new cases embracing different facts, resting upon the same principles, as the exigences of a progressive age and new modes of travel and commercial activity may call them forth. And in all such cases, where all the reasons are the same, the law should be and is the same.

Until the case of *Kent v. Shuckard*, 2 *B. & Ad.* 803 (in the year 1831), there seems to have been no reported case in England which had held an innkeeper to be liable for *money* of a guest stolen at an inn; and this fact was urged by counsel to show that innkeepers were not thus liable. To this Lord Tenterden, in giving his judgment, replied: "There are many cases where *money* has been recovered in an action against carriers, who, like innkeepers, are liable by the customs of the realm. And I can not see any distinction in this respect between an innkeeper and a carrier. The principle on which the liability of the innkeeper * * * for the loss of the goods of his guests is founded, is, both by the civil and the common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent

collusion between him and such persons." Courts and text writers have alike treated the liability as analogous and as founded upon the same reasons, and have habitually illustrated the one by reference to the other. — See *Richmond v. Smith*, 8 *B. & Cress.* 9; *Cole v. Goodwin*, 19 *Wend.* 259; *Grinnell v. Cook*, 3 *Hill*, 485; *Smith's Lead. Cases, supra; Angell on Carriers*, §§ 524, 525.

In *Cohen v. Frost*, decided by the Superior Court of New York in 1853 (2 *Duer*, 341), a passenger on a passenger ship had taken his trunk into the steerage with him, and kept it for some time under his bed, and then tied it with ropes to the berth in which he slept. During a storm, the ropes which fastened the trunk were cut, and it was stolen. The court say "the case is not to be distinguished from that of a guest at an inn." But the court, by a misapprehension, as it seems to me, of the case of *Burgess v. Clements*, 4 *M. & S.* 306, conclude that the innkeeper would not be liable for the loss in such a case, and therefore that the carrier was not liable. In the case of *Burgess v. Clements*, upon which this opinion purports to rest, a guest at an inn, not satisfied with having a bedroom, and free access to the traveler's room, called for a third room, "for the purpose of exposing in it his wares to view, and for introducing a number of persons over whom the innkeeper could have no control." He seems to have used the room rather as a kind of shop for showing his goods to customers; "and thus (said Lord Ellenborough, in delivering his opinion), for a purpose wholly alien from the ordinary purpose of an inn, which is *adhospitandos homines*." Bayley J. places his opinion upon the same ground. It seems to me manifest, therefore, that the court, in *Cohen v. Frost*, misapprehended the ground and extent of the decision in *Burgess v. Clements*, and that it would by no means absolve an innkeeper from liability for a loss like that in *Cohen v. Frost*.

By the civil law, the liability of ship masters, innkeepers and stable keepers, was identical. — *Story Bailm.* § 462,

and authorities cited. I am aware that Judge Story, in his Commentaries (§ 472), intimated the opinion that innkeepers are not responsible as insurers to the same extent as common carriers — that the former might absolve themselves from liability by showing that there has been no negligence. But this has not generally been recognized, and I think the law, in this country, at least, may be considered as settled that both are equally insurers of the property intrusted to their care against all losses not occasioned by inevitable accident or the public enemies. — See *Mason v. Thompson*, 9 *Pick.* 280; *Grinnell v. Cook*, 3 *Hill*, 485; *Shaw v. Berry*, 31 *Maine*, 478.

As to the objection of a want of delivery to the carrier, upon which the case was made to turn in the court below, I have already indicated my opinion that the evidence tended to show a clear case of constructive delivery, and a sufficient notice to and acceptance by the carriers. If it was a usual and prudent course (as I think it was), for the plaintiff to carry the money and chain in the pocket of her dress, instead of putting it into a trunk, and delivering it to the carriers as baggage, then no notice to the carriers was necessary of the contents of her pockets, more than would have been required of the contents of a trunk, had the money and chain been placed in a trunk. And as she left her clothing where they must have expected, and be held to have known it would be left, in her sleeping room, there could be no occasion for giving them personal notice, when about to disrobe, that she intended to leave it, or when she had undressed, that she had left it there. Such a notice would have been simply ludicrous. In *Van Horn v. Kermit*, 4 *E. D. Smith*, (*N. Y. Com. Pl.*) 454, the doctrine that to hold ship owners liable for baggage, it must be placed beyond the passenger's reach, in the special charge of the officers of the ship, is expressly denied, because the passenger must necessarily require access to it, and unless particularly enjoined

to deposit it in some other place on ship board, there is no place more appropriate than the stateroom or cabin assigned to him for use during the voyage.

In *Richards v. London, Brighton and South Coast R. W. Co.* 7 *Com. Bench*, 839, where it was held that the liability of the company for the dressing case of a lady passenger, continued until the porter employed by the company for that purpose should deliver it at the carriage in which she rode off at the terminus of the journey, it was expressly held, also, that "the fact of the dressing case having been placed under the seat of the (railway) carriage, and so under the more immediate control and inspection of the passenger, makes no difference" as to the carrier's liability.

The case of *Tower v. Utica & Schn. R. R. Co.* 7 *Hill*, 47, cited on the argument, has no bearing upon the present question. The plaintiff, who had been a passenger upon a railroad car, went off and left the car (ceasing to be a passenger), and left his overcoat upon the seat he had occupied. When he thus left the car, the carriers had a right to suppose he had taken his clothing with him, and that their care was at an end, if the coat could, before that, have been considered in their custody.

Under the facts which the evidence in the present case tended to prove, I think the money (or rather so much of it as should be found reasonable for the journey) and the chain, and the dress in the pocket of which it was contained, were in the custody of the defendants as carriers, and that they were liable as such for the theft committed during the night, to the same extent as if such money and chain had been contained in a trunk actually delivered to the defendants, and lost or stolen from them. Nor do I think this is any extension of the generally recognized liability of carriers, but simply applying the well settled principles of adjudged cases to a new case clearly within them. I see no force in the objection urged

at the bar that the carriers should not be held liable, because they could not enforce their lien for money and articles carried upon the person of a passenger. The same objection might be made with the same force against the liability of an innkeeper for a similar loss, and yet it is not denied that an innkeeper would have been liable for this loss. Nor do I perceive any great force in the objection that no case is found where carriers have been held liable for money or property stolen or lost under the circumstances presented by this case. This may result as well from the fact that the liability has not been disputed, as from its non-recognition, or from the fact that such losses have not been very common, or have been paid or compromised. There was evidence in this case of the compromise of such cases occurring on this very boat, and a compromise was offered to the plaintiff for *this* loss.

But it is further urged that the liability of a carrier must be continuous from the time the property is delivered into his custody to the end of the transit, while in the present case it would be frequently changing, appearing and disappearing by turns, as the clothes of the passenger were on or off, etc.

I can see no legal foundation for this objection. It is not true that the carrier's liability can not exist without being continuous for the whole trip or transit. In the case of ordinary baggage, it may cease and be revived, appear and disappear any number of times during a trip or voyage. A trunk actually delivered into the hands of the carriers may be often required by the passenger on the way, and when he obtains access to it, has it in his own hands or opens it to take out or put in articles, it is in his own custody, *pro hac vice*, and for a loss occurring at such moments, the carrier would not ordinarily be responsible; and yet the moment it goes back into the custody of the carrier, his responsibility revives. And so in the present case, while the plaintiff was up, with the

clothing on her person, it was in her own custody; but when laid aside in her room, while she slept, it was, as I have endeavored to show, in the custody of the defendants as carriers.

It was also objected that if the defendants are to be held liable to the same extent as innkeepers, the declaration should have charged them as innkeepers. But though the defendants are liable to the same extent as innkeepers, they are liable in the capacity of carriers, and not in that of innkeepers. Their obligation is not like that of the innkeeper, simply one of *custody* and *safe keeping*. Carriage, *transportation* is the principal object both of the passenger and the carrier, and the responsibility for the safety of the property in transitu, is imposed by the law as in all other cases of the carrier's liability, as an incident to that principal object. The obligation relates to the *mode* of *carrying*. The defendants are therefore properly sued as carriers, not as innkeepers.

The hardship of holding carriers responsible as insurers, without and irrespective of negligence, has sometimes been made a subject of complaint; and in particular instances it may operate with some severity. But in my opinion, the public interest and common good require the strict observance of the general rule; and, upon the whole, the hardships are more apparent than real, as carriers have it always in their power, like other insurers, to demand a premium in proportion to the hazards of the employment, which we must presume they have, in cases like the present, received in the amount of the fare which has been paid. — *Hollister v. Nowlen*, 19 *Wend.* 234. But the province of the courts is to declare, and not to make the law; and as I regard the general rule to be well settled, the hardship, if any, is, I think, one for the legislature, not for the courts to relieve.

But the court also charged that the defendants would not be liable for the loss, if the jury should find that the room

was unsafe, and that there was not due and reasonable diligence on the part of the defendants; for the reason that the property was not in the custody of the carriers. In my view of the case, this question does not arise, and I shall not discuss it. But admitting the premises, I am by no means satisfied that the conclusion drawn by the court would follow.

My reasoning upon the main question in the case sufficiently indicates my opinion against the admissibility of the evidence offered to show that it was usual for occupants of staterooms to leave their windows open during the night, which, however, when given, only tended to show that in warm weather (which probably did not prevail in April), some left them open and some closed them. If other passengers chose to disregard the means of safety in warm weather, it is difficult to see why the plaintiff should be denied the right of resorting to those means, especially when the weather was not likely to be warm enough to induce even others to open their windows. This error, however, was of little, if any, importance in this case; because under the charge given upon the main question in the case, the plaintiff could not possibly have recovered, though this evidence had been excluded; and if the charge upon the main question had been correct, it would have cured the error of its admission.

When the foregoing opinion was written, I was not aware of the decision in *Mudgett v. Bay State Steamboat Co.* 1 *Daly* (*N. Y. Com. Pleas*), 151, which has just been received here.

This was a case in which the plaintiff sued to recover the value of a valise (and its contents), which he, as a passenger upon the defendants' steamboat, had deposited in his stateroom, the key of which had been given him by the clerk. He had left the room locked, and the valise was stolen from it. The defendants were held liable for the loss; and their liability is placed on the same grounds,

and declared to be the same as that of an innkeeper. This is a well reasoned case. It fully sustains the views I have expressed, and goes much further than is necessary to sustain the liability of the defendants in the present case.

I think the charge of the court was erroneous, and that the judgment should be reversed, with costs, and a new trial granted.

COOLEY J. concurred.

CAMPBELL J.

The only important question in this case is, whether a steamboat owner is liable for articles carried about upon the person of a passenger, in her pockets, and which she professes to have had stolen from her in her stateroom, which she occupied with another passenger, to whom it was allotted with her.

It is not claimed by any one that there is any authority which covers such a case, and, in the absence of some such decision, it seems to me we should not be justified in importing new liabilities into contracts for the carriage of passengers. If we could imagine that a person had never been, or pretended to have been, robbed in a cabin or stateroom before, we might perhaps suppose that in settling the law this contingency had been overlooked; but, inasmuch as this can not be regarded as an event without numerous precedents, the fact that the decisions thus far made do not sanction the imposition of such a liability, furnishes an almost irresistible argument against enlarging the responsibilities of such carriers.

It is very well known that, until a recent period, there was no such thing as a common carrier's liability attached to the carriage of passengers, so as to cover their baggage, and that a separate contract was made

for that as freight, in order to hold the carrier. And it is very well settled now that the only thing which passenger carriers are liable for, as common carriers, is the same baggage, which is regarded by usage as covered by the passage money, and which is in its nature nothing more nor less than freight accompanying the traveler. *Ingalls v. Bills*, 9 *Metc.* 1; *Hollister v. Nowlen*, 19 *Wend.* 236; *Camden and A. Railroad Co. v. Burke*, 13 *Id.* 626; *Boyce v. Anderson*, 2 *Pet.* 150; *Stokes v. Saltonstall*, 13 *Id.* 181; *Angell on Carriers*, § 521; *Story on Bailm.* § 390. And, while it is recognized by the text writers that attempts have been made from time to time to enlarge the liability of passenger carriers, it is also agreed that the support of such a doctrine has been uniformly resisted. *Angell on Carriers*, § 522; *Story on Bailm.* § 590; *Boyce v. Anderson*, 2 *Pet.* 150. And it is a matter of familiar knowledge, that, while many acts have been passed limiting the liabilities of carriers by sea and land, there has been no attempt in any direction to increase them. In the case last cited, it was said by Chief Justice Marshall: "The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and policy, we do not think it ought to be carried further, or applied to new cases."—*P.* 153. In confining themselves to the settled law, the courts have, it seems to me, done wisely. To bring new cases within the category of absolute liability for everything except inevitable accident, or the assaults of public enemies, would be to break down all legal barriers. For no one can deny that there are many employments and avocations, wherein there is as much opportunity for fraudulent combination as in this species of bailments. The liability laid by the civil law upon carriers and innkeepers did not purport to depend upon

their obligation to receive persons and property. It is expressly stated by the digest that they have no reason to complain of the rule, because they are *not* bound to receive any against their will; and that the rule is established, because they have so many opportunities for combining with thieves. *Story on Bailm.* § 464. It is certainly difficult to see how a common carrier has greater opportunities for embezzlement, or collusion with thieves, than a private carrier, or a warehouseman, or any other bailee of valuables. Nor does there seem to be any reason for supposing that an innkeeper will rob transient guests, rather than boarders. If the rule were to be framed now, for the first time, I can not persuade myself that any legislative body would assume that the two classes of innkeepers and common carriers required this extreme and exceptional treatment. I think that the rule which singled them out must be regarded as strictly confined to its common law force, and that courts are not authorized to extend it.

Such, at least, has always been understood to be the rule in regard to passengers. The passenger and his baggage generally travel together. If a coach is attacked and robbed by highwaymen, the carrier must pay for the baggage, but it was never supposed he was responsible for what was on the persons of the passengers. Yet in such a case he would certainly be as able to protect the one as the other. The only principle holding him in the one case, and discharging him in the other, is that the baggage is freight in his custody, and he is bound to respond for freight, and for nothing else.

It is decided also, that the property must be delivered in some way into the custody of the carrier, and that if it is retained by the owner under his own supervision the carrier is not responsible. *Brind v. Dale*, 8 *C. & P.* 207; *Tower v. Utica and Schenectady R. R. Co.* 7 *Hill* 47; *Cohen v. Hume*, 1 *McCord*, 439.

In both of these American cases the articles lost were outer garments, and such as the carriers might have been compelled to take and care for as baggage, if delivered to them.

The course of decision as to what constitutes baggage, is of some value in throwing light on this subject. It has now become settled, by a predominance of authority, that a reasonable sum of money for traveling expenses, and any articles of daily personal use and convenience, may be recovered for as baggage, if contained in the ordinary luggage, whether they are articles usually kept on the person or not. But this doctrine was long disputed upon the specific ground that the carrier could not fairly expect to be held liable for articles which are usually kept upon the person, as he could not suppose they would be put among baggage.

In *Hawkins v. Hoffman*, 6 *Hill*, 586, where the doctrine of implied liability for luggage is fully discussed and maintained, *Bronson J.* says that "this implied undertaking has never been extended beyond ordinary baggage, or such things as a traveler usually carries with him for his personal convenience in the journey. It neither includes money nor merchandise. *Orange Co. Bank v. Brown*, 9 *Wend.* 85; *Pardee v. Drew*, 25 *Id.* 459. It was suggested in the first case that money to pay traveling expenses might perhaps be included. But that may, I think, be doubted. *Men usually carry money to pay traveling expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage.*" * * * "An agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication cannot be extended a single step beyond such things as the traveler usually has with him as a part of his luggage." In *Merrill v. Grinnell*, 30 *N. Y.* 594, the Court of Appeals reaffirmed the

doctrine that the liability for luggage was the same as for freight, but held that it was not so unusual for passengers to carry their expense money in their trunks as to make it improper when so carried, to include it in the baggage; and they speak of it as *a hardship to compel a passenger to keep it about his person*, as he would be compelled to do, if it were not treated as baggage, for which carriers in possession are answerable.

The view taken in both these decisions is clear, that for articles upon his person the passenger must answer himself. And I am unable to see any other rule which is not full of difficulty. It is one of the first principles of the law of bailments, that a carrier may retain any baggage for passage money. It is said to have been formerly supposed that he might detain the passenger also, but this absurd idea came from a *dictum* which is properly regarded as preposterous. *Ang. on Carriers*, § 375, *note* 5. It is very plain that no such lien can be enforced by either searching or stripping a passenger; and there is no lawful method of reaching what has never been in the carrier's custody.

It was claimed on the argument that the liability of carriers and innkeepers was put by the courts on the same footing, and therefore that the same rules must apply to both. It is undoubtedly true that many judges have used this resemblance by way of illustration, and some, misled by analogy, have spoken of the two as identical. But it is not maintainable as matter of law that both are held to the same relative liabilities; and, if they were, it would not follow that all property which is with the traveler *infra hospitium* in an inn, would be regarded as having come into the hands of a carrier, who is transporting a passenger who retains possession of it. It has never been held that every thing on board is in the carrier's custody. All that can be said by way of classifying these callings is that the law has seen fit to

impose on these two classes of bailees more rigorous liabilities than it attaches to others. The common carrier is liable at all events (except as to enemies or inevitable accident) where he is liable at all. The innkeeper is not liable according to any adjudged case for robbery or other violence from without, or fire. *Calye's case*—8 *Co.* 32—(1 *Smith Lead. Cas.* 47), which is the leading case upon this subject, declares that the innkeeper "shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guests goods and chattels within his common inn."

It appears also from that case, as well as numerous others, that there is not any strict rule which will confine a guest's recovery to ordinary baggage; but the innkeeper will be liable for any articles received in the inn with the traveler, whether money or goods, or for beasts or carriages, and to any extent. *Kent v. Shuckard*, 2 *B. & Ad.* 803; 2 *Kent's Com.* 592-3-4-5. And herein, therefore, he is liable beyond a passenger carrier.

There is a resemblance in some of their functions as well as in their liabilities. Both may board and lodge their guests, sometimes very conveniently, and sometimes very inconveniently. There has never been a time when a traveler could be expected to remain without sleeping accommodations at night through a voyage, and it would be expecting a great deal of him to suppose he could be very vigilant when asleep. It would certainly require more close watching to keep him from being robbed in an open cabin, than in a stateroom. The law can hardly, I think, be presumed to intend that a carrier may lawfully leave a passenger unprotected from manifest danger, and yet be responsible for any loss which he may trump up, when he has been put in comparative security. Nor does it seem to me entirely reasonable, to claim, as is done by plaintiff, that her clothing and other personal articles are in custody of the carrier, when the carrier is

locked out, and not in his custody when the passenger is out of her room. It seems to me there is no middle ground where liabilities can appear and vanish from time to time as the passenger goes hither or thither. If these articles are baggage, the law declares the carrier liable at all events. If they are not, he has nothing to do with them.

The only ground on which the occupant of a state-room can maintain this peculiar liability, is, that the carrier has not merely become *quoad hoc*, like an innkeeper, but that he is an innkeeper in fact. There is certainly no authority for any such claim, nor, as it seems to me, is there any more reason. The occupations are essentially different. Boarding and lodging on a vessel are only necessary incidents to traveling on it. To travel in comfort one must both eat and sleep. Such provision has been made ever since men have traveled, but it has never yet been held that a shipmaster was an innkeeper, because he did not starve his passengers, or make them sleep in crowds. If defendants are not liable as carriers, they are not liable at all. And the declaration proceeds on this assumption.

There are some cases which have held that there was a liability for baggage, even where it has been kept in a passenger's private room. Upon this point the current of authority, both in England and America, seems to hold that it becomes in such cases a question of fact, whether the owner retained it under his personal supervision and control, or whether the carrier had also qualified possession. *Richards v. The London, Brighton & Southcoast Railway Co.* 7 *C. B.* 839. No such difficulty could arise concerning articles kept in the dress, or on the person.

Although the impossibility of protecting themselves against losses is no answer to an action, where the law requires impossibilities of carriers (as it sometimes does), yet it is a very strong argument against extending their

liabilities beyond the principles already established. And it needs but a small acquaintance with the usual circumstances of navigation, to become satisfied that, without police powers which no civilized community would tolerate, carriers could very seldom prevent or redress any such depredations as are claimed to have occurred in the case before us.

The facts alleged, it is not proper to comment on, as the jury would be the proper tribunal to weigh the extraordinary matters narrated. But the fact that in these cases carriers must be at the mercy of travelers, who can not usually be contradicted as to the extent of their losses, and may therefore recover what they see fit to swear to, renders some caution necessary against opening the door unwarrantably.

I think the judgment below should be affirmed.

MARTIN Ch. J. concurred.

The court being thus equally divided, the judgment below was affirmed.

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Langdon Hubbard and others v. Richard Winsor and another.

Partnership property, assessment of. Certain partnership property, alleged to have been held in joint tenancy, was handed in for taxation, and taxed as partnership property. *Held*, that the assessment was properly made, as there could be no individual assessment in such a case.

Board of Supervisors, effect of adjournment of: Tax, mode of determining amount of. The law (1 *C. L.* § 807,) requires supervisors to act at "their session in October." They met in pursuance thereof, and at a subsequent adjourned meeting—November 12th—fixed the amount of taxes for the ensuing year. Instead of fixing a specific sum, to be raised by taxation, the Board directed a per centage on the assessed value. *Held*, that the session in October embraced all adjournments, although they might run into another month, and that the law merely refers to it by way of designation. *Held further*, that the designation of a per centage on a definite sum was just as certain as though it were calculated; nothing remaining to be done except simple computation.

HUBBARD *v.* WINSOR.

Equitable relief: Treasurer's bond, effect of delay in filing: Assessment roll: Warrant. The proceedings required by law, and the filing of the Treasurer's bond having taken place after the time designated by law, but before the time required for the handing over of the assessment roll, it was *held*, that the delay was immaterial. *Held further*, that delay, beyond the time required by law, in appending the warrant to the assessment roll, furnished no ground of relief.

Equitable relief: Misdescription of lands for assessment by owner. Where a misdescription of lands in an assessment roll was caused by following a list furnished by the parties themselves, they were not allowed to claim it as a ground of equitable relief, and were remitted to their legal remedies.

Equity pleadings, evidence. Where evidence is not applicable to any allegations in the pleadings, it can form no basis for relief.—6 *Mich.* 133; 11 *Id.* 529; 13 *Id.* 367.

Heard October 19th. Decided November 10th.

Appeal from Huron Circuit in Chancery.

The bill was filed to restrain the collection of certain taxes, alleged to be illegally assessed against complainants jointly, upon certain lands and personal property in the township and county of Huron, for the year 1862.

Upon the filing of the bill the circuit judge granted a temporary injunction, and upon final hearing of the cause, upon pleadings and proofs, made the same perpetual by decree.

The facts are stated in the opinion.

Wm. T. Mitchell, for complainants.

1. The lands upon which the taxes were assessed were owned by the complainants in their several names, as joint owners or tenants in common, and were therefore improperly assessed to them as co-partners in the partnership name; their several interests should have been assessed, or, if not known, they should have been assessed as unknown. They could not legally be assessed to the partnership.—*Comp. L.* §§ 802, 800, *and subd.* 6, § 804.

Personal property only can be assessed in the partnership name.—*Id.* § 793.

When real estate is held by partners for the purpose of the partnership, they do not hold as partners, but as tenants in common, and the rules relative to partnership

property do not apply in regard to it.—15 *Johns.* 169; 2 *Caines R.* 166; 21 *Pick.* 64; 2 *Gibbs*, (*Mich.*) 98, 486.

2. The assessment of the northeast quarter of section 4, town 18 north of range 14 east, "less lots sold," at $12,000, was entirely void, for want of certainty in the description. There is no definition of what lots had been sold or what was assessed.

The collection of the tax upon this land should be restrained, were there no other defects in the assessment.—*Comp. L.* § 804; 3 *Mich.* 172; 2 *Blackf.* 51; *Blackwell on Tax Titles*, 159, 160, 162, 166.

3. The supervisor made no sufficient inquiry or examination as to the value of the property assessed, and especially as to the personal property, he having no means of judging its amount, quality or value, and taking no steps to ascertain the same, as required by the statute.—*Comp. L.* §§ 795, 800.

4. The board of supervisors did not, at their annual session in October, as required by the statute, make any determination of the amount to be raised for county purposes; nor did they, at their session in that month, make any apportionment of the amount to be raised for state or county purposes among the several towns of the county as required by the statute. Any such determination or apportionment at any other time was and is entirely void. At the session in October no action whatever was taken in regard to the amount of taxes to be raised or their apportionment.—*Comp. L.* § 813.

5. The board did not fix, ascertain, or determine any basis upon or for which the per centage, was to be raised. The amount and not the per centage should have been ascertained and determined, and placed at large upon the record. Their action at this time did not in any respect comply with the statute requiring a determination of the amount to be raised. Both the time and the manner, or more properly speaking, the failure of

determination rendered any tax for county purposes entirely void. There was an entire failure to determine any amount.—*Id.* § 813.

6. There was no certificate made by the clerk of the board of the amount apportioned to be assessed upon the taxable property of the township of Huron, but simply a certificate of the rate per cent., so that the supervisor had no authority for levying the taxes.—*Comp. L.* § 814.

7. The collection of taxes when illegally assessed, may be restrained by injunction, and most especially in cases where a levy has been made, as in this case, for the collection of taxes absolutely void and unauthorized by law.

The court has undoubted jurisdiction to interfere by injunction where public officers are proceeding illegally and improperly under a claim of right to do any act to the injury of the rights of others.—*Harring.* (*Mich.*) *Ch.* 72; 3 *Ham.* 72.

Under the action, or rather lack of action, of the board of supervisors, the whole state and county taxes were void. An illegal and void assessment is no assessment at all; it is a nullity, and authorizes no person to act under it or enforce it.—2 *Term R.* 372; 10 *Mass.* 17; 11 *Id.* 220; 13 *Id.* 282; 15 *Id.* 144; 5 *Conn.* 190; 2 *Id.* 550; 14 *Ill.* 223.

The cases in 3 *Mich.* 22 *and* 25 *Ill.* are entirely dissimilar to the case in hearing.

We insist, therefore, that the complainants are entitled to a decree for perpetual injunction, as prayed in their bill.

Newberry & Pond, for defendants.

1. The lands were properly assessed to complainants as co-partners.

a. The bill, upon its face, shows that the lands were owned by complainants as partners, and not merely as tenants in common.

b. The bill in effect alleges that the lands were handed in by Langdon Hubbard, as partnership property, subject to taxation, and it affirms and seeks the benefit of his action in this regard.

Under these circumstances complainants are not in a position to object to the tax upon that ground, even if they otherwise might have done so.

c. Conceding that the lands should have been assessed to the complainants, severally, according to the undivided interest of each, the assessment to them as partners was not so prejudicial to their interests, that a court of equity will aid them to resist its collection.

So far as can be seen, no possible injury could result to them from this irregularity — if irregularity it be — in the assessment, and hence equity requires that they should overlook it and pay the tax.

2. The action of the board of supervisors in ascertaining and determining the amount of money to be raised by tax for county purposes, and apportioning the same, together with the state tax, amongst the several towns, was in substantial compliance with the statutes.

a. The amount to be raised for county purposes was ascertained and determined at the October session of said board. It was regular for the board of supervisors to adjourn from time to time, and thus continue the October session into November.

b. Fixing the amount of county tax to be raised at $12\frac{2}{10}$ mills on the dollar of valuation of property in the county, as appears to have been done, was a determination of the amount within the statute. *Id certum est, quod certum reddi potest.*

3. The action of the board of supervisors in that behalf as set forth in the bill was a sufficient apportionment of

the state and county tax to be raised among the several towns.

The amount to be raised by each town was as definitely fixed as if it had been stated in dollars and cents. If, however, it should be held that this action of the board of supervisors was not an apportionment in accordance with the statute, the irregularity is cured by *Sess. Laws*, 1863, *p.* 25.

4. The provision of the statute, *Comp. L.* 816, which requires the supervisor to notify the township treasurer on or before the 25th of October, of the amount of state and county tax apportioned to his township, and said treasurer to file his bond with the county treasurer on or before the 5th day of November, is directory, and a failure to strictly comply with it does not vitiate the tax.

This proposition seems too clear for argument.

5. If there was such defect or irregularity in the proceedings of the proper officer in relation to the matters considered under points I, II and III, as to otherwise vitiate the tax roll for said township of Huron, such defects are irregularities, and cured by statutes. — *Sess. Laws*, 1863, pp. 25, 26, 35, 36.

These statutes are valid.—28 *Conn.* 97; 36 *Penn.* 29; 3 *Dutcher*, 185; 12 *Md.* 195.

6. If the proceedings of the board of supervisors in relation to the ascertaining and determination of the amount of money to be raised by tax for county purposes, and the apportionment thereof, together with the state tax, among the several towns, were so irregular or defective as to render a sale of land for a tax of that year void, or as to enable the complainants to resist at law the collection of said tax, yet a court of equity will not aid him to resist its collection.

The tax undertaken to be levied by the board of supervisors, was authorized by law, and said board authorized to levy it, and complainants' property upon which it was

assessed was subject to assessment for such tax, and hence, however defective and irregular the proceedings of said board or other officers charged with duties relative to the levy and assessment of said tax may have been, complainants are *equitably* bound to pay it, and therefore do not stand in a position to ask a court of equity to aid them in resisting its collection. If they think they can defend at law, they have their right to try the experiment, and should be left to do so.—2 *Mich.* 560; 22 *Ill.* 35, 574, 594.

7. There is no allegation in the bill that by an error of the supervisors the state and county tax was extended upon the tax roll of said town of Huron upon a wrong basis, by which said tax was increased, and hence no relief can be claimed upon that ground.—2 *Mich.* 560.

But if relief can be claimed upon that ground, complainants, notwithstanding said error, are *equitably* bound to pay all the tax except the excess, and are not entitled to an injunction against the collection of the entire tax.—25 *Ill.* 557.

8. The bill makes no case entitling complainants to the aid of a court of equity, even upon the theory that the tax sought to be collected was wholly illegal.

A court of equity will never interfere to prevent the collection of a tax by seizure and sale of personal property —a mere trespass—if the tax sought to be collected be unauthorized.—2 *Mich.* 584; 13 *Id.* 549.

CAMPBELL J.

This was a bill to restrain the collection of certain taxes alleged to have been wrongly assessed against complainants, who were doing business as partners in the town of Huron, in Huron County.

The grounds set up for relief are that real estate belonging to the complainants was assessed to the partnership, and that the valuation of property, real and

personal, was excessive; that the supervisors did not properly determine the amount of taxes to be levied, and that such action as they took was had too late. It is also claimed that the proceedings to complete the roll and warrant, and file the Treasurer's bond, were not had within the statutory period, and that as to one parcel of land assessed, the description is defective. It appears in proof also, that the taxes were extended at about fifteen per cent. too much.

We think the objections concerning the mode of assessing real estate are not tenable. It appears that the land was all handed in on one list with other property belonging to the firm, and as it is alleged in the bill to be held in joint tenancy, there could be no assessment of shares in it individually to the owners severally, because their estate as set out is indivisible. We can not perceive how any injury could accrue from this assessment, which is substantially, if not technically, made to the true legal owners.

The objections to the conduct of the supervisor in refusing to allow evidence to reduce the valuation are not made out by proofs, and the charges are denied.

The order of the supervisors fixing the amount of taxes was not made until November 12th. That meeting was one upon adjournment from the 10th, which was also an adjourned meeting continued from October. The law requires the supervisors to act at "their session in October." — 1 *C. L.* § 807.

The law gives them power to adjourn their meetings from time to time, as they may deem necessary. — 1 *C. L.* § 335. We think the session in October embraces all adjournments, although they may run into another month, and that the law merely refers to it by way of designation.

Instead of fixing a specific sum to be raised by taxation, the board directed a per centage on the assessed

value. The legislature subsequently passed a statute designed to legalize this method of taxation, and it is claimed this statute is void. We do not perceive any illegality in the original proceedings, and do not deem it necessary to inquire into the validity of the law. The designation of a per centage on a definite sum is just as certain as if it were calculated and stated in figures, and leaves nothing to be done to make it known, except a simple computation. It would be absurd to hold a tax valid or void according as a sum of this nature is done by one or another officer from the same data. The law presumes that the rules of arithmetic are the same in all offices.

There is no dispute but that all other steps were taken, and regular except as to time. As the proceedings required by law and the filing of the treasurer's bond took place before the roll was required to be handed over, we think the delay immaterial. Nor do we think the delay in appending the warrant furnishes any ground of relief.

It is also urged that a description of a tract of land "less lots sold," renders the assessment invalid as to that parcel. This objection is not pointed out by the bill, and, so far as it appears, the assessment follows the list of property handed in. Although, if so described, the land cannot be held bound, yet complainants should have pointed out this defect specifically, if they meant to rely upon it; and should not be allowed to object in this court to their own description. The defect is one which would destroy the tax at law as well as in equity, and under the circumstances we must leave them to their legal remedy.

The excess in the amount of taxes levied is not mentioned in the bill, and appears for the first time in the proofs. This evidence, not being applicable to any allegation in the pleadings can form no basis for relief.

Warner v. Whittaker, 6 *Mich.* 133; *Peckham v. Buffam*, 11 *Id.* 529; *Moran v. Palmer*, 13 *Id.* 367.

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

The other Justices concurred.

John A. Newbould and others v. Charles H. Stewart and others.

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Decree not drawn up: Appeal. Where a decision is announced, but no decree is actually drawn up or filed, *Held*, there is no legal determination of the cause, and therefore nothing to appeal from.

Heard and decided November 10th.

Appeal in Chancery from Wayne Circuit.

This was a motion to docket and dismiss the appeal.

S. T. Douglass, for the motion.

William Gray, contra.

The court below had announced its decision, but no decree had been actually drawn up or filed. It was held that under these circumstances there was no legal determination of the cause, and therefore nothing to appeal from. The appeal was dismissed as premature.

The People ex rel. Dean v. The Board of Registration of Nankin.

Board of Registration: Their duty as to the mode of determining the qualifications of voters. When a person applies to the Board of Registration for the purpose of having his name registered as a voter, and offers to be sworn as to his qualifications, it is the duty of the board to examine such person upon his oath. They have no right to reject him on mere inspection.

Where the return made by respondents denies that the relator was entitled to be registered as a voter, an issue will be directed to determine the fact.

Heard and decided November 9th, 1866.

Petition for mandamus.

This was a petition for an order that respondents show cause why a writ of *mandamus* should not issue to compel them to register the name of the relator as a legal elector of said township, upon his showing to them, in the manner required by law, his right to such registration.

The petition of Dean set forth that he was a citizen of the State of Michigan, and a resident of the township of Nankin, Wayne county, in which place he had resided for nine months, and in the state ten years, and that he was thirty years of age; that he was a white person, and a legal elector under the Constitution of the state, and that his father and mother were each of them white persons, though possessing less than one-sixteenth Indian blood, and that he (the petitioner) had less than one thirty-second of Indian blood in his veins, the balance being pure white or Caucassian; that on the third day of November last, he applied to the board of registration of the town of Nankin for the purpose of having his name registered among the legal electors of that town, and requested the said board to register his name as such elector, and offered to make oath, as required by law, of his possessing the requisite legal qualifications which entitled him to such registration, but that the said board refused to register his name, or to put him upon his oath, as requested;

and did declare that the petitioner was a negro, and that they would not examine him in relation thereto.

The answer of respondents set forth that they had always considered relator as a negro; that upon his application he tendered no evidence of his statement excepting his own oath, and that from their previous knowledge of him, his dusky complexion and curly hair, they *still* considered him a negro. The answer also admitted, as set forth in the petition, that they refused to receive his oath at the time of his application.

H. M. Cheever, for relator.

When a specific duty is imposed by statute, as in this case, upon public officers, and they refuse to execute it, they may be compelled to act, by *mandamus*, and as to corporations and ministerial officers, the writ may also direct how they shall act. — 20 *Barb.* 294; 1 *Barb. S. C. R.* 34; 1 *Doug.* 319; 20 *Wend.* 658.

It has been granted to compel such officers to meet and perform a duty; *e. g.* to restore names struck off an assessment roll. — 4 *Hill*, 20; 4 *Seld.* 318.

In this case, the duties of respondents is clearly defined by section 12 of the Registry Act. — *Laws of* 1858, *p.* 490. After providing for a session of the board, to be held at a specified time, it says: "During this session it shall be the right of each and every person who, at the next approaching election or township meeting, may be a qualified elector, and entitled to vote thereat, and whose name is not already registered, to have his name duly entered on such register, which shall be done in the manner and form above set forth. The board shall have the power, and it shall be their duty, and the duty of the clerk, and of the supervisors individually, when acting under this statute, to question every person presenting himself for registration touching his residence and his other qualifications as an elector of the township, and it shall be the

duty of the applicant to make truthful answer to all such questions."

It was the duty of respondents, if they entertained doubts as to the qualification of relator, to question him, and receive his oath, if tendered. They could reject his application for registration only when convinced, after hearing the application, of its falsity.

The answer of respondents to the petition, admitting that they rejected the application, without questioning relator, and solely on their own opinion of his ineligibility, a *mandamus* should issue, compelling them to investigate the facts, and, if found to be as charged in the petition, to register him as an elector.

Moore and Griffin, for respondents.

Section 13 of the Registry Act is as follows: "The name of no person but an actual resident of the township at the time of registration, and entitled under the Constitution to vote at the then next election or township meeting, shall be entered in the register. Neither the board, nor any member thereof, shall write or enter therein the name of any person, nor suffer him to write or enter his name therein, whom they know or have good reason to believe not to be such resident and so qualified."

Under this the board have the right to reject any application, without taking testimony, or examining the applicant, if they are satisfied from their own knowledge, or any circumstance connected with the applicant or his application, that he is not entitled to registry. The board in this case acted fairly, within the scope of their authority, and no *mandamus* should issue.

BY THE COURT.

It was the duty of the respondents, when the relator offered to be sworn to his qualifications, to examine him on oath; and while they would not be absolutely bound

by his statements, they had no right to reject him on mere inspection. A failure on their part to perform their duty would not, however, entitle the relator to be registered; and the return now made would seem to propose an issue of fact upon his qualification. If the respondents still think the relator not qualified, within the decision of this court in *People v. Dean*, we will direct an issue of fact to be sent for trial by jury; but if they should now consider him entitled, and do not desire to contest the point, we can issue a peremptory mandamus, by consent, at once. It rests with respondents to say whether they will have a trial of the issue or not.

On consultation with the respondents, Mr. Moore assented that a peremptory mandamus should issue.

Ordered, that a peremptory mandamus issue, commanding the respondents to meet within thirty days, and cause the relator to be registered, and that they pay ten dollars costs.

JANUARY TERM, 1867, AT LANSING.

The People ex rel. E. W. Hudson and others v. Peter E. DeMill and others.

Quo Warranto: Rule to plead. The statute which authorizes the Attorney General to enter a rule requiring the defendants to plead to the information within twenty days after service of a copy—*Comp. L.* § 5306—is enacted altogether, for his benefit, and to enable him to expedite the proceedings.

Heard and decided January 10th.

Quo Warranto.

Motion to confirm default.

The summons in this case was made returnable on the 23d day of October, 1866, and was served personally on all the defendants and was duly returned before the return day. The clerk did not enter the appearance of the defendants as prescribed by the statute, nor did the Attorney General enter a rule to plead.

On the 12th of November, 1866, the defendants entered the default of the Attorney General for want of such rule, and thereafter, on the same day, the defendants entered their appearance subject to the default; reserving the right to have the same made absolute.

The Attorney General then entered a rule to plead and served notice thereof together with a copy of the information, and the defendants filed and served their demurrer thereto, *de bene esse*, without waiving the right to have the default made absolute, and the information dismissed;

to which the Attorney General filed the general joinder in demurrer.

The defendants moved that the default be made absolute and the information be dismissed with costs.

A. D. Fraser and *Levi Bishop*, for the motion.

1. The present rules, 46 and 47, of this court were adopted in the year 1845.

They prescribe a course of proceeding to be followed in *quo warranto* after defendant has been served with process.

These rules would of course have full force and effect if there were no statute regulating the same practice.

2. The revised statutes of 1846 changed the practice in these cases requiring the clerk to enter the appearance of the defendants and requiring the Attorney General to enter a rule to plead.—2 *Comp. L.* §§ 5292, 5306.

Upon familiar principles of law this legislation covering the same subject embraced by the rules, in effect repeals them.

Where the rules of court and a statute conflict with each other the statute must prevail.

The old rules, 46 and 47, of this court, adopted in 1845, were therefore repealed by the statute.

But, as we understand the matter, when a code of rules was adopted after the revised statutes of 1846 took effect, these rules, 46 and 47, were adopted by an oversight, without a careful comparison of them with the statute. Still, rules of court in conflict with statutory provisions can have no effect, though the rules may be adopted subsequently to the statute.

So far as they are inconsistent with each other and also so far as they cover the same subject, the rules are a nullity, 2 *Bouvier's Law Dic. Title, Rules;* 3 *Pick.* 512; 1 *Peters*, 604; 3 *Binney*, 417; 3 *Serg. & R.* 250.

Courts can not make rules contradictory of the laws of the land.—8 *Sergt. & R.* 335; 11 *Id.* 131.

3. The word "*may*" in the statute has the effect of the word "*shall.*"—2 *Comp. L.* § 5306.

Such will be the construction when such is the intent of the legislature where the public, or private persons are interested in the question, or where public justice or public officers are concerned.—*Note* 1 *to* 1 *Saund. R.* 58; 5 *Cow.* 188–193; 14 *Sergt. & R.* 429; 1 *Peters*, 46; 1 *Cr. & Mees.* 355; 3 *Tyrw.* 272; *Smith's Com.* 724–729.

The legislature evidently intended to prescribe a course of practice that should produce speedy issue in these cases. Not only was authority given to the Attorney General, but a duty was imposed on him to practice promptly according to the statute.

At common law neither party was compelled to take any step in pleading till ruled so to do by a special order. 1 *Tidd's Prac.* 365. It was to remedy this dilatory practice that the statute was passed.

4. All our proceedings since the default have been taken *de bene esse*, saving all rights growing out of the default and the right to move that the same be made absolute.

This course is familiar in practice.—1 *Tidd's Prac.* 361; *Graham's Prac.* 190–1.

It was the only course for us to take and save our rights, without being ourselves in default if we should mistake the practice.

H. K. Clarke, contra.

There is no such conflict between the statute and the rules, as the defendants contend. The statute authorizes the Attorney General to enter a rule to plead on the return of the summons. It does not require it. Rule 46 requires the defendant to enter his appearance. Until he has appeared, he can claim nothing. If a rule to plead is a necessary

step in the practice in such cases, it can only be after appearance and when a copy of the information is served. This view of the practice harmonizes the statute and the rules, and is supported by the authorities and the practice in personal actions, which are referred to in several places in the statute.

Per Curiam.

The statute which authorizes the Attorney General to enter a rule requiring the defendants to plead to the information within twenty days after service of a copy, *Comp. L.* § 5306, is enacted altogether for his benefit, and to enable him to expedite the proceedings. The defendant is under no necessity of waiting for notice of any such rule, but may plead at once on being served with summons. If the Attorney General anticipates that he may not do so, he can enter this rule; in which case, if the rule is duly served, the defendant must plead within the twenty days or suffer default.

Motion denied.

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The People ex rel. Hudson et al., v. P. E. DeMill et al.

Quo warranto: Pleading: Misjoinder. The information charged defendants with intrusion into the offices of Wardens and Vestrymen, of St. Paul's Church, Detroit, "*a corporation created by the authority of this State.*" *Held*,

1. That inasmuch as the court had no judicial knowledge of the existence of any such corporation, the information was defective in not setting forth such facts as in connection with the public statutes, of which the court can take judicial notice, would show such corporate existence.

2. Where a corporation is created by special statute, such existence need not in general be shown by further averment; but where not so created it must be made out according to the facts.

3. Where an information is filed for usurpation of office, the existence of the corporation is a jurisdictional fact, which must be averred unless judicially known.

THE PEOPLE *v.* DEMILL.

4. When the court is not judicially informed concerning the nature of an alleged office in a corporation, it must be so described as to its nature and duties as to show whether it is such an office as comes within the purview of the law relative to the usurpation of franchises.

5. Persons claiming to be wardens and vestrymen of a church can not join as relators to test in one proceeding their rights to the offices respectively, against adverse claimants.

Heard January 10th and 11th. Decided January 14th.

Information in the nature of a quo warranto.

The information was filed to determine the legality of the election of the wardens and vestrymen of St. Paul's Church, in the city of Detroit.

The pleadings were as follows:

Information.

"Albert Williams, Attorney General of the State of Michigan, who sues for the people of the said State, in this behalf, comes here before the Justices of the Supreme Court of the same people, on the eighteenth day of October, in the year one thousand eight hundred and sixty-six, and upon the relation of Elon W. Hudson, Frederick A. Stokes, Kirkland C. Barker, Thomas J. Cram, Alonzo D. Denny, Alexander W. Copland, Marcus Stevens, Thomas Woodhams, Israel Mowry and Charles F. Clark, according to the form of the statute in such case provided, gives the court here to understand and be informed that Peter E. DeMill, Benjamin Vernor, James V. Campbell, Thomas Radcliff, Allen S. Sweet, Willard Parker, Lorenzo M. Mason, Edward LeFavour, Robert P. Toms and Richard H. Hall, of the city of Detroit, in the county of Wayne, and state aforesaid, for the space of one month now last past, have held, used and exercised, and still do hold, use and exercise, without any legal election, appointment, warrant, or authority whatsoever, the office of wardens and vestrymen, to wit, the said Peter E. DeMill and Benjamin Vernor the office of wardens, and the said James V. Campbell, Thomas

Radcliff, Allen S. Sweet, Willard Parker, Lorenzo M. Mason, Edward LeFavour, Robert P. Toms and Richard H. Hall the office of vestrymen, in St. Paul's Church in the said city, a corporation created by the authority of the said state, under the name and style of "The Rector, Wardens and Vestrymen of St. Paul's Church, in the city of Detroit."

And the said Attorney General further gives the court here to understand and be informed, that at an election for wardens and vestrymen, held on the sixth day of September now last past, the said Elon W. Hudson and Frederick A. Stokes were duly elected and chosen Wardens of said corporation, and Kirkland C. Barker, Thomas J. Cram, Alonzo D. Denny, Alexander W. Copland, Marcus Stevens, Thomas Woodhams, Israel Mowry and Charles F. Clark, were duly elected and chosen vestrymen of said corporation, and that the said Elon W. Hudson and Frederick A. Stokes, have ever since been and still are rightfully entitled to hold, use and exercise the said office of wardens; and Kirkland C. Barker, Thomas J. Cram, Alonzo D. Denny, Alexander W. Copland, Marcus Stevens, Thomas Woodhams, Israel Mowry and Charles F. Clark, have ever since been, and still are rightfully entitled to hold, use and exercise the said office of vestrymen in said corporation; which said office of wardens the said Peter E. DeMill and Benjamin Vernor, during all the time aforesaid, have usurped, intruded into, and unlawfully held and exercised, and still do usurp, intrude into, and unlawfully hold and exercise; and which said office of vestrymen the said James V. Campbell, Thomas Radcliff, Allen S. Sweet, Willard Parker, Lorenzo M. Mason, Edward LeFavour, Robert P. Toms and Richard H. Hall, during all the time aforesaid, have usurped, intruded into, and unlawfully held and exercised, and still do usurp, intrude into, and unlawfully hold and exercise, to wit, in the state and

county aforesaid, in contempt of the people of the State of Michigan, and to their great damage and prejudice.

Whereupon the said Attorney General prays the advice of the court here in the premises, and for due process of law against the said Peter E. DeMill, Benjamin Vernor, James V. Campbell, Thomas Radcliff, Allen S. Sweet, Willard Parker, Lorenzo M. Mason, Edward LeFavour, Robert P. Toms and Richard H. Hall, in this behalf to be made to answer to the said people by what warrant they, the said Peter E. DeMill and Benjamin Vernor, claim to hold, use, exercise and enjoy the said office of wardens in said corporation; and the said James V. Campbell, Thomas Radcliff, Allen S. Sweet, Willard Parker, Lorenzo M. Mason, Edward LeFavour, Robert P. Toms and Richard H. Hall, claim to hold, use, exercise and enjoy the said office of vestrymen in said corporation.

ALBERT WILLIAMS,
Attorney General, Michigan.

HOVEY K. CLARKE,
Of Counsel."

Demurrer.

"And now come the said defendants, by Levi Bishop, their attorney, and having heard the said information read, they severally say that they do not think that the said People ought to impeach or trouble them, or any of them, by reason of the premises in said information specified or mentioned; because they severally say that the said information, and the matters therein contained, are insufficient in law, and that they need not, nor are any of them obliged by the law of the land to answer thereto; whereupon, for the insufficiency thereof, they severally pray judgment, and that they, and every one of them, be discharged and dismissed by the court hereof, and from the premises above charged upon them with costs. And the said defendants would further severally say, that in addition to all grounds

competent to be urged under the above demurrer to said information, they will also insist on the following special causes, viz.:

1. It is not averred with sufficient certainty and precision in said information, that the "Rector, Wardens and Vestrymen, of St. Paul's Church, in the city of Detroit," mentioned in said information, had actually been "created a corporation by the authority of this state," and continued to be such until said information was filed, so as to bring the case within the purview of the statute.

2. It is not averred in said information by or under what law, special or general, or when said parties had been so incorporated.

3. Neither is it averred that said offices of wardens and vestrymen had been created or provided for in such act of incorporation; what the nature of their duties, or how appointed or elected, and the tenures of their office.

4. It does not appear from said information whether the said relators had been elected as a vestry at an annual or special election or not, or whether the said election was authorized by the provisions of the alleged act of incorporation, or what the provisions of such act were.

5. It is not averred in said information that any particular defendant usurped or exercised any office claimed by any designated relator.

6. That the information presents the pretended rights of several relators to several distinct and separate offices, and of different classes, who, however, are not averred to have accepted or claimed said offices.

7. The alleged corporation is of a private nature; has no concern with the government or the administration of justice; has nothing of a public nature about it, and does not come within the purview of the statute on which the proceedings are based.

And also, that said information is in other respects uncertain, informal and insufficient, etc."

To which a general replication was filed.

A. D. Fraser and *L. Bishop*, for defendants, in support of demurrer.

1. It is not averred in a direct, positive and affirmative manner, and with sufficient certainty and precision, that said corporation had been created, and still existed, so as to bring the case within the purview of the statute.

The information is radically defective in not setting forth all the facts necessary to be alleged, to show that the officers of St. Paul's Church had been incorporated according to the laws of this state. It has been held by the courts of New York, from which we have adopted the statute, regulating these proceedings, that all grounds of complaint under it must be set out with all the exactness of pleading required in an action for a penalty, or for a libel, etc. 23 *Wend.* 193, 217, 221, 223, in which the case of the 9 *Wend.* 374, 375, laying down the same rule is fully approved of. To the same effect are the following authorities:—5 *Bacon's Ab. Information C, p.* 178, 179; *Comyn's Dig. Plead. C.* 76; 1 *Lord Raymond*, 107, 478; 1 *Salk.* 139; 2 *Mass.* 444; 4 *Id.* 471.

This is essential, that it may appear, whether or not the act charged, comes within the purview of the statute. 1 *Chitty's Pl.* 322, 324, *and notes;* 2 *Doug.* 159, 278; 5 *T. R.* 70.

Judge Buller says: "The allegations must set forth everything, which is matter of substance, material or essential, to the plaintiff's demand."—1 *Esp.* 299; *Buller's N. P.* 167.

The information must state, directly and affirmatively, the grounds of complaint, so that they may be traversed. 7 *Bacon's Ab. Information, B. Decln.* 510; *Graham's Pr.* 211; *Philip's Ev.* 165, 166; 2 *Str.* 1151, 1162; 2 *Salk*, 636; 1 *Chitty's Pl.* 216, 217, 228.

Facts only are to be stated, and not arguments or inferences, or matters of law.—1 *Chitty's Pl.* 196; *Cowp.* 684; 5 *East*, 275; 10 *Id.* 205; 1 *Johns.* 468; *Willcock on Corp.* 466; 7 *E. C. L.* 168; 4 *Blackf.* 392; 6 *Ala.* 169.

It ought in all matters to state that which is the essence of the action—7 *Bacon's Ab. Pleas and Pleadings*, 510, 465, 477—and this must be done by positive and express averments.—*Ibid.* 510, 579.

If these principles are applied to this information, it will be found that it is destitute of those elements, which are essentially necessary for the object in view.

2. It is not averred in the information by or under what law, private or public, general or special, or when the said parties had been created a corporation.

It is not pretended that the officers of said church had been incorporated by any special statute, and assuming the creation of such corporation, under one of the numerous general acts adopted in this state since the year 1807, relative to "Religious Corporations," it is still more necessary that the information should state the precise law under which it claims to have been organized. Hence it was held in Indiana that the information should inform the court, under what statute a company was organized, so that the court might be acquainted with its charter, and know its powers and duties, 16 *Ind.* 456; all the precedents too, both English and American, are to this effect, 4 *Cow.* 107; 5 *Day*, 329; 1 *Denio*, 389; 13 *Penn.* 133, 136; 6 *Wentw.* 154. In 16 *Wend.* 658, the decision turned upon the effect of precedents. In prosecutions for an offense created by statute, a reference to it is indispensable, and so in penal actions.—3 *Comst.* 188.

Even in civil actions, on our own statutes, under our present system, a reference to the particular statute on which a suit is based, is essentially necessary, 2 *Comp. L.* §§ 5115, 5117, 5116, 4156 *to* 4158, and in ordinary actions by or against corporations a party must set forth the title

to the act under which the corporation was created, and the date of its approval.—2 *C. L.* 1291, §§ 6, 7.

The 18th subdivision of the 3d section of the chapter on statutes, (1 *C. L.* 89,) does not dispense with the necessity of such reference, even in actions based on special statutes; besides, this provision has no applicability whatever to a corporation organized under a general law, of which the court can not take notice until pleaded, for its creation is merely a matter *in pais*, and must be shown by pleading.

3. Neither is it averred that such officers, as wardens and vestrymen, had been created or provided for in such act of incorporation, or the nature of their duties.

A simple act of incorporation is often applied for in order to enable a company to sue by a general name; to have a common seal; to transmit their rights, property, etc., to succeeding members, without conveyances, and without any other aim. These attributes alone are sufficient to constitute a corporation: neither the possession of property, nor the actual enjoyment of franchises is necessary.—*Angell & Ames*, *p.* 26.

But this is not enough to give jurisdiction to this court.

It is necessary, in addition to its corporate character, to confer upon it certain privileges and immunities, which are to be enjoyed by the corporators in common.—1 *Kyd*, 70; 6 *East.* 359, 361, 363; 5 *T. R.* 85; *Skinner*, 311; 15 *Johns.* 358, 386; 10. *Co.* 31*a*; 3 *Id.* 75, *b*; 4 *Comyn Dig.* 450, 452, 465, 474; 1 *Black. Com.* 475, 476; *Angell & Ames*, 365, 66.

"It is true," say the court, in the case of Regina *v.* Mousley, (55 *E. C. L.* 945,) "that a charter was obtained from the Crown, according to the founder, in order to incorporate the members of his foundation; but that alone is quite immaterial, as the Crown neither added anything to the foundation, nor reserved to itself any control over it." But, if on this corporation be conferred

a "franchise," then it is this franchise which is protected by the courts, 1 *Kyd*, 14, 15; *Angell & Ames*, 618; hence the necessity of setting out this "franchise" in this information, especially as some of the general laws above alluded to, contemplated little more than the mere act of creating a body corporate, without any franchise; and in others, powers were delegated to the corporations to create officers, prescribe their duties and terms of office. The information in this case is entirely inapplicable to the case, and was designed merely to apply to an officer, whose office and duties were prescribed by public law. All the precedents already cited support this view. Aside from these considerations, it is highly proper, that this legal document should contain a full statement of all the facts connected with the case. The English courts, impressed with the propriety of this course, have adopted stringent rules, requiring the *rule nisi*, granted in such cases to contain a statement of the intended objections, in the nature of a bill of particulars; and no objection can be raised by the prosecution on the pleadings not so specified.—48 *E. C. L.* 96, *note B*; 64 *Id.* 939.

The sole object of this proceeding is to resume a franchise; hence the necessity of showing in what it consists; and if it springs from a general law, or a by-law, then the whole matter must be set out.—2 *Kyd*, 167, 424, 425; *Angell & Ames*, 307, 308; 6 *Comyn's Dig.* 157; 2 *Johns. Ch.* 377.

4. There is a misjoinder in this information, not only as regards the relators and defendants, but, also, as respects the causes of complaint, or offenses charged; and, especially, in embracing the wardens with the vestrymen, although each and every of them hold separate and distinct offices, and that they are distinct classes, having to perform distinct duties.

This is the most extraordinary feature of this case. The course adopted here is inadmissible in either civil or criminal

proceedings, except when the peculiar nature of the case or the statute law permits it. The statute governing these proceedings very distinctly contemplates only a contest for one office in any one information. In the nineteenth section of 2 *C. L. p.* 1394, it is laid down that "when several persons claim to be entitled to the same office or franchise, one information may be filed against all such persons, in order to try their respective rights to such office or franchise." But here are ten different persons, holding as many distinct offices, which are claimed by as many distinct relators. Nor is it permitted in practice. It is a misjoinder as regards relators and defendants. — 5 *Bacon's Ab. Information C.* 179, 183, 187; *Comyn's Dig.* 196; *Willcock*, 481, 482; *Angell & Ames*, 633; 2 *Kyd*, 413; 4 *Cow.* 109. The nature of the trial and the judgment show that there should be separate informations. — 2 *Comp. L.* §§ 5310, 5312.

The same rule obtains in civil actions, and the objection is available, either on general demurrer, arrest of judgment, or on error. — 1 *Chitty's Pl.* 178, 188, 394; 1 *Tidd.* 12, 694; 1 *Taunt.* 212; 2 *Bos. & P.* 424; 2 *Saund.* 210, *notes;* 18 *E. C. L.* 461.

5. All the defendants are charged jointly with having intruded into and usurped ten offices, and with having held, used and exercised the same, although said offices are manifestly separate and distinct in their natures. This objection is as fatal as the last, and may be availed of in the same way. — 1 *Chitty's Pl.* 34, 73, 74, 182, 183, 187; 7 *Bacon's Ab. Pleas and Plead.* 471.

"If in legal consideration," says Chitty, 73, "several can not concur in the act complained of, separate actions must be brought against each." And in criminal cases several offenses can not be joined, as for perjury (2 *Str.* 921), or for seditious words or the like, because such offenses are, in their nature, several. "Even where several commit a joint act, not of itself illegal, but which became so, by

reason of some circumstances applicable to each severally, and not jointly, they must be indicted separately."—1 *Barb. Cr. L.* 338; 2 *Hawk. C.* 25, § 89. Thus several partners can not be indicted jointly for exercising their trade, without having served an apprenticeship.—*Ibid.* 1 *Salk.* 382; *Str.* 623. And when several defendants are permitted to be included, the word "several" must be inserted, which makes the offense several as to each.—1 *Barb. Cr. L.* 338. And so are the precedents.—6 *Wentworth;* 4 *Cow.* 107.

On a joint charge there must be proof of a joint offense.—1 *Barb.* 338; *Russ. & Ry. C. C.* 257, *in receiving stolen goods.*

It required a special provision in our code to sanction a joint indictment in certain cases.—2 *Comp. L.* § 6052.

6. The alleged corporation is of a strictly private nature; has no concern with the government, or the administration of justice; has nothing of a public nature about it, nor does it enjoin any public duty, or come within the statute on which the proceedings are based.

We are aware that Angell & Ames (from 614, 618, and also at p. 627), take somewhat of a different view of the subject; but a series of decisions of the English courts, on a statute somewhat similar to ours, we apprehend, puts this question at rest. It has been held that no case is embraced in the statute, except such as were cognizable at common law, and we have several decisions in which this writ has been denied against wardens and vestrymen.—2 *Str.* 1196; 4 *T. R.* 381; 11 *Sergt. & R.* 73.

Vide on the general doctrine.—*Willcock*, 457, 464; 3 *Burr.* 1615; 1 *Dow. & Ry.* 426; 16 *E. C. L.* 45; 30 *Id.* 132; 21 *Id.* 61, 62; 33 *Id.* 210.

In this case Lord Denman said: "We are not at liberty to depart from the case of Ramsden, which was decided after much consideration."—*Also*, 55 *E. C. L.* 945, *already cited; see, also*, 11 *S. & R.* 73, 74; 21 *Ill.* 65.

The case referred to from S. & R. presents very strong reasons why the court should not interfere with this class of cases. Beside, there is a remedy by civil action. — *Andrew's R.* 14; 3 *Kent*, 459, 618; 3 *Burr.* 1821, 1822; 10 *Wend.* 327.

7. It is not averred in the information that any particular defendant usurped or exercised any office claimed by any of the designated relators; but it presents the supposed rights of several relators to several distinct and separate offices, and of different classes, who are not even averred to have accepted of said offices, or to claim them, which we apprehend to be necessary. — 5 *Day*, 529.

8. It does not appear from said information whether said relators had been elected at an annual or special election or not, or whether said election was authorized by the provisions of the alleged charter, or what the provisions of such act were, in this regard.

H. K. Clarke, for relator.

1. A demurrer to an information in the nature of a *quo warranto* is an unusual proceeding. It may be conceded that it is the proper method for obtaining an adjudication of the court upon an information, substantially defective; but it is unusual, because the information rarely, if ever, tenders the precise issue to be tried. It is more in the nature of a rule to show cause than a pleading to be treated by technical rules. The defendant must either disclaim or justify.

If he disclaim, there is, of course, no occasion for an issue. If he justify, he must do it by plea, in which he must accurately set forth his title and aver specifically every fact necessary to show his present continuing right.— *A. & A. on Corp.* (*4th ed.*) *Ch.* 21, § 756; 3 *Ark.* 570; 15 *Ill.* 213; 1 *Denio*, 388.

The defendant is obliged to assume the affirmative, and his plea tenders the issue. This explains why a demurrer

to an information is so unusual, and it shows, also, that the most general averments are all that is necessary to require the defendant to disclose the authority under which he claims to act. — 2 *Mich.* 348; 5 *Id.* 146; 13 *Id.* 384.

All the causes assigned for the demurrer, except the last, seem to be founded upon an opposite theory, namely, that it is the duty of the Attorney General to aver every fact necessary to exclude every inference in favor of the defendant's right. It demands the highest degree of certainty — "certainty to a certain intent in every particular." This theory of the defendant's counsel is not supported by any of the authorities, and being erroneous, all the causes of demurrer founded upon it, fall with it.

2. The seventh of the assigned causes of demurrer is that "the alleged corporation is of a private nature, * * * and does not come within the purview of the statute on which the proceedings are based."

At common law, the right of the Attorney General to file the information, without asking leave of the court, was not denied. In cases where it was necessary to ask the leave of the court to file the information, and the franchise was not of a public character, leave has been refused. It was only in such cases that the private or public character of the franchise became material. — *A. & A. on Corp.* (*4th ed.*) *Ch.* 21, §§ 734-5-6; 10 *Mass.* 290.

The courts of Pennsylvania, however, in which state the statute of Anne had never been enacted, entertained jurisdiction of just such cases as this. — 3 *S. & R.* 28; 5 *Id.* 510; 11 *Id.* 73; 15 *Id.* 127.

The statute of this state leaves no room for doubt as to what constitutes a proper case for the action of the Attorney General — "when any person shall exercise any office in any corporation created by the authority of this state." — *Comp. Laws*, § 5291.

The proceeding here is against persons claiming office

in a corporation; and the usurpation complained of is averred in the precise words of the statute, namely, that they "exercise" an "office in" a "corporation created by the authority of this state."

This averment is as certain as that required in the United States courts in averring the existence of a corporation. — 16 *How.* 314; 20 *Id.* 227; 6 *Pet.* 761.

These are averments of jurisdictional facts. If they be sufficient for that purpose, there can be no doubt of the sufficiency of the averments in this information.

Acts of incorporation in this state are deemed public acts, and do not require to be specially pleaded. — *Comp. L. p.* 89, § 18.

C. I. Walker, on the same side.

1. Although the proceedings by quo warranto are criminal in form, they are to determine civil rights, and the principles applicable to pleadings in civil cases measurably prevail. — *Angell and Ames on Corp.* (3*d Ed.*) 686 *and* 687; 28 *Penn.* 387; 4 *Seld.* 70.

Thus certainty only to a common intent is required. — 1 *Blackf.* 271.

Then, too, in these proceedings the state is bound to make no showing, and the averments of the information may be of the most general character; the object being to require the defendant to show cause. — *Angell and Ames on Corp.* 717; 5 *Mich.* 148; 12 *Id.* 394; 3 *Ark.* 570; 15 *Ill.* 217.

As to the general nature of these averments see *Green's Prac. pp.* 486, 492; 4 *Cow.* 106; 10 *Mass.* 290.

In the light of these general principles let us look at the special grounds of demurrer in this case.

2. The creation of the corporation by the authority of the state is clearly and distinctly averred in the very language of the statute, and with as much fullness and clearness, as would be required, if the corporation were

the plaintiff in a civil action. — 2 *Comp. L.* § 5290; *Gould's Pl. Ch.* 3, § 61; 1 *Chitty's Pl.* 256, 382; 2 *Id.* 29, 34.

The origin of the corporation having been clearly stated, its continuance will be presumed. — 2 *Doug.* 364.

3. It was not required by any known rule of pleading, either to set out by what law or when the incorporation took place.

The fact of the incorporation by the authority of this state was the only fact necessary to be averred; and that is averred in a clearly issuable form.

4. It was unnecessary to aver the nature or tenure of the office, or whether it be one created by the act itself or under the act by its authority.

It is distinctly averred that the defendants have intruded themselves into, and unlawfully hold the offices named; and that they are offices in the corporation.

The statute makes no distinction between offices created by the act of incorporation itself, and those created by virtue of its authority.

If the defendants hold such offices, as they are charged with doing, they have no need to be informed of the duty or tenure of the office. They are called upon to justify their holding.

If they do not hold the offices they may disclaim.

5. It was entirely unnecessary to set forth any more specifically the claim of the relators to said offices. Indeed, it was not necessary to set them forth at all, and no issue can be taken upon these averments. — 2 *Comp. L.* § 5293; 2 *Mich.* 348.

6. The statute applies as well to offices in private as in public corporations. And in this country it is settled independently of the statute, that a quo warranto will lie for intruding into the office of a private corporation. — *Angell and Ames on Corp.* 694, 696, *and cases there cited;* 15 *S. and R.* 127.

THE PEOPLE v. DEMILL.

COOLEY J.

It is commonly a source of regret when a court is compelled to dispose of the case before it without passing upon the main questions raised; but the nature of the record in the present case is such as to leave us no alternative. We are clearly of opinion that the information is fatally defective in two particulars.

It is defective, *firstly*, in not showing in what manner the organization in which the defendants are accused of having usurped office became a body corporate. When any person, or association of persons, is charged with usurping the franchise of a corporation, it is sufficient for the Attorney General to call upon them, in general terms, to show by what authority they claim the right to exercise such franchise; but when the very nature of the proceeding is such as to assume the actual existence of a corporation, and it is alleged that defendants usurp some authority therein, no ground whatever is shown for calling upon defendants to show their right until it is made to appear that a corporation exists. The claim to a corporate franchise, which does not exist in fact, may be a great public wrong, demanding immediate redress; but the claim to an office in a corporation which has no existence, can hardly be a matter of public concern, unless accompanied with the attempt to exercise a corporate franchise; in which case the remedy would be an information, not for the unlawful intrusion into an office, but for the usurpation of the franchise. The information in a case like the present must, therefore, show that a corporation exists; for until that is shown, it is not made to appear that there is any office into which the defendants can intrude. The precedents in proceedings against public officers, are not applicable, in all particulars, to the case before us; since those are cases where the courts must judicially take notice of the existence of the offices, and no allegations are necessary to show how they were created.

The statute under which this information is filed — *Comp. L.* § 5291 — authorizes this proceeding in the case of usurpation of office "in any corporation *created by the authority of this state.*" The information avers, in the words of the statute, that the corporation known as the "The Rector, Wardens and Vestrymen of St. Paul's Church, in the city of Detroit," of which the defendants claim to be wardens and vestrymen, is "a corporation created by the authority of this state;" and we might infer it to be the view of the pleader that the statute establishes a rule of pleading; whereas, in our opinion, it only points out the cases in which an information may be filed, leaving the mode of showing that the case is one within the statute, to be governed by the rules of pleading before in force.

Where a corporation has been created by special charter, we do not regard it necessary, though perhaps usual, to do more in the information than to aver its existence in general terms; since the court is bound to take judicial notice of the charter — *Comp. L.* § 2, *clause* 18 — and is thus informed of the actual corporate existence. But as the body in question has no such charter, and if it exists as a corporation at all, must have been constituted such under some general law of the territory or state, by acts *in pais*, it is obvious that there is nothing upon the face of this information by which the court can see that the allegation that the church is a corporation, is true in fact. The bare averment that it is one, is but a conclusion of law drawn by the pleader, but which the court ought to have the means of drawing for itself from the facts set forth.

We were referred upon the argument to several cases in which it has been held that when the state calls upon one to show cause why he claims to exercise a corporate franchise, or to possess a public office, the allegations of the Attorney General may be of the most general character, while the defendant is required to set forth specifically, and with particularity, the grounds of his claim, and the

continued existence of his right. — *People v. Mayworm*, 5 *Mich.* 148; *People v. River Raisin & Lake Erie R. R. Co.* 12 *Mich.* 398. We have no disposition to qualify these decisions in any way. The state has always a right to demand of any one assuming a public office or franchise to show his authority therefor; but the state has no concern with the unfounded claims which parties may make to an office not existing in fact. The existence of the corporation in the present case is a jurisdictional fact which must be set forth; while there was no corresponding jurisdictional fact to be alleged in the cases cited. The right to file information, in those cases depended solely upon the discretion of the Attorney General; while in this case there must be corporate existence, or he is not authorized to call upon defendants to show ground for their claims. Jurisdiction appearing, the facts relating to the usurpation or intrusion may be alleged here as they were in those cases, in very general terms; and similar allegations to those referred to in the cases cited have not been objected to in the present case.

There is also a broad distinction in respect to this particular point between the cases now before us, and those cited by counsel from the federal decisions, where the question related to the averment of citizenship, where one of the parties was a corporation. That question affected either personal rights to sue, or personal exemptions from being sued in the particular court; and the fact was one of which the court would take no notice in any stage of the case unless it was specially put in issue. But here the fact of corporate existence is the basis of any authority at all in the court to act in respect to the subject of controversy, and it is not one in respect to which there can be a waiver by the parties. This proceeding by information is of a prerogative character, to enable the court to see that privileges or franchises granted by or pertaining to the sovereignty of the state are not usurped,

intruded upon or abused; and it pertains to the dignity of the court to see that parties do not use it, even by consent, for private purposes. If the general allegation employed in this case were sufficient, and the proof could be waived by the parties, it would be easy to impose upon the court the disputes as to offices in voluntary associations, in no way affecting prerogatives of sovereignty, and to which this proceeding has no application whatever.

But if this were not a jurisdictional defect, there would still be reasons why the mode in which the corporation became such should be pointed out. Although the statute says the information may be filed against "*any* person" usurping office in "*any* corporation," created by authority of this state, yet there must be very many cases in which the court would be at liberty to refuse to listen to the controversy. When the proprietors of a country store, or the members of a village library association, or the participants in a district school debating society, or an association of musical amateurs, may incorporate themselves under our general laws, and establish various grades of offices for the purposes of their organization, it can scarcely be seriously urged that the Supreme Court can be required to settle all their contested elections and appointments in this proceeding. There are grades of positions denominated offices which do not rise to the dignity of being entitled to the notice of the Attorney General by information, if in fact there be not corporations which are not within the intention of the statute — upon which we express no opinion. An information filed in a case not proper for the consideration of the court, it should have the opportunity to dismiss in some preliminary stage of the case; and for that reason, if for no other, it ought to have the facts set forth which would direct it to the law authorizing the corporation, prescribing its functions, and indicating the powers and duties of its officers. We ought to be able to see whether the office is one provided

for by the statute, or whether, instead, it is created by some derivative authority; so that we may draw the line of distinction between those which are "offices" within the meaning of the statute, and those which are rather the positions of agents or servants merely.

But the information is bad *secondly*, because of misjoinder of parties, and of causes of complaint. It may be proper that the two parties claiming to be wardens should unite in a proceeding to test the right of those in possession, and that the eight vestrymen should do the same. This might depend upon the mode of election. But no mode of election or appointment could authorize persons claiming different offices to unite their complaints and seek to determine the title to both offices in one proceeding, without a statute specially permitting it. There is no such statute in this state, and the difficulties in the way of making it of service are so great, that it could hardly be desirable that one should be passed. It is just as competent to test in one suit the right to the offices of sheriff and treasurer of a county, as to those of wardens and vestrymen in a church. They may derive their title from the same election, and the questions in dispute may be the same; but this is no more than will often happen when several offices of the same municipality are in contest at the same time. The misjoinder is as fatal as it would be for two persons having distinct and separate claims for trespasses committed by two others, to join in a suit to recover damages therefor. The similarity of duties in the two offices, or the fact that the incumbents participate in the same duties, if such be the fact, can not change this fundamental rule in pleading.

We are of opinion that the demurrer is well taken. As on the ground of the misjoinder, if for no other reason, an amendment could not be allowed, the judgment must be final.

CHRISTIANCY J. and MARTIN Ch. J. concurred.

CAMPBELL J. being a party, did not sit in this case.

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People ex. rel. William H. Chapman v. Horatio Pratt.

Quo warranto: Practice in signing stipulations. The Attorney General having control of the proceedings in *quo warranto*, he alone is authorized to sign stipulations of fact on the part of the people.

Heard and decided July 10th.

Quo warranto.

This was an information in the nature of a *quo warranto*, to try the right to a public office. The case was sought to be heard upon a stipulation of facts, signed by the relator and defendant. It was held that as the Attorney General has control of the proceedings in such cases, that he alone is authorized to sign admissions of fact on the part of the people.

The case was continued as not in readiness for hearing.

Maria Chaffee v. Amos Chaffee.

Divorce a mensa et thoro: Alimony. The principles which should determine whether alimony should be allowed when a divorce *a mensa et thoro* is applied for and denied, discussed, but not decided; the court being equally divided.

Heard November 1st, 2d, 3d, 1866. Decided January 14th.

Appeal in Chancery from Wayne Circuit.

The bill in this cause was filed by complainant for a divorce *a mensa et thoro*, and for alimony.

The cause was heard in the court below on the pleadings and proofs, and the bill was dismissed.

The complainant appealed.

Levi Bishop and *G. V. N. Lothrop*, for complainant.

D. C. Holbrook and *S. T. Douglass*, for defendant.

CHAFFEE *v.* CHAFFEE.

CHRISTIANCY J.

The bill was filed for a divorce *a mensa et thoro*, and for alimony, or a reasonable support and maintenance for complainant and her daughter Lizzie, a young lady about twenty-two years of age, alleged to be an invalid, unable to support herself, and compelled by the defendant to leave her home.

The case was heard in the court below upon pleadings and proofs, and the bill being dismissed, the case comes to this court upon appeal. A preliminary objection is taken by the defendant, that the bill does not make a case warranting the relief prayed. As we are all of opinion that the case made by the bill *and sustained* by the proof does not warrant a decree for the divorce prayed for, the objection to the sufficiency of the bill is only important so far as relates to the question of support and maintenance. The statute — *Comp. L.* § 3263 — provides, "In case of an application for a divorce from bed and board, although a decree for such divorce be not made, the court may make such order or decree for the support and maintenance of the wife and children, or any of them, by the husband, or out of his property, as the nature of the case may render suitable and proper." The denial of the divorce, therefore, does not of itself dispose of the case, and the court are bound to examine the evidence and consider the circumstances of the case with reference to the question whether a support and maintenance should not be ordered, notwithstanding the divorce is denied. This allowance for support and maintenance without a decree of divorce, is not a new feature found for the first time in this statute; it comes precisely within the original definition of alimony in the English law, which did not extend to cases of divorce, but was confined to cases where the wife lived separate without a divorce. — *See Bishop on M. & Divorce, book* 5, *chap.* 19, §§ 350 *and* 351, *and cases there cited.*

But this allowance can only be made under this statute in case of an "application for a divorce from bed and board." This must be such an "application" as is contemplated by the statute, and that is a proper bill for a divorce. The bill should, therefore, be one which, if sustained by proof, would warrant a decree for divorce from bed and board. In this view, and this only, the sufficiency of the bill becomes important in the present case.

There are but two grounds upon which it is or can be claimed that the bill makes a case for a divorce. First, cruelty to the wife; and, second, that the husband being of sufficient ability, has grossly or wantonly and cruelly refused or neglected to provide her a suitable maintenance.

The bill does not expressly charge cruelty to the wife, though it does charge "that for several years past the defendant has been exceedingly morose, irritable, captious, quarrelsome, abusive and tyrannical in his family; treating his children with great harshness, and sometimes with unnecessary violence, thus rendering his home and that of complainant exceedingly uncomfortable and unpleasant, as well for her and the family as for himself;" that during a severe and dangerous fit of sickness of their daughter Lizzie, he treated her with unkindness and harshness, and showed a determination either to turn her out of his house or to break up housekeeping, so as to deprive her of a home and its comforts. It also alleges that his temper has become so soured that he seems to hate all his children, and complainant with them; that he has frequently ordered them out of the house, and put them out by violence. (This last allegation is not claimed to apply to the wife, though from the context it might be so construed.)

Now, I do not wish to be understood to say that cruelty to children might not be carried to such an extent as to constitute cruelty to the wife, especially under

our statute, which does not, like the English decisions, restrict the definition to acts of personal violence to the wife, or bodily harm actually inflicted or reasonably apprehended — a definition which, like some other relics of barbarism in the English law, ignores the human soul, with all its susceptibilities of suffering tortures more intense than physical pain, and more certainly destructive of health and life. — *See Evans v. Evans*, (1 *Hag. Con.* 35) 4 *Eng. Ec.* 310, 312; *Lockwood v. Lockwood*, (2 *Curt. Ec.* 281) 7 *Eng. Ec.* 114, 115; 1 *Bishop M. & Div.* §§ 715 *to* 733; *Rice v. Rice*, 6 *Ind.* 105. And while I fully admit that the objection to the bill in this stage of the case is not to be treated with the same favor as if made by demurrer, yet I am inclined to think the allegation of cruelty as respects the wife is not sufficient to sustain the bill on this ground. But I think this point immaterial, because the bill is clearly sufficient on the second ground, of cruelty and wantonly neglecting and refusing to provide a suitable maintenance. His ability to do this is distinctly alleged, and that he was worth from $75,000 to $100,000; that he had a comfortable residence in the city of Detroit, reasonably well furnished, where he had lived for years; it also substantially charges that defendant had, without any fault on her part, and without just cause or excuse, turned her off and refused to allow her to live with him; that he peremptorily ordered her to quit the house, and go and board elsewhere; that she did leave, in obedience to this order, taking with her such of the furniture as he permitted her to take, but, for sufficient reasons which she states, instead of going to board, that she hired a house, removed into it, etc., he remaining alone in his residence; that they have not since lived together, and that he has been requested to furnish her a support, but he has wantonly and cruelly neglected and refused so to do.

It is claimed by the defense that the allegations of the

bill on this point amount only to a charge that he determined to break up housekeeping, and ordered her to leave and go and board *with him* in some other place. I do not find anything in the bill to warrant this construction.

Having thus driven her from him, and from her house, it was his clear duty to provide for her a sufficient support and maintenance, and his neglect or refusal to do so was, under the circumstances stated in the bill, both wanton and cruel.

The bill, therefore, sets forth sufficient ground for the divorce, if sustained by the evidence.

But the evidence does not sustain the bill, especially in reference to the charge that she was driven from him or her home by his peremptory order and against her will; and that she left solely in consequence of such order. This is the main ground upon which the divorce is claimed by the bill. Nor, if the bill could be held sufficient on the ground of cruelty, do we think the evidence shows a state of facts which, under all the circumstances of the case, would authorize a divorce on that ground alone. In fact the defendant so far from using any violence or threats against complainant is not shown to have used toward her any harsh language; but he was severe to his children, and had driven off two of them; one son and one daughter, and forbidden them to return; he had also intimated an intention of expelling a third, the last daughter who remained at home. The mother was warmly attached to the expelled children and to all her other children, and they were equally attached to her. She wished the children to be allowed to visit her, and felt the need of their society. The husband was displeased at this. It was a matter which weighed heavily upon the mother's mind, and in some measure affected her health. The father, by nature of a severe and gloomy cast of mind, with little inclination to conversation, and little conversational power, jealous of his marital and parental authority; requiring

most implicit obedience, firm even to obstinacy, never allowing himself to be questioned; with none of that delicacy of sentiment or of attention calculated to make him sympathize with her feelings or sufferings — was for some years before the separation in ill health, of a dyspeptic habit, and becoming more nervous, irritable, and gloomy — brooding over fancied wrongs, and less and less fitted to enjoy life himself, or to render himself in any respect agreeable to his wife and family. The difficulty in respect to the children had produced a state of ill feeling between the husband and wife, and great mental suffering on her part. She had always been obedient and respectful to him, never using an unkind word. But this state of feeling continuing to grow worse, both parties, it seems, had for some time been thinking of a separation, or at least he had for some time contemplated breaking up house keeping and having her go and board at a public hotel or boarding house; whether he intended to board with her is quite problematical. And she on her part, though opposed to boarding out, was desirous of separating from him and keeping house with her daughter, where her other children, driven away by the husband, might visit her and make it their home.

And without going into a detail of the evidence, after a careful examination of it I am entirely satisfied that the separation finally took place by mutual consent; she, with his full concurrence, taking a large part of the furniture, and he assisting in the removal of a part of it; she going to keep house with her daughter, and he, remaining at his own house and residing alone. And without, here, intimating an opinion which party was most to blame for the separation, I am satisfied from the evidence that the parties could not longer have continued to live and cohabit together with any such degree of harmony as to render such cohabitation desirable. And that now after what has occurred, and this long, not to say, bitter litigation in which all the members of the family have been involved, there

can be no reasonable hope of such reconciliation as would render it desirable to attempt again to live together.

For these reasons I think it better for the welfare of both, and of the family in general that the parties should continue to live separate.

Under these circumstances and the separation having been by mutual consent the husband is bound, I think, to furnish the wife a support and maintenance to enable her to keep a separate establishment — that being necessary to her comfort — and to enable her to live in a style corresponding with the station in society to which they had attained, and in due proportion to his means.

He has refused to furnish her any support, and she has been compelled to rely for her support upon the liberality of her two sons, who have, much to their credit, supplied her wants and those of her daughter from their own earnings: she having no property of her own. This the defendant admits it is not reasonable the sons should be required to do. The evidence shows that he is amply able to furnish this support. It also shows that she has by her steady industry, frugality and privations contributed largely to the competence he has acquired, and that such support and maintenance are therefore equitably her due, as a part of the fund acquired by their joint efforts.

But the maintenance should, I think, be confined to the wife. The daughter is above the age of majority, and however desirable it might be that she should be provided for with the mother, I can discover no recognized principle upon which it can be done by a decree in this proceeding.

I see no reason for a reference to take proof and and report upon the property and means of the defendant or other circumstance affecting the amount of alimony. These matters were fully and specifically set forth in the bill, and distinctly put in issue, by the answer, and the

proof taken is before us. (*See* 2 *Bish. Mar. and Div.* § 495.).

The bill alleges his property to be worth from $75,000 to $100,000, and his annual income to be $4,000 or $5,000. The answer states his property to be worth only from $30,000 to $35,000, and his income varying from $770 to $1,441 per year. Complainant's testimony shows his property to be worth from $60,000 to $75,000, and his annual income nearly $3,000.

The defendant has offered no evidence upon the point. From the best estimate I have been able to make from the evidence I think one thousand dollars per year a reasonable allowance for her support and maintenance, taking into consideration the condition in life of the parties, and his ability.

The defendant among the other costs was, by this court, (14 *Mich.* 463,) ordered to pay the costs of making and printing the return; subject however to the final determination of this court upon the hearing, whether the same or part of the same should not be returned on account of the unreasonable length of the record arising from the great amount of irrelevant testimony introduced by complainant. And being now satisfied that the record was increased one-half by such irrelevant testimony and that induced by it, I think one-half the cost of making and printing the record must be paid by the complainant, or at her option deducted from the first installment of alimony under this decree. Such alimony should be paid quarterly in advance.

The decree of the court below dismissing the bill should be reversed so far as relates to alimony, and a decree entered in this court in accordance with the conclusions above stated.

COOLEY J. concurred.

CAMPBELL J.

I think with my brethren that no ground exists for a decree of divorce in this case.

Nor do I think it a proper case for alimony. Without stopping to inquire whether the bill was maintainable on its face, I think the court should never allow alimony in the absence of a divorce, unless upon a very strong case of fault which should not fall short of gross and wanton misconduct. I feel very sensible of the extremely unfortunate condition of this family, but it is not owing to any desire to oppress or injure the wife. And I am not willing to establish a precedent which will tend in any degree to lessen the obligation of mutual forbearance between those who are joined for better and for worse. It is not contended that the separation was involuntary on the part of the wife, and while I can not but see that this litigation has made an unfortunate state of things still more difficult, yet I do not think defendant should suffer for any such consequences. No such family difficulty ought to be beyond reconciliation; but if it should continue so, I do not think that justice would be subserved by compelling defendant to bear the consequences of the household division, under the decree of a court charging such a responsibility upon him.

I fully agree that a more sorrowful state of affairs is not often brought before a court, but I believe that the policy of justice will be best subserved by leaving the parties to make such arrangements for the future as a proper sense of their past relations and calm reflection should dictate to both of them.

MARTIN Ch. J. concurred.

The court being equally divided, the judgment of the court below was affirmed.

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The People v. Jerome Slack.

Marriage under the age of consent: Separation: Bigamy. When persons are married, one of whom is over and the other under the age of consent, the former by the statutes of this State is bound by the marriage unless they separate by consent before the other reaches lawful age, and do not co-habit afterwards; or, unless the other refuses consent on arriving at that age. And a second marriage by the former, in the absence of such mutual separation, or of such refusal to consent, is bigamy.

Heard January 9th. Decided January 14th.

Error to Kalamazoo Circuit.

The defendant was tried and convicted upon an information for bigamy.

The facts and the exceptions to the ruling of the court are stated in the opinion.

William L. Stoughton, Attorney General, and *A. Williams*, for People:

1. There is but one question for consideration in this case, to wit:

Was the said charge of the court a true reflection of the object of *Sec.* 3223, *Comp. Laws*, (considered in connection with *Secs.* 3224 *and* 3255, *Comp. Laws*,) as applied to this case?

We think it was, and hold that to warrant a different charge, or to constitute such a separation as is contemplated by said Sec. 3223, it must affirmatively appear, from testimony introduced on the trial.

a. That the separation, was the single fruit of the judgment and action of the party within the age of consent, at the time of the marriage.

b. That the party within such age, occasioned the separation, as aforesaid, with the fixed intent of avoiding or annulling the marriage forever.

c. That such separation and intent were continued by the party within such age, till arrived at the age of consent; and that thereupon such party then deliberately annulled and determined the marriage.

d. That the separation and annulling of the marriage, were in no wise induced by the fraud, fault, or procurement of the party who, at the time of the marriage, had arrived at the age of consent; and,

e. That the party who was of full age at the time of the marriage, will not be allowed, at any time thereafter, by word or act, directly or indirectly, to annul or resolve the marriage void; thereby taking advantage of the nonage of the other party, or of his own wrong. — 1 *Mich.* 42.

2. The foregoing views are strengthened by turning to and considering *Secs.* 3224 *and* 3255 *Comp. L.* Though provision is made by said *Sec.* 3224 for having a marriage supposed to be void or illegal, where the parties have separated during the nonage of one of them, "upon the proof of the nullity of the marriage, declared void by a decree or sentence of nullity;" yet, this privilege, by said *Sec.* 3255, is expressly denied to the party who was of the age of legal consent at the time of the marriage;" and also denied to both parties "when it shall appear that the parties, after they had attained the age of consent, had freely cohabited as man and wife." — *Comp. L.* § 3225. And looking at the common law which fixes the age of competency for marrying at twelve years for females, and fourteen for males; and at *Sec.* 3204, *Comp. L.* which changes those ages, for such purpose to sixteen and eighteen years, respectively; and carefully considering them in connection with said *Secs.* 3224 and 3255, it seems quite unsatisfactory to conclude otherwise than that the legislature, in incorporating these two sections, last recited, into our statutes, upon the subject of marriage and divorce, intended,

a. That at no time, and in no manner, shall the party of full age when the marriage was solemnized, be at liberty to avoid or annul it; and,

b. That the party within such age, at the time of the marriage, is also deprived of that privilege till reaching full age, and not then unless a separation, of the description aforesaid, had occurred before reaching such age, and was not followed by free cohabitation afterwards.

Indeed, the construction of our statutes, as herein claimed, will be found, we think, to be the doctrine of the books, or in accordance with the weight of authorities. — *Bishop on Marriage and Divorce*, § 19 *to* 29; *Pars. on Con.* 277 – 8, 563 – 4 – 5; 2 *Green, Iowa*, 379.

3. The important and sacred character of the institution of matrimony, considered with respect to its divine origin and purposes in promoting morality, christianity, and a well ordered society, can tolerate no easier, or less rigid construction of our statutes, touching marriage and divorce than that insisted upon by us. — 1 *Bishop, Cr. L.* §§ 376 – 9; *Bishop on Marriage and Divorce*, §§ 31 – 40.

The following authorities were cited as to the construction of statutes. — 6 *Johns.* 103; 7 *Id.* 482, 492, 503; 8 *Id.* 41; 9 *Id.* 356; 10 *Id.* 461; 12 *Id.* 175; 15 *Id.* 510; 3 *Mass.* 523; 5 *Id.* 380; 7 *Id.* 451; 22 *Pick.* 571; 3 *Scam.* 153; 4 *Md.* 335; *Black. on Tax Titles*, 609 – 627.

We submit, therefore, in conclusion, that the defendant has no right to a construction which will evade the purposes of said *Secs.* 3223 – 4 *and* 3255. Coming here as he does, for aught we can see, with unclean hands, seeking to take advantage of his own wrong, by and through a construction of our statutes which would be fruitful in crime, we most respectfully, but earnestly, submit that he should be sent back from this court, with his request denied, and to receive the pains and penalties which a just and violated law pronounces upon him.

Stuart, Edwards & Severens, for defendant.

There is but a single question in this case, and that is one of statutory construction.

The court below, held for the purpose of that trial, that the age of legal consent referred to in section 3223, Compiled Laws, is the age of legal consent as fixed by the common law — that being twelve years, in the case of a female.

We insist that this was erroneous.

Marriage, under the law of this state, so far as its validity in law is concerned, is a civil contract, to which the consent of parties capable in law of contracting, is essential. — *Comp. Laws*, § 3205.

The section immediately preceding (3204) declares who are capable in law of contracting, namely, males of the age of eighteen, and females of the age of sixteen, if otherwise competent.

Now, this last cited section supercedes the common law rule, or it is senseless.

1. The chapters upon marriage and divorce, from which the preceding sections are taken, are *in pari materia*, and it is a cardinal rule, that all acts on the same subject-matter are to be taken together and examined, and construed with reference to each other. — *Sedg. on Stat. and Const. Law*, 247, 251; *Doug.* 30; 1 *Burr.* 445.

Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other. 20 *Johns.* 735; 9 *Cow.* 437; 15 *Barb.* 627; 6 *Id.* 60, 75; 9 *Id.* 161; *Smith's Com.* 751, §§ 736, 639; 1 *Kent's Com.* 463–4; 3 *Mass.* 21, 296; 8 *Id.* 423; 1 *Pick.* 254; 10 *Id.* 235; 20 *Id.* 267, 407.

2. Another fundamental rule of interpretation is that all the provisions of the statute upon the subject are to have their weight in fixing the construction of each, and

such a construction of the whole is to be adopted as shall give effect to every provision, if possible; and shall make no part nugatory or senseless. — 2 *Mich.* 138; 5 *Id.* 114; 7 *Cush.* 53; 22 *Pick.* 573; 15 *N. Y.* 532; 1 *Binn.* 601.

These rules plainly point to the conclusion that when the legislature in one section speaks of the "age of legal consent," and they have already in another section fixed that age, they must have referred to the standard they had established. Any other rule of interpretation would make these statutes a snare to the common understanding.

The Supreme Court of Ohio have held upon provisions in their statutes very similar, if not substantially identical with ours, that the common law was superseded, and that in a case where one of the parties was under the age of legal consent, as fixed by statute, at the time of the marriage, and there had been no cohabitation after arriving at that age — such marriage was void, and the parties might lawfully marry again. — 20 *Ohio*, 1; 2 *Wharton, Crim. Law*, § 2628 (*5th ed.*)

COOLEY J.

The defendant was informed against in the court below for bigamy. It was admitted by him on the trial that on the 29th day of May, 1864, he intermarried with one Electa A. Ogden, at Oshtemo, in this state, who was at the time under the age of sixteen years, and that before she arrived at that age she and the said defendant separated, and that they have not, since such separation, cohabited; and that said defendant, claiming such marriage to be void, afterwards, on the 4th day of November, 1865, was again married to one Auleda Beecher — the said Electa being then living. Upon this admission, and certain evidence supporting it, and which also showed that said Electa was more than twelve years of age at the time of the first marriage, the Circuit Judge was asked to charge the jury, that if said Electa was under the age of sixteen

at the time of the first marriage, and that the parties separated before she arrived at that age, and did not at any time afterwards cohabit, they must find the defendant not guilty. This request the judge refused, and charged the jury, among other things, as follows:

"It is proved that the said Electa Ogden was, at the time of her said marriage with the defendant, over the age of twelve years, and under the age of sixteen years, and that they cohabited as husband and wife from the time of said marriage for a short time, when, and before the the said Electa had attained the age of sixteen years, the parties became separated and ceased to cohabit as husband and wife, and have not cohabited as husband and wife, or lived together since. The defendant's counsel, on these facts, asks the court to advise you that the marriage with said Electa was and is void, and that, therefore, you should find the defendant not guilty. Having serious doubts upon this question, and believing that it ought to be considered by the court of last resort, for the purposes of this trial, I advise you that the said facts do not show said marriage with said Electa to have been void, and that, therefore, you ought to find the defendant guilty." The defendant was accordingly convicted, and the correctness of this charge is the sole question brought up for review.

We are all agreed that this charge cannot be supported, and that a new trial should be directed. The age of legal consent is fixed by our statute at eighteen in males, and sixteen in females — *Comp. L.* § 3204 — and it is provided by another section that, "In case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards, * * * the marriage shall be deemed void without any decree of divorce or other legal process."— *Comp. L.* § 3223. It was suggested rather than urged, on the argument, that the age of legal consent intended by the section quoted, was that of the

common law, which, in the case of females would be twelve years; but we think there is no foundation for this suggestion. When one part of the statute fixes the age of consent, we should do violence to the plain intent of the legislature if we should hold that the "age of legal consent" mentioned in any other part of the same statute meant anything else than the legal age thus fixed. The common law rule having been abrogated in this state, there is nothing to which we can refer this phraseology but the rule which the statute has thus substituted.

The only doubt any of us have had upon this point arises from the somewhat ambiguous character of the admission in regard to the separation, and the charge based upon it. We are all agreed that if the separation takes place with consent of the party under age, and cohabitation is not resumed after such party attains the age of consent, the marriage is thereby rendered null, while we are not agreed that the party who is of competent age can, by his own act, annul it. But as the charge of the court would cover the case where the separation was by mutual consent, as well as a case of desertion by the competent party, we think there should be a new trial, that the jury may have an opportunity to determine whether this case was the one or the other.

The question then arises as to the directions to be given for the conduct of the new trial. It is insisted by the defendant that, under the statute quoted, either party is at liberty to annul the marriage at any time before the one under the age of legal consent shall attain it, and that either is then at liberty to marry again. I do not think this is the law under our statute.

At the common law, it was undoubtedly the rule that the right to annul the marriage continued with one party as long as it did with the other. — *Reeves Dom. Rel. p.* 200. But as this subject is fully covered by statutory provisions in this state, we have only to see whether those

provisions have introduced any change in this particular. That they were intended to do so, seems to me very clear.

If we look no further than the statute above quoted, it is difficult, I think, to avoid the conclusion that the separation spoken of is something other than the abandonment by the party over age of the person who is within the age of consent, and who will usually be induced to enter into the marriage by the arts and solicitations of the other. There are so many and so powerful reasons against a rule which leaves females who have reached the age of puberty, but are not yet sixteen, at the mercy of the wiles of designing men, who, after enticing them into a marriage with all the solemnities of the law, may then desert and abandon them with impunity, that we are not disposed lightly to conclude that it was designed to adopt it as a statutory rule. And I do not think apt words are employed for the purpose, if such was the intent. Where a man competent to contract marriage enters into the relation with one who lacks the capacity to give binding assent, and after a brief cohabitation, against her will abandons her, the act is not properly a *separation*, but a *desertion;* and the latter is the proper term to apply to it. And as such a desertion would commonly be a great wrong to the female, and shock the moral sense of the community, we should naturally look in the statute for penal provisions, rather than for those which would not only exempt the wrong doer from any punishment, but allow him with like impunity to repeat the process elsewhere so often as he may find a confiding female who will yield to the proposals he makes, accompanied as they are with all the appearance and form of honesty and honor. For the marriage being only voidable, and not absolutely void, all the consequences of a legal marriage flow from it until it is avoided; it could not be punished as seduction, nor has any statute in any way attempted to make it criminal. I do not think this section can fairly be held to protect

such a desertion; but, on the contrary, that it refers only to the separations which are brought about by the mutual consent of both, or by the refusal of the party under legal age to assent to further cohabitation.

But another section of the statute seems to me to place the construction of this beyond question. Section 3255 of the Compiled Laws provides that "A bill to annul a marriage on the ground that one of the parties was under the age of legal consent, may be exhibited by the parent or guardian entitled to the custody of such minor, or by the next friend of such minor; *but in no case shall such marriage be annulled on the application of the party who was of the age of legal consent at the time of the marriage*, nor when it shall appear that the parties, after they had attained the age of consent, had freely cohabited as man and wife."

Here is an express prohibition of the judicial annulment of the marriage on the application of the party who was competent to contract. It seems to me incredible that the legislature could ever have enacted this provision if they supposed that by another section in the same statute they had empowered such party to annul the marriage upon his own motion alone. There are manifest reasons why it would be proper that a judicial decree should be had in any such case; and I am unable to conceive of any for prohibiting it. If the marriage is to be annulled at the option of the competent party, it would still seem desirable that he should apply to the proper court for its decree in the premises, that any doubtful question of fact might be judicially settled, and also that the court might be enabled to direct the making of proper provision for the children of the marriage, if any. There are the same reasons for his filing a bill for the purpose, as for the other party or her natural or legal protectors doing so, unless the intention was to make the marriage absolutely binding upon him at her option. And it appears to me from the statute first above quoted, taken in connection

with this, that such was clearly the legislative intent. Prohibiting the party from applying to have the marriage annulled in equity, if he has the power in his own hands, was, to say the least, a work of supererogation, as parties are not likely to ask permission of the courts to do an act which they have the right to do without permission, especially when the proceeding would be accompanied with considerable expense to themselves.

I think the circuit court should be advised that it is the opinion of this court that a new trial should be granted, and that it is also the opinion of this court that the said first marriage was binding upon the defendant upon the facts shown, unless the separation was by the mutual consent of the parties, or by the refusal of said Electa to continue the cohabitation after reaching the age of consent.

CHRISTIANCY J. concurred.

MARTIN Ch. J. did not sit in this case.

CAMPBELL J.

I concur with my brethren in granting a new trial in this cause, for the reason that the marriage with prisoner's first wife was before the statutory age of consent had been attained, which has superseded the common law period. I concur, also, that a separation by mutual consent before such age was reached, and without subsequent cohabitation, would prevent the marriage from having legal validity. But I think the statute goes somewhat further in this respect than it seems to them to extend, and that defendant would not be required to show on the new trial that the separation was by mutual consent.

At the common law, there can be no doubt but that a marriage contracted while either party was under the age of consent might be annulled by either, and no preference was given to the person under age over the older one.

And I understand the effect to have been that the marriage was of no complete and absolute validity, until the arrival of both parties at the legal age enabled them by their conduct to affirm it, if they so desired. Up to that time, it was always subject to defeat by either. And, while there are undoubtedly many reasons which render such an unsettled condition very unfortunate, yet it would be, in my judgment, a greater and more dangerous anomaly, to have marriages which bind one party and do not bind the other. Our statutes, after fixing the age of consent, proceed to declare expressly that "marriage, so far as its validity in law is concerned, *is a civil contract, to which the consent of parties capable in law of contracting is essential.*—2 *C. L.* § 3205." I can not reconcile this language with the idea that the legal consent of one party can create a marriage, when the consent of the other is wanting. And I think the provisions on this subject in the next chapter of the statutes, concerning divorces, do not weaken this conclusion, but rather strengthen it. The second section (§ 3223 of the Compiled Laws), if standing alone, would, as it appears to me, hardly admit of any other meaning. It declares that in case of a marriage solemnized when either of the parties was under the age of legal consent, "*if they shall separate during such nonage, and not cohabit together afterwards, the marriage shall be deemed void without any decree of divorce, or other legal process.*"

This language is not consistent with the idea that the marriage is voidable only, nor does it seem intended to introduce any new rule on the subject. "*Separation*" does not in itself mean necessarily that both parties agree to it. Such is not its popular meaning, nor has it any such settled legal meaning. The validity of the marriage must depend on consent given after reaching the legal age, by the acts or conduct of the parties; and if they are not then, or subsequently, living in marital relations, there is

nothing to reach back to the previous union, and nothing which can make it valid, therefore, by ratification. A marriage once valid can only be dissolved by a divorce, and the statute expressly declares no legal process shall be required in these cases.

It is, however, held by my brethren that the subsequent sections, which authorize parties to bring suits to establish the nullity of the marriage, inasmuch as they are confined to the party under age, govern the previous section, or at least signify the intent which should be deduced from the entire statute. I do not concur in this view. If such was the meaning of the second section, I think there could have been no reason to make an express provision prohibiting suits in chancery from being brought by any except the minor under the age of consent. And the fact that this prohibition is confined to proceedings in chancery, furnishes a strong argument against its applicability to cases where no such proceedings are sought or needed. For while we may very well say, as a matter of prudence, that a decree of nullity is always desirable to avoid difficulty, yet the statute declares expressly that it is unnecessary, and only permits, without requiring or recommending it. If there were not other cases where a remedy in equity is confined under analogous conditions, I should concede the very great force of the argument in favor of confining the election to the party under age. But it is one of the most familiar principles of equity that there are many contracts and liabilities which equity as well as law regards as void, but against which equity affords no relief whatever, or, in some cases, affords only modified relief upon equitable conditions.

There are very many illegal and void acts which equity will not relieve against at all, and others where it will only relieve one party. For example, where usury avoids an agreement, equity will not enforce it; but, on the other hand, it will not relieve the borrower unless he will pay

the debt with legal interest. And in relation to marriages, while the policy of the law is certainly very clear against allowing them to be contracted by persons under age, yet I can very well conceive why a court of equity, even without any statute, might decline to aid a party who has been in fault. And this statute, while it does not profess to go upon the ground of fault (because the older party may have acted in perfect good faith), has doubtless assumed that in most cases the person under age is least to blame, and has, therefore, given to that person a privilege of suit which it has denied to the other.

The question of interpretation is not one upon which our ideas of policy can have very much bearing, as, after all, the language of the statutes must govern. There is, it must be admitted, a great danger of abuse, but even here it does not seem at all certain that the evils are not as incident to one interpretation as the other. While males of over eighteen may abuse the confidence of young women under sixteen, yet if this is done, and they then desert them, I can see no difficulty in reaching such cases under the laws punishing seduction. And where the female is over sixteen, and the male under eighteen, then it is, under this construction, entirely at his option, and not at hers, to repudiate the connection. In other countries, and I suspect here, also, there is as much fraud committed by entrapping young persons over the age of consent into undesirable marriages with those who are under, as there is by any other misconduct concerning such marriages; and both parties are often mere puppets in the hands of others. Our laws, by raising the ages, have lessened this danger, but the woman is still able to marry at an age when she is easily imposed upon, and her husband may be within the smallest period less than two years older, and have a means of avoiding a marriage which she can not, under this rule, recede from.

In this, as in other relations, parties must be held to a knowledge of the law; and the cases can not be very numerous which would render it desirable to enable one party rather than the other to recede from an illegal marriage. But be this as it may, I can not but regard our statutes as placing them upon an entire equality, except in the one case of commencing suits in equity.

While, therefore, I agree in ordering a new trial, I think it is not necessary that the marriage in the case at bar should have been repudiated by the wife.

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H. N. Strong v. The Grand Trunk R. R. Co.

Common Carrier: When intermediate consignee liable for deduction of freight. In an action by a carrier agninst an intermediate consignee for a deduction of freight, by virtue of an alleged custom permitting shortage to be deducted when it did not arise from the fault of the prior carrier: *Held*, that the action was properly brought, if the deduction was made under protest, and the carrier had not accounted with the owner of the cargo when suit was commenced.

Mercantile custom, when void. A custom that an intermediate carrier who received property subject to charges may deduct from the freight earned by a prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, is not such a valid custom as the courts will enforce.

Heard October 24th, 1866. *Decided January 14th.*

Case made for review from Wayne Circuit.

This was an action of assumpsit, brought by the plaintiff as owner of the schooner Swallow, to recover a balance of freight due upon a cargo of corn carried in plaintiff's vessel from Chicago to Sarnia, and delivered to defendants as intermediate consignees. The object of the suit was to test the right of an intermediate consignee to deduct shortage, when it does not arise from the fault of the prior carrier.

STRONG *v.* THE GRAND TRUNK R. R. CO.

The declaration consisted of three special counts, averring in as many different forms, an indebtedness of the defendants for freight, due upon the transportation of a certain cargo of corn, in plaintiff's schooner Swallow, from Chicago to Sarnia, and the delivery thereof to the defendants at that place. To these were added the common counts.

The plea was the general issue, with notice of special matter.

The facts are stated in the opinion.

The case was tried without a jury, and judgment was rendered for the defendants.

H. B. Brown, for plaintiff.

1. This action is properly brought against the defendants as intermediate consignees.

The vessel undoubtedly had a lien upon the cargo for freight, but the defendants also had a right to an examination of its condition and quantity before payment could be required. — 3 *Kent's Com.* 214; 1 *Ab. Adm.* 209; 21 *How.* 527; 1 *Bosw.* 177.

By the custom of the lake ports this could only be done by delivering the cargo into defendant's elevator, where it was mixed with other grain of the same kind and quality and its identity lost. The defendants took the cargo with notice in the bill of lading that the master would look to them for freight, and in so taking it and depriving the vessel of its lien became obligated to pay. — 1 *Pars. Mar. Law*, 220, 221; 1 *Iredell*, 236.

This rule that any party receiving goods under a bill of lading conditioned upon payment of freight is liable therefor, is well stated in *Canfield v. Northern R. R. Co.* 18 *Barb.* 586, the leading case upon this point; and see 24 *N. Y.* 317.

It is also shown and admitted to be the custom for carriers receiving cargoes from other carriers to pay all

back charges and to retain their lien for them at the place of destination. This custom has been expressly recognized by the courts. — 37 *Barb.* 236; 8 *Gray*, 266; 6 *Allen*, 246; *Hill and Denio*, 163; 1 *M. and S.* 157; 5 *M. and W.* 502.

This may now be considered the settled law of the land.

2. As between the owner and consignee of the cargo (or his agent) and the vessel, the bill of lading may be explained by showing a mistake in the amount or condition of the cargo.

A bill of lading is both a receipt and a contract; so far as it is a contract, it can not be explained; so far as it is a receipt, it follows the ordinary rules relative to such instruments and may be shown to have been signed ignorantly or through mistake. — *Abbott on Shipping*, 324; 1 *Pars. on Mar. Law*, 137; *See* 1 *Moody and Ry.* 106; 7 *A. and E.* 29; 3 *Saund.* 7, 399; 12 12 *Barb.* 99; 1 *Abbot Adm.* 115, 188, 212, 397; 5 *Seld.* 529; 16 *Ill.* 408.

In the present case there can be no doubt as to the cause of the deficiency. The measurement in defendants' elevator is admitted to have been correct; it is also shown that the vessel put to sea with her hatches battened down, and that no loss or damage occurred upon the voyage. Hence there must have been a mistake in the measurement at Chicago — probably an error of one tally, as the corn was weighed in hoppers of 200 bushels — nearly the amount of the shortage.

3. Defendants had no authority to deduct the value of the shortage in this case.

a. They would not have had this authority even if the cargo had suffered loss by an act for which the vessel was responsible.

The claim of defendants is in the nature of a set-off or recoupment, and might be made the foundation of a

separate action. Indeed, at common law, and in England, the rule is well settled that the shipper can not, in an action brought against him for freight, set up in defense that the goods were damaged by the negligence of the carrier, but is obliged to resort to a cross action.—1 *Pars. Mar. Law, p.* 172, *note* 2, *and cases cited.*

Hence, the defendants can have no greater rights than they would have had if they had paid the entire freight and brought an action against the carrier. Now, the general rule is perfectly well established that actions against carriers for loss or damage must be brought in the name of the person whose legal right has been affected.—*Angell on Carriers*, § 491; 1 *Pars. on Mar. Law*, 212–219.

In general the owner is the only proper party to sue, and the only case in which a mere carrier can bring suit concerning the goods is where damage is done them while in his possession—an action arising solely from his possessory interest.—*Angell on Carriers*, § 348; *Story on Bailm.* § 93–95.

Cases of this kind usually relate to the question as to whether the consignor or consignee is the proper party to sue, and it has been repeatedly held that neither of them, as such, is entitled to bring the action; *Angell on Carriers*, § 495; 15 *Wend.* 474; 4 *Blackf.* (*Ind.*) 364. And it usually turns upon the question as to which has the right of property in the goods.—1 *Ld. Ray.* 271; 3 *B. and Ad.* 283.

In the present case the defendants had not the slightest interest in the cargo until it came into their possession. Their adjustment of shortage would not be binding upon the owner unless subsequently ratified by him (*Travis v. Thompson*, 37 *Barb.* 236,) nor would payment of the deficit to defendants exonerate the vessel from liability, unless the owners had actually received the amount from them.

b. But conceding for the sake of the argument that an intermediate consignee is authorized to deduct shortage where it is occasioned by the admitted fault of the the vessel, no case holds that an intermediate consignee is authorized to deduct shortage where it arises from a cause for which the carrier is not responsible.

The books are full of cases holding that when the consignee is sued for freight and sets off damage or deficiency of the cargo, the plaintiff may show a mistake in the bill of lading. — 33 *Barb.* 532; 28 *N. Y.* 590; 3 *Allen*, 103; *Abbott's Adm.* 115, 212; 1 *A. and E.* 29; 3 *Sandf.* 7, 399; 12 *Barb.* 99, 112; 5 *Seld.* 529; 16 *Ill.* 408; 7 *Mass.* 297; 1 *Cal.* 417; 34 *Me.* 554; 4 *Ohio*, 334; 5 *Ala.* 430; 8 *Gray*, 287; 7 *Allen*, 456.

This case is peculiarly strong in that the Bank of Montreal is both the consignor and consignee of the cargo, and as against them there is no question but that we should have the right of explaining the mistake.

4. The only defense to this action is based upon an alleged custom for common carriers in receiving grain from other carriers to deduct the value of the shortage as shown by their own measurement, regardless of the fact whether the same originated from the default of the carrier.

a. Evidence of this should be rejected because the custom is wholly unreasonable. It puts the owners and masters of vessels completely at the mercy of railroads and elevators by depriving them of their lien upon the cargo, and without giving them an opportunity to defend themselves, or even explain the deficiency; extorting such shortage as they may choose to demand, regardless of the master's protest and the fact that the vessel is in no wise at fault. "A custom which is contrary to the public good or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason."— *Broom's Legal Maxims*, 826.

b. The custom has not been acquiesced in, but has been the subject of constant dispute.

The multitude of cases cited in this brief also show it to have been a constant subject of litigation. The truth seems to be that vessels are willing to pay one-tenth of one per cent. for unavoidable wastage, or when the shortage is their own fault; and that peaceable men will generally submit to extortion rather than a law suit.

In fine we contend that the established principles of law should not be set aside, and we be compelled to submit to this forced deduction without some guaranty: that the measurement of the receiving carrier and the price charged per bushel is correct: that defendants' adjustment will be ratified by the owner: and that in a suit against him this adjustment will be recognized by the courts.

And we certainly should not be held responsible where the vessel clearly exonerates herself from fault.

Maynard, Meddaugh and *Swift*, for defendants.

1. The defendants claim that there has existed for many years, among carriers of grain shipped in bulk, a custom, whereby one receiving grain from another, deducts from the freight, to which the latter is entitled, the shortage, if any there be, to be determined by comparing the quantity actually delivered with the quantity specified in the bill of lading.

That the custom is proved will not be denied. But it is claimed to be void because it is unreasonable.

2. When goods are transported by a single carrier, there is no doubt of the right of the consignee to deduct from the freight the value of any portion of the goods which may have been lost in their transportation.—3 *Mich.* 281.

But when goods are transported over a long route, by several successive carriers, and each carrier who receives the goods pays all the back charges,—whether the consignee shall have the right to deduct from the whole amount of freight, damages which he has sustained by reason of a loss during the transportation, is a different question.

If the loss occurred solely through the fault of the last carrier, the right of recoupment would undoubtedly still remain. But if he was guilty of no fault, and the loss occurred through the neglect or misfeasance of some previous carrier, the right to recoup damages will depend upon circumstances.

As against any carrier, through whose fault an injury has happened to the goods, the consignee has a right to recoupment.

And when a carrier receives goods from a previous carrier, on the same route, through whose gross carelessness or willful misfeasance, it is admitted or is clear that a loss has occurred, it would be paying a premium for neglect of duty to allow the former to pay full freight, and then recover the same sum of the consignee. In such a case there would seem to be no doubt that the carrier receiving the goods ought to adjust the loss with the previous carrier, or that the consignee would have a right of recoupment.—24 *N. Y.* 317; 6 *Gray*, 539.

But when the goods received by the second carrier, though they have, in fact, been damaged in the transportation, are in apparent good order, and he, in good faith, pays full freight, without any deduction, it may be right that he should recover of the consignee the sum thus paid. To adopt any different rule would compel each carrier to open packages and make a minute examination of each item, and thus cause great delay and expense, and subject the goods to the risk of additional njury in the handling and examining them.

But in this class of cases he must see that the goods are in apparent good order, as described in the previous bill of lading, or if not, use reasonable exertions to ascertain how they became damaged, and the party liable therefor.—16 *Ill.* 408.

3. In a case like the present, where, upon comparing the actual quantity delivered, with the quantity specified in the bill of lading, there is an apparent deficiency, this custom comes in and puts an end to the difficulty. It makes the bill of lading conclusive upon the carrier who first receives the goods, and requires him, in case of mistake, to look to the party from whom he received them. It does no injustice to him. For he might have protected himself, either by requiring payment of freight in advance, or by making sure that the quantity of goods delivered to him corresponded with the quantity mentioned in the bill of lading, or by insisting upon an agreement that, for any discrepancy in quantity between the goods, as measured anywhere on the route, and as stated in the bill of lading, he should settle with the consignee alone. Such a custom fixes an invariable rule; compels the persons to whom it properly belongs to adjust any loss; prevents disputes among successive carriers; relieves the carrier who receives the goods from all embarrassment, and expedites the carriage of the goods.

A custom, justified by so many reasons and adopted by the practical wisdom of experienced men to meet the necessities of their business, and so long maintained, is surely a reasonable one.

4. But though the custom is not a valid one as to all persons, the rights of those who have acted upon it are to be governed by it. So far as the plaintiff is concerned, the presumption, from his having been so long engaged in the business of carrying grain, together with other circumstances, is that he knew it.

5. But, assuming that we mistake the facts, and that the master denied the right to make any deduction for shortage, on what grounds are the defendants liable for the balance of freight due the plaintiff? If the corn had belonged to them, or been carried for their benefit or at their request, there might be some ground for implying an agreement to pay for such freight. But they were under no more obligation to pay it than any other person, unless, upon receiving the goods, they, either expressly or by implication, promised to pay for it. So far from that, they expressly refused to pay any more than they did pay, and the plaintiff, by his agent, received the sum they offered. If the mutual assent of the parties is essential to a contract, then here was no contract. In order to maintain this action, the plaintiff should show — what he had failed to do — that the master informed the defendants he should still hold them liable for the balance of the freight, and gave them an opportunity to return the corn. By consenting to their keeping the corn, and receiving the money, he waived all right to any further claim upon the defendants.—24 *N. Y.* 317.

COOLEY J.

This case presents questions regarding the proof and validity of a mercantile custom, by which an intermediate consignee is authorized to deduct from the back freight earned, any deficiency in the cargo, as shown by a comparison of the bill of lading with the measurement of the carrier receiving it.

It appears that the plaintiff's vessel, the schooner Swallow, took on board a quantity of corn at Chicago, consigned to the Bank of Montreal, Coburg, and stated in the bill of lading to be 20,034$\frac{2}{56}$ bushels. This was the measurement of the elevator at Chicago, and was supposed at the time to be correct. On the delivery of the cargo to the defendants as intermediate consignees, at Sarnia, a deficiency of 205$\frac{40}{56}$

bushels was discovered, and the defendants, thereupon, refused to pay the freight upon the amount actually delivered, except subject to a deduction of the value of this deficiency; justifying their refusal upon the custom mentioned. The evidence of the master of the vessel, if trustworthy, would show very clearly that the apparent deficiency was in consequence of erroneous measurement at Chicago; and as the supposed custom makes no exception of the case where the master is not in fault, we must consider its validity on the assumption that the facts are as claimed by the plaintiff.

It may be well to see at the outset what the rights of the parties would be in the absence of any such custom, and what the changes are which it proposes to make in the law.

There can be no doubt that although the bill of lading specifies the amount received, it is, notwithstanding, like other receipts, open to explanation, and the carrier is at liberty to show that the actual amount which came to his hands is different from that stated: *Wolfe v. Myers*, 3 *Sandf. S. C.* 7; *Ward v. Whitney*, *Id.* 399; *Dickerson v. Seelye*, 12 *Barb.* 99; *Backus v. Schooner Marengo*, 6 *McLean*, 487; *Blanchard v. Page*, 8 *Gray*, 287. And see *Ellis v. Willard*, 9 *N. Y.* 529. The qualification of this rule is where third persons have acquired rights by purchase or advance of money, based upon the statement contained in the bill of lading, and relying upon its accuracy: the extent of which qualification, and when and against whom applicable, it does not become important to discuss here, inasmuch as it is not claimed that any such rights have intervened.

Although the consignee of property is authorized to recoup from the freight earned any losses properly chargeable to the carrier, it is well settled, and indeed follows logically from the rule before stated, that he is not entitled to deduct as deficiencies any difference between the

amount delivered to him, and that receipted by the bill of lading, where the carrier can show an error in the bill, and that he actually delivered all that he received. *Bissell v. Price*, 16 *Ill.* 408; *Ryder v. Hall*, 7 *Allen*, 456; *Meyer v. Peck*, 33 *Barb.* 532; *S. C.* 28 *N. Y.* 590; *Sears v. Wingate*, 3 *Allen*, 103. See for the same principle *Bowman v. Hilton*, 11 *Ohio*, 303; *Lee v. Salter*, *Lalor*, 163. That the carrier has a lien upon the cargo for the freight earned is not disputed; 3 *Kent*, 214; *Chitty on Carriers*, 220; *Pars. Merc. L.* 212; and an intermediate consignee by whom the property is received subject to the charges, is liable to an action therefor in case of neglect or refusal to make payment.—*Abbott on Shipping*, 421; *Canfield v. Northern R. R. Co.* 18 *Barb.* 586.

The custom alleged, if valid, changes the settled law in several important particulars. *Firstly:* It precludes the carrier, as between himself and the intermediate consignee, from explaining the bill of lading and showing any error that may have occurred in stating the quantity; and this without regard to the question of intervening equities. *Secondly:* It gives to the intermediate consignee the right not only to deduct the deficiencies chargeable to the carrier, but also all such discrepancies between the bill of lading and the actual amount delivered by the latter, as have resulted from erroneous measure or count, and consequently are not deficiencies in any proper or legal sense, and could not, in a suit between the carrier and the ultimate consignee, be recouped at all. *Thirdly:* As to any amount thus deducted, and not properly chargeable to the carrier, he is deprived of his lien upon the cargo, and if he has any remedy for it, he is obliged to resort to the personal responsibility of the party liable to him, in lieu of the security which he took into his own hands when the cargo was received. Meantime the value of the supposed deficiency is paid over to the ultimate consignee, who

has no claim to it whatever if, in fact, he receives all that was consigned to him.

Before proceeding to discuss the custom upon principle, we shall examine the cases cited upon the argument, and which are supposed to have some bearing upon the question of its validity. There are several cases where it has been held to be the duty of an intermediate carrier to protect the interests of the consignee in the property carried, and where certain powers for the adjustment of damages actually sustained have been recognized as vested in him. In *Bissell v. Price*, 16 *Ill.* 414, it is said that, "While the warehouseman or carrier is authorized to advance for, and on account of the consignee, previous charges upon the goods, he is bound to act in good faith towards, and to carefully watch the interests of the owner, whoever he may be. He is bound to do this to the same extent that a prudent man would were he present, and acting for himself. He must see that the goods are in apparent good order, as described in the previous bill of lading, or, if not, use reasonable exertions to ascertain how they became damaged, and the party liable therefor. So, also, to the same extent he must see that the previous charges are reasonable before he is authorized to pay them."

There is nothing in this indicating that an intermediate carrier is or may be vested with greater powers than those possessed by the owner himself; or that the prior carrier, in dealing with him, can be subjected to demands against which he would have a complete defense as between himself and the ultimate consignee. On the contrary the court hold the intermediate carrier to be vested, as respects the property carried, only with certain powers of the owner, and bound on his behalf to exercise them with diligence and good faith.

The facts in *The Fitchburg and Worcester R. R. Co. v. Hanna*, 6 *Gray*, 539, were, that several carriers, whose operations constituted one continuous line of transportation

from Fitchburg to New York, and who, by mutual agreement divided between them, in certain specified proportions, the freight earned upon the whole route, had carried property for the defendant, and in a suit brought by one of them to recover the charges, the defendant sought to recoup damages to the property, occurring somewhere on the route, but not shown to have occurred upon that portion over which the operations of the plaintiff extended. The court held the recoupment allowable, but at the same time said: "If this service had been performed, and no special agreement had been made in relation to the terms upon which it should be done, each of the several parties who contributed towards it would have been entitled to a reasonable compensation, in proportion to the service which they respectively rendered, and would have been liable only for such failures and delinquencies as occurred on their own portions of the line." It is obvious that the facts as stated have no analogy to those now before us, while the general rule stated by the court, in the absence of any joint undertaking, is the one which the defendants in this case seek to avoid by proof of the custom.

The case of *Davis v. Pattison*, 24 *N. Y.* 317, which was supposed on the argument to be most directly in point, does not seem to us, on careful examination, to be even analogous. It appears that one Davis received at Oswego three thousand seven hundred bushels of wheat to be carried by canal and delivered to the defendant as intermediate consignee at Troy. He delivered all but thirty bushels, which he either converted to his own use, or lost. The defendant offered to pay the freight if Davis would deduct the value of this deficiency; but he refused to do so, and action was brought to recover the whole amount. The court held that the defendant had a right to make the deduction. Now it is quite evident that that case differs from the present in all its legal bearings. It was not claimed there that any custom had changed the

law of carriers applicable to the case, but the defense was rested upon general principles. It does not appear from the report that Davis disputed the deficiency being properly chargeable to him, and it was, therefore, clearly a case where the deduction could have been made, by way of recoupment, had the action been brought against the owner himself. And it was not held or intimated in that case that the carrier was liable to have deduction made for deficiencies for which, as carrier, he was not insurer against, or that the intermediate carrier had greater privileges in respect to deductions than were possessed by the owner. On the contrary, the whole reasoning of the case shows that the court considered the intermediate consignee as standing, in respect to the suit, in the place of the owner; bound to protect his interest, and entitled to all his defenses, but no more. In short, this case decides that a carrier suing to recover freight may collect the amount earned by him, less any loss occurring to the property while in his hands and properly chargeable to him as carrier; and the question whether, by custom, he might be charged with other losses, or with supposed deficiencies, not existing in fact, was not before the court, and there was no expression of opinion upon it.

The case of *Canfield v. The Northern R. R. Co.* 18 *Barb.* 586, is more nearly like the present in its facts than any other which has been reported, and it was there held that the intermediate carrier had no right to deduct from the freight earned, the amount of a discrepancy between the bill of lading and the amount delivered to him, where it was shown that the discrepancy occurred by mistake in stating the amount in the bill of lading. But as the defense there was not rested on evidence of usage, the case can not be considered an authority on the point now involved, and we have been unable to find any other that bears very directly upon it. We must, therefore, consider the custom in question

upon general principles, and see whether it is capable of being sustained by them.

There are many customs which, to a certain extent, are convenient, but to which the law does not allow a compulsory force, either because they have never been generally acquiesced in, or because, to give them general application, would in some cases violate fundamental principles and rights. The law has established certain rules which are to test the legal validity of a custom; and we shall now examine the one alleged, in the light of the standard thus afforded.

1. Before any custom can be admitted into the law, it must appear that the usage has been general and uniform, the custom peaceably acquiesced in, and not subject to contention and dispute.—*Broom's Legal Maxims*, (5 *Am. Ed.*) 828; see *Oelricks v. Ford*, 23 *How.* 49. It is not very clear that the evidence in this case establishes any such custom. The testimony of witnesses shows that the question of shortage is frequently the subject of dispute. Capt. Elsie says: "The custom is sometimes acquiesced in by the captains of vessels, and sometimes disputed. If the shortage is small, they generally pay it; if it is large, they generally dispute it, and leave it to be settled by the owners." Mr. Stephenson, the general freight agent of the defendants, says: "I have known captains refuse to pay the shortage, but we always have the freight in our own hands before we settle. We invariably refuse to pay the captains until the two principals are agreed." Capt. Montgomery, after testifying that the custom is universal, says: "I have known the question of shortage disputed at least a hundred times." Several other witnesses give evidence that the custom is general, but the impression which the whole evidence leaves upon our minds is, that the deduction of shortage is submitted to when the carrier concedes that it is his fault, or where the amount

is not beyond what is usual and incident to transportation; but that it is disputed in other cases. A custom varying the common law must be clearly proved; but we do not find clear evidence in this case that ship owners concede their liability to have deductions made from freight earned, for the value of property receipted for by mistake. That the railway companies assert the right, is fully shewn; but it must be generally assented to, as well as asserted, before the custom can be established.

2. Another essential to a good custom is, that it be *certain.* The evidence of usage in this case does not inform us whether, under it, the carrier is to have any remedy for the freight deducted, and if he is, whether that remedy is left to common law rules, or is provided for by the custom itself. We will not assume that the carrier is to be deprived of all remedy, for that would be so manifestly unjust and unreasonable that it could not be seriously urged that the law should sanction it. And if he has any remedy, it must be either, 1. Against the consignor; or, 2. Against the intermediate consignee; or, 3. Against the owner or ultimate consignee. And it may be well to examine the grounds upon which either of the three may be held liable, as well as the reasonableness of remitting the carrier to a remedy against one, rather than the others.

If the *consignor* was not himself the owner of the property, and had made no express contract with the carrier either for the payment of freight, or for the delivery of any specific quantity, and that which was delivered was, by the bill of lading, deliverable to the consignee on payment of charges, the consignor could not be liable over to the carrier in a case like the present, except by the application of some rule unknown to the common law. — *Pars. Merc. L.* 352 *and note; Chitty on Carriers*, 208; *Barker v. Havens*, 17 *Johns.* 234; *Drew*

v. Bird, M. and M. 156. It might perhaps be suggested that the consignor, having undertaken to ship a certain quantity to the consignee, any payment to the latter for deficiencies may be recovered for, as a payment made to the use of the former; but any liability upon this theory must fall to the ground, if, in fact, the consignor was under no contract obligation to forward a specific quantity to the consignee, or if, being under such obligation, he would still be in time under his contract to forward the balance afterwards. And while the consignor is still entitled to fulfill his contract, by delivery of the grain instead of paying its value, we do not perceive how any third party can be authorized, in correcting an error in part performance, to compel the consignee, who is entitled to grain, to accept, instead, its price at a distant point. Such a case would require ratification by both the consignor and the consignee before the former could be made liable to the carrier; and in the absence of ratification, the latter must seek his remedy elsewhere.

That the *consignee* or owner would be liable, where the amount deducted from the freight by the intermediate carrier had been forwarded to and received by him, there can be no doubt. If he receives all the property shipped to him, a sum of money paid in addition, for a supposed deficiency not existing in fact, is paid without any consideration, and he can have no claim to retain it. But if this alleged custom is legal and compulsory, and the carrier is remitted to the owner of the property for his remedy, we shall have here, perhaps, the first instance in the law where a person is required, by legal compulsion, to make a payment, or submit to an exaction, and then empowered immediately to sue and recover it back from the very person to whose use he has paid it.

But while the owner would be liable, in such a case, after the money has been paid to him, it is equally clear

that, at the common law, the intermediate consignee would also be liable, at least until he had paid over the money, or in some manner changed his legal position relative to the owner, with respect to the money, after making the deduction. His position would be that of an agent to whom money had been paid for a principal not entitled to it; and that an action is maintainable against the agent under such circumstances is well settled. — *Parker v. Bristol & Exeter Railway*, 7 *E. L. & E.* 528; *Snowden v. Davis*, 1 *Taunt.* 359; *Edwards v. Hodding*, 5 *Id.* 815; *Hearsey v. Pruyn*, 7 *Johns.* 179; *La Farge v. Kneeland*, 7 *Cow.* 456; 1 *Pars. on Cont.* 79; *Smith's Mer. L. B.* 1, *C.* 5, § 7. And treating this custom as perfectly valid, we do not see why this action is not properly brought against these defendants, if the deduction was made under protest, and they had not accounted with the owner of the corn when suit was commenced. Customs of this description are to be strictly construed, and we are not to assume that they change the common law beyond what expressly appears. — *Broom's Legal Maxims*, 5 *Am. Ed.* 829. Assuming that defendants had the right to make the deduction at the outset, but that this does not deprive the plaintiff of all remedy, we have only to see against whom the common law would give that remedy; and we can not doubt that these defendants would be liable, either as consignees who had received property subject to charges, or as agents who had exacted money for a principal who has no right to retain it. The anomaly of allowing them to make the deduction, and then have it recovered back from them, is no greater than to allow a similar recovery from the ultimate consignee on whose behalf the deduction is made.

But we do not propose to place our judgment upon this ground exclusively, as we are clearly satisfied the custom itself can not be enforced in the law.

3. All customs must be *reasonable*. If the one in question were confined to vesting in the intermediate consignee

the same power to refuse to pay freight in cases in which the owner would be justified in doing so, it would not exceed the reasonable province of a mercantile usage. But it goes very much further when it makes the bill of lading conclusive in favor of the intermediate carrier, and allows him to make deductions for supposed deficiencies, not in fact existing, which the owner himself would not be permitted to make. And it is specially unreasonable if it deprives the carrier of his lien, and remits him to a personal responsibility which he never relied upon, whether he is given a remedy in all cases against the consignor, or required to follow the money to the hands of the owner, who will usually reside at a point distant from the place where the exaction was made, and frequently in a foreign country. That such a custom may be convenient, and operate justly in most cases, is very true, but it can only rest for its observance on the consent of parties.

The courts are frequently required to hold a custom unreasonable and void, notwithstanding strong reasons urged in favor of it, as a rule of convenience, by the class by whom it has been adopted, and where the hardships in any case would not be greater than in this. The case of *Leuckhart v. Cooper*, 3 *Bing. N. C.* 99, is an illustration of such cases. The usage given in evidence there was, for public warehousemen in London to have a general lien on all goods from time to time housed with them for and in the name of the merchants or other persons by whom they were employed, for all moneys or balances due from such merchants or persons for expenses incurred about goods consigned from abroad, and irrespective of the ownership of the goods upon which the lien was claimed. In *Bryant v. Commonwealth Ins. Co.* 6 *Pick.* 131, a custom for the master of a vessel stranded, to sell the cargo without necessity, was held void. In *Bowen v. Stoddard*, 10 *Met.* 380, a custom among merchants of New Bedford and Fairhaven, engaged in the whaling trade, to accept the bills

of their masters, drawn for supplies furnished abroad, failed to receive the sanction of the court, on the ground that a usage could not be reasonable which put at hazard the property of the owner at the pleasure of the master. And see *Jordan v. Meredith*, 3 *Yates*, 318; and *Spear v. Newell*, referred to in 23 *Vt.* 159. Some of the cases cited were more liable to work injustice generally, than the present; but as a custom, if good at all, is compulsory on all cases falling within it (1 *Bl. Com.* 78), we are not at liberty to regard it exclusively in the light of its effects in the majority of cases. Special customs are so liable to create confusion of legal rules in directions not contemplated in their adoption, that they are admitted into the law with great reluctance; and it is not often a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can incorporate it in their contracts if they see fit to do so.

We have not deemed it necessary to consider how far, if the custom were certain and valid, an adjustment between the two carriers for an actual loss or conversion could be binding on the owner in the absence of ratification by him; or how far a similar adjustment for a supposed deficiency which did not exist at all, could bind either the consignor or the consignee. It is sufficient that there are in the usage elements which prevent its being accepted in the law as a compulsory custom. We think the circuit judge erred in holding it valid, and the judgment must be reversed, and judgment entered for the plaintiff in this court for the amount claimed, with interest.

The other Justices concurred.

Theodore J. Campau v. Joseph E. Shaw and another.

Lease by Guardian: Ratification. The special guardian—*Laws*, 1862, *p.* 11—of *a non compos* made a lease of lands for a term of years, and a portion of the rent was paid in advance. The ward died soon after. The lessees thereupon applied to the heirs to execute an instrument confirming the lease—this they declined to do, but were silent as to expressing any intention to disaffirm the lease.

In an action by the lessees to recover from the estate the rent paid for the unexpired portion of the term for which it was paid: *Held*,

1. That the special guardian had power to execute such lease; but had no power to create a term which should remain valid by virtue of the lease alone, beyond the life time of the ward; and further, that he was accountable for the rent in his official capacity at the time it was received.

2. That the lessees might treat the conduct of the heirs as a refusal to ratify, and that they might recover from the estate the rent paid for the unexpired portion of the term for which they had paid, as money paid without consideration.

Heard October 24th, 1866. *Decided January 14th.*

Error to Wayne Circuit.

This case came from the Probate Court into the Circuit Court, by way of an appeal from the decision of commissioners appointed to audit claims against the estate of Joseph Campau. The Circuit Court allowed the claim of defendants in error, and the case was removed to this court by writ of error and bill of exceptions.

The person and estate of the late Joseph Campau were under a special guardianship on account of his mental incapacity. His special guardian entered into a lease with Shaw and Botsford, for fifteen years, of a piece of land in Saginaw; and eighteen months rent was paid in advance. Before the eighteen months had elapsed, Mr. Campau died, and Shaw and Botsford claimed the right to recover back the proportion of rent thus paid, which would accrue between the time of his death and the expiration of the eighteen months, on the ground that, if the lease was not

void *ab initio*, it was at least void after the death of said Campau.

Levi Bishop, for plaintiffs.

1. The lease appears by its terms, and also by its signature, to have been the instrument of Joseph Campau, entered into by his guardians duly appointed and qualified. The lease was in law, therefore, the act of Campau, performed through another, duly authorized; and it, therefore, bound him the same, as it would if he had executed it himself, in the full possession of his faculties. It had the same effect as acts done by a principal through his agent or attorney.—*University v. Y. M. Society*, 12 *Mich.* 138.

2. The powers of a special guardian are the same, for the time being, as those of a general guardian.—*Laws*, 1862, *p.* 11; 2 *C. L.* 3313, 3305 *and* 3306, *subdivisions* 2 *and* 3.

The general rule is that a guardian not only may, but must, lease the lands of his ward, if he can do so to advantage.—2 *Kent's Com.* 255 *and notes; Taylor's L. and T.* § 135; 4 *Cruise's Dig.* 129; 2 *Wilson*, 129, 135; 10 *East*, 491; 5 *Johns.* 66; 10 *Yerger*, 160, 8, 9; 5 *Halst.* 133; 1 *Johns. Ch.* 561; 7 *Id.* 154; *McClellan's Executor's Guide*, 122.

It is difficult to see what possible objection can be urged against this rule. The guardian is bound to make the best bargain he can for his ward; and he is presumed in law so to do if he makes a lease. It is presumed that he does his duty. Such a bargain will be presumed to remain for the benefit of the ward and his representatives during its continuance. It is for the interest of all parties, and it is absolutely necessary to a good bargain, that the idea of permanence should enter into the transaction. I insist that the doctrine, for which I contend, is the only reasonable one on the subject.

It is said that the guardian of an infant shall not lease for a term beyond the majority of the ward. — *Mc Clellan's Executor's Guide*, 123; 2 *Kent's Com.* 255.

The reason of this rule is, that the age of the infant and, by consequence, the time when the wardship and incapacity of the infant will terminate, are well known. There is no such certainty in the case of a wardship, which can only be determined by the death of the ward.

It was said *arguendo* in the court below, that a guardian might sell the property of his ward, but could not lease it. In reply to this it may be said in brief, that the larger includes the less. A lease is but the sale of a term less than the fee. In the language of the books it is a particular estate carved out of the general estate. If the whole estate or interest could be sold, any interest less than the whole estate could be sold, or leased, which is the same thing.

3. The court below charged the jury that if the ward, during his life, had recovered his faculties, that he might have affirmed or disaffirmed the lease entered into by his guardian. This was erroneous. Most certainly the ward was bound by the lease during his life. The rule here laid down by the court would render the property of a ward worthless, even during the time of his incapacity. No reasonable man would accept a lease of a guardian, if the lease might be terminated by the ward at any moment. Such a doctrine takes from the property of a ward its whole or a great part of its value. The charge was more than the claimants asked, and its tendency was to prejudice the case against the administrators in the minds of the jury.

4. This lease was not absolutely void, either before or after the death of Campau. The most that can be said against it is that it was voidable. As I have argued, it was not voidable by him, even though he had recovered his faculties. It was not voidable by the lessees, who

entered into it as competent persons, and with their eyes open. If voidable at all, it was so only at the instance of the heirs of Campau after his death. This is shown by the authorities already cited. — 5 *Halst.* 133; 1 *Washb.* 304–7.

If the lease was voidable by the heirs, they should be held to act on the subject promptly and unequivocally, on the death of Campau. Delay alone should be held an affirmance; for it is laid down that slight acts, and even inaction itself, even in the case of infants, will be evidence of a ratification. — 1 *Washb.* 304.

We proved that there had been no act of disaffirmance whatever by the heirs; while on the other hand the administrators, who are also heirs, had repeatedly affirmed the lease, so far as their official action could go, by demanding the payment of rent.

5. There is good sense in holding the acts of an infant voidable at his option, on his arrival at maturity, because the law presumes that there may be improvidence in the acts of an infant. The presumption is not that there is improvidence, and, therefore, that the acts are void; but that there may be improvidence, and, therefore, that the acts are voidable.

The reason of the rule does not hold at all in the case of an adult under guardianship. The guardian is a judicious person selected by the probate court. He is presumed in law to make such bargains only as are beneficial to his ward. No theory of improvidence enters into the transaction. The provident acts of the guardian are, in contemplation of law, the acts of the ward. The law presumes that all is done for the best interest of all persons interested. It is difficult to see upon what principle such a transaction can be held either void or voidable.

There was nothing unreasonable about this lease. If there had been, it was for the court of probate to control it, as he controls the guardian. It appears that the judge of probate expressly approved this lease.

6. If this lease was absolutely void after the death of Campau, then the wrong person is sued here. If the lease was thus void, then all the acts of the guardian relating to the time of the lease, which might run after Campau's death, were also void. Nothing which the guardian could do with reference to that time could bind the estate. Of course, the rent in question was not paid to Joseph Campau. It went into the hands of the special guardian. But the lease being void, the receipt of money by the special guardian for the rent, which was to accrue from the death of Campau to the expiration of the eighteen months, was not an official, but was an individual act of the special guardian. If the lease for that time was void, the receipt of the rent must have been also void for the same time. That receipt could not bind the estate, or render it liable. The whole transaction must stand or fall together. If, therefore, these claimants have a just demand at all, it is not against the estate, for the void acts of the special guardian; but it must be against Mr. Daniel J. Campau individually for money had and received to the use of the the claimants.

In any view of the case, therefore, upon authority and upon principle, the claimants were not entitled to judgment, and it should be reversed with costs.

S. T. Douglass, for defendants.

CHRISTIANCY J.

The late Joseph Campau having, from old age, become mentally incapable of managing his affairs, Henry C. Knight, Esq., was duly appointed by the Probate Court as his guardian.

An appeal having been taken from this appointment to the Circuit Court, Daniel J. Campau was, on the twenty-third day of January, 1862, duly appointed and qualified

as special guardian of the ward, pending the appeal, as provided by the act of January 17, 1862.—*Sess. L. pp.* 11 *and* 12.

As such special guardian, he had (so far as is material to the present case), during his continuance in office, the same rights and powers as a general guardian, over the ward and his estate.—*See acts above cited; also Comp. L.* §§ 3313, 3305 *and* 3306, *sub.* 1 2.

On the first day of May, 1863, the special guardian executed in due form, under seal, a lease to Shaw & Botsford, the defendants in error, of a lot of land in Saginaw county "for the purpose of erecting a steam saw mill and other improvements" thereon, for the term of fifteen years, for the rent (for the first five years, all that is necessary to notice here) of four hundred and fifty dollars per annum, payable semi-annually in advance, which Shaw & Botsford thereby covenanted to pay.

Immediately upon the execution of the lease, Shaw & Botsford, who were then only bound to pay the first semi-annual installment, paid to the special guardian six hundred and seventy-five dollars as the rent for eighteen months in advance.

Joseph Campau, the ward, died on the twenty-third day of July, 1863; the special guardian remaining in office up to that time, and the defendants in error having soon after applied to some of the heirs for a confirmation of the lease, which they declined to execute, presented to the commissioners appointed by the Probate Court for examination and adjustment of claims against the estate, their claim for five hundred and seventy-one $\frac{25}{100}$ dollars (and interest) being the balance of the six hundred and seventy-five paid, after deducting the proportion which had accrued as rent, at the time of Joseph Campau's death, on the ground that the lease ceased to be valid after that event. This claim was disallowed by the

commissioners, from whose decision an appeal was taken to the circuit court, where the claimants obtained a judgment for the amount of their claim, and the administrators have brought the cause into this court by writ of error, alleging exceptions. The only questions we deem it necessary to consider upon the exceptions are those we proceed to consider.

We see no reason to doubt the power of the special guardian to lease the real estate of his ward, which might otherwise be rendered useless. Whether this power has any other limitation in a case like this we are not called upon to decide, but we think it very clear the power in this case did not extend to the creation of a term which should remain valid (by virtue of the lease alone) beyond the life time of the ward; and that the lease, though good up to the time of his death, became by that event invalid as against his heirs, and probably (though the point does not arise here), as against his administrators.

But we do not think the lease was so absolutely void for the remainder of the term as to be incapable of confirmation by the heirs and other parties claiming under the ward. They might treat it as void at their option; but if they chose to confirm it, it would be binding both upon them and the lessees. But the lessees would not be bound to accept a confirmation by a part of the heirs or other persons who had a right to disaffirm it, without the whole; nor to accept a term in an undivided interest in the land; nor for a period less than the whole remainder of the term. The record discloses no evidence tending to show any confirmation or ratification by any of the heirs. There was some evidence tending to show that the administrators treated it as a subsisting lease after the death of the intestate, by calling upon the lessees for payment of rent and taxes

according to its terms; but this action of the administrators did not bind the heirs.

It was strenuously urged by the counsel for plaintiffs in error that the mere silence of the heirs, in not expressly objecting to the validity of the lease, and their failure to take any affirmative action for annuling it, operated of itself, as an affirmance or confirmation of the lease; and that the lessees were not at liberty to treat it as void until the heirs had indicated their intention to disaffirm it. However this might have been, had none of the heirs been called upon to confirm it, is a question which does not arise in the present case. Nor—if the matter had been allowed to run along in silence, the lessees, with the knowledge of the heirs, making the expensive improvements contemplated and paying rents and taxes—are we called upon to determine whether the acquiescence of the heirs might not grow into an equitable estoppel or even a legal confirmation; nor at what time or under what circumstances such effects might take place. Immediately upon the death of the ward, the lessees, who, as the evidence shows, had already commenced expensive and permanent improvements, were entitled to know, before they should proceed further with their expenditures and improvements, whether the heirs intended to confirm the lease, and to have that confirmation in due and proper form so as to render it valid and effectual in law under the statute of frauds; and they could not be expected to go on with their expenditures, or to rest quietly upon so precarious a title as might or might not accrue to them from an acquiescence of the heirs in such expenditures and use of the property, while it was entirely uncertain whether they would acquiesce or not; whether they would confirm the lease or disaffirm it, and compel the lessees to lose the money they might expend in trying an experiment which could be tried only by running the risk of the loss. The condition of the lessees might,

perhaps, be rendered safe enough after the acquiescence of the heirs should have grown into an estoppel or confirmation; but how were they to know there would be any such acquiescence? and until then, their condition would be one of great risk—a risk which they could not be legally, or even honestly, asked to assume.

The lessees, as the evidence shows, within a week after the death of Joseph Campau, like fair and prudent men, applied to two of the heirs, and requested them to execute an instrument confirming the lease, and also to obtain the execution of such an instrument by the other heirs. These requests were renewed from time to time afterwards, but were refused. It does not appear that they said anything expressly declaring an intention to disaffirm the lease, but merely declined the requests to confirm, and remained silent. And it is seriously and strenuously urged by their counsel that they had a right to take this course, and yet hold the lessees bound by the lease. But this attempt to reserve to themselves, under these circumstances, the power at any future day to affirm or disaffirm the lease, as future developments and the improvements of the lessees might, in their opinion, render most for their interests, is difficult to be reconciled with good faith and fair dealing. It was calculated to put the lessees upon their guard against incurring further risks; and, in our view, fully justified them in treating the refusal as a disaffirmance, or at least an intention to disaffirm, and left the lessees at liberty to treat it as invalid from the death of Joseph Campau.

But it is urged that if the lease is to be treated as void after Joseph Campau's death, then so much of the money paid as was applicable to that portion of the rent thereafter to accrue, was not received by the special guardian in his official, but in his individual capacity; that the estate is not, therefore, liable to the

lessees, but that their right of action, if any, is against the special guardian in his individual capacity.

The evidence does not show whether the special guardian in fact accounted for or paid over the amount to the estate; and the right of the lessees to call upon the estate for the amount must, therefore, depend upon the question whether the guardian, immediately upon the receipt of the money, was legally accountable for it as the money of the ward or his estate — as for money coming to his hands by virtue of his guardianship; or whether he had a right, if then called upon to account in the Probate Court, to retain it as his own, as against the ward or his estate.

At the time of the execution of the lease and receipt of the money, it was entirely uncertain when the death of the ward might occur. He might live for the whole fifteen years, and then the lease would be valid for the whole term as against all parties. He might die the next day after the execution of the lease; and if the guardian could, the next moment after the money was received, have refused to account for any part of it, or hold any part of it in his individual capacity, he could, with equal right and upon the same ground, have retained the *whole*, and refused to account for any of it; for it was uncertain whether the ward would live through that single day. If, therefore, his accountability should depend upon the time when the ward should actually die, he could not, at the time when it was received, have been held accountable at all. But in legal contemplation, the ward might have recovered his capacity the next week or the next month, or the appointment of the general guardian, from which the appeal was taken, might be affirmed, and the special guardian in either case called to an account; and the lease in either case would continue valid for the whole term, or so much of it as the ward should continue to live.

And the Probate Court might probably, of its own motion, call upon the special guardian at any time to account, for the purpose of seeing that he was properly managing the estate, and properly applying the money. For these, among other reasons, I can not doubt that the special guardian was accountable for this money in his official capacity, at the time it was received, and being so liable, he and his bail must continue so until paid. In fact, so far as this case is concerned, I think we are bound to presume he has accounted for it to the estate. Though he had no right to demand, he had a right to receive this money when paid to him, as rent in advance; and if he did, as the case shows, receive it as rent in advance, he received it in his capacity as guardian. There is no pretence that it was understood to be paid to, or received by him in any other capacity, or that it would have been paid to him otherwise. He, as guardian, had no right to treat the lease as void, even after the death of the ward; for with that event his guardianship ceased, and until that event it was valid as to all parties. After that event, the heirs (or the heirs and representatives) had the right to confirm it and hold the lessees upon it, or to disaffirm it, and thereby release them. But in either case, the guardian, as such, was accountable for the money at the time it was received. The payment to him operated as payment to the ward or his estate, and the lessees are entitled to recover the amount from the estate as so much paid upon a consideration which has failed, upon a principle analogous to that which authorizes the recovery of money paid upon a contract which has been rescinded. *Raymond et al. v. Bearnard*, 12 *Johns.* 274; *Gillett v. Maynard*, 5 *Id.* 82; *Rice v. Peet*, 15 *Id.* 503; *Wheeler et al. v. Board*, 12 *Id.* 363; *Burr v. Veeder*, 3 *Wend.* 412.

Had the covenant been to pay a gross sum down for a lease executed by the guardian for the fifteen

years, there might have been some plausible ground for saying that the lessees took upon themselves the risk of the ward's living for that length of time. But here the payments were semi-annual, and the whole transaction shows that neither party expected the rent to be paid for any period for which the lessees should not be allowed to enjoy the premises.

There is no error in the record, and the judgment must be affirmed, with costs to the defendants in error.

The other Justices concurred.

Wm. Comstock v. John W. Howd.

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126	675
15	237
129	2642
15	237
d135	44

Declaration in assumpsit: Cause of action. Justice's Court. In an action to recover the amount of a subscription to provide for a public dinner, the declaration filed in the justice court alleged that the "defendant, with others, desiring to serve a free dinner to the soldiers, and desiring to raise money therefor, did designate plaintiff as a proper person to raise said money by subscription, and to disburse the same; all which was agreed to and accepted by said defendant; and that defendant, for the carrying on of said purpose, became indebted to plaintiff, and promised to pay," etc., referring to the subscription on file. *Held*, that under the rules of pleading in justice's courts, a substantial cause of action was set forth.

Voluntary subscription: Consideration: Parties. A subscription, by which several persons promise to pay the sums set opposite their names, to provide such free dinner is legally binding, notwithstanding no promisee is named; and it may be collected in the name of one of the number, who is selected by the rest to collect and disburse the money. *Held*, also, that the object being a meritorious one, and the subscription by defendant being an inducement to others to subscribe and pay their money, both constituted a valid consideration.

Heard January 10th. Decided January 14th.

Case made from Gratiot Circuit.

The case was commenced in a Justice's court. The declaration was as follows:

"William W. Comstock, plaintiff, complains of John W. Howd, defendant, who has been summoned to answer him

in a plea of assumpsit, and says that about the middle of June last, the said John W. Howd, William W. Comstock, and divers other persons, desiring to celebrate the fourth day of July, A. D. 1865, and also on that day to serve a free dinner to the soldiers and their families, of Gratiot county, and also desiring to raise a sum of money for the said purpose, did designate the said William W. Comstock as a proper person to raise such a sum of money, by subscription, as would be necessary to defray the expense of said celebration, and make all necessary disbursements; all of which was agreed to by said persons, and accepted by the said William W. Comstock.

And the said William W. Comstock further says that the said John W. Howd, for the carrying on of said purpose, became indebted to the said William W. Comstock in the sum of ten dollars, and promised to pay the same when requested, which will more fully appear from the instrument in writing, filed herewith. Yet the said John W. Howd has utterly refused to perform his said promise, though often requested so to do, to the damage of the said plaintiff, fifty dollars, and of this he brings suit."

The paper referred to in said declaration, and filed therewith, is as follows:

"We, the undersigned, citizens of Ithaca and vicinity, agree to pay the several sums set opposite our respective names, for the purpose of furnishing a free dinner on the 4th of July to the returned soldiers and their families; also, to the widows and orphans of deceased soldiers of Gratiot county."

This was signed by the plaintiff, defendant, and twenty-five others. The amount opposite defendant's name was ten dollars.

After judgment, the defendant appealed to the circuit court, where he pleaded the general issue, and gave notice that he would give in evidence and prove that he signed said subscription with the express understanding that the

said public dinner referred to therein should be given and served in the village of Ithaca, and that the same was not so given; and that he gave notice, before any expense had been incurred, that he would not pay his subscription unless said dinner was given in the village of Ithaca.

The objections to the evidence on the trial, and the facts, are stated in the opinion.

Judgment was rendered for plaintiff.

H. Walbridge, for plaintiff.

1. It is not necessary that a person should be named as payee in the said subscription paper. By the popular plan adopted by the citizens of Ithaca, of whom the defendant was one, it was understood and agreed that the plaintiff should raise, collect and disburse the funds.

The defendant's liability arose at the time of signing the subscription paper, subject only to his withdrawal of the same; and giving notice prior to any liability incurred by plaintiff, in the furtherance of the contemplated object.

Defendant's promise was not in consideration that, if plaintiff, by himself or with others, would get up and serve a free dinner to "returned soldiers," etc., he would pay, etc., but was in consideration of the object of the subscription, and in the other subscriptions, and was founded on a sufficient consideration. — 12 *Mich.* 73.

Defendant promised and agreed to pay the amount of his subscription, for the purpose of furnishing so much in defraying the expenses of a free dinner, etc.

The plaintiff's right of action accrued and was as perfect against the defendant on the 24th day of June, 1865, and after the agreement with Burgess & Kinkerter (who provided the dinner), as at any subsequent time.

Suppose Burgess & Kinkerter had refused to accept and look to plaintiff for pay, and some other person had become personally liable, how could that affect the defendant's liability to the plaintiff, and the plaintiff's right of action?

The plaintiff, in his declaration, clearly alleges the undertaking and promise of the defendant, the object, purpose and the consideration for the same; the relation of plaintiff to the object contemplated and agreed upon, and also the relation of the subscribers to him as the payee and disburser of the subscription fund; and that for the purpose of carrying on and accomplishing the object in view, the defendant "became and was indebted" to him, plaintiff, etc.

The declaration contains all the material facts, in point of law, necessary to sustain this action.

But defendant having by his plea and notice waived his right to demur, can not now question the sufficiency of plaintiff's declaration.

This court have always held the rules of pleading to be extremely liberal when applied to justice's courts. — 8 *Mich.* 427.

It is true that no precise day was agreed upon when defendant should pay his subscription, yet the facts clearly show, and it must have been understood by all the subscribers, including defendant, that the payment of the subscriptions must precede the getting up and serving of the dinner: That the payment was a pre-requisite.

The acceptance of the duties and trust by the plaintiff was, in law, entering upon their discharge.

2. The evidence offered by plaintiff, showing that a dinner was provided and partaken of, as contemplated, and that plaintiff had expended money in procuring said dinner, was admissible and proper.

R. Strickland, for defendant.

1. There is no payee named in the said subscription; therefore, no promise in law.

The purpose for which the money was proposed to be given, or paid, was the furnishing of a free dinner for the returned soldiers, etc., of Gratiot county. The plaintiff has

not in his declaration alleged that such a dinner was provided or partaken of by the parties named, viz: the returned soldiers, etc.; nor that the plaintiff had expended any money for such purpose, or become liable to pay any money for the same.

These papers do not show any consideration for the alleged or assumed promise; and without a good and valid consideration, no binding obligation can be incurred.

The declaration must contain all the material facts necessary in point of law to sustain the action.—1 *Dan'll Prac.* 235–6; *Graham's Prac. 2d ed.* 195 *to* 215; 1 *Chitty's Plead.* 255.

The evidence offered by plaintiff, to show that a dinner was provided and partaken of by the returned soldiers, etc., and that the plaintiff had expended money in procuring said dinner, was not admissible, there being no allegations in the said declaration to which said evidence can apply, or go to establish.

The objection made by defendant to the admissibility of said evidence was well taken, and should have been sustained by the court.

The question is here raised directly, on the trial, at the earliest opportunity.

This case is not analogous to the cases where the sufficiency of the declaration is raised collaterally, after judgment. In such cases it has been held that judgments could be sustained when defects were apparent in the declaration. Here the question is as to the admissibility of the evidence, when the objection is taken at the trial.

The words "because" and "was indebted," as used in the said declaration, can only relate to the statements that precede them in the said declaration, and can not by construction be taken as equivalent to necessary allegations, not expressed therein.

The question of the admissibility of the said evidence, in this case, is directly presented to this court; and if

the said evidence is not admissible, the judgment of the court below should be set aside.

CHRISTIANCY J.

This was an action brought to recover the amount of a subscription of the defendant, which was in the following words: "We, the undersigned, citizens of Ithaca and vicinity, agree to pay the several sums set opposite our respective names, for the purpose of furnishing a free dinner on the 4th of July to the returned soldiers and their families; also to the widows and orphans of deceased soldiers of Gratiot County." This was signed by the plaintiff and defendant and twenty-five other persons, with an amount in figures opposite the name of each; the amount opposite that of the defendant being ten dollars.

The defendant objected to the introduction of the subscription, because, 1: No cause of action is alleged in the declaration, and, 2: That no payee is named in the subscription. This objection was overruled and the evidence admitted. Plaintiff was also allowed to prove, against defendant's objection, that said celebration was held, the dinner provided and partaken of by the returned soldiers and their families, and by the widows and orphans of the deceased soldiers; and that plaintiff, at a meeting held (June 19th) for the purpose of raising the funds for the above purposes, was elected a treasurer to receive and disburse the funds raised for the purpose, and that he was made the chairman of a committee to raise funds for those purposes by subscription, and had paid for the dinner.

It is claimed by defendant's counsel that the only ground upon which the plaintiff could recover, must be that he had, in reliance upon the subscription, incurred and paid the expenses; that his declaration which is special, not containing the common counts, does not place his right of action upon this ground, but merely upon the liability created by the subscription itself and, therefore,

that it shows no right of action, and that all the evidence of payment by plaintiff, as well as his appointment to raise, receive and disburse the funds, was inadmissible.

It may be admitted that the evidence of the plaintiff having paid the expenses of the dinner, or become liable to pay, was mere surplusage. We think such was the fact.

The declaration does not allege such payment or the incurring of any liability by the plaintiff, but bases his right of action upon the subscription, and the facts that defendant and divers other persons had designated him "as a proper person to raise such sum of money by subscription, and make all necessary disbursements," all which was agreed to by such persons and accepted by said plaintiff; that defendant, for the carrying on of said purpose, became indebted to the plaintiff in the sum of ten dollars and promised to pay when requested; for which he refers to the subscription on file as a part of his declaration.

Under the liberal rules of pleading in justices' courts we think the declaration sets forth substantially all the facts necessary to a good cause of action, and that it was fully sustained by the proof, as found by the judge.

The subscription itself, together with the appointment of plaintiff to raise the money by subscription, to make all necessary disbursements, and his acceptance of the position constituted a valid contract between the defendant and the plaintiff. The designation of the plaintiff, as the person to raise and disburse the funds, places the subscription on the same ground as if his name had been inserted in it as the payee. It was held in *Thomas v. Dodge*, 8 *Mich.* 51; *and Nevius v. Bank of Lansingburg*, 10 *Id.* 547, that the guaranty of a promissory note need not name the promisee, and that it becomes definite and fixed when any one takes it upon the guarantor's credit. This is a very usual mode of drawing up a subscription, and we

must suppose the subscribers expected and intended to pay to some party appointed for the purpose of receiving it: and in legal effect the promise, we think, is to pay to the person who shall be thus appointed.

We see no difficulty upon the question of a consideration. The object was a meritorious one, for which people generally are willing to expend money, and which, therefore, "must be regarded as worth money when it is promised." (*Underwood v. Waldron*, 12 *Mich.* 90.) Beyond this also the subscription of the defendant must be looked upon as an inducement to others to subscribe and pay their money, in reliance upon the payment to be made by each of the other subscribers; none of whom would be so likely to subscribe or pay, but for this reliance, as without it they would not expect the attainment of the common object.

The judgment of the court below must, therefore, be affirmed, with costs to the plaintiff.

CAMPBELL and COOLEY JJ. concurred.

MARTIN Ch. J. did not sit.

John M. Brackett v. William S. Sears and others.

Mortgage, when security for advances. Commissions: Accounts current. Professional services, where several suits depend upon trial of one: Equitable set off. S. made a mortgage to J. S. and W. P. L. for $15,000, for which they gave their receipt which concluded as follows: "*from which we are to deduct our account with him, and to pay him the balance, or to be returned to him at our option.*" That account was a balance due upon mutual accommodation discounts and acceptances, or indorsements. The parties subsequently pursued a similar course of business accommodations; the balance of advances being always against S. but never equalling the face of the mortgage and interest.

Held, that the mortgage should be considered as security for all such dealings and advances.

Held, further that no commissions could be allowed to the mortgagees on their discounts or advances so long as the account in their favor did not suffice to pay the amount of the mortgage; and that the security could only cover the sums actually remaining due, excluding such commissions.

Held, further, that from the nature of the dealings between the parties and the course of their accounts their mutual dealings were evidently considered as dependent, and, therefore, the professional charges of S. should be regarded as equitable set-offs in the accounting on the mortgage; and that where it was assigned to secure a sum less than the whole amount due, with a residuary interest in the mortgagees, such services subsequent to the assignment might also be set-off upon such residuary interest. But accounts for services rendered, not to the firm, but to the individual partners or to third persons could not be set-off against the firm unless by some valid agreement the firm had made itself liable for them.

Professional charges will not be rejected merely for want of success in the litigation, where there is no clear proof of mismanagement. But where several suits were made to depend on the argument of one, the charges should not be multiplied at the full rate as if there had been separate hearings in each, but should be confined to such services as were actually rendered.

Heard November 3*d*, 1866. *Decided January* 14*th*, 1867.

Appeal in Chancery from Wayne Circuit.

The bill in this case was filed to foreclose a mortgage made by William Sears and wife to James S. and William Libby, and by them assigned to the complainant to secure a debt.

The cause was heard on pleadings and proofs, and a decree was entered for the sale of the mortgaged premises in default of the payment of $15,168.25 and costs of suit.

The defendant, William S., appealed from said decree. The facts are stated in the opinion.

R. P. Toms, for complainant.

T. Romeyn, for Wm. S. and C. E. Sears.

D. C. Holbrook, for J. S. and W. P. Libby.

CAMPBELL J.

This is a bill to foreclose a mortgage given by William S. Sears and wife to James S. Libby and William P. Libby, and by them assigned to complainant to secure a debt. The mortgage was dated August 17th, 1858, and was given

to secure a bond for $15,000 in the penalty of $30,000. At the time these securities were given no money was advanced, and Sears owed the Libbys a much smaller sum. Upon delivering them to the mortgagees, the latter gave back a receipt for the papers, which described them and then concluded as follows: "*From which we are to deduct our account with him, and to pay him the balance, or to be returned to him at our option.*"

There had been many previous dealings by way of mutual accommodation by indorsements and discounts and money advances, which had been settled by striking a balance and taking notes from Sears in November, 1857. Between that time and the date of the securities further dealings had enlarged the balance against Sears, and there was some outstanding paper of his on which the mortgagees were liable, but not enough, with the debt, to reach the sum secured by mortgage. These dealings continued, and in March, 1861, when the papers were assigned to complainant to secure a debt of about $11,000, the balance was much larger than this last sum, unless reduced by some claims now in dispute. There is some conflict of testimony as to whether Sears was immediately informed of this assignment. The question does not become very material, but we are inclined to think he was so notified or informed.

The contest in this case arises on several points which will be noticed in their proper order.

First, it is claimed that the papers were made for the sole purpose of being discounted, and that the mortgagees could not hold them for any other purpose, or to secure future advances.

It is further claimed that set-offs due Sears have been disallowed, and that claims have been allowed in favor of the mortgagees which were not proper charges.

It is very evident from the testimony that it was expected that the mortgagees would get it cashed if possible,

and pay over the balance to Sears after retaining what was due themselves; and we think this the real reason why the bond was originally designed to bear ten per cent. interest—the correction to seven per cent. being out of doubt as to the legality of the larger rate. But the receipt does not make the delivery conditional. It authorizes the mortgagees to return the papers at their option, but its purport is to make them the property of the mortgagees, who were to pay for them, whether discounted or not, after deducting their account. No time was fixed for this payment, and no doubt Sears could after any reasonable time have tendered the balance of account, and demanded back the mortgage. But instead of doing this he obtained further discounts and advances, which would certainly be applicable as far they went, in reduction of the purchase money. And, as such a mortgage could only be enforced to the extent of money actually advanced, or indebtedness actually existing, the effect of the entire transaction was in law substantially the same as if the mortgage had been given in fact to secure future and present liability.

We are, therefore, to determine what was the state of the accounts between the parties. The advances and payments made by the Libbys are not in any way put in doubt, but the chief conflict arises upon the rejection of certain items claimed by Sears. The dealings of the parties were evidently based on a reliance that all of their accounts should be connected and dependent. We have no doubt that their dealings, pecuniary and professional, are within the laws applicable to equitable set-off. And we are compelled, therefore, to adjust the accounts on this basis.

Sears produces several checks, which he claims were made by way of advances to the Libbys, but which they have not credited him. The checks themselves are no evidence, one way or the other, of the fact that they were

given for or without an immediate equivalent. If given in exchange for cash or other securities they would not of course be credited. But if lent, then they should be credited on account as advances. The mortgagees produce in turn a large amount of paper, which would apparently be chargeable against Sears, but which they do not claim to be due; and they say that these checks and the paper in their hands were exchange items, so far as they ever had them, and never went into account, because received and given for an immediate equivalent. Upon a careful consideration of the whole case we think the accounts kept by the Libbys are correct. Sears has not produced any satisfactory proofs to counterbalance the circumstances against him, and upon the documents alone, without the admissions of complainant and the Libbys, the balance against him would be much larger. We, therefore, reject these disputed items—regarding the finding in the Circuit Court as correct.

The next set of items embrace the professional account of Sears. He claims payment for his services as counsel in several suits before and since the settlement of November, 1857. The previous services were not rendered to the firm of J. S. and W. P. Libby, but a part to J. S. Libby, and a part to Joshua F. Bridge and Samuel J. Bridge. We find no sufficient proof of any agreement by the firm to pay these claims, if they were not—as seems probable—included in the settlement. Nothing but a distinct agreement, upon a valid consideration, could raise a legal liability to pay such debts. The same remarks will apply to the charges for services subsequently rendered, not to the firm, but to individual partners or to other persons. And as there is no sufficient and clear proof of any such liability—while the mutual relations of the parties may have given some reason for expecting such allowance, we can not create a debt out of such premises.

From a computation it would appear that the commissioner allowed all of complainant's charges against the firm at the sums claimed, except in relation to seven foreclosure suits in favor of David Gould, and three suits in ejectment. It appears that in both of these instances the cases were dependent by agreement upon one hearing. This being so there was no propriety in allowing each to be charged for as a separate suit fully argued. If each suit argued was worth $300, as charged, we think the extra sum of $50 for completing the business in the other cases dependent on it was, so far as the testimony shows, a sufficient compensation. In the absence of proof that the business involved extra trouble, we are not disposed to change the allowance. We do not consider the testimony concerning the alleged mismanagement of the suits, as the counsel employed — who were better acquainted with them than the parties — have not shown any plain case of misconduct or unmistakable fault.

The Libbys, who appeal from the decree allowing these items, insist not only on their being excessive, but also that they refer to services subsequent to the assignment of the mortgage. As the assignment was by way of security, and the allowance of these claims leaves enough to pay the complainant in full, we think the balance in his hands as trustee for the Libbys or their assigns was properly subject to these set-offs, which are within the rule of equitable set-offs, and should be governed by the principles applicable thereto. The Libbys were equitable owners of the surplus interest in the mortgage after, as well as before, the assignment, and it should be subject to these accounts which do not seem to have changed their character as mutual dealings.

The only remaining question is concerning the allowance of a commission of one thousand dollars to the Libbys for their trouble.

The charge of such a commission can not be maintained

unless upon some understanding between the parties, as it is very clear that this is not a case of ordinary brokerage. Each party was in the habit of freely endorsing for the other, and of exchanging paper. And in relation to a very large portion—if not all—of the charges for money, the Libbys appear to have been lenders and not brokers.

Sears swears positively that there was no agreement or understanding of the kind. The only one set up was in relation to the specific sum of $1,000, which William P. Libby swears he proposed to Sears soon after the settlement in 1857, which he says Sears thought rather high but not unreasonable. It is somewhat difficult to understand how this can be possible. At that time there had been no considerable amount of business since the settlement. If it related to business done before, then it is very singular it was not mentioned during that settlement. But Libby swears that all previous services were settled by Sears giving up his accounts against the Bridges and Libbys for anterior professional services. It could not have related to the future, because the business could not be calculated, and indeed they claim full additional commissions at the rate of five per cent. This sum was never entered upon the books, which contain none of the charges for commissions, and no account was ever rendered to Sears containing any such items. Whether proper or improper, we can not but regard this charge as an afterthought. Nor do we think it admissible. The balance of advances between Sears and the Libbys never approached the amount of the bond and mortgage. Under the terms of their receipt they had bound themselves to pay for the mortgage unless they saw fit to return it, and could not charge for such moneys; and we can not believe that it could have been supposed by any of the parties occupying these very peculiar mutual relations that such a one-sided arrangement existed as is now relied on. We think the commissions charged and allowed in favor of the Libbys should be struck out. The

decree in other respects should be affirmed. As the contest in this respect does not concern the complainant individually, the costs of this court should be taxed against the Libbys in favor of Sears, and deducted from the balance due after satisfying the debt to secure which the mortgage was assigned to complainant.

The decree of this court will be entered on these principles.

The other Justices concurred.

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Adam W. Pattridge v. Chauncey Lott.

Justice's Court: Judgment of nonsuit: Appeal: Statute of limitations. Where a cause was adjourned in a justice's court, by consent of parties, before any pleadings were made, and the justice on the adjourned day refused to proceed with the cause, it was held that such refusal might be treated as a judgment of nonsuit, and that an appeal would lie therefrom.

And where such appeal was dismissed by the Circuit Court, it was further held that it must be regarded as an avoidance of the action for matter of form, and that the time for further suit ran from such dismissal.

Heard January 10th. Decided January 14th.

Case made from Clinton Circuit.

This was an action on a promissory note. The defense was the statute of limitations.

Judgment was rendered for plaintiff.

The facts are stated in the opinion.

R. Strickland, for plaintiff.

S. Hoyt, for defendant.

CAMPBELL J.

Plaintiff sued upon a promissory note dated August 25th, 1857, and maturing on the 4th of March, 1864. Defendant set up in defense the statute of limitations.

Plaintiff sets up in avoidance of this that he brought suit within the six years, which was avoided and defeated for matter of form, and that the present suit was begun within a year after such avoidance. Defendant, on the other hand, claims that he did not sue within a year after his former suit was rendered nugatory.

The facts show that a suit was brought before a justice of the peace on the last day allowed by law, and, defendant being duly served, both parties appeared at the return day, when, on account of a death in plaintiff's family, the case was adjourned over for several days by consent. Upon the adjourned day, the justice refused to take any further steps whatever, or to call on the case, alleging, that, inasmuch as there was no pleading before the adjournment, and it was not granted by himself for cause shown, he ceased to have jurisdiction. Plaintiff then appealed the cause to the circuit, where, after about a year, it was dismissed for want of jurisdiction, on the ground that no judgment had been rendered by the justice, from which an appeal would lie. It is now claimed by the defendant that the appeal was void, and that the year of grace ran from the time when the suit before the justice became defective.

We think there is no foundation for this pretense. The action of the justice in refusing to allow plaintiff to proceed with his case was equivalent to a judgment of nonsuit, and must be so regarded. It was entirely unjustifiable, as a continuance by consent under the circumstances meant a continuance of the cause in its then condition, and the parties consenting could not afterwards revoke such consent. Such consent is clearly sufficient cause within the statute, and the justice could not disregard it. The fact that nothing was said expressly about postponing the time for pleading amounts to nothing, as the continuance must necessarily leave it *in statu quo*, without some agreement to the contrary.

The case was, therefore, regularly in court on the adjourned day, and the refusal of the justice to proceed was a plain denial of right.

The action of the justice being in effect a nonsuit, the appeal was regular and ought not to have been dismissed. Its dismissal must be regarded as an avoidance of the action for matter of form, and the time for further suit ran from such dismissal.

The action, therefore, is properly brought, and the judgment of the Circuit Court in favor of plaintiff must be affirmed, with costs.

COOLEY and CHRISTIANCY JJ. concurred.

MARTIN Ch. J. did not sit.

Silas Ireland v. John Woolman and others.

Chancery practice: Affidavit of regularity: Recital in order, effect of: Subsequent purchaser, when to pay costs: The affidavit of regularity required by chancery rule 92, previous to the taking of a bill as confessed, is for the convenience of the judge only; the rule only requiring that evidence in that form, or some other, should be furnished of the regularity of the proceedings on taking the bill as confessed.

When a recital in a chancery order is not essential to its validity, it may be treated as surplusage.

When a subsequent purchaser is made a party to a foreclosure bill, and contests the amount due upon the mortgage, a decree for costs may be rendered against him, if the mortgaged premises prove insufficient.

Mortgage premises, in what order sold: Notice of foreclosure sale: Practice in computing amount due. Where there is nothing on the record to show the propriety of any other disposition, a sale of premises in the inverse order of alienation is proper.

The decree in this case directed that notice of the foreclosure sale be given "according to the course and practice of the court." *Held*, that the practice in this state had become so uniform as to make this direction sufficiently clear to be valid.

The court may dispense with a reference to compute the amount due on a mortgage, and make its own computation, if it sees fit.

Heard January 9th. Decided January 14th.

IRELAND *v.* WOOLMAN.

Appeal in Chancery from Cass Circuit.

This was a bill to foreclose a mortgage. The case was heard on the pleadings and proofs, and a decree was made in favor of complainant.

The defendants appealed.

The objections to the decree are stated in the opinion.

F. Muzzy, for complainant.

J. Hollister and *J. Sullivan*, for defendants.

The decree is erroneous.

1. Because complainant furnished no affidavit of regularity of proceedings. That there is none returned is certain.

The recital in the decree that such an affidavit was furnished, is no proof of the fact. — 10 *Mich.* 265; 6 *Id.* 401.

The decree can not be sustained without such an affidavit. — *Chancery Rules*, 92.

2. No subpœna was ever served on Woolman, nor was any affidavit furnished of his non-residence, nor any order of publication made in the cause. No such affidavit or order is returned.

The recital in the decree or in any interlocutory orders, either of personal service or notice by publication, does not establish the fact. — 10 *Mich.* 265.

Personal service or affidavit of non-residence and proof of order of publication, and compliance with such order, are necessary to confer jurisdiction. — 10 *Mich.* 265.

No decree could properly be made against any of the parties, much less against Woolman, until it was legally taken as confessed by Woolman. — *Harring.* (*Ch.*) 265; 2 *Paige*, 572; 4 *Id.* 122.

If Woolman were an unnecessary party, the cause could not properly be heard until it was either taken as con-

fessed, as to him, or the bill dismissed by order of the court. — 2 *Paige*, 585; 1 *Id.* 548, 559; 5 *Id.* 638.

3. It requires Bilderback, who was merely a grantee under Woolman, to pay the costs of the foreclosure.

4. It contains no directions as to the mode or term of publication, but orders that the Circuit Court Commissioner give public notice of time and place of sale, according to the course and practice of this court.

Such a decree is a nullity, since the court has furnished no rules as to the mode of publishing notice of mortgage sales, or the term of such notice.

The form was probably borrowed from the New York forms, where the statute or rules prescribed the time and place of sale, and the mode and term of notice. — 1 *Barb. Ch. Pr.* 526.

5. No order of reference was made to the Circuit Court Commissioner to compute the amount due on such mortgage.

COOLEY J.

Several objections are taken by the appellants to the decree in this cause, but none of them, we think, well founded.

1. It is objected that no affidavit of the regularity of the proceedings as to the defaulted defendants was presented at the hearing. It is always proper that such an affidavit should be presented, and the rule — *Chancery Rule*, 92 — requires that either in that form, or some other, evidence should be furnished of the regularity of the steps to take the bill as confessed; but this is for the convenience of the judge only, and while the affidavit could not make the proceedings regular if, in fact, they were not, neither does its absence invalidate them, if correct.

2. The default as to Woolman is claimed to be irregular. An inspection of the record furnishes no ground for

this objection except that the recital in the order for default states that he was personally served with subpœna, whereas, in fact, he was brought in by publication as a non-resident. But this error was merely clerical, and as no recital of the kind was essential to the validity of the order, the mis-recital must be treated as surplusage.

3. It is said that the decree for costs against Bilderback was erroneous. Bilderback was a subsequent purchaser from the mortgagor. The mortgagor himself was a non-resident, and did not appear; but Bilderback contested the amount due upon the mortgage, and it was clearly proper that the court should decree costs against him if the mortgaged premises proved insufficient.

4. The decree directs the various parcels of land covered by the mortgage to be sold in the inverse order of their alienation by the mortgagor, whereas it is claimed that one of them is taken out of the operation of the general rule which would require this order of sale, by being specially charged with the payment of the mortgage by the mortgagor's deed conveying it. Without inquiring whether there is anything in the testimony to show this fact, it is sufficient to say that the point is not in any way presented by answer, and was not, therefore, properly before the court below.

5. The decree is objected to, because it directs notice of sale to be given "according to the course and practice of the court;" and it is said that neither the statute nor the rules prescribe the length of such notice. The practice in this state has always been to give notice for the same time and in the same manner as required by sheriffs before sale of real estate on execution; and this is so well understood, that it is not uncommon for decrees to be made in this form. We are not disposed to question the validity of such decrees.

6. It is lastly objected that no reference was made to a Circuit Court Commissioner to compute the amount due

on the mortgage, but the Circuit Judge computed it himself. A reference in such case is for the relief of the Circuit Judge, and he can dispense with it if he see fit.

The decree must be affirmed, with costs against the appellants.

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN Ch. J. did not sit.

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S. T. Conway and others v. The Township Board of Waverly.

Bill in Chancery to remove cloud upon title, what should set forth: Allegation of illegal taxes, how made. A bill to restrain the collection of taxes on the ground that they constitute a cloud upon the title, must set forth the description of the lands, or it cannot be sustained. And where it alleges that a part only of the taxes are illegal, it should furnish the court with the information which will enable it to separate the legal from the illegal.

Heard January 8th. Decided January 14th.

Appeal in Chancery from Van Buren Circuit.

This bill was filed by twenty-nine complainants to restrain the collection of the taxes for the year 1865, levied against them on the assessment roll of the town of Waverly, Van Buren county.

Neither the description nor value of complainant's real property is set forth in the bill.

The illegal taxes alleged were certain taxes assessed to refund bounties, and which were included in the taxes.

The bill prayed for an injunction.

Defendants demurred for misjoinder, and for want of equity in the bill. The demurrer was sustained and the bill dismissed.

D. D. Hughes, for complainant.

1. The case comes under a well recognized head of equity jurisdiction, and may be maintained to remove a cloud from the title of complainants. — *Comp. L.* § 3490; 12 *Mich.* 414; 8 *Id.* 276; 9 *Id.* 94; 10 *Id.* 248; 5 *Id.* 336; 15 *Barb.* 395.

And it makes no difference that the tax or cloud is irregular on its face. — 12 *Mich.* 414; 14 *N. Y.* 9.

The court also has jurisdiction to restrain the defendants within the scope of their jurisdiction and powers. — *Har. Mich. Ch.* 96.

2. The bill is not multifarious for a misjoinder of complainants, or causes of action.

a. There is no fixed, inflexible rule by which to test the question of multifariousness or misjoinder of complainants, and each case must stand upon its own circumstances. — 9 *Mich.* 58; *Story's Eq. Pl.* § 284; *Adams' Eq.* 650, *note;* 1 *Barb. Ch.* 62.

b. The general and approved rule is, that when the parties have a common interest touching the matter of the bill, they may join, although they claim under distinct titles, and have independent interests; but this rule must yield to questions of convenience. — 2 *Anst.* 469; 9 *Mich.* 59; *Story's Eq. pl.* 120.

c. The case comes within this rule as construed by the courts. It is in principle like the case of execution creditors, who may join against the common debtor, who is charged with fraud; such cases do not proceed on the grounds of a common fund, or upon any theory of trust, but on the ground of fraud, to avoid multiplicity of suits, and that they come within the rule. — 6 *Johns. Ch.* 152; 4 *Cow.* 682; 9 *Paige.* 605; 1 *Sand. Ch.* 368.

The case is in principle like the cases of several joining in a bill to restrain a nuisance. — 1 *Barb. Ch.* 59; *Hop. Ch.* 416; *Story's Eq. Pl.* § 286.

The case comes within the rule, in that it requires but one decree: the interest is common: the pleadings are the same as to all: the proofs are the same as to all: the whole controversy is one transaction: there is nothing peculiar to any one complainant: the interest centers in the one point of the illegality of the tax.

3. The case is not one where jurisdiction depends upon the amount. — *Walk. Ch.* 113.

If it did, the several amounts may be added. — 9 *Paige* 595, 605.

4. The tax is illegal. — *Laws*, 1865, *p.* 140; 13 *Mich.* 546.

5. If the demurrer is sustained on the ground of misjoinder, and not for want of equity, the case should be sent back with leave to complainants to sever. — 1 *Dan. Ch. Pr.* 670.

Stuart, *Edwards* and *Severens*, for defendants.

1. The bill is defective for multifariousness of parties.

Several individuals, tax-payers in a municipality, having distinct parcels of property subject to taxation, with no common ownership or interest in the several parcels can not unite in one bill for the purpose of arresting the collector's proceedings to collect an alleged illegal assessment or to sequester the property itself if the assessment be not otherwise collectable.

The threatened wrong, if it be such, affects no common interest, nor does it spring from any common act. The collection of the tax from one man does not affect another, but is an entirely different proceeding, and may produce quite different results, as affecting the interests of each.

a. The doctrine of the English Court of Chancery requires that the complainants should have some common interest in the thing affected, to justify their uniting in

one suit. — 1 *Turn. and Russ.* 297; 12 *Simons*, 416; *Story Eq. Pl.* § 121.

The case of several creditors joining in one suit to obtain the application of the debtor's estate is no exception, for there the subject of controversy is the common fund which in equity belongs to the creditor, and their interest extends to the whole fund, their claims though several constituting a joint burden; and it is necessary and proper that the creditors should all be represented in an arrangement involving an appropriation of the common property.

b. In this country some courts have gone somewhat further in a particular class of cases than the English rule would allow, and have permitted parties to unite when there was one common act on the part of the defendant which in producing injury to one has also at the same time produced injury to several. On this principle, the court of chancery has in several instances permitted land owners owning distinct parcels, to unite in a bill to restrain the erection of or continuance of a nuisance affecting their lands injuriously. — 15 *Barb.* 375; 43 *Id.* 239.

c. This bill is not filed by the complainants in a representative character in behalf of themselves and others, and so not within the scope of those cases spoken of in the case of 13 *Mich.* 551.

Then as to the merits:

2. The jurisdiction of the court of Chancery to restrain the proceedings of public officers, is one to be sparingly and cautiously exercised. And it is a matter of extreme doubt, whether the court should interfere to restrain official proceedings when those proceedings affect the community generally or a class of inhabitants, except upon the suggestion of the Attorney General, who is charged with the duty of taking such legal proceedings as the public good may require. Indeed, it seems to be

pretty well settled that in such a case as is made by this bill, the court will not entertain a suit instituted by one or several tax payers on their own account, the other tax payers not being present or represented, and for aught that appears, willing and desirous that the tax should be collected and applied to the contemplated purpose. — 6 *Metc.* 425; 7 *Cush.* 254; 14 *Conn.* 565; 17 *Id.* 372; 19 *Id.* 128; 6 *Johns. Ch.* 439, 28; 6 *Paige* 133; 18 *N. Y.* 155; 23 *Id.* 318; 28 *Id.* 396; 12 *Pet.* 91; 3 *Atk.* 750; *Amb.* 158; 2 *Anst.* 603; 8 *Sim.* 193, 272; 13 *Mich.* 540; 26 *Wend.* 132.

And several of these cases establish that the rule is the same whether the proceeding affects the whole public, or a geographical district only, or a general political class.

3. The complainants do not show that the proceedings they complain of will affect their lands. The township collector can only reach personalty. He is entirely without power to go farther. If the complainants have personal property he will collect the tax from that. If not, other proceedings supervene under the direction of other officers. And then by possibility a cloud upon the title may be created. This was the point where this court held in 12 *Mich.* 414, that equity might interfere to prevent the proceedings which would culminate in title *de facto*, having a presumption of validity.

At present these complainants are not in a position to file their bill. The presumption is, that the collector will collect from goods and chattels. It is therefore improbable that the proceedings will ever reach the lands themselves. And before the court should proceed, it ought to be satified that in all probability a cloud will be created upon the real estate.

Its preventive jurisdiction will not be exercised until it is apparent that a cloud must necessarily arise from the illegal act. — 5 *Paige* 493; 6 *Id.* 262.

A mere lien which the very proceedings enjoined are adapted to remove, is not a cloud which will properly call for equitable interposition.

If the bill is to be regarded as one filed to prevent a trespass on personal property, it is sufficient to say that there is no averment that the complainants have any of that class, and if there was, it would not make a case for a court of equity. — 2 *Mich.* 560.

The circumstances must be very peculiar to warrant the court in interfering when personal property only is to be affected. — 13 *Mich.* 540.

By this injunction the whole state and county tax of these complainants is withheld from the public treasury. Certainly there should be something very peculiar to justify such hindrance to the collection of the revenue of the state.

CAMPBELL J.

Complainants, twenty-nine in number, filed their bill to restrain the collection of the taxes for the year 1865, levied against them on the assessment roll of the town of Waverly, in Van Buren county. They aver that they are all tax payers and land owners in the township, and set forth the amount which is assessed upon each of them on the assessment roll, which is alleged to be in the usual form, including taxes for state, county and town purposes. One of the complainants avers his aggregate taxes to exceed $100. The rest vary from $6.45 to $85.98. Their property is not described or valued, and the bill does not show what proportion of the taxes was for township purposes. The illegal taxes complained of are certain taxes assessed to refund bounties, which are included in the taxes for township purposes. The bill prays an injunction to prevent the collection of all the taxes on the roll in the hands of the town treasurer. An injunction was allowed on condition that complainants respectively pay into court

the amounts assessed against them respectively, which was done accordingly.

Defendants demurred for misjoinder of complainants, and for want of equity. The demurrer was sustained, and the bill dismissed. The court also ordered the money deposited to be paid over to the town treasurer.

We think the demurrer was well taken. If it should be assumed that complainants can thus join their several causes of individual grievance in one bill, they have entirely failed to point out any tangible grievance of such a specific nature as to enable a court to relieve it. The bill cannot be maintained to remove a cloud upon land without showing what the land is, and there is no averment giving either description, quantity or value. It is not asserted that any part of the tax is illegal except a part of the town tax. As the state and county taxes are separately charged, it was, at least, possible to distinguish the town taxes from the rest, whether the bounty tax was or was not put by itself. No illegality in a town tax could, before the land should be actually sold, affect the other taxes. And complainants, if entitled to relief at all, could only be relieved against the tax which included the illegal charge. It was, therefore, incumbent on them to show distinctly the grievance to be remedied. The bill must be certain enough to furnish the means of giving the precise relief needed. No court can give assistance to a party who does not show what he is entitled to demand. The bill asks relief against what must be presumed to be legal as well as illegal taxes, and the court has no means of ascertaining one from the other, while complainants could have given the means, but have neglected to do so.

Without passing upon the several other questions discussed, we think the demurrer properly sustained for want of equity, and the decree thus far must be affirmed, with costs.

We think, however, that the court could not properly direct the money deposited to be paid over by the register to the township treasurer. The tax for bounty purposes was manifestly illegal, and even if it were not so, there had been no issue or hearing which could enable the court to determine that the parties had no defense against the enforcement of collection in whole or in part. The dismissal of this bill could not affect any legal defenses which any of them might set up against the levy of any of the taxes. And the case being out of court, there is no way now to reach the facts, as there is nothing on record to show the true amount of lawful charges. This portion of the decree must be vacated. But as the decree is affirmed on the merits of the cause, and this has formed no main part of the controversy, the defendants are entitled to their costs in this court.

CHRISTIANCY J. and COOLEY J. concurred.

MARTIN Ch. J. did not sit.

APRIL TERM, 1867, AT DETROIT.

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Henry Warren v. Hiram F. Cole and another.

Repudiation of contract, for fraud: Action for damages. Where a contract has been repudiated on the ground of fraud, the party defrauded may bring an action for the damages sustained.

Actions of tort: Rule of damages. In an action of tort, where, from the circumstances, no certain pecuniary standard can be obtained by which to ascertain the amount of damages, the jury have a wide range of discretion, and no absolute rule can be laid down; but where, from the nature of the case, a rule can be discovered by which adequate compensation can be given, the rule should be applied to actions of tort, as well as upon contract. *Held, further*, that the expenses of litigation can not be considered in estimating the damages.

Patent right: Construction of deed. A agreed to sell to B an interest in two inventions, for the former of which only a patent had been issued. A deed was duly executed by A, conveying his interest in said patent to B. Subsequently, A received a patent for the second invention. *Held*, that inasmuch as the conveyance from A referred only to the description in the first patent, it could not be construed so as to include the invention in the second.

Heard January 12th. Decided April 3d.

Error to Lenawee Circuit.

This was an action to recover damages for an alleged deceit practiced by plaintiff in error upon defendant in error, in the sale of two patent rights for the making of soap. Judgment was rendered for the plaintiff below. The facts are sufficiently stated in the opinion.

The following are the assignments of error, covered by the opinion:

1. That the court erred in charging and instructing the jury that if the fraud was proved on the part of the

defendant to be a gross one or aggravated, they will be justified in imposing exemplary or punitive damages.

2. That the court erred in charging and instructing the jury that they might also, in estimating the plaintiff's damages, take into consideration his expenses of carrying on and prosecuting his suit, including counsel fees.

3. That the court erred in refusing to instruct and charge the jury, as requested by the defendant's counsel, that if the jury believed from the evidence that the plaintiffs had disaffirmed the contract, that then the plaintiffs could not recover in this form of action; and also erred in charging and instructing the jury that unless such disaffirmance was acceded to or acted upon by the defendant, or the consideration money restored on request, any act of disaffirmance in evidence in this case, on the part of the plaintiffs, would not preclude the plaintiffs from maintaining this action.

4. That the court erred in refusing to charge and instruct the jury, as requested by the counsel for the defendant, that the conveyance of the 17th October, 1863, conveyed to the plaintiffs all the rights of the defendant to his patent of February 9th, 1864, to the washing and jelly soap for the county of Cuyahoga, and invested the plaintiffs with all the rights they would have had if the patent had been granted before the sale to the plaintiffs.

C. A. Stacy, for plaintiff in error.

1. In all cases of contract where fraud is charged or has been committed, the contract is voidable, at the election of the injured party. — 1 *Doug.* 330.

a. If the defrauded party elects to affirm the contract, he is bound by it in all respects. If he elects to rescind it, from that moment it becomes void, and neither party can maintain any rights under it. — 4 *Mich.* 508; 2 *Parsons on Con.* 780.

b. The party defrauded must rescind as soon as circumstances permit after the discovery of the fraud. — 1 *Denio*, 69; 24 *Wend.* 74.

c. Generally an offer to return the property received is as effectual as actually returning it. — 5 *Black.* 225; 9 *Porter*, 420.

d. When instead of paying money for an article, one delivers some other article in exchange, if the one of whom he purchases be guilty of fraud, he may return, or offer to return, the whole consideration which he received, and maintain trover for the chattels he gave; otherwise, his remedy is by action on the case for the deceit, and not trover for the consideration. — 4 *Mass.* 502; 3 *Esp.* 83; *Sedg. on Dam.* 562; 3 *Hill*, 333; 8 *Barb.* 9, 18; 1 Hill, 484; 4 *Denio*, 584.

2. The court erred in charging the jury that they might, in addition to punitive or exemplary damages, also, in estimating the plaintiff's damages, take into consideration his expenses of carrying on and prosecuting his suit, including counsel fees.

In the theory of the law, the taxed costs are full indemnity for the expenses of a suit. — 13 *M. & W.* 47; 5 *Wend.* 535; 23 *Id.* 425; 11 *Pick.* 378; 4 *Black.* 277; 13 How. 363.

This erroneous direction in cases where, like this, the jury had the right to give compensatory damages, will require the court to reverse the judgment, as they can not assume that the intention of the jury was to give vindictive damages rather than compensatory.—*Sedg. on Dam.* 529, 563; 3 *Sandf.* 628; 8 *Wend.* 505.

3. The court erred in charging the jury that in this case the plaintiff could recover punitory or vindictive damages.

If the defendant was guilty, he was also liable to a criminal prosecution and punishment, and if damages as a punishment, over and above the actual damages sustained

could be given by the jury in the civil action, then the defendant might be twice punished for the same offense.—4 *Cush.* 273; 4 *Denio*, 461; 4 *Taunt.* 355; 21 *Pick.* 378; 2 *Green. Ev. Title, Damages.*

4. The sale of the patent right and the conveyance of 17th October, 1863, we claim conveyed not only all the right to the patent then issued, but to the patent for washing soap issued February 9, 1864; it contains a warranty, and, by force of the warranty, conveys not only the right he had obtained under the patent of 1861, but also all he acquired under the patent of 1864.

5. The charge of the court upon the rights acquired by the plaintiffs by the sale, not only misled the jury upon that point, but also ignored the testimony tending to show an offer in the spring of 1864, by Warren, to convey to plaintiffs the right for Cuyahoga county, to the patent of July 9, 1864.

A. L. Millerd, for defendant in error.

It is settled by the verdict of the jury, that the defendant (below) by means of a false and fraudulent representation to the plaintiffs, that he had a patent for two kinds of soap, when he had a patent for but one, induced them to purchase the right for the county of Cuyahoga, and to pay him therefor the sum of fifteen hundred dollars.

Upon the discovery of the fraud, the plaintiffs (below) offered to re-convey to him, and demanded of him to restore the purchase price which he had obtained from them. This he refused, and this action was brought in the court below to recover damages for the deceit.

1. Fraud or deceit, accompanied with damages, is a good ground of action.—2 *Hill. on Torts*, 146.

It is no objection to the plaintiffs' right of recovery that they repudiated the contract, on the discovery of the fraud.

If they had failed to do this, it might have been construed to be a waiver of the fraud, and an acquiescence in the performance of the contract by the defendant.—2 *Kent's Com.* (*3d Ed.*) 480.

It has been made a question whether a purchaser did not waive his right to damages by acting in affirmance of the contract after discovering the fraud, though the courts have decided that he did not.—1 *Hill*, 484; 2 *Hill. on Torts*, 150.

But when was it ever decided, or even suggested, before, that he waived it by disaffirming the contract?

It may be true that we could not sue upon the contract, after repudiating it. A party can not both affirm and disaffirm a contract. But this action is not upon the contract, but for the fraud.

It is settled, too, that a vendor may on discovering the fraud and returning or offering to return what he has received, recover back what he has paid. But it does not follow that this is his only remedy. He has two remedies. He may either recover back the whole consideration that he has paid, in an action for money had and received, or may bring his action for the fraud and recover the damages.—4 *Wend.* 488; 4 *Mass.* 502; 1 *Doug.* 330, 347.

In the former case he must first return or offer to return what he has received; in the latter it is decided that this is not a necessary pre-requisite. It may or may not be done. In the former case the party, if he recovers anything, recovers specifically the consideration paid—in the latter he recovers his damages, which may or may not be the full amount of the consideration.

2. There was no error in the charge of the court as to the rule of damages.

The court charged that the measure of damages would be the difference in value between the right acquired by the plaintiffs by the purchase, and what would have been

the value of the right or rights as they were fraudulently represented to be by the defendant.

This was in accordance with the request of the defendant's counsel, and no exception was taken to it by either party.

He also charged that if the fraud was a gross one, or aggravated, the jury would be justified in imposing exemplary or punitive damages, and might take into consideration the plaintiff's expenses of carrying on the suit, including counsel fees.

Exemplary damages may be given in a case of gross or aggravated fraud.—*Sedg. on Dam.* (3*d Ed.*) 36, 59, 476–492, 665–672; 4 *Strobh.* 34; 10 *N. H.* 130; 29 *Conn.* 496; 11 *Mich.* 105, 548.

And in such a case the jury may properly take into consideration the probable expense of the litigation, including counsel fees.—*Sedg. on Dam.* 99, 100, 658; 15 *Conn.* 225; 24 *Id.* 392; 1 *Baldwin*, 138; 17 *Ala.* 833.

3. There was no error in the charge of the court upon the request of the defendant (below) as to the effect of the deed of 17th October, 1863, conveying the right for Cuyahoga county to the plaintiffs: at least none of which the plaintiffs in error can complain.

This deed was made before the patent for the washing soap was issued. There was not even an application for a patent on that then pending. The original application for that had been withdrawn, and the subsequent one, on which the patent finally issued, was not filed until after the date of the deed.

The deed by its terms is a conveyance of the right for Cuyahoga county in the patent already granted, which was for the hard soap, and makes no reference to the washing soap.

How it could operate to convey title to another improvement, and to a patent subsequently applied for and

obtained, to which no allusion is made in it, we do not understand.

The fact that the grantor fraudulently misrepresented the extent of the right conveyed, as including the washing soap, for which he then had no title, would not make the deed *ipso facto* operate as a conveyance of the right subsequently acquired, though it might be the ground upon which a court of equity would compel a further conveyance.

CAMPBELL J.

Suit was brought in the court below by the defendants in error, to recover damages for deceit alleged to have been practised upon them in the sale of a local interest under a patent right. They claimed that they were led to purchase by the representation that the patent issued by the United States to Warren covered two different kinds of soap, when in fact it only embraced one. It seems that Warren filed a claim and specifications for the two sorts, but, under the law, only one could be included in a single patent, and therefore one was left out. After the sale to Cole and Arnold of a territorial right under the patent, which they aver was said to be for both inventions, a second patent was issued covering the claim omitted in the former one. There was evidence tending to show a repudiation of the contract by defendants in error on the discovery that the patent did not include all it was supposed to, and there was also contradictory evidence concerning the readiness of Warren to make further assurances to remedy the deficiency in the original transfer; but this last matter does not become important, as no legal question is raised upon it for review. The jury having rendered a verdict for damages against Warren, the case comes before us on objections to the various rulings of the Circuit Judge.

Several exceptions are based upon the refusal of the Circuit Court to charge that if defendants in error had disaffirmed the contract, this action would not lie, and to his charges concerning what would or would not amount to a disaffirmance, if such disaffirmance would bar the suit.

The only intelligible ground for the main objection is the claim that this suit amounts to an affirmance, and that a previous election to disaffirm can not be receded from. We do not so understand the pleadings. This is not, as claimed by Warren, a suit to enforce a contract. On the contrary it is an action of tort, to recover damages for a deceit and imposition claimed to have been practised on Cole and Arnold, whereby they were fraudulently induced to make an agreement they would not have made had they known the truth. This being the character of the suit, it can not be seriously contended that a person repudiating a contract for fraud can not sue for redress, if he has suffered damage from it. We think the plaintiff in error has mistaken the nature of this action, and that the objection was not well founded. The minor rulings connected with this theory become unimportant, and were in fact more favorable to plaintiff in error than to the defendants, upon the proper theory of the prosecution.

The court below also refused to charge that the second patent operated to confirm to defendants in error the title which they originally supposed they were buying. Had the conveyance covered, or purported to cover, the subject of the second patent (as the court below seems to have assumed it did,) this question would have been quite material, inasmuch as Warren unquestionably owned the exclusive right as inventor, and had not abandoned it to the public. But the deed will not bear such a construction. It does not purport to convey an interest in anything but the invention identified as described in the letters patent of September 3d, 1861, and can not, therefore, have any bearing whatever upon the invention not included in that

patent. We are not required, therefore, to decide, and we do not express any opinion upon, the sufficiency of the reasons given for refusing to give retroactive effect to the second patent, so long as the decision itself was right. The deed does not purport to give rights in the second invention, and could work no estoppel concerning it or concerning the subsequent patent.

The remaining exceptions relate to the rule of damages. Objection is made that the court below allowed the jury to give vindictive damages, and to include in the damages the expenses of litigation. We think the instructions were erroneous on both points.

Without considering the disputed question whether damages in a civil action can ever be properly based on the theory of punishment instead of redress, we recognize fully the fact that there are many wrongful acts which are committed under circumstances which preclude the possibility of reducing the grievance to any reasonably certain pecuniary standard. In many cases, it can not be said that there has been any mere pecuniary damage whatever. But, inasmuch as the injured party should have some redress, and the law can only give that redress by pecuniary damages, it has been found necessary to leave the amount, in the absence of any other standard, to the common sense of a jury; and anything which, in their opinion, is not out of proportion to the more or less aggravated character of the grievance, is allowed to stand as the rule of damages; not because it is an accurate measure of redress, but because no better one can be attained. And, accordingly, such damages will stand, unless it is plain that the jury have gone very much astray in their action. Such damages have, in many cases, the effect of a heavy punishment; but whether the law properly regards them in that light we do not find it necessary to determine. For there are many wrongful injuries where the grievance created is purely pecuniary in its nature, and is susceptible of full

and definite money compensation. When this is the case, we do not conceive it admissible to abandon a certain rule, which will do complete justice, for an uncertain one, that can hardly fail to do injustice. It was remarked by my brother Christiancy, in *Allison v. Chandler*, 11 *Mich. R. p.* 555, that "where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract." We think the present case is one of that kind. The parties have been damnified, if at all, by not getting the property they expected to get. Their position is, in point of damage, just what it would have been, had Warren agreed to convey what they bargained for, and wantonly broken his agreement. The same redress which would compensate the breach of such a contract, will compensate the deceit in not giving them what they supposed they were buying in the transaction complained of. We think the court erred in permitting the jury to adopt any other measure of damages.

Nor do we think the jury were properly permitted to consider the expenses of litigation in the present suit. It was held in *Hatch v. Hart*, 2 *Mich. R.* 289, that such expenses could not be considered in estimating damages for detention in replevin suits, and there is no distinction in principle between such cases and other actions for torts. Such we consider the better doctrine on authority, and also the more reasonable. We are not disposed to disturb the rule so laid down.

For these reasons, we think there is error apparent on the record upon the rulings on the estimate of damages.

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

COOLEY J. and CHRISTIANCY J. concurred.

MARTIN Ch. J. did not sit in this case.

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John O'Neil v. The People.

Criminal Statutes: Construction. Subdivision 2, of section 5947, of the Compiled Laws, provides that if an offense *attempted* to be committed "be punishable by imprisonment for five years or more, the person convicted of such attempt shall be punishable by imprisonment, etc., not more than three years, etc."

In subdivision three, providing for the punishment of the attempt to commit a crime of lesser grade, the following provision is made: "But in no case shall the punishment by imprisonment exceed one-half of the greatest punishment which might have been inflicted, if the offense so attempted had been committed."

The defendant in this case was convicted of an attempt to commit larceny from the person, the punishment of which offense—2 *Comp. L.* § 5761—was imprisonment for a period not exceeding five years. He was sentenced to be imprisoned for three years in the State Prison. *Held*, that under the above statute, the proviso in subdivision three applied to all the different grades mentioned in the second and third subdivisions to said section. The sentence was held void, and the prisoner was discharged.

Heard January 12th. Decided April 3d.

Error to Kalamazoo Circuit.

This was an information for an attempt to commit larceny from the person.

The plaintiff in error was convicted for an attempt to commit the crime of larceny, and sentenced to be confined at hard labor in the State Prison for three years.

It was assigned for error that the prisoner could not be sentenced for a period exceeding two and one-half years.

The case turns upon a construction of the statute.

D. B. and H. M. Duffield, for plaintiff in error.

1. The statute defining the offense of larceny from the person, and prescribing its penalty (five years) is found in 2 *Comp. L.* § 5761.

There is no statute specifically prescribing the punishment of an *attempt* to commit the crime of larceny from the person.

The only statute regulating the punishment for an attempt to commit a crime prohibited by law is found in 2 *Comp. L.* § 5947, the third subdivision of which reads as follows: "But in no case shall the punishment by imprisonment exceed one-half of the greatest punishment, which might have been inflicted if the offense so attempted had been committed."

The sentence actually passed was imprisonment in the State Prison for three years.

We claim that under this statute the greatest punishment that could have been imposed on the plaintiff in error by the court, was two years and six months in the State Prison.

2. It being established then that the plaintiff in error was sentenced by the court for a longer period than is allowed by law, the judgment must be reversed and the prisoner discharged. — 13 *Mich.* 365; 2 *Metc.* 419; 8 *Barn. and Cress.* 395; 7 *Adolph. and Ellis*, 58.

W. L. Stoughton, Attorney General, for the People.

The only question presented is, whether the court had power, upon a conviction for an offense which, if committed, would be punishable by five years in the State Prison, to sentence the person so convicted to the State Prison for a period of three years.

Section 5761 of the Comp. Laws makes the punishment for larceny, by stealing from the person, five years' imprisonment in the State Prison, or one year in the county jail.

The second subdivision of section 5947 of the Comp. Laws is as follows: "If the offense so attempted to be committed is punishable by imprisonment in the State Prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the State Prison not more than three years, or in the county jail not more than one year.

The class of cases, and the punishment awarded, are here clearly and fully set forth. There is no uncertainty, and no reference is made to any other or different punishment for such cases. The sentence imposed by the court below is in accordance with this provision, and fully authorized by its express terms.

But it is claimed on the part of the plaintiff in error, that this provision is limited by the last clause of the third subdivision of this section. It is respectfully submitted that this construction can not prevail.

1. The court will so construe a statute as to give effect, if possible, to every clause and section of it. — 1 *Bishop's Cr. L.* § 66; 5 *Mich.* 114; *Dwarris on Stat.* 568; 22 *Pick.* 571.

The natural and reasonable construction of this section will confine the limiting clause to the last subdivision, and to that alone. In case the offense attempted to be committed is punishable by a less term than five years in the State Prison, the attempt can only be punished by imprisonment in the county jail, or by a fine of three hundred dollars. The attempt, in such a case, is not a felony, but a misdemeanor. — *Comp. L.* § 5955.

The only "punishment by imprisonment" provided for in the third subdivision is in the county jail; and the words "the punishment by imprisonment," in the last clause, would seem, naturally and grammatically, to relate to the same words used in the clause immediately preceding, rather than to another and different kind of punishment provided for a felony in a former subdivision. — 1 *Bishop's Cr. L.* § 68; *Dwarris on Stat.* 573.

3. If we consider the object designed to be accomplished by this limiting clause, it will very clearly appear that it was intended by the legislature to relate only to the third subdivision. Without this limitation the punishment provided by the third subdivision would be unjust and unreasonable. All attempts to commit offenses

which, if actually committed, would incur a less penalty than five years in the state prison, are made punishable by one year's imprisonment in the county jail, or a fine of three hundred dollars.

But there is a large class of cases where the offense, if consummated, can only be punished by the same, or even a less penalty. Hence the necessity and reasonableness of the clause in question, when confined to the third subdivision. It would evidently be unjust to impose the same or a greater punishment upon an attempt, than upon the actual commission of an offense. Section 5794, of the Comp. Laws, for instance, provides that certain willful and malicious acts shall be punished by imprisonment in the county jail not exceeding six months, or a fine not exceeding fifty dollars, or both. The attempt to commit such acts would doubtless be within this statute, but it would be strange, indeed, if the attempt could be punished by one year's imprisonment, etc., while a less punishment would attach to the offense if actually committed. Such, however, would be the effect but for the limitation referred to. — 1 *Bishop's Cr. Law*, § 61; 13 *Mich.* 44.

4. The clause limiting the punishment for an attempt to one-half of the imprisonment imposed upon the offense if committed, can not apply to the first subdivision of this section. This only embraces offenses, if such there be, which, if committed, would be punishable with death. Nor can it apply to that class of cases mentioned in the second subdivision, which, if committed, would be punishable by imprisonment in the state prison for life. Such a construction would be wholly unreasonable, and lead to a degree of uncertainty never contemplated by the legislature. The court will so construe a statute as to give it a reasonable effect. — 8 *Pick.* 370.

And it seems very clear that the same punishment

is provided for all attempts to commit an offense, whenever the actual commission would be punishable by imprisonment in the state prison for five years, or for life.

CHRISTIANCY J.

The plaintiff in error was convicted of an attempt to commit larceny from the person of one Rachael Thompson, and sentenced to be confined at hard labor in the state prison for the period of three years; and the question is, whether this period of imprisonment does not exceed that which the statute has prescribed for the offense of which he was convicted.

The punishment for the completed offense of larceny from the person, as fixed by the statute, is "imprisonment in the state prison not more than five years, or by imprisonment in the county jail not more than one year."—2 *Comp. L.* § 5761. Section 11 of chapter 192, Compiled Laws, for the punishment of attempts to commit crimes, is in the following words:

"Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be punished by imprisonment in the state prison not more than ten years.

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for five years or more, the person convicted of such attempt shall be punished by imprisonment in the state prison not more than three years, or in the county jail not more than one year.

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than five years, or by imprisonment in the county jail, or by fine, the offender convicted of such attempt shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding three hundred dollars; but in no case shall the punishment by imprisonment exceed one-half of the greatest punishment which might have been inflicted if the offense so attempted had been committed."

The only question is, whether the last provision in the third subdivision (limiting the punishment by imprisonment to one-half the greatest punishment which might have been inflicted for the offense if completed), applies as well to the offenses provided for in the second, as to those in the third subdivision.

We see no reason to doubt that such was the intention of the statute. The reasons for limiting the period of imprisonment for an *attempt* to commit an offense, to one-half that provided for the consummated offense, are, in our view, equally strong, in the cases provided for in the second subdivision as for applying the same limitation to those mentioned in the third, and this being so, there should be some plain reason furnished by the language of the statute, to confine the operation of the clause to the third subdivision only.

We can discover nothing in the language of the provision or in the punctuation to thus confine it. On the other hand, the prohibition is general, and all the terms used apply equally well to both subdivisions, "but in *no case* shall the punishment by imprisonment exceed," etc. Had it been the intention to confine the operation of the clause to the cases of "imprisonment" mentioned in the third subdivision, we should naturally have expected some indication of the intention thus to limit it, such as "in no case mentioned in this subdivision," or something of similar import.

If the attention of the judge was called to the statute, he may have been misled by inferring from the latter clause of the second subdivision, that this subdivision was complete in itself, and had fixed a different limit for the ratio of punishment between an attempt and a completed offense, from that fixed by the third. But it will be seen that without this limitation found in the third subdivision, the second would fix the same limitation for an attempt to commit an offense punishable by imprisonment for life as for one punishable with but five years; and for the purpose of approximating a ratio in the various cases, this general limitation of subdivision two was made subject to the further limitation at the close of subdivision three.

We are, therefore, of opinion that the imprisonment for the offense of which the defendant was convicted, is limited to two years and a half. The sentence exceeded this limit, and is therefore void for the whole.—*Elliott v. The People*, 13 *Mich.* 365. The judgment must be reversed, and the defendant discharged.

CAMPBELL and COOLEY JJ. concurred.

MARTIN Ch. J. did not sit in this case.

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Eben Smith, Jr., Administrator of H. W. Ellsworth v. Robert Jones.

Attachment: Estate of deceased persons: Commissioners. Where in the prosecution of a claim a lien has been acquired by attachment against a defendant in his life time, the plaintiff may, on obtaining judgment, have execution against the property so attached, whether commissioners have been appointed, or not, to hear claims against the estate of the deceased person.—2 *Comp. L.* § 2974.

Heard April 2d. Decided April 3d.

SMITH *v.* JONES.

Certiorari to Kent Circuit.

This writ was brought to review the proceedings of the Circuit Court for Kent Circuit, in granting an order for the issuing of an execution against an administrator. The facts are stated in the opinion.

The following are the errors assigned:

1. For that the said judgment was certified to the Probate Court, under section 2931 of the compiled laws.

2. For that said judgment was presented to the commissioners appointed by the Probate Court of Kent county, in said estate, and allowed by them.

3. Because the amount of said judgment must be paid in the same manner as other claims duly allowed against the estate of said deceased.

4. That by the death of the defendant in the original suit, and the subsequent proceedings, the plaintiff's specific lien, by virtue of such writ of attachment, was lost, and he is not therefore entitled to enforce it, to the exclusion of the other creditors; and,

5. Because such judgment is under the control and disposition of the Probate Court, and the plaintiff can not have execution in the Circuit Court of the county of Kent.

Miller and *Willson*, for plaintiff.

1. A lien was created by the levy and subsequent proceedings, 2 *Comp. L.* § 4751, which was not lost by the death of original defendant.

2. The action was prosecuted to final judgment, after the death of the original defendant.—2 *Comp. L.* § 2931.

3. The time was fixed by the Probate Court for the payment of debts by the administrator.—2 *Comp. L.* § 2946.

4. The right to issue execution against the estate of the deceased was suspended by the appointment of commissioners, until the expiration of the time limited by the court for the payment of debts.—2 *Comp. L.* § 2930. *See, also*, §§ 2974–5.

5. Plaintiff claims that a lien having been created by the levy and subsequent proceedings, and the time limited by the Probate Court for the payment of debts having expired, and the judgment being still unpaid, he is entitled to an execution on his judgment in the regular form.—2 *Comp. L.* §§ 4763–4.

The inference from the language of the statute, (§§ 2930, 2974–5) is, that the lien of the attachment is not destroyed, but only suspended during the time limited for the payment of debts.

Justice requires that plaintiff be allowed to enforce his lien by an execution, and not be compelled to resort to any other proceeding for that purpose.

Eben Smith, Jr., for defendant.

1. The plaintiff has no specific lien on the lands levied on, under his attachment.

The judgment in the cause was certified to the Probate Court, under section 2931 of the compiled laws, and presented to the commissioners appointed on said estate and allowed by them; and the amount thereof must be paid in the same manner as other claims duly allowed against the estate.—*Comp. L.* § 2931.

2. The plaintiff is not entitled to have an execution issue on his judgment.

No execution shall issue against the administrator, etc., during the time allowed him for the payment of debts, except in the case provided for in section 2974; Comp. L. § 2975.

Article No. 190, laws 1850, amended said section 2974, by inserting between the words "omitted" and "no," the words, "the Judge of Probate shall perform the duties devolving upon such commissioners by law," and thus provided against any failure in allowance of claims.

The section before amendment provided that "if the appointment of commissioners to allow claims should in

any case be omitted, no person having any contingent or other lawful claim against a deceased person should thereby, (*i. e.* by any failure to appoint commissioners, etc.,) be prevented from prosecuting the same against the executor, etc., as provided by law, and in such case (*i. e.* in case the appointment of commissioners to allow claims, should in any case be omitted,) the claimant having lien by attachment previous to his death, may, on obtaining judgment, have execution, etc."

The words, as provided by law in the section, refer to the ordinary methods of prosecuting claims to judgment.

The plaintiff in this case having presented his claim to commissioners appointed by the Probate Court, and the same having been allowed, it must be paid in the same manner as other claims duly allowed against the estate. It is under the control and disposition of the Probate Court, and the plaintiff can not have execution in this court, even though the time limited by the Probate Court for payment of debts, has passed and not been extended.

The clerk of this court properly refused to issue any process on said judgment.

COOLEY J.

The defendant in error brought suit in the court below against Ellsworth by attachment, which was returned not personally served. Ellsworth died pending the suit, and the cause afterwards proceeded to judgment against his administrator. The judgment not being satisfied, defendant applied to the court below for execution, which was awarded to him. The administrator thereupon brings the proceedings to this court to obtain a reversal of the order for execution. The question is solely one of statutory construction.

The statutes of 1846 — *Ch.* 72, § 16 — provide that all actions pending against a person at the time of his death, may, if the cause of action survives, be prosecuted to final

judgment, and if judgment is rendered against the estate, it shall be certified to the Probate Court, to be paid as other claims duly allowed against the estate.

Other sections provide for commissioners in the Probate Court to audit and allow claims; and section fifty-nine, before amendment, was as follows:

"If the appointment of commissioners to allow claims shall in any case be omitted, no person, having any contingent or other lawful claim against a deceased person, shall thereby be prevented from prosecuting the same against the executor, administrator, heirs, devisees or legatees, as provided by law, and in such case a claimant having a lien upon real or personal estate of the deceased, by attachment previous to his death, may, on obtaining judgment, have execution against such real or personal estate."

This section is certainly very awkwardly drawn; the first reading might leave the impression that liens by attachment were only preserved in the cases where the appointment of commissioners had been neglected, so that the creditor was compelled to resort to suit. But as no attachment could be obtained after the party's death, to give the section this construction would nullify this portion of it; as demands already in suit did not go before the commissioners in any case, unless the plaintiff saw fit to withdraw his suit for the purpose. We think it the evident intent of this section to save the lien by attachment in any case where the party proceeded in his attachment suit to judgment; and that the words "in such case," here employed, refer to the case of the party prosecuting his demand to judgment against the executor, etc., and not to the case of failure to appoint commissioners. We are not warranted in giving the statute a construction which would render any part of it nugatory, if any reasonable construction can be put upon it which would give effect to the whole.

The legislature of 1850 must have understood the section as we do. They amended it by providing that if no commissioners were appointed, the judge of probate should perform their duties. The remainder of the section then provided that "no person, having any contingent or other lawful claim against a deceased person, shall thereby be prevented from prosecuting the same against the executor," etc., "as provided by law, and in such case a claimant having a lien upon real or personal estate of the deceased, by attachment previous to his death, may, on obtaining judgment, have execution against such real or personal estate." Now the cases provided by law, in which the creditor may prosecute his demand to judgment, are those in which suit was commenced before his death; and in these, if lien had been acquired by attachment, the section as it now stands clearly saves it.

The order of the Circuit Court is correct, and should be affirmed.

CAMPBELL and CHRISTIANCY JJ. concurred.

MARTIN Ch. J. did not sit.

George K. Johnson v. John Frisbie.

Negotiable instrument: Rate of exchange. A promissory note made in Michigan, and payable "with current rate of exchange on New York," is a negotiable instrument.—*Smith v. Kendall*, 9 *Mich.* 241.

Heard April 2d. Decided April 3d.

Error to Wayne Circuit.

This was an action of assumpsit, brought by the plaintiff as first indorsee of two promissory notes against the defendant as indorser of the same.

JOHNSON v. FRISBIE.

The declaration consisted of the common money counts at length, with a notice subjoined that two promissory notes, of which copies were also subjoined, would be given in evidence for the plaintiff, on the trial, under the money counts.

The defendant demanded a bill of particulars, and the plaintiff served upon him the following:

"SIR — Please to take notice that two certain notes, of which the following are copies, are a bill of particulars of the plaintiff's demand in this cause, and for the recovery of the amount due on which this action is brought, to wit:

DETROIT, 29TH MAY, 1860.

$4,196.67.

On the 10th of October next after date, I promise to pay to the order of Geo. K. Johnson, four thousand one hundred and ninety-six dollars and sixty-seven cents, with current rate of exchange on New York, at the banking office of W. A. Butler & Co.

N. P. STEWART.

Value received.
Indorsed, "GEO. K. JOHNSON."

DETROIT, 29TH MAY, 1860.

$4,196.67.

On the 10th of October next after date, I promise to pay to the order of Geo. K. Johnson, four thousand one hundred and ninety-six dollars and sixty-seven cents, with current rate of exchange on New York, at the banking office of W. A. Butler & Co.

N. P. STEWART.

Value received.
Indorsed, "GEO. K. JOHNSON."

The notes were duly protested.

The plea was the general issue.

On the trial, the defendant's counsel insisted that the notes were not negotiable promissory notes for the payment of a sum certain, without contingency, upon their respective faces, but that they provided for the payment of exchange on New York, which was a fluctuating item, to be fixed by extrinsic proof. He therefore claimed

that they were not admissible in evidence under the money counts; and further, that they were not evidence under the pleadings of any liability of the defendant to the plaintiff.

The court admitted the notes in evidence, against the defendant's objection, and the defendant's counsel excepted thereto.

The plaintiff's counsel then proved that there was due upon the said notes the sum of $11,524.36, and rested his case.

The defendant's counsel then proved that at the date and at the maturity of the notes the maker lived in Detroit, Michigan; that the indorser lived at Grand Rapids, Michigan, and spent much time and had his principal business in Detroit; and that the banking office of Wm. A. Butler & Co. was at Detroit.

He further proved that the rate of exchange between New York and Detroit was fluctuating; that since the giving of the notes to the time of trial it varied from one-eighth to three-fourths of one per cent; and that at other times its variations had been greater.

The case was submitted to the court by the respective counsel.

On 20th March, 1866, the court, without a special written finding of facts, decided generally in favor of the plaintiff, and ordered judgment for him for $11,580; being for the amount found due on the trial and interest subsequently.

T. Romeyn, for plaintiff.

1. If these notes be not, by their terms, negotiable notes, within the meaning of the Law Merchant, the defendant, on the pleadings and evidence in this case, is not liable.

a. On general principles, and according to the weight of adjudged cases, an indorsement, by the payee of a

note, without negotiable words, does not render the indorser liable. — 1 *American Lead. Cas.* 322 *to* 325, *and cases there cited.*

b. None of the cases allow a recovery on the indorsement merely, according to its face, without additional evidence and in this form of pleading.

2. These are not negotiable notes.

a. A note for the payment of money may be a promissory note without being a negotiable note. — 1 *Comp. L.* 407; *Chitty on Bills*, 525; 6 *Term R.* 123; 46 *Me.* 390.

b. It is of the essence of a negotiable promissory note that it be for the payment of a named, certain sum. — *Chitty on Bills*, 133; *Bailey on Bills*, 12; *Story on Bills*, §§ 42 *and* 43; 2 *Mich.* 131.

c. Each of the notes in this case is dated at Detroit, and is payable in Detroit, and the maker lived in Detroit. It is for the payment of a sum certain. If it stopped there, it would have had all the requisites of a promissory, negotiable note. But it provides for the payment, in addition to the certain, specified sum, of "current exchange on New York."

d. The rate of exchange on New York is fluctuating, and unascertainable by calculation. Its exponent is a variable and uncertain quantity. This we know historically, and by the evidence in this case.

It matters not whether it be exchange on New York, or San Francisco, or Calcutta. The principle is the same.

The clerk of the court could not assess damages on this instrument. It must be submitted to a jury or the court, on evidence. — 2 *McLean*, 85, 581.

e. On principle, this element of uncertainty in amount must be held fatal; and such are the results of the adjudged cases.

Lowe v. Bliss, 24 *Illinois*, is exactly in point. *Smith v. Kendall*, 9 *Mich.* 241, is not opposed, if we keep in

view the terms of the note. In that case the note was dated in New York, and was payable in New York. The addition "with current exchange on New York," was simply superfluous and did not vary the promise to pay a certain sum. It was surplusage, and without legal effect. 29 *Ill.* 102, 115.

And so Judge Christiancy thought and ruled.

The cases cited by Judge Manning do not touch the present question. Pollard's case, 3 *B. & P.* 335, was a suit against the maker by the promisee, or payee, and the declaration was special. No question of negotiability arose.

Leggett v. Jones, 10 *Wis.* 34, did not present this question. It went up on a point of pleading, under the code; was between the immediate parties, and was very imperfectly argued and decided.

Taylor & Hartwell, for defendant in error.

A judgment was recovered in the circuit court for Wayne county, against the plaintiff in error as endorser of promissory notes given for sums named therein, "with current rate of exchange on New York."

The case is removed to this court by writ of error.

1. The question presented is, whether the addition of the words "with exchange on New York," deprives the note of its negotiable character, and whether the plaintiff in error can be held as endorser of such notes.

This question came fairly before this court in the case of *Smith v. Kendall*, reported in 9 *Mich.* 241, and the negotiable character of the paper was sustained.

The matter of exchange is simply an incident of payment for the convenience of the parties. It is for the advantage of commerce that such paper should be negotiable, and it is within the language and spirit of the act. — 10 *Wis.* 34; 19 *Johns.* 144; 4 *Ala.* 32; 1 *Barn. & Cress.* 193.

JOHNSON *v.* FRISBIE.

In case of *Arnold v. Rock River Valley Union R. R. Co.*, 5 *Duer*, 207, the court held that an instrument which is, in its terms and form, a negotiable promissory note, does not loose that character, because it also contains a special contract for securing the payment of the money. — Citing 4 *Barn. and A.* 617; 10 *Ad. and E.* 98; 28 *E. L. and Eq.* 108; 3 Hill, 389.

The class of paper which has been held not to be negotiable, contained conditions or provisions which made the note something entirely different from what is known as commercial paper — or which, in addition to containing a promise for the absolute payment of money, contain promises for the performance of other acts, having no reference to, or connection with, the money promised to be paid.

Eastern merchants generally take their notes payable "with exchange on New York." It is a usual custom, and it is intended that goods shall be paid for in New York, or in a manner equivalent to payment in New York. The payment near the home of maker or endorser, is for his convenience.

CAMPBELL J.

Johnson was sued as endorser of two promissory notes to his order, dated and payable in Detroit (where the maker resided and the endorser did business), *with current rate of exchange on New York.* His defense rests entirely upon the want of negotiable character in such a note, and no other question is presented.

We consider this point as settled by the decision in *Smith v. Kendall*, 9 *Mich. R.* 241, in which it was held by a majority of the court, that making a note payable with current exchange did not destroy its negotiability. An attempt has been made to distinguish this case from that, because it is said that note was actually payable in New York, and therefore there could be no exchange on

it. The court, however, had no judicial knowledge that the note was so payable, and the case was presented upon an entirely different basis, it being assumed to be payable elsewhere. The decision was based exclusively upon the assumption that such notes were negotiable wherever they might have been made payable, and no other question was entertained.

Regarding the point made in the case before us as precisely covered by that adjudication, we are not called upon to discuss it further.

The judgment must be affirmed, with costs.

COOLEY and CHRISTIANCY JJ. concurred.

The Chief Justice did not sit.

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15 292
67 442
15 292
146 543

John Gibbs and another v. Ira Blanchard.

Statute of Frauds: Joint promise to pay debt of one. When a sale of goods is upon the joint credit and promise of two, though the property is purchased for, and delivered to but one of them, the legal effect as between them and the vendor, is a sale to the two jointly. Such a promise is an original one as between them and the promisee, and does not come within the Statute of Frauds.

Pleading: Goods sold on credit: Common counts. In a suit for the value of goods where the sale was made on credit, to be paid for by a note, the declaration must be special for a refusal to give the paper when the period for which the note was to run is yet unexpired; but after the expiration of such period, the plaintiff may recover upon the common counts.

Heard January 9th. Decided April 3d.

Error to Kalamazoo Circuit.

This was an action of assumpsit brought for the value of a horse. The declaration contained a special count setting forth that in consideration that the plaintiff would sell the horse to Daily — one of the defendants below — that they (the defendants) would deliver their note to

plaintiff for the sum of $60, payable in six months; that said horse was delivered to said Daily, but that defendants refused to give their said note or pay for the horse. The common counts were also added.

A copy of a note for $60, signed by Daily and endorsed by Gibbs, was attached to the declaration.

Defendants plead the general issue, and gave notice that the promise of said Gibbs to endorse the said note was not in writing, and was, therefore, void. It also appeared in evidence that Gibbs endorsed the said note on Sunday. The note was tendered to the defendant on the trial. Judgment was rendered for plaintiff. The facts and the exceptions to the rulings, and the charge of the court are stated in the opinion.

M. J. Smiley, for plaintiff in error.

1. The undertaking of the defendant Gibbs, at the time of the sale of the mare, and the signing of the note, was collateral, and in aid of the defendant Daily.

If so, then the defendant Gibbs could only be bound by a contract in writing, and parol evidence of such a contract would be entirely incompetent and inadmissible. *Comp. L.* § 3183; 1 *Greenl. on Ev.* §§ 267, 268; 1 *N. H.* 57; 1 *Johns. Ch.* 274; 5 *East.* 10.

Had the plaintiff declared upon a contract such as he has related in his testimony, and had stated in his declaration that it was not in writing, it would be demurrable, and, if bad upon demurrer, evidence to support it, if objected to, would not be competent to charge defendant Gibbs. — 6 *Cow.* 346; 5 *Hill*, 483; 28 *Barb.* 444; 2 *Min.* 227; 3 *Met. Ky.* 463.

The admitted evidence was parol and tended to contradict and vary the note in writing. This was clearly erroneous. — *Edwards on Bills and Notes*, 147, 313, 315; 3 *Camp.* 57; 8 *Taunt.* 92; 3 *Barn. and Adol.* 233; 10 *B. and C.* 729; 1 *Hill*, 116; 13 *Barr.* 297; 7 *Mass.* 518; 11 *Id.* 27.

2. The plaintiff below could not recover on the note against the defendant Gibbs, as his indorsement was made on Sunday, and therefore void. — *Comp. L.* 449, 450; 12 *Mich.* 378; 2 *Doug. Mich.* 73.

He then sought to recover upon the common counts by delivering up the note. But this he could not do as the note was good as to one defendant. The indorsement only was void. He could not recover against one defendant on the note and against the other upon the common counts.

If the plaintiff below relied upon the special count in his declaration, it was his duty to first demand of the defendants a note such as was claimed by him, and he should allege and prove that a note was drawn and presented to the defendants and a refusal on their part to sign it. — 6 *Cow.* 347.

3. Where goods are sold and delivered to one person for his use, the undertaking of another person in aid of his liability is void unless in writing, although the collateral undertaking may have been the principal inducement to the delivery of the goods; and where the whole credit is not given to the person who comes in to answer for another, the promise is collateral and within the Statute of Frauds unless in writing. — 2 *Term.* 80; 5 *East*, 10; 8 *Johns.* 29; 18 *Pick.* 369; 13 *Wend.* 114, 121; 39 *N. H.* 259; 13 *Gray*, 613; 1 *McCord*, 100; *Roberts on Frauds*, 216; 1 *Gill. and J.* 260; 22 *Me.* 395; 4 *Yerger*, 576; 10 *Mich.* 319; 12 *Id.* 224; 1 *Smith's Lead. Cas.* 325.

H. F. Severens, for defendant in error.

The principal questions arising upon the record in this cause, are resolvable into two leading points:

First: Was it competent to charge the defendant, Gibbs, in this cause with liability without written evidence? and, *Second:* Was the plaintiff below estopped by the note from proving the facts, making Gibbs chargeable:

said note being repudiated by said Gibbs, as having been signed (or endorsed) by him on Sunday in violation of the statute, and having obtained the ruling of the court, that the note was as to him void for that reason?

1. The evidence in the case tended to show that the defendants bought the horse in question, for the use of Daily, and agreed to become jointly liable therefor, and a promissory note was to be signed and given for the price covering a term of credit; and the charge of the court substantially submitted to the jury whether this state of facts was proven, and instructed them that, if they so find, the statute of frauds would not be available to the defendant, Gibbs.

a. By section 3183 of *Comp. L.*, "Every special promise to answer for the debt, default, or misdoings of another person," is void, unless it be manifested by writing. The promise here intended is one which is distinct from, but accessory and collateral to, such "debt" of another person. The statute can have no application to the case of a person originally and directly liable for the "debt." In other words, where the only debt, or obligation in the case, is the very one upon which the party is sought to be charged. The statute contemplates two things, a "debt" of one person, and a "special promise" of another to pay it. Here, the "debt" is that of defendant, Gibbs. There can be no inquiry about the evidence of a "special promise," for there is no such element here. The liability of Gibbs, is established without it, and the statute is out of the case.

The statute itself would seem to furnish a plain answer to the objection of Gibbs.

b. The terms "original" and "collateral," though sometimes complained of as not always a safe means of distinction, yet have been employed in almost all the modern cases, as well as in many of the older ones; and as was said by Comstock, Ch. J., 21 *N. Y.* 412, 414, were used, the one to mark the obligation of the principal debtor;

the other, that of the person who undertook to answer for such debt.—2 *Pars. on Cont.* 301–2 (3*d ed.*); *Brown on Frauds*, 196, 197, (1*st ed.*); 18 *Me.* 324; 5 *Mass.* 358; 13 *Gray*, 613; 15 *Vt.* 215; 21 *Barb.* 218; 4 *H. & N.* 739; 3 *Dutcher*, 443.

c. The question whether the defendant is a joint promissor or guarantor, is one of fact to be determined, as such, by the jury from all the circumstances of the case.—2 *Pars. on Cont.;* 4 *H. & N.* 739; 9 *Cal.* 328.

d. It is undisputed that a person who is not to receive the property purchased, may make himself liable without writing, if he undertakes directly for the payment by himself; certainly it can not make any difference whether the person receiving the goods should unite in the promise with him, or some other person should do so. In the last case no one would contend that the case was within the statute. Why should it be so in the other? The promise of the first, is equally to pay the "debt of another," in the one case as in the other.

Again, two persons buy for the use of both; part of the goods for one, part for the other; the promise of neither would be within the statute, and yet upon the principle contended for by Gibbs, it would be a promise to answer for the debt of another. It certainly does not bring the case within the statute, that the goods are bought for one only.

e. Whether upon a sale to one only, a promise by a third to sign a note with the purchaser for the price, is within the statute of frauds or not, is at least doubtful. Upon principle and the weight of authority it would seem that it is not.—2 *Car. & Payne*, 249; 1 *Bing. N. C.* 103; 2 *Peters*, 170; 5 *Hill*, 483.

f. The term of credit having expired, the plaintiff, on tendering back the note, was entitled to recover upon the indebitatus count.—1 *New R.* 330; 13 *East*, 98; 3 *B. & P.* 582; *Hill. on Sales*, 178 (2*d ed.*); *Chitty on Cont.* 853 (10 *Am. ed*).

And the circumstance that the facts were such as to show the plaintiff entitled to recover for goods sold and delivered, has some bearing in determining that the promise was not within the statute, for in cases falling within the statute, a special count would probably be requisite.—1 *Saund.* 211, *a. b.*; 13 *Wend.* 85.

2. The defendants having repudiated the note as being void as against Gibbs were not in a position to interpose the note as an estoppel to preclude the plaintiff from showing the facts making Gibbs chargeable for several reasons.

a. A void instrument can not operate as an estoppel. 12 *Mich.* 99; 6 *Ham.* 366; 1 *A. K. Marsh.* 493; *Sprague*, 477.

b. The instrument not being executed by Gibbs, as was contemplated by the parties, was imperfect and never became a valid contract as against Daily. At all events not unless Blanchard should elect so to treat it.

c. The name of Gibbs having been placed upon the instrument in pursuance of a previous agreement to that effect, and Gibbs not being the payer or owner of the note, he became liable as maker of the note by putting his name on the back of it, as held by many authorities. 31 *Me.* 536; 32 *Id.* 339; 36 *Id.* 265; 44 *Id.* 433; 12 *Vt.* 219; 20 *Id.* 355; 11 *N. H.* 385; 8 *Met.* 504; 7 *Gray*, 284; 13 *Id.* 580; 18 *Mo.* 74, 140; 20 *Id.* 571; 10 *Rich.* 17.

If not conclusively liable as maker, the facts may be proven in order to ascertain the intent of the parties, which will then control.—11 *Conn.* 213; 25 *Id.* 576; 14 *Vt.* 228; 28 *Penn. St.* 189; 18 *Id.* 426; 4 *Duer*, 45; 13 *Ohio*, 228; 17 *Id.* 36; 1 *Greene, Ia.* 331; 13 *Sm. & Marsh.* 617.

It makes no difference whether the name of the party be put upon the back at the time of the principal transaction, or afterwards in pursuance of a previous agreement. 7 *Gray*, 284.

GIBBS v. BLANCHARD.

CHRISTIANCY J.

The main question in this case is whether the promise of Gibbs (one of the defendants below) comes within the second clause of the second section of our Statute of Frauds, as a "special promise to answer for the debt, default, or misdoings" of Daily, the other defendant.

The declaration contains a special count upon the contract, and the common counts for goods sold and delivered. The special count sets forth that "in consideration that said plaintiff agreed to sell to the said Daily a certain horse which the plaintiff then and there had, of the value of sixty dollars, undertook and promised the said plaintiff to make, sign, and deliver their promissory note to said plaintiff or bearer in the sum of sixty dollars for the purchase price of said horse, which said promissory note was to be payable thereafter, in six months from date." It further alleges that the plaintiff relying upon said promise of said defendants, and in consideration thereof, did sell and deliver the horse to said John Daily for the price of sixty dollars. The breach alleges the failure and refusal to make and deliver the note, as well as the refusal to pay the money.

It was clear, from the evidence, that the horse was bought for the benefit of, and delivered to Daily, and that the plaintiff would not have sold the horse on the credit of Daily alone. But upon the question whether Daily and Gibbs were to give a joint note, or whether the latter was only to endorse the note of the former, or to become his guarantor, the evidence was conflicting.

There was evidence from which the jury might have found a joint promise, or in other words a promise by both to execute and deliver to the plaintiff a joint note for the price: and from the circumstances and subsequent acts of the parties the jury might have been authorized to find that the note was to be made payable in six

months; though they might also have found that no particular time was mentioned or expressly agreed upon for which the note was to run.

The evidence tending to show that the promise was joint, or that a joint note was to be given, was substantially this: Gibbs and Daily called upon the plaintiff together, and Gibbs asked plaintiff if he wanted to sell his mare. Plaintiff said he did. Gibbs enquired the price, and being told sixty dollars, wanted to know if plaintiff would take Daily's note if he, Gibbs, would sign it and see it paid; to this plaintiff assented. The mare not being present, and Gibbs, being anxious to get home, said, Daily might go with plaintiff and see the mare, and if the mare suited him he might fetch her back with him and draw up a note and Daily might sign it, and the first time he, Gibbs, went to town he would sign it. The mare was delivered to Daily, who signed a note for it at six months, which was afterwards endorsed by Gibbs on Sunday. This note was produced on the trial and tendered back to defendants.

The court charged the jury that "if it was the understanding of the parties that Daily was the purchaser and that he should give his note to the plaintiff for the price, and that Gibbs should so sign as only to be liable as endorser, the plaintiff must fail. If, however, the understanding of the parties was at the time, that Gibbs and Daily were the buyers of the mare, and that both were to be liable as purchasers for the purchase price, and, accordingly, should become joint makers of a promissory note for its payment, though Daily was less relied upon by the plaintiff than Gibbs, and though, in point of fact, it was understood that the mare, when bought, should belong to Daily, the plaintiff is entitled to recover. That the principle in this class of cases is, that if the agreement be such that two persons, in the purchase of goods, do at the same time become co-debtors to the seller for

the price, then both are purchasers, and the case is not within the statute of frauds, and no memorandum in writing is necessary. But if it be such that one, at the time, becomes debtor to the seller, and the other security only for the debt, it is within the statute of frauds, and the undertaking of the security is void unless a memorandum of it in writing is made."

Though the question is one requiring some accuracy of discrimination, I have come to the conclusion, after a careful examination of the authorities, that the charge of the court was not only correct, but that it expresses the true rule of law applicable to the question with remarkable clearness.

No question can arise as to the sufficiency of the consideration for the undertaking of Gibbs, whether original or collateral, within or without the statute. Without his promise, the plaintiff would not have parted with his property. The consideration, therefore, is equally as good in law as a sale of the horse to him alone would have been for his sole promise to pay the price.

The plain, ordinary meaning of the language used in this clause of the statute, would seem sufficiently to indicate that the class of special promises required to be in writing includes only such as are secondary or collateral to, or in aid of the undertaking or liability of some other party whose obligation, as between the promissor and promisee, is original or primary. If there be no such original or primary undertaking or liability of another party, there is nothing to which the promise in question can be secondary or collateral, and the promise is, therefore, original in its nature, and not within the statute. In other words, the statute applies only to promises which are in the nature of guarantees for some original or primary obligations to be performed by another. This has been settled by a remarkably uniform course of decision since the passage of

the statute — 29 *Car.* 2, *Ch.* 3 § 4 — which does not essentially differ from our own and those of most of the states of the Union. So numerous and so uniform have been the decisions upon this point, that it would savor of affectation to cite them. They will be found cited in most of the elementary treatises. — *See Brown on Stat. Frauds, ch.* 10; *Chitty on Cont. p.* 442, *et seq.*; 2 *Pars. on Cont. 4th ed.* 301. And though the terms *original* and *collateral* have been criticised, yet when used, the one to mark the obligation of the principal debtor, the other that of the person who undertakes to answer for such debt, they are strictly correct, and give the true view of this clause of the statute. — *Mallory v. Gillett*, 21 *N. Y.* 412, 414; *Brown on Stat. Frauds, ch.* 10, § 192.

As a result of this principle, that one must be held originally or primarily, and the other only collaterally, or in default of the former, it follows that the statute only applies to such promises made in behalf or for the benefit of another, as would, if valid, create a distinct and *several* liability of the party thus promising, and not a joint liability with the party in whose behalf it is made. For if one be bound in the first instance and at all events, and the other only contingently, or on default of the first, the liability could not be joint. On the other hand, if the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other; and such joint promise is original as to both. Hence it has been held in England that an agreement to convert a separate, into a joint debt is not within the statute; the effect being to create a new debt, in consideration of the former being extinguished. — *Exparte Lane*, 1 *De Gex*, 300; *Brown on Stat. of Frauds*, 193.

Where the question arises (as it has in almost all the cases), as one of the *several* liability of the party promising in behalf of another (as for the price of goods sold

to another), the true rule undoubtedly is, that if the latter (to whom the goods are sold) be liable at all, then the promise of the former is collateral, and must be in writing; because, from the very nature of such a case, the party to whom the goods are sold, and in whose behalf the promise is made, is the principal debtor; and because it would be manifestly unreasonable to hold that both were in such cases *severally* liable as principals, as upon several original undertakings at the same moment. *See Hetfield et al v. Dow*, 3 *Dutcher*, 440; *Dixon v. Frazee*, 1 *E. D. Smith*, 32. And this rule applies equally when the promise is made in reference to a pre-existing liability of another, if the plaintiff in accepting the promise does not release the principal. In reference to all such cases the authorities may be said to be entirely uniform. But the rule thus established as to cases where the question is one of the *several liability* of the party making the special promise, can, I think, have no application to the question of a joint liability upon a joint promise of the two. The only intimation to the contrary which I have seen is to be found in a dictum of Judge Catron in *Matthews v. Milton*, 4 *Yerg.* 576, a case in which no such question was involved, there being no evidence tending to show a joint promise. To say that when the party originally owing the debt, or for whom goods are purchased and to whom they are delivered, is liable at all, no other person can be held severally liable unless the promise be in writing, is merely saying that such promise is collateral, and therefore within the statute. But to say that they can not both become jointly liable upon their joint promise, not in writing, to pay such debt or the price of such goods, if the party originally owing the debt or receiving the goods be at all liable, is but another form of declaring that it is *not competent* for both to become original promisors, as between them and the promisee, unless both are under an equal obligation, as *between themselves*, for the ultimate payment of the debt. Such a proposition,

it seems to me, can not be maintained either upon principle or authority. Such an objection to a joint promise seems rather to have reference to some supposed defect of consideration (a question entirely distinct from the statute), than to the promise. And, if the party promising jointly with another to whom goods are furnished, can not be bound jointly with the latter, because, as between the two promisors, he, not having received the goods, is under no obligation to pay; then the same reason ought to operate with still greater force, against his *several* promise to pay the *whole* price of goods received by the other. But the law in the latter case is well settled the other way.

It was very correctly remarked by Whelply, Judge, in Hetfield et al *v.* Dow, above cited, that, "to settle the rights of promisors *inter sese*, to ascertain as *between them*, who is to pay the debt ultimately, is no part of the object of the act. It by no means follows that he who by the arrangement between the promisors, ultimately may be bound to pay the debt, is, as *to the promisee*, the principal debtor. That does not concern him." This view, it seems to me, rests upon sound reasons — reasons which must naturally enter into the consideration of business men, in the ordinary transactions of business. Where a party has been willing to put himself in the position of an original promisor (either jointly or severally) to a vendor for goods purchased for the benefit of, or delivered to another, the vendor has a right conclusively to presume, that such relations or arrangements exist between the two as to make it the duty of the party or parties promising, as between themselves, to pay according to the promise. And to allow the contrary to be shown to defeat the promise, would operate as a fraud upon the vendor.

The question of a joint promise appears to have been seldom raised for adjudication in connection with the statute of frauds; but the following cases fully sustain the

proposition, that a joint promise of two, whether to pay the pre-existing debt of one of them, or a debt contracted at the time for his benefit (as for goods bought for and delivered to the one), does not come within the statute, but is an original promise, as between them and the promisee, and valid without writing. *Exparte Lane*, 1 *De Gex*, 300; *Wainwright v. Straw*, 15 *Vt.* 215; *Stone v. Walker*, 13 *Gray*, 613; *and Hetfield v. Dow*, 3 *Dutcher*, 440. See also by analogy *Batson v. King*, 4 *H. & N.* 739. The same doctrine is laid down by Mr. Brown in his able treatise on the statute of frauds.—*Ch.* 10, § 197.

It is true that in *Wainwright v. Straw*, which most resembles the present case, the decision is placed in part upon the ground that the sale was made to both. The facts were that Straw and Cunningham both went to plaintiff's store and said they wished to buy a stove for Straw, but that both would be responsible. Now I can see no difference in legal effect between the case where A and B say to a merchant, "We want to buy a stove for B, and both of us will be responsible," and the case where A says, "B wishes to purchase a stove, but we will both be responsible." *Substantially*, the transaction is the same; in both cases alike it is a sale for the benefit of the one on the joint credit of the two, and the real question in both cases is, whether the credit was given to both jointly. I do not think the court, in *Wainwright v. Straw*, based their decision upon the narrow and merely verbal ground of the use of the first person plural, showing merely who wanted the stove, but upon the broad ground above stated, that it was sold upon their joint credit. And in all such cases where the sale is upon the joint credit and promise of the defendants, though the property is purchased for, and delivered to but one of them, I think the legal effect of the transaction constitutes, as between them and the vendor, a sale to the two jointly. The sale, as between

the vendor and the vendee, is to the party or parties to whom the credit is given for the price, without reference to the question for whose use it is purchased, or who, as between the promisors, is to be its owner when bought.

This brings us to another point in the case. The sale (if upon the joint credit and promise of the defendants) was a joint sale to both, as between them and the plaintiff. But in the special count of the declaration it is alleged as a sale to Daily alone. The plaintiff can not therefore recover upon the special count.

But upon the count for goods sold and delivered, the sale having been made to both, the plaintiff would be entitled to recover, if the facts be such as would warrant a recovery upon a sale made for the joint benefit of, and the property delivered to both.

The defendants having failed to give their joint note, as agreed — the incomplete note of Daily alone, with the void endorsement of Gibbs, made on Sunday, not being a compliance with the joint promise, and being tendered back to the defendants on the trial — the case presented is the ordinary case of a sale of goods on credit, to be paid for by a bill or note, in which case it is well settled that, though, while the credit — or period for which the bill or note was to run — is yet unexpired, the declaration must be special for a refusal to give the paper; yet, after the period for which the bill or note was to run, the plaintiff may recover upon the common count for goods sold and delivered.—*Hesketh v. Blanchard*, 4 *East*, 149; *Lee v. Risdon*, 2 *Marsh.* 495; *Brooke v. White*, 1 *N. R.* 330; *Marshall v. Poole*, 13 *East*, 98; *Heron v. Granger*, 5 *Esp.* 269; *Dutton v. Solomonson*, 3 *Bos. & P.* 582; 1 *Chitty's Pl.* (7 *Am. ed.*) 380, 381; *Hilliard on Sales* (2*d ed.*) 178. This action was brought more than eight months after the sale. The evidence was such that the jury might have found either that the note was to run six months (none of it tended

to show a longer period), or that no specific time was agreed upon for which it was to run. Should the jury find the latter, then a note made in compliance with the promise would have been a note payable immediately or on demand.—*Herrick v. Bennett*, 8 *Johns.* 374; *Thompson v. Ketcham*, *Id.* 189; *Field v. Nickerson*, 13 *Mass.* 131; *Russell v. Ormsbee*, 10 *Vt.* 274; *Bailey v. Simonds*, 6 *N. H.* 159. But in either case the credit—the time for which the note was to run—had expired, and the plaintiff was entitled to recover as for goods sold and delivered.

I think there was no error in the charge or proceedings of the court below, and that the judgment should be affirmed, with costs.

COOLEY J. concurred.

CAMPBELL J.

Assuming that in his charge the judge gave the jury to understand that if there was in fact intended to be a contract of suretyship, the case would come within the statute, I think there is no error in the charge. Such, I think, is its meaning, taken as a whole, and in the view which was evidently taken of the testimony by the jury, this became the only point of importance in the case. I can not regard the mere form of the liability (as joint or several), as having any bearing on the applicability of the statute, inasmuch as sureties very generally assume joint obligations with their principals, and are, nevertheless, protected in all of the rights of suretyship, and vested with all its immunities. I have had some doubt whether some of the rulings were not open to the objection that they rest too much on the question of a joint obligation; but regarding the subsequent qualification as removing this difficulty, which, upon the facts, was not very likely to mislead, I concur in sustaining the judgment.

MARTIN Ch. J. did not sit.

Harvey Dewey v. The City of Detroit.

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City of Detroit, liability of, for injuries resulting from defective sidewalks. Under the charter of the city of Detroit all repairs of sidewalks are required to be made under the supervision of the street commissioners in their respective districts, and under the direction of the common council. The charter further provides that one or more commissioners may be appointed for the city.

In an action against the city for damages resulting from a defective sidewalk, it was held that the commissioner may in such matters be fairly regarded as representing the corporation. If a defect is found which he ought to have known, and which he has failed to repair within such reasonable time after such knowledge may be presumed to have reached him as, under the circumstances, was sufficient to provide for such repairing, then the city would be liable, but not otherwise.

The extent of the duty resting upon the city depends upon the means provided for its performance; and while responsible for neglect where reasonable diligence has not been exercised, it is not responsible where it is not reasonably capable of acting efficiently by its proper agencies.

Municipal Corporation: Power of determining number of officers, discretionary. The discretionary power under the charter of determining how many officers are required for certain duties, is one of a legislative character, which can neither be reviewed, nor made the basis of an action against the city. The number fixed must be assumed to be all that were needed for the proper care of the interests entrusted to them.

Heard April 10th. Decided April 16th.

Error to Wayne Circuit.

This was an action of trespass on the case brought by plaintiff in error for damages, alleged to have been sustained from injuries received by defects in one of the sidewalks of the city of Detroit.

The only question involved is whether the circuit judge charged the jury properly, with reference to the rule concerning the negligence which would charge the city for the accident.

The facts and charges of the court are stated in the opinion. Judgment was rendered in favor of the city.

Ward and *Palmer*, for plaintiff in error.

1. The city of Detroit has full control over the construction and repairs of the streets and sidewalks within the city limits, to the exclusion of all individual action in

the matter, and the power to levy and enforce the collection of taxes to defray the expense thereof. The power being given, the duty to execute it follows; and for neglect in that behalf the city is liable.—*City Charter, pp.* 30–40 *and* 41; 9 *Mich.* 165; 39 *Barb.* 330; 17 *N. Y.* 105.

The city being liable for neglect, and the defect in the sidewalk not disputed, the only question raised on the trial, and reserved for the consideration of this court is, whether the defect was of such a nature that the city is liable for its existence or continuance.

The court charged the jury in substance, that the city would not be liable unless they had notice of the defect; that if any city officer had actual notice of the defect, or if it was of long standing and so open and palpable as to be apparent and necessarily attract the attention of passers by, that notice might be inferred, and the city would be liable.

Two classes of defects may exist — one arising from the improper construction of the way, or neglect in taking care of it and making necessary repairs — and the other from accident or from agencies not under the control of the party liable to maintain and keep the way in a proper condition.

When a flood washes away a bridge or other part of a highway or a tornado blows trees across it, or individuals place obstructions in it or make unauthorized excavations, the city, town, or county can not be considered in fault until they have had notice of the defect, or time by reasonable diligence to find it out and repair the injury.—35 *N. H.* 74, 52; 40 *Id.* 410; 41 *Id.* 135; 43 *Id.* 265; 27 *Conn.* 293; 13 *Pick.* 94.

But when the way gets out of repair, from defective construction, or from ordinary use or wear and decay of the same, or from causes constantly existing and apparent, then the defect arises from culpable inattention to duty,

and no notice is necessary to establish the neglect.—39 *Barb.* 330; 2 *Hilton*, 440.

In this case no proper drains were constructed under the walk to conduct away the water from the lots adjoining it—and so defective was it in this respect, as shown by the witness, Lacroix, that the walk was frequently afloat on the water accumulating under it, and moved up and down as people walked over it, so as to cause the planks to work loose, and at the point of the accident where a small drain was dug under it from the penstock, it was covered with an oak plank, a kind of timber most liable to warp and twist, and draw out the nails with which it was fastened from the effect of being constantly soaked on the under side and exposed to the sun on the top.

The rule of law laid down by the court though the same as enunciated in three or four exceptional cases, (see 36 Barb. 226, which is in effect overruled in 39 Barb. p. 329; 5 Bosw. p. 497, where one of the judges dissented,) is not based on any recognized principle of law, and does not accord with the general current of decisions.

Paid agents must in all cases exercise care and diligence in the discharge of their duties.

The city of Detroit, for a consideration, that is the grant of power contained in its charter, undertakes to construct and maintain in proper condition its public ways, and imposes the expense of doing it on the public, as also the expense of paying two officers, the street commissioner and overseer of highways, for taking charge of them and seeing that all necessary repairs are made. The law, as laid down by the court, would relieve those officers as well as the city which is responsible for them, of all diligence in the matter. They can wait until some indifferent person assumes the duty of bringing notice to them, or if no person chooses to take that trouble, then until the want

of repair becomes so notorious that they ought to hear of it from common report.—16 *N. Y.* 161.

Neither, in cases where notice to the corporation is required, is it necessary that it should be brought home to a city officer. It is enough if it is known to inhabitants of the town or city, and has often been so held under statutes requiring it to be given.—7 *Me.* 442; 32 *Id.* 271; 40 *Id.* 176; 1 *Mass.* 153.

2. The question of negligence and whether the defect arose from the imperfect construction of the walk, or from causes which were apparent and might easily have been seen and guarded against, and if not, whether it was such that the city officers might with reasonable diligence have found it out and repaired it, should have been left to the jury instead of being virtually withdrawn from their consideration, as was done by the court.—35 *N. H.* 74; 40 *Id.* 410; 41 *Id.* 135; 13 *Pick.* 94.

The matter of diligence or neglect in such cases can not be reduced to a rule of law, as too great a diversity of circumstances exists in each case to permit it. A walk which would be sufficient in a remote part of the city, would be wholly unfit and unsuitable to be built in a central and frequented part.

And in proportion as the walk is central and much used, would the facilities be increased of finding out and repairing its defects. So that what might be diligence in one case would be gross neglect in the other.

Wm. Gray, for defendant in error.

1. The testimony was properly excluded. The state of the sidewalk three months after the accident was immaterial. It could have no tendency to show its condition at the time of the injury for the alleged defect—a loose plank might happen any day. The evidence showed it was frequently taken up and nailed down again. All evidence as to the condition of the walk at and about the

time of the accident was received. The evidence offered could only be intended to prejudice defendants, by claiming subsequent negligence, which was immaterial. It would be as competent to show defective walks in other parts of the city. The farthest that the cases go, is that the admission or rejection of such evidence was in the discretion of the court, and the ruling will not be reviewed.—43 *N. H.* 356; 7 *Gray*, 92; 11 *Wis.* 160, 175.

Error will not lie as to any matter addressed to the discretion of the court.—12 *Mich.* 449, 368.

2. There was no proof that the defect, if any, was caused by persons in the employ of the defendants.

It would be error to give a charge, there being no evidence on which to found it.—5 *Mich.* 368, 380.

The other charges, asked by plaintiff, were given.

The charge of the court was correct.

The court did, in effect, charge that if any city officer had notice, or if the defect was of such character or long continuance as to naturally or necessarily attract the attention of passers by, notice might be presumed.

This is in strict accordance with adjudicated cases.—36 *Barb.* 226; 5 *Bosw.* 497; 5 *Selden*, 456.

In determining whether there was error or not, the court will look at the entire charge, and say how the jury must have understood it.—3 *Mich.* 55; 13 *Id.* 70.

CAMPBELL J.

Plaintiff sued the City of Detroit for personal damages, caused by his being tripped up by a loose board in a sidewalk. The injury is said to have occurred by reason of the plank being raised suddenly by a person stepping upon an end of it, so that Dewey, when passing, caught his foot under it as it was so raised, and was thrown down. The only question presented for review is, whether the circuit judge laid down a proper rule concerning the negligence which would charge the City for the accident. The

charge was as follows: "That the City would be liable if they had notice of the defect; that actual notice need not be shown, but might be presumed or inferred, if the defect was open and notorious, or of long standing, and of such a character as would naturally arrest the attention of persons passing it. If the jury found that any city officer had actual notice of the defect, or that it was of such a character that notice might be inferred, the city would be liable, unless it should appear that the plaintiff was himself negligent, and by his own neglect contributed to the accident." In answer to a special request, the court charged "That in the absence of proof of express notice to the defendant of the defect which was the alleged cause of the injuries received by the plaintiff, the plaintiff can not recover unless the jury finds that such defect was so open and palpable as to be apparent, and necessarily attract the attention of passers by."

This action is based upon a supposed neglect of duty to repair defects in the city sidewalks. How far this duty lies upon the city depends of course upon its charter, and upon the means provided by that charter to enable it to perform this duty. It can not be liable for neglect, in any case where it is not reasonably capable of acting efficiently; and, on the other hand, it is responsible for reasonable diligence in the performance of any duty which it is capable of performing, so far as the means in its power will enable it to act.

Under the charter all repairs of sidewalks are required to be made under the supervision of the street commissioners in their respective districts, and under the direction of the Common Council. — *Charter*, *Chap.* 4, § 16. There may be one or more commissioners for the city. — *Chap.* 2, § 2. The nature of their duties would preclude the appointment of any considerable number of these officers, as their functions in supervising various improvements must of necessity give them jurisdiction

over different wards, and the ward overseers are subject to their oversight, and must act under their direction — *Chap.* 2, § 17. It appears from the case that one commissioner is appointed over the entire eastern part of the city, from Woodward Avenue to its eastern limits, except a portion of the Second Ward.

It is very well settled that the discretionary power of determining how many officers are required is one of a legislative character, which can neither be reviewed nor made the basis of complaint against the city. — *Griffin v. Mayor of N. Y.* 9 *N. Y. Rep.* 456. It must be assumed that there were adequate reasons for fixing the number adopted. And any rule which would hold this officer, and the city through him, for neglect, must have respect to such facilities as he may be fairly supposed to possess, to inform himself of defects in the walks, and to attend to their repair.

It is clear that he can only get knowledge from his own observation, or from information laid before him; and that neither he nor any one else can be expected to ascertain without information the existence of defects which are not apparent to every ordinary observer. The walks in a city of the size of Detroit cover many scores, and probably several hundreds of miles, and unless an injury is such as to be very readily noticed, it would be altogether unlikely to attract attention, or to be reported to him by private parties. That minute daily inspection which is possible and necessary on a line of railroad, where a small break may endanger hundreds of lives, would be absurd and impracticable in relation to sidewalks. A city, responsible as it must be only for the neglect of duties incumbent on its agents, can not be distinguished in its liabilities from individuals who might be entrusted with the same kind of duties. In this case the commissioner may be fairly regarded as representing the corporation. If a defect is found which he

ought to have known, and which he has failed to repair within such reasonable time after such knowledge may be presumed to have reached him as under all the circumstances was sufficient to provide for such repairing, then there is a good cause of action, but not otherwise.

The ruling of the court below went far enough to hold the city responsible for any defect which was known to any city officer whatever, whether connected with the street department or not, or which was generally known, or which was apparent to ordinary observers. It would be assuming too much to suppose the city authorities can be in fault for being ignorant of what they could not learn in one of these ways; and to hold them further, we must expect them to possess some faculties in their corporate nature which are denied to natural persons. The charge was sufficiently liberal to the plaintiff, and the judgment should be affirmed with costs.

COOLEY J. and MARTIN Ch. J. concurred.

CHRISTIANCY J. did not sit in this case.

Jerome B. Corey v. Oliver D. Hiliker.

Notices: When Sunday to be included in computation. In notices required by the rules of court, when Sunday is an intervening day, it is to be included in computing the time.

Heard and decided April 20th.

Motion to strike from the docket.

M. E. Crofoot, for the motion.

C. Draper, contra.

This was a motion to strike from the docket for want of prosecution.

It was resisted on the ground that four days notice of the hearing had not been given, according to the rules, one of the intervening days being Sunday. Notice of the motion was served on Saturday, March 30th, 1867, and the hearing was for Wednesday, April 3d, 1867. It was held that Sunday being an intervening day it was to be included in the computation, and that it was properly counted as a day. The notice was held to be sufficient.

The People ex rel. Joshua B. Dickinson v. Thomas L. Sackett.

Quo Warranto: Pleadings, on suggestion of damages. The statute having established the form of pleadings on a suggestion of damages in *quo warranto*, the Supreme Court will not prescribe any other.

Heard April 16th. Decided April 20th.

Suggestion for damages in *quo warranto*.

G. V. N. Lothrop, for relator.

Maynard and *Meddaugh*, for respondent.

In this case, an information in the nature of *quo warranto* had been previously filed by the Attorney General on the relation of Dickinson against Sackett, for the purpose of obtaining possession of the office of Register of Deeds of Macomb county. Judgment was rendered by this court—14 *Mich.* 321—that said relator was entitled to the office.

The relator in this proceeding filed a suggestion of damages under the statute—2 *Comp. L.* § 5297—against Sackett for the detention of the said office, and asked that the court frame special issues, to be tried by the jury in the Macomb Circuit.

The court held that the statute having established the form of pleadings in such cases, they would not prescribe a different form; and that the case must go down for trial upon the statutory issue.

David Robinson v. Rowland Cromelein and others.

Answer to bill in chancery, when responsive. Where a bill to foreclose a mortgage alleged it to have been given in consideration of an actual indebtedness, to an amount named, which it was stated remained unpaid, and called for an answer under oath, an answer purporting to set forth the real circumstances under which the mortgage was given, and showing it to have been in part for money advanced, and in part for property at a valuation, which the party had failed to convey according to agreement, was held to be responsive, inasmuch as it explained the whole transaction out of which the mortgage originated, and upon which its validity depended.

Agreement to convey specific lot, performance of. Where a contract to convey a number of lots of land at a gross sum, gave the grantee an option to select others in lieu thereof, to be laid out on certain streets not then platted, the grantor had no right to compel the acceptance of any undesignated lots, except such as the grantee should choose, and a deed, embracing some designated and some not designated, which the grantee refused to receive, was held no performance, but entirely void as against the latter, as the price could not be apportioned.

And the grantor had no right to debar the grantee from such selection, by so platting his new lots as not to conform in size with the lots designated.

Mortgage, when security for advances. When a mortgage is given for an amount exceeding what is advanced, it is valid in the hands of the mortgagee, and those standing in no better light, only to the extent of the real advances.

Heard April 16th, 17th and 20th. Decided April 23d.

Appeal in Chancery from Wayne Circuit.

This case was heard on bill and answer.

The bill was filed to foreclose a mortgage on certain real estate in Detroit, given to secure the payment of $5,500. Defendants answered in substance denying said indebtedness, and setting up that the consideration of said bond and mortgage consisted in part of a proposed loan of $3,000, and the purchase of certain lots in Pittsburg;

that a portion only of the said $3,000 was advanced, and that the contract as to the lots was unperformed.

A decree was made in the court below in favor of complainant dismissing the cross-bill, and allowing the money actually paid. The agreement to convey the said real estate was also rescinded.

The facts and the pleadings are sufficiently stated in the opinion.

J. P. Whittemore, for complainant.

George E. Hand and *George A. Wilcox*, for defendants.

COOLEY J.

The bill in this case was filed to foreclose a mortgage of $5,500, given by the defendants, Rowland and Amelia Cromelien, to one William F. Willock. The bill averred that the defendants, on or about the 15th day of February, 1856, became and were justly indebted to said Willock in the sum of $5,500, and being so indebted, in order to secure the payment thereof, with interest, executed and delivered to Willock the bond and mortgage now in suit, which Willock afterwards, on February 18, 1856, assigned for a valuable consideration to complainant. The bill called for an answer on oath, and the Cromeleins answered, denying that at the time mentioned, or at any other time, they were indebted to Willock, and setting forth substantially the following as the circumstances attending the giving of the bond and mortgage, and the consideration therefor.

That said defendants having occasion to procure a loan of money for business purposes, Willock, who was a broker in Pittsburg, Penn., proposed to procure it for them, and informed them that if they would purchase fourteen lots of land, say of twenty feet front and about one hundred and ten feet deep, situate in the city of Alleghany, then known

as Benvilla, at the gross sum of $2,500, they should have a loan of $3,000, securing the whole sum of $5,500, on certain lands in Detroit; that Willock, in making this proposition, was acting for one Thompson Bell, of Pittsburg, who was to furnish the money and the lands; that defendants entertaining this proposal favorably, Rowland Cromelein and said Willock went to Bell's office together, where a rough plat of Benvilla was produced by Bell, and an arrangement agreed upon by which Bell was to loan defendants the $3,000, and deed to said Amelia Cromelein the fourteen lots of land, with fronts of twenty feet, and one hundred and ten feet or thereabouts in depth, and the defendants were to give their bond for $5,500, with mortgage on the Detroit lands, payable in two years, with six per cent. interest; that the snow was then lying upon the ground, and the fourteen lots in Benvilla were not selected, but Bell stated that he was about to make a new plat, which would exhibit the lots more fully, and as soon as the melting of the snow would permit, said Rowland should have the privilege of selecting from the new plat such fourteen lots then (at the time of the making of the contract) unsold as he should prefer, and Bell should convey a good title thereto to said Amelia; that the bond and mortgage were executed by defendants to Willock, at Bell's suggestion; that Bell then paid $1,500 of the $3,000 agreed to be loaned them, but under various pretexts postponed paying the remainder, but did afterwards pay, in all, $950 more, making $2,450 in all; that Bell furnished no new plat of Benvilla until December 6, 1856, when said Rowland received one from him by mail, with red lines drawn round certain portions, and the word "sold" written thereon; that on February 17, 1857, said Rowland wrote Bell, apprising him of the selection of fourteen of the lots not marked sold on the plat, and requesting Bell to send a deed therefor to said Amelia; that three of these lots were on Federal street, four on Bell avenue, and seven on Willis street,

the numbers being particularly given in the answer; that on February 21, 1857, defendants received by mail a deed from Bell to said Amelia, covering the three lots on Federal street, and also eleven other lots on Willis street, none of which had been selected by defendants, whereupon said Rowland, without delay, notified Bell that the deed did not cover the lots selected, and requesting and demanding that he convey those chosen, which Bell refused to do, assigning as a reason that he had sold and disposed of a portion of them; that the defendants never accepted or recorded the deed from Bell, and that they have no other than a verbal contract from him for the conveyance of the fourteen lots, which can not be enforced against him.

The cause being put at issue upon this answer, Bell's testimony was taken as the sole evidence in the case, except the answer. In all important particulars, it corresponds with the answer in its statement of facts, showing the original consideration of the bond and mortgage to be as stated by defendants, and that they were assigned by Willock to complainant, at Bell's request, and are now held and foreclosed in his interest. Bell, however, gives with his testimony what he says he believes is a copy of his agreement to convey the fourteen lots to Amelia Cromelein, and which is in writing, and as follows:

"PITTSBURG, February 18, 1856.

"I promise to convey to F. A. Willock, or R. C. Cromelein, clear of all incumbrances, as soon as satisfactory information is received from Detroit about mortgage of $5,500, fourteen lots of twenty feet front by one hundred feet deep, part of the Benvilla plat, three lots fronting on Federal street, and eleven immediately back. I further promise, if said Willock or Cromelein should prefer the same number of lots on Willis street, or on Bell avenue, as marked on plan, that he shall have his choice, about the 1st of April, or when the weather permits a proper examination.

"THOMPSON BELL."

Bell testifies that he afterwards performed this agreement, by conveying fourteen lots in pursuance of it, but

he gives no explanation, and fails to specify what lots he conveyed.

The court below rendered decree in favor of complainant for the $2,450 and interest only, deducting a payment, and making certain allowances for taxes. Complainant appeals, claiming to be entitled to the whole amount of the bond and mortgage, less the payment made thereon, and that portion of the $3,000 which, it is conceded, the Cromeleins never received.

The only question on the appeal is, whether the court was right in making a deduction from the mortgage of the sum included therein, as the price of the fourteen lots in Benvilla.

Complainant's position is, that the answer, in what it sets forth as to the consideration of the bond and mortgage, and the partial failure, was not responsive, and, therefore, not evidence. We have not been able to yield our assent to the argument on this point. The bill avers an indebtedness by defendants to Willock as the occasion upon which they gave these obligations, and calls upon them to answer on oath in respect thereto. They do answer specifically, denying any such indebtedness, and stating that the bond and mortgage were given for a consideration, a part of which was received at the time, and the remainder to be furnished afterwards, but which they have never received. The answer, if true, shows that the mortgage was based on no consideration, and had no original validity, except to the extent of $2,450. We have no doubt this is proper evidence against complainant, and, as we have said, it is corroborated by Bell's evidence, so far as that goes. It is claimed, however, that the deed from Bell was in compliance with his contract, or, if it were not, then defendants could only claim, by way of reduction, any difference between the value of the lots conveyed, and those purchased by him, and which should have been conveyed. We do not perceive how a man can be compelled, under

such a contract, to receive a conveyance of other lots than those he had bargained for; and as it is not disputed that the Cromeleins refused to accept the deed as a performance by Bell, we have only to see whether that deed can be regarded as in compliance with the contract.

Assuming the copy given by Bell to be correct, Mrs. Cromelein was to have the three lots on Federal street, and eleven immediately in the rear, with the privilege, however, of substituting others on Bell avenue and Willis street. Eleven others were selected, which Bell refused to convey on the claim that a part of them had been sold to others. On the argument in this court it is claimed that he was justified in refusing because the lots so selected, though of the same front, were of greater depth than those in the rear of the Federal street lots. This excuse can not avail for two reasons: *First*, If the Cromeleins had failed to exercise their right to select other lots instead of those in the rear of the ones on Federal street, then, under the contract, the latter were to be conveyed, and Bell had no right to substitute others on Willis street as he did. There can be no pretence that under any circumstances he could have any right to select for the Cromeleins, as the contract itself fixed the lots they were to have unless they voluntarily substituted others. But, *Second:* The contract did not confine Cromelein's choice to lots of a specified depth. When it was entered into, the lots on Willis street and Bell avenue were not yet laid out, and it was optional with Bell to fix the size to suit himself. The maps now produced show that when they came to be platted, a part of them were made of the same depth as those on Federal street, and a part deeper. Every lot on Bell avenue is deeper than the Federal street lots; so that if complainant's theory is correct, the Cromeleins were altogether debarred of selection on that street by the voluntary act of Bell in giving additional depth to his lots. We think this suggestion entirely

an afterthought, especially as it does not appear that Bell based his action in conveying unselected lots to Mrs. Cromelein on any such ground. We also think the Cromeleins were justified in refusing to accept a deed which covered lots not embraced in the contract, but selected for them arbitrarily by Bell without even the semblance of authority.

We have not considered it important to discuss any question based upon a supposed difference between showing by the answer the original invalidity of the mortgage, in part or in whole, or showing by way of defense a subsequent failure of consideration; as the evidence in the present case proves clearly that the securities never had any force, as such, beyond the moneys advanced by Bell. *Ladue v. Detroit and Milwaukee R. R. Co.*, 13 *Mich.* 380. We think the decree correct, and it should be affirmed, with costs of this court to the appellees.

CAMPBELL J. and MARTIN Ch. J. concurred.

CHRISTIANCY J. did not sit in this case.

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Lorenzo Tabor v. Addison P. Cook and others.

Bill to quiet title: Tax title deed: Vacant lands: Right to jury. The law of 1865, page 576, provides that "any person claiming title to lands through the Auditor General's deed, executed upon a sale thereof for non-payment of taxes, may file a bill in chancery to quiet his title thereto, *without taking possession* thereof," etc.

In a proceeding in chancery to quiet title by a person claiming through such a deed against one holding the premises under an adverse claimant, it was held—

1. That the act of 1865 does not authorize such a proceeding against a defendant in possession—its purpose being to extend the remedy by bill in equity to cases where the land was vacant, and where, under the then existing law, the complainant could not file a bill without first taking possession.

2. That under the Constitution—*Art.* 6, § 27—the legislature could not authorize such a proceeding without providing a mode by which the defendant could have a jury trial, if he so elected, where the right existed when the Constitution was formed.

TABOR *v.* COOK.

Construction of legislative acts. Courts will always construe a legislative act so as to give it effect as law, if it be practicable to do so. An intent to violate the Constitution is not to be presumed in any case; and a construction which would have that effect is not to be adopted unless forced upon the court by the terms employed.

Heard April 10th. Decided April 23d.

Appeal in Chancery from Lenawee Circuit.

This was a bill filed to quiet title to certain lands purchased by complainant at a tax sale.

The defendants were in possession under an adverse claim.

A demurrer was filed, and the bill was dismissed.

Bachman & Tatem, for complainant.

Howell & Robinson, for defendants.

COOLEY J.

We do not feel at liberty to consider the various questions which are discussed by the briefs in this cause, inasmuch as there is apparent upon the face of the record a fatal objection to the jurisdiction.

The bill is filed to quiet the title of complainant to certain lands purchased by him at tax sales for the taxes of 1859, and which, he avers, are occupied by the defendant, Addison P. Cook, under an adverse claim. There is no law of the state which permits a bill to be filed for such a purpose against a claimant in possession, unless it be "An act to provide for the recovery of taxes paid on real estate by persons claiming title thereto in certain cases," approved March 20, 1865—*Laws of* 1865, *p.* 576—and it appears to be under the supposed authority of this act that the present proceeding is taken.

We think the complainant has mistaken the intent of this statute. It provides that "Any person claiming title to lands under or through a conveyance executed by the Auditor General, upon a sale thereof for non-payment of taxes, may commence a suit in the circuit court in chancery

of the county where such lands lie, to quiet his title thereto, without taking possession of such lands; and all parties who have, or claim to have, any interest in such lands, may be made defendants in said suits," etc. Under the law as it stood before the passage of this act, no person could file a bill in equity to quiet the title to lands, unless he was in possession thereof—*Comp. L.* § 3490—and we do not discover in the provision above quoted an intention to extend this remedy except to the case of lands which are unoccupied. Although the terms employed in the act are very general, and authorize "any person" to file a bill, yet we can not shut our eyes to the prior law when endeavoring to arrive at the true construction of this; and as that law required the complainant to *take possession* before bringing suit, and this act authorizes any person to commence suit *without taking possession*, it would seem that the particular change designed to be made was, to dispense with the necessity of the complainant taking possession where the lands were vacant. If the other party was in possession, ample remedy at law existed before; and the legislature would not be likely to make so radical a change in the law as to authorize a bill in equity in the nature of an ejectment bill, against an adverse claimant in possession, without clearly expressing their intent so to do.

But if the act of 1865 would bear the construction which complainant puts upon it, there is a very conclusive reason why we could not adopt that construction if a different one were possible. It is not in the power of the legislature, under our present Constitution, to provide for the trial of titles to land in equity, in the cases which were triable at law at the time the Constitution was adopted, unless it shall first make provision for having the case tried by jury if the defendant shall so elect. The Constitution—*Art.* 6, § 27—says that "The right of trial by jury shall remain; but shall be deemed to be waived

in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law." The intention here is plain: to preserve to parties the right to have their controversies tried by jury, in all cases where the right then existed — *Work v. State*, 2 *Ohio N. S.* 296; *Norval v. Rice*, 2 *Wis.* 22; *Exline v. Smith*, 5 *Cal.* 112; *Hughes v. Hughes*, 4 *Monr.* 43 — and suitors can not constitutionally be deprived of this right except where, in civil cases, they voluntarily waive it by failing to demand it in some mode which the legislature shall prescribe.

The present is one of those cases where a right to a trial by jury existed when the constitution was formed; and this right must therefore "remain." Whatever proceeding the legislature authorizes for the determination of adverse claims, the right of the party in possession to a jury trial must be kept in view, and some mode pointed out by which he can demand it. In civil cases at law, including ejectment suits, provision is made by statute and rule whereby either party may obtain a jury; but there is no such provision for cases in chancery, and it is only in special cases, where the court desires the verdict of a jury for its own guidance, that issues in chancery can go before a jury at all. A defendant in chancery, therefore, can not waive a jury by failing to demand it, because no mode is provided by which any such demand can be made; and a statute which should authorize a bill in the nature of an ejectment bill, without at the same time providing some means by which a jury could be had at the option of defendant, would be in palpable disregard of the provision of the Constitution which we have quoted.

The courts will always construe a legislative act so as to give it effect as law, if it be practicable to do so. An intent to violate the Constitution is not to be presumed in any case; and a construction which would have that effect is not to be adopted unless forced upon us by the terms employed. — *Newland v. Marsh*, 19 *Ill.* 384; *Dow v.*

Norris, 4 *N. H.* 17; *Clarke v. Rochester*, 24 *Barb.* 471. We do not discover in this statute a clear intent to give a remedy in chancery in cases where the defendant was entitled to a jury trial at the common law; and as an act to that effect, without provision for a jury at the option of defendant, would be unconstitutional, it is our duty, under the principle stated, to hold the act applicable only to those cases where the defendant is not in possession.

As, therefore, the suit was not maintainable, whether the tax title was valid or not, the decree of the court below must be affirmed.

CAMPBELL J. and MARTIN Ch. J. concurred.

CHRISTIANCY J. did not sit in this case.

The People ex rel. Gurdon O. Williams v. Edward V. Cicott.

Quo Warranto: Change of Venue. In *quo warranto* cases the statute being silent as to the place of trial of issues of fact involved therein, the Supreme Court will not send any such case for trial to a court other than that where the election took place, without the same showing as would authorize a change of venue.

Section 5300 of the Compiled Laws which authorizes an issue to be sent to such county as the Supreme Court may direct, refers only to issues arising on the question of damages for the detention of the office, and not to those referring to the office itself.

Heard April 16th. Decided April 23d.

Information in the nature of a *quo warranto.*

The information in this cause was filed to test the right of E. V. Cicott to the office of Sheriff for Wayne county; and this motion was made asking this court to send the issues to be tried to another county than Wayne.

Maynard & Meddaugh and *A. Pond*, for the people.

C. I. Walker, for respondent.

THE PEOPLE *v.* CICOTT.

COOLEY J.

This motion was argued as if, under the statute, it were entirely a matter of discretion with us to send the case for trial to any county in the state; and if it were so, I think great force ought to be allowed to any reasonable suggestion that a trial in any particular county would be in danger of being improperly influenced. But after a most careful examination of the statute, I am satisfied that it is entirely silent on the subject of the place of trial, and that in this respect we must be governed by common law rules.

The first six sections of the chapter relating to informations — *Comp. L.* § 5291 – 5296 — specify the cases in which informations may be filed; provide for issue and return of summons, and that the right of the relator as well as the intrusion may be set forth in the information; prescribe what judgment upon the right involved shall be entered, the proceedings by the relator after judgment, and how the defendant may be compelled to deliver over official books and papers. Nothing thus far is said about the place of trial.

The next two sections, 5297 and 5298, authorize the relator, when judgment has been given that he is entitled to the office in question, to file a suggestion of damages, in the nature of a declaration in personal actions, to which the defendant may plead the general issue, and upon which he may recover the damages which he has sustained by reason of the usurpation. Then follows section 5300 which provides that, "All issues of fact or of law that shall be joined between the parties shall be tried and determined in the Supreme Court, or in the Circuit Court of such county as the Supreme Court may by special rule direct, and execution may issue on any judgment recovered on such trial as in other cases." The next section has reference to an assessment of damages where judgment has passed against the defendant without trial. It will thus

be seen that section 5300 is interposed between others which relate exclusively to the suggestion of damages and the proceedings thereon; that it seems to be the necessary complement to those sections and that all its terms are fully satisfied by applying it exclusively to the issues upon such suggestions. I think we must infer that if the legislature designed a section thus placed to have a broader scope than those preceding and following it, they would not have left the intent to inference, but would have used language clearly expressing it.

It is worthy of note also that this section speaks of issues joined between "the parties." There is no intimation here that any two classes of parties are intended. But to the issues on the information the people are parties; while to those on the suggestion, the relator is the party plaintiff, and the section next preceding had spoken of him in that character when providing for the issue and trial. Both the natural and the grammatical construction require us to understand "parties" as used in section 5300 as referring to those just before spoken of in that character. The section also provides that "execution may issue on any judgment that may be recovered on such trial." The word *execution* when thus used must be understood to refer to the writ by which damages or costs or both are collected: *Rathbun v. Ranney*, 14 *Mich.* 382, and these terms imply that *any* judgment which can be rendered on the trials referred to, may be enforced by this writ. But the principal judgment on the information relates to the title to the office, and upon any of the issues except upon the suggestion of damages, there may be judgment without either damages or costs, and upon which, therefore, there can be no execution.

The silence of our statute as to the locality of trial, is owing, I have no doubt, to the sections being copied almost verbatim from the Revised Statutes of New York, where no provision on the subject was important, as the

issues would be sent for trial at the proper circuit under their general system. The provision in section 5300 as to the courts in which a trial of issues on the suggestion might be had, was introduced to prevent an incongruity which would have appeared if the corresponding section of the New York statute had been copied literally. That section provided that the issues should be determined as in personal actions; but as under our system personal actions are not tried in the Supreme Court, it seemed necessary to make special provisions. No such incongruous provision being found in the other sections, they seem to have been adopted substantially as they stood, and remain as silent as they were originally about the venue.

I infer from the manner in which Judge Green, the revisor, incorporates section 5300 with the provisions regarding the assessment of damages in his work on practice (§ 1356), that his construction of it is the same as my own.

It remains to be seen what was the rule on this subject at the common law. The proceeding by information is peculiar in its character, partaking of the nature both of a civil and of a criminal proceeding, and may be followed by fine of the defendant if he is convicted. *Comp. L.* § 5312. But, except as we may be justified in applying by analogy the rules of criminal law, we shall find almost an entire absence of authority as to the venue. Trials were sometimes ordered at bar in cases of importance: *Rex v. Amery*, 1 *T. R.* 363, and the Supreme Court of Wisconsin directed such a trial in a case where an important judicial office was in contest. *State v. Messmore*, 14 *Wis.* 115. This course might, I have no doubt, be taken in any case where questions of difficulty or of great public importance were involved. But if the case is sent to a Circuit Court for trial, and relates to an office which is local in its duties, I have no doubt it is to be treated as a local proceeding. That was the view of the Supreme

Court of Massachusetts in *Commonwealth v. Smead*, 11 *Mass.* 74, and of the Supreme Court of Ohio in the *case of the Bank of Mount Pleasant*, 5 *Ohio*, 250. It would seem to be the view of Judge Cowen also. See his valuable note to *People v. Richardson*, 4 *Cow.* 120. See also *Ang. and A. on Corp.* § 762 *and notes.* I have looked in vain through the books of practice and reports for any different intimation.

It follows that we are not at liberty to send this case to any other county than Wayne for trial, unless on such showing as would authorize a change of venue.

The other justices concurred.

The People ex rel. William Moore v. Anthony Kehl.

Circuit Court Commissioner: Habeas corpus: Notice to creditor: Waiver. In a habeas corpus proceeding before a Circuit Court Commissioner, in behalf of a party held under an execution against the body, a plaintiff in execution is entitled to four days notice before any order of discharge is made; and the appearance of his attorney for the purpose of objecting to the hearing, for the want of such notice, is no waiver of the same.

Alias execution in trespass may issue against the body. In an action of trespass, where an original execution can issue against the body of a defendant, an alias execution may also issue against the body upon the return of the previous one, "not found."

Heard and decided April 25th.

Certiorari to William S. Atwood, a Circuit Court Commissioner for Wayne county.

This was an application to review proceedings before a Circuit Court Commissioner upon habeas corpus.

Moore sued Kehl in an action of trespass before a justice of the peace, and obtained judgment. An execution issued against the body of Kehl, but was returned "not found." Afterwards, a second execution was issued upon the same judgment, and upon which the defendant Kehl was arreste

and imprisoned in the county jail. Kehl sued out a writ of habeas corpus, returnable before the Circuit Court Commissioner, and moved to be discharged, on the ground that he was arrested upon a second execution, and which he claimed could not be done under the statute. No notice was given to Moore, the plaintiff in the execution, of the issuing of the writ; but his attorney appears to have made a preliminary objection, on the ground that Moore was entitled, under the statute, to four days notice of the time and place at which said writ was returnable.

The commissioner overruled the objection, and treated the appearance of Moore's attorney as a waiver of notice. He also held the second execution void, and discharged the prisoner.

Moore & Griffin, for the relator.

E. Crofoot, for the respondent.

Per Curiam.

The plaintiff in the execution was entitled, under the statute — 2 *Comp. L.* § 5237 — to four days notice of the time and place at which the writ was returnable before any order of discharge could be made.

The appearance of the plaintiff's attorney for the purpose of objecting to the hearing of the writ, until such notice had been given to the plaintiff can not be treated as a waiver.

In an action of trespass, when an original execution can issue against the body of a defendant, an alias execution may also issue against the body upon the return of the previous one, "not found."

Ordered, that the proceedings of the commissioner be reversed, and the prisoner remanded to the custody of the sheriff.

John Brooke v. The Grand Trunk R. W. Co.

Railroad tickets over separate roads: Rights of passenger. Where a passenger bought tickets of a railroad agency in Buffalo, one from Buffalo to Stratford, in Canada, over the B. and L. H. Railway and the other from Stratford to Detroit over the G. T. Railway, and after a delay of two months, from the time of using the former ticket commenced his journey from Stratford to Detroit on the second, it was held that, although printed on the same piece of paper, yet, as they contained no restrictions, they were distinct contracts and vouchers for separate journeys, and the validity of the last ticket was not affected by the delay.

When the evidence conflicts, it is error in the court to decide the point in conflict and take it from the jury.

Heard April 23d. Decided April 30th.

Error to Wayne Circuit.

This was an action of trespass on the case brought by plaintiff to recover damages against the Grand Trunk R. W. Co. for being ejected from the cars by one of their conductors.

The jury, by direction of the court, rendered a verdict for the defendants, and the case was removed by writ of error.

The facts are stated in the opinion.

Larned and *Hebden*, for plaintiff in error.

1. The principal question presented on the record in this case is the charge given by the court, that from the plaintiff's evidence he could not recover; that the contract was for a continuous passage from Buffalo to Detroit, and was not severable, and that leaving the train at Brantford was a forfeiture of his contract.

The record is distinct that plaintiff purchased two tickets—one from Buffalo to Stratford, and the other from Stratford to Detroit. The tickets and the evidence of witnesses also show that these two roads between Buffalo and Detroit were owned and operated by separate and distinct companies—*i. e.*, the Buffalo and Lake Huron to Stratford,

and the Grand Trunk from there to Detroit. That these tickets were upon the same piece of paper is not material. They were so printed as to be easily severed, and were as much distinct agreements as two promissory notes or contracts written upon the same piece of paper. One ticket is the contract of one company, the other the contract of the defendant's company. Upon the latter the defendant never rode till the day he left Stratford in August. Shall the defendants keep his money and withhold the consideration?—24 *Barb.* 514.

Again: Why did the agents of defendants assent to plaintiff's riding from Stratford to Port Huron on the second ticket?

This last act is decisive of the case. The question is, what was the contract or understanding of the parties? Plaintiff, by presenting, and the agent of defendants, by receiving the second ticket as valid from Stratford, admitted the contract to be, that, while he might have to complete a continuous ride upon each ticket, he might sever the tickets.

The plaintiff is entitled to "a reasonable interpretation of the contract"—*i. e.*, the meaning of the tickets as gathered from their face. They plainly read two separate contracts, for different parts of the route.—11 *Ohio*, 462.

The punching of the ticket between Stratford and Port Huron did not and could not destroy its validity from Port Huron to Detroit. If it was not intended to be good for the balance of the route, why was it left with plaintiff? Is it a reasonable regulation for a company to sell a ticket from Stratford to Detroit, punch it midway, and tell the passenger to pay a second time?—*Ibid; Redfield on R. W.* 300.

Maynard and *Meddaugh*, for defendant in error.

1. There is no error in the charge of the judge to the jury.

a. One who has purchased a passage of a railway company from one point to another over its road, and commenced the journey, is bound, in the absence of a special contract to the contrary, to continue through on that train. By leaving the cars at an intermediate station, he forfeits his right to be carried under that contract.—*Pierce on Am. R. R. Law*, 491; 11 *Met.* 121; 4 *Zabris.* 435; 11 *Ohio*, 457; 24 *Q. B.* 120.

When the passenger enters upon his journey, by virtue of his contract with the company, the company is undoubtedly bound to carry him directly through. It can not, after having conveyed him part of the way, stop its train for its own convenience, and detain him until the next day, nor insist that he shall leave the cars at an intermediate station and remain till a subsequent train. Such course by the company would be a violation of the contract, subjecting it to an action for damages.—*Redfield on Railways*, 342, *Note* 2. This obligation is reciprocal—on the part of the company to carry directly through by the usual course, and on the part of the passenger to be so carried.

b. By the rules of the company, a ticket was valid only for a continuous journey, and did not entitle the holder to stop at intermediate stations.

A common carrier may prescribe rules and regulations concerning the carriage of persons and property, and if reasonable, they must be observed by those employing the carrier.—11 *Met.* 121; *Pierce on Am. R. R.* 491.

The fact proven in this case in reference to the difference in fare charged by the company for a through passage, and a passage from intermediate points to the terminus of the road, is only the well known regulation of all railroad companies. The existence of competition at the termini of a road is generally the reason for this discrimination in favor of through passengers. If carriers have the right to make this distinction in fare, it would seem necessarily

to follow that they should have the right to protect themselves in the advantages to be secured by it. — 18 *Ill.* 469; 31 *Barb.* 556; 11 *Met.* 121; 20 *N. Y.* 126; 5 *Mich.* 520.

Such regulations are at all events binding upon the passenger, unless he can show good reason why he should be excepted from them. — *Redfield on Railroads*, 32, *note* 5.

c. The company did not waive its rights by carrying the plaintiff from Brantford to Port Huron. One of its agents neglected his duties in not ejecting the plaintiff sooner, but can the plaintiff predicate any right upon this? 17 *N. Y.* 306.

d. The character of the contract is not affected by the fact that two tickets were issued instead of one.

The ticket is not a contract, but is simply evidence to the conductor of the train that the passenger has paid his fare. It is not signed by either party, and expresses neither a consideration nor time of performance. It is a device by carriers for their own convenience in conducting the business of carrying passengers. It is of the same nature as a check for baggage, and, like it, simply designed to answer a particular purpose of convenience. — 17 *N. Y.* 306; 31 *Id.* 661; 22 *Conn.* 14; 24 *Ill.* 338.

2. The judge did not invade the province of the jury in directing a verdict for the defendant.

That plaintiff purchased a through ticket from Buffalo to Detroit on the 28th day of June, A. D. 1864, and on that day rode as far as Brantford, Canada, where he stopped; and that he did not resume his journey from the latter place until August 24th, some two months thereafter — when he was carried by defendant to Port Huron, where he again stopped and remained till the next westward bound train — the charge assumes to be true, and there is no testimony to the contrary.

If, upon this state of facts, the law will not sustain a verdict in favor of the plaintiff (as we have argued), then this direction of the judge was not error.

There was certainly nothing in these facts for submission to a jury.

If, independent of any of the rules of the company against it, the plaintiff was entitled to be carried on the 28th day of August, by virtue of his previous contract, then, unless the reasonableness of the regulation of the company to the contrary be a question of law, we see no way of sustaining this charge.

CAMPBELL J.

Plaintiff sued defendants for ejecting him from one of their cars. He purchased in Buffalo, in June, 1866, tickets from Buffalo to Detroit, consisting of two tickets on one piece of paper, one from Buffalo to Stratford by the Buffalo and Lake Huron Railway, and one from Stratford to Detroit by the Grand Trunk Railway. Upon the first ticket he rode to Brantford, in Canada, and remained there about two months. Then he went from Brantford to Stratford on the same ticket. Thence he went to Port Huron, in Michigan, on the second ticket, which was punched by the conductor and handed back. Between Port Huron and Detroit the conductor of the train on which he was riding between those places, ejected him from the cars on his refusal to pay his fare, and would not receive the ticket as valid.

Defendants, among other things, introduced testimony to prove that fare for through tickets from Buffalo to Detroit was, at the time these tickets were sold, cheaper than was charged from some intermediate points to Detroit, and that the defendants had an arrangement with the Buffalo and Lake Huron Railway, whereby they were enabled to carry passengers and freight through from Buffalo to Detroit. Also, that, by the regulations of the company, persons having a through ticket from one point to another upon the line, could not stop at intermediate stations.

The court below held that the plaintiff was only entitled to a continuous passage, and, after leaving Buffalo, was bound to proceed to Detroit on the same train, or lose the right, after once stopping, to proceed further on his ticket.

The court also instructed the jury that, if the plaintiff had a right to treat the second ticket as valid from Stratford to Detroit, yet he had abandoned the train on which he started at Port Huron, and the ticket was unavailable upon any other train. This latter charge appears by the bill of exceptions to have been based upon an assumption of facts which it belonged to the jury to determine, inasmuch as the evidence conflicted. Accordingly, it becomes necessary to consider the former ruling, which treated the whole journey from Buffalo to Detroit as single, and which, therefore, if correct, obviated the error caused by taking the facts on the last charge from the jury.

The circumstances of the present case render it unnecessary to consider whether a simple contract, made to transport a passenger in a single journey beyond the line of the road with which he contracts for passage, renders the contracting company liable as a carrier for what occurs upon another railway. In the case before us, the tickets purport to provide expressly for passage over the lines of two separate companies, and neither ticket extends beyond one line. Each is the voucher for a journey between two specified points. Neither refers to the other in terms, and neither contains any words of restriction.

It was claimed that these tickets are not contracts, and can not, therefore, be of any force in determining the rights of the plaintiff, but that he must be considered as having purchased what was equivalent to a single through passage. Whether a through ticket over the roads of two separate companies would entail all the same consequences as if they were owned by one, need not now be considered. But we can not regard these tickets in any such light. Although they are very informal documents, yet they are

easily recognizable as vouchers for separate journeys over distinct roads, one issued by a company on its own behalf, and one issued by the same company in behalf of another. The purchaser must necessarily infer from their face that one of them was issued under some claim of agency; and he had a right to treat them according to their purport. They are the usual evidences of a contract of passage; and whatever may be their imperfections as substitutes for more formal agreements, they must be treated as valid for all which they purport to express. They are no more dependent, merely because printed together, than they would be if each were precisely like the other.

We think that it was not incumbent upon the plaintiff to use these tickets for one continuous journey but that, having used one of them to reach the terminus denoted by it, he was at liberty to begin his second journey when he pleased. The general rule, requiring each separate journey to be completed without needless interruptions, was conceded on the argument, and there are no facts calling upon us to decide whether there are any circumstances of convenience or necessity which can vary it. The plaintiff had a right to use his ticket from Stratford to Detroit, notwithstanding the time which had elapsed after its issue. He had a right to have the jury determine whether he lay over between Stratford and Detroit. The rulings disposed of his entire cause of action, and took away the facts from the jury, touching the continuity of the last journey.

The court erred in holding the two tickets to be valid only for a single continuous passage from Buffalo to Detroit, and also in directing the jury that the second journey had been interrupted.

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

The other Justices concurred.

H. Norton Strong v. Jeremiah Saunders.

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Assumpsit: Competency of evidence. Power of master to bind vessel. The plaintiff below had for some years kept a set of range lights and stakes on the St. Clair flats, to aid vessels in navigating the channel, and relied upon such compensation as he could obtain from vessel owners.

In a suit against defendant for the value of such services rendered to his tug boat, evidence was offered tending to show that the lights were of great benefit to navigation, and that without them it was dangerous for vessels to pass the channel at that point at night; that defendant was the owner of steam tugs engaged in towing vessels through said channel; that defendant had paid $25 for the use of said lights for the season of 1863, and that on being called upon by plaintiff for the payment of the use of said lights for the season of 1864 replied that he would pay what his captain certified was right; that the plaintiff's bill of $40 for said services was certified to as correct, and that the captain of his tug boat had subscribed as master, to pay the sum of $40 for said season of 1864. *Held*, that the testimony relating to the payment by defendant of $25 was competent as it tended, in connection with the other evidence, to show that defendant had been fully informed as to the nature of plaintiff's services, and that he acknowledged their value, and a willingness to pay for them.

Held, further that it was a question for the jury whether from the evidence a promise to pay could be implied, and that, as the services had already been performed, the plaintiff would be entitled to recover if the jury should find a promise to pay, either expressed or implied.

Held, further that the power to bind the owner for such expenses did not come within the ordinary general powers incident to the employment as master, and that, therefore, the said subscription was not binding upon the owner.

Heard April 23d. Decided April 30th.

Error to Wayne Circuit.

This was an action of assumpsit brought to obtain compensation for the use of certain range lights placed on the St. Clair flats by defendant in error to aid vessels in navigating the channel.

The declaration was on the common counts.

Defendant plead the general issue.

The facts, together with the exceptions taken to the rulings of the court below, are stated in the opinion.

Judgment was rendered for plaintiff in the court below, and the case comes up for review as to the correctness of the rulings.

Newberry and *Pond*, for plaintiff in error.

1. The first and second assignments of error can be considered together as they relate to the admission of testimony of the same nature, to wit: Testimony tending to show that the defendant paid plaintiff for the use of said range lights, by the tug "Bob Anderson," in the year 1863.

This testimony was clearly irrelevant. The fact that defendant paid for the use of these range lights in the year 1863, by the "Bob Anderson," would not justify the inference that he promised to pay for the use of them for the "I. U. Masters" in 1864.

2. The fourth and sixth assignments of error may also be considered together.

The fourth is based upon the refusal of court to instruct the jury that under the facts no promise by Strong to pay for the use of said range lights could be implied. And the sixth, upon the instruction given, that it was for the jury to determine from the evidence whether there was any promise, express or implied.

We think it clear that the court erred in refusing to give the instruction asked; but whether this be so or not, the instruction given was clearly erroneous.

a. An "implied promise," is a promise created by the law from a given state of facts; and hence, the facts being conceded, the question whether or not the law created a promise, is pure question of law.

And we insist that the facts as claimed by plaintiff were not such that the law would create from them an implied promise by Strong to pay for the use of said range lights; and hence that the instruction asked should have been given.

b. The instruction given left it to the jury, first, to determine the facts, and second, whether from the facts, as they should find them, the law would create an implied promise by Strong.

This was clearly erroneous.

3. The question involved in the consideration of the seventh and eighth assignments of error, is whether the subscription for the use of said lights signed by "W. H. Littleton, Master of tug I. U. Masters," was binding upon defendant, as a contract made by him through his agent.

We submit that it was not so binding. Defendant's name no where appears upon it, and the promise is by Littleton. The words "Master Tug I. U. Masters" after his name, are to be taken only as *descriptio personæ*.—1 *Amer. Lead. Cases*, (4 *Ed.*,) 623; 1 *Pars. on Cont.* 48, *Note A.*; 11 *Mass.* 27; 8 *Met.* 456; 9 *N. H.* 263; 3 *Wend.* 94; 10 *Id.* 271; 5 *Sandf.* 101; 4 *N. Y.* 208; 9 *Id.* 571.

4. The master of a vessel, as such, undoubtedly has authority to bind her owner, or owners, by any agreement necessary and proper to be made in regard to such vessel, in and about her usual and ordinary course of business. But, we insist that an agreement to pay for keeping up said range lights was not such an agreement any more than would be an agreement to pay a certain sum towards building or sustaining a light house.—1 *Pars. Merc. L.* 383.

We submit that the judgment below should be reversed.

Moore and *Griffin*, for defendant in error.

1. If Strong paid for the use of the lights in 1863, and availed himself of the benefit of them in 1864, knowing that Saunders expected compensation for such use, and without notice to Saunders that he should not pay, the law raises an implied assumpsit on the part of Strong to pay for the benefit he derived from the lights in 1864.

If Strong acknowledged the benefit of the lights in 1863 by paying for them, from this the law infers or deduces that he intended to pay for them in 1864, if he used them.—*Story on Cont.* § 11 *et seq.*; 1 *Pars. on Cont.* 4; 2 *Greenl. on Ev.* §§ 107, 108.

It was competent to introduce in evidence the bill against the tug certified to by the master, W. H. Littleton, as there was evidence before the jury of an express promise on the part of Strong on condition that such certificate should be produced.

It was also proper evidence to show that the amount charged by Saunders were the figures which Littleton, as master, made for the use of the lights for tug I. U. Masters during the season of 1864.

The fourth, fifth and sixth assignments of error relate to the charge of the court, and may be considered together.

There is certainly evidence, if believed by the jury, which justifies them in finding an implied promise.

There is also evidence, if believed by the jury, that justifies them in finding that keeping the range lights was beneficial to plaintiff in error, and if they so found, it was a sufficient consideration to support an express promise.—2 *Greenl. on Ev.* § 107, *above cited.*

The second and third requests were properly refused.

The defendant in error was entitled to a stronger charge than the one alleged as error in the sixth assignment. He was entitled to the charge that if the jury believed the testimony of the witnesses of defendant in error, they must find both an express, and an implied promise.

The jury must have believed this evidence, to have found their verdict, and as, therefore, no injury resulted to the plaintiff in error, this court will not reverse the judgment, even if the charge were not technically correct.

2. The general rule as to the authority of the master is: That owners of vessels are bound by contracts of the master, relative to the usual course of ships's employment. *Abbott on Shipping, pp.* 164–167; 3 *Kent,* (*last ed.,*) 220, *et seq. and notes; Conk. Adm.* 74, 75; *Ware's Rep.* 194.

These authorities indicate and decide that whatever contracts relate to the employment or navigation of the

vessel or to supplies, repairs or necessaries, furnished to her are binding upon the owner, though made by the master.

The evidence in this case discloses facts which bring the contract made by Littleton within the rule.

CHRISTIANCY J.

The plaintiff below had for some years kept a set of range lights and stakes on the St. Clair Flats, to aid vessels in navigating the channel at night, for which he received no pay from government, but relied upon such compensation as he was able to obtain from the owners of vessels navigating the channel, and others interested in the navigation.

All the evidence tended to show that the lights were a great benefit to the navigation, and that without them it was imprudent and dangerous for vessels, and especially for tugs, towing vessels, to pass the channel across the flats at night. Defendant below was the owner of certain steam tugs engaged in towing vessels between lakes Erie and Huron, which had to pass this channel.

The evidence tended to show that defendant, in the spring of 1864, being called upon by plaintiff for pay for the use of these lights by his steam tug Bob Anderson, for the season of 1863, professed to be ignorant of the nature and value of the services, and upon inquiry of his captain of the tug, and learning the facts, had paid the twenty-five dollars claimed by the plaintiff, which the captain assured him was reasonable. The defendant, in speaking of the use of the lights, always carried the idea that whatever was right to pay the plaintiff he would pay, but declared he would not pay any bill until certified by the captain — that defendant said he wished his captains to make figures as to what he should pay for such services. And though the defendant had refused to subscribe in advance for such services to be rendered, there was evidence tending to show that his answer to such application

was that his masters would fix the figures, and that he would pay the amount they fixed or certified.

This suit was brought to obtain compensation for the use of these lights by defendant's steam tug "I. U. Masters," for the season of navigation of 1864. Plaintiff declared only upon the common counts, and claimed forty dollars as a reasonable compensation for the use of the lights by a tug of the size of that in question, and plaintiff's bill for this amount was certified by the captain of the tug as correct.

The captain had also, about the last of October or fore part of November, signed a subscription as master, promising to pay forty dollars for the use of said range lights, by that tug, for the season of navigation of 1864.

The first two exceptions were to the admission of evidence tending to show that defendant had, in the spring of 1864, paid the plaintiff for the use of these lights by his tug "Bob Anderson," for the previous year.

We see no error in the admission of this evidence. It tended, in connection with the other evidence, to show that the plaintiff had been, in the spring of 1864, fully informed of the nature of the plaintiff's services, and that he recognized them as valuable to him, and as the services for the season of 1864, for which the suit was brought, were of the same nature, it tended, in connection with the other evidence, to show a willingness on his part to pay for such services in future — in other words, a promise to pay for such future services.

The third and fifth assignments of error were very properly abandoned on the argument, and need not be noticed.

The fourth assignment of error is the refusal of the court to charge that, under the facts disclosed in the evidence, no promise to pay for the benefit derived from the range lights could be implied, and the sixth, the charge given upon this point, that it was for the jury to determine

whether there was any promise on the part of the defendant, express or implied. There was evidence strongly tending to show an express promise to pay such sum as the defendant's captain should certify to be fair and reasonable; and there was also evidence tending to show an implied promise, or, in other words, a clear duty on the part of the defendant, to pay a reasonable compensation; and, although this evidence was contradicted by that of the defendant, still it was a question for the jury upon the evidence, and it would have been clearly erroneous for the court to have taken the question from the jury and assumed to decide it himself, in accordance with the request. As the services had already been performed, the plaintiff would be entitled to recover if the jury should find an express promise, or such a state of facts as would create an implied promise.

But the court was requested to charge that Captain Littleton's employment as master of the tug "I. U. Masters," gave him no authority to bind the defendant by an agreement to pay the plaintiff for the use of said range lights, and that his subscription of forty dollars for that purpose did not bind the defendant. This request was refused, and the court charged directly the reverse — that if the use of the range lights was necessary and proper, the subscription was binding. This refusal and charge, we think, were erroneous. Had the tug been sailing in a foreign country, or at a great distance from the home port, where the master could not communicate with the owner in time to meet the emergency; or, had the subscription been only for the use of the lights for one or two passages of the tug over the flats, and it had become necessary to agree upon the sum before he could consult the owner, we are not disposed to deny — though we do not decide — that for such special emergency, he might have had power to bind the owner. But the power to bind the owner for such expenses can not be treated as one

of the ordinary general powers incident to his employment as master, like that of contracting for freight, signing a bill of lading or the purchase of customary supplies. The power here in question can be recognized only as springing from, and therefore, limited by, the necessity of the case. Here could have been no such necessity. For admitting that the tug could not have had the use of the lights without immediate payment or the master's subscription (though the contrary clearly appeared by the evidence), still as the tug was engaged in towing vessels between Lakes Huron and Erie, and must, in the ordinary course of business, frequently pass Detroit, the home port where the owner resided, the master must have had frequent opportunities of conferring with the owner, and the flats where the lights were kept were about thirty miles from Detroit, where he might communicate daily with the owner by mail.

For the error of the court below upon this point, the judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

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In the matter of Edwin P. Teachout.

Affidavit: when the words "before me" necessary in jurat. Where an affidavit is used before the officer who administers it, the omission in the jurat of the words "before me" will not vitiate it.

Circuit Court Commissioner: Fraudulent debtor's act: Prima facie case. An application to a commissioner under the fraudulent debtor's act must make out facts amounting to a *prima facie* case of fraud.

Heard and decided May 1st.

Habeas corpus to the Sheriff of Calhoun county.

G. V. N. Lothrop, for the relator.

C. I. Walker and *William H. Brown*, for respondent.

THE PEOPLE *v.* HIGHWAY COMMISSIONERS OF NANKIN.

This was a proceeding to review the acts of a Circuit Court Commissioner under the non-imprisonment law.

The petition set forth in substance that Teachout was imprisoned by the Sheriff of Calhoun county by virtue of a warrant of a Circuit Court Commissioner for fraudulently contracting a certain debt to C. M. Garrison, H. W. Newbery and G. W. Waterman, January 4th, 1867, and assigning his property with intent to defraud his creditors. That such detention was unlawful for the reason that the said warrant was issued without satisfactory evidence to establish the complaint made before said commissioner; and that in the affidavit upon which said warrant was issued the words "before me," in the jurat were omitted.

The court held that where an affidavit is used before the officer who administers it, the omission in the jurat of the words "before me" does not vitiate it.

The majority of the court also held that an application to a commissioner under the fraudulent debtor's act must make out facts amounting to a *prima facie* case of fraud.

The People ex rel. G. R. Goldsmith v. The Highway Commissioners of Nankin.

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71	445
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89	299
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118	91

Constitutional law: Powers of Highway Commissioners and Supervisors. Under the Constitution—*Art.* 10, § 11—"the Board of Supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law." *Held*, that such provision did not contemplate exclusive control over the subject-matter by the supervisors; neither was it inconsistent with the exercise by Highway Commissioners of the power to lay out, alter or discontinue highways.

2. That by the amendment to the Constitution—*Laws* 1859, § 1102—Highway Commissioners had authority to discontinue such roads as came within the exercise of their official duty without the intervention of a jury.

3. That the Board of Supervisors, having full control over the opening, altering and discontinuing of state and territorial roads (1 *Comp. L.* § 1081), the exercise of such power by Highway Commissioners was repugnant thereto, and not contemplated by the statutes.

Heard April 25th. Decided May 7th.

THE PEOPLE *v.* HIGHWAY COMMISSIONERS OF NANKIN.

Certiorari to the Commissioners of Highway of the township of Nankin.

The Commissioners of said township made an order discontinuing a portion of the Monroe and Pontiac Territorial Road, running through the village of Wayne. And this writ was brought to review their proceedings.

H. M. & W. E. Cheever, for relator.

1. Admitting that all the proceedings are valid in form, we insist that Highway Commissioners have no power to discontinue a territorial road. If the power exists at all, without the intervention of a "jury" or "commissioners of a court of record," it is expressly delegated to the supervisors of the county. Under the old Constitution, no jury was required in laying out or discontinuing highways; and an act was passed giving to the Board of Supervisors power "to lay out, alter or discontinue, all state or territorial roads.—*Comp. L. p.* 364; *Sess. L.* 1861, *p.* 261; *Sess. L.* 1867.

2. There is no power either in Highway Commissioners or the Board of Supervisors, to act in any case under the Constitution of 1851, without the intervention of either a "jury" or "commissioners appointed by a court of record. *Constitution, Art.* 18, §§ 2, 14; *Id. Art.* 15, § 15; *Id. Art.* 10, § 11; *Sess. L.* 1860; 4 *Mich.* 95.

3. If it be urged that in discontinuing a road no "private property" is "taken" for public use, we answer:

a. If the whole matter is committed to the Board of Supervisors by the constitution, no statutory enactment can give it to the Highway Commissioners.

b. The discontinuance of a road may be just as effectual a "taking" of private property as the opening of one. Whatever hinders or obstructs the use of property, virtually takes it away. The "taking" contemplated is not an annihilation, but a preventing of the use. So the discontinuing a highway by which access is obtained to land,

depreciates, or wholly destroys, as the case may be, the value of the land. The value is in the use. The use gone, the value is gone.

We submit the proceedings of the Commissioners are void, and should be set aside.

Moore & Griffin, for respondent.

It is contended by counsel for relator —

First, That the power of laying out highways is committed exclusively to the Board of Supervisors by the constitution. — *Art.* 10, § 11.

Second, That, in any event, the Highway Commissioners can not act except through the intervention of a jury, or of three commissioners. — *Art.* 18, § 2.

1. In 1856, this court decided the act of 1848 repugnant to the provisions of section two, article eighteen, of the constitution adopted in 1851.

Subsequent legislation demonstrates that in the view of the law-making power "the charge of this matter," was not committed exclusively to the Board of Supervisors.

Prior to the adoption of the constitution in 1851, the power of the legislature to authorize Highway Commissioners to lay out a highway, is conceded.

Under the operation of the above decision, there was no law providing for the laying out of highways. At its next session of 1857, the legislature passed an act authorizing the Highway Commissioners to lay out, etc., a highway. Section eleven, article ten, of the constitution, was not considered by the legislature itself a limitation or restriction of its power to authorize Highway Commissioners to lay out highways, or we should not have the act of 1857: Nor yet the joint resolution of 1859, recognizing the validity of such grant of power to the Highway Commissioners: Nor the act of 1861.

Some respect is due to the opinion of a co-ordinate power of the government. — 17 *N. Y.* 241.

2. This act is not repugnant to the provisions of section two, article eighteen, as amended in 1860.

The amendment removed all constitutional difficulty. — *Sess. L.* 1859, *p.* 1102.

That it was the intention of the legislature which passed the joint resolution to clothe the Highway Commissioners with power to act without the intervention of a jury, is obvious from the whole history of legislation on this subject.

"The official discharge of their duties as Highway Commissioners," refers particularly to the official discharge of their duty in relation to the laying out, altering and discontinuing highways.

All prior statutes had made it such — the subsequent act of 1861 made it such.

There are but few, if any, other acts of Highway Commissioners to be performed in the "official discharge of their duty," as provided by law, which conflicted with this provision of the constitution, prior to the amendment.

But granting that the act is unconstitutional so far as it authorizes Highway Commissioners to lay out a highway, may it not be constitutional so far as it authorizes them to discontinue a highway?

A law unconstitutional in some of its provisions, may be valid as to the remainder. — *Cooley's Digest*, 611, *cases cited.*

The constitution has not expressly given to the Board of Supervisors power to discontinue a highway. Neither is discontinuing a highway taking private property for public use, within the meaning of section two, article eighteen.

On opening a highway, the public take the use and not the fee.

For such taking, the law provides the owner shall be compensated in damages. If the owner is once compensated

for the taking of his property, must he also be paid when it is returned to him?

It is of no consequence that such taking indirectly affects the value of the adjacent property. — 4 *N. Y.* 205.

3. The act of 1846 — *Comp. Laws*, § 1081 — shared the fate of the act of 1848, and was annulled by the decision of this court, as repugnant to section two, article eighteen, of the constitution.

In the absence of any special act providing for the laying out, etc., of state and territorial roads, it was undoubtedly the intention of the legislature to grant such powers to the Highway Commissioners.

COOLEY J.

The first objection to the jurisdiction of the commissioners in this case is, a want of constitutional power. If the objection is valid, it must be so either *first*, because power to lay out, alter and discontinue highways is conferred upon the county boards of supervisors; or *second*, because the commissioners can only act after the necessity has been determined by a jury or by commissioners appointed by a court of record.

The constitution — *Art.* 10, § 11 — provides that "The board of supervisors of each organized county may provide for laying out highways, constructing bridges and organizing townships, under such restrictions and limitations as shall be prescribed by law." This section has never been construed by the legislature as taking from the township authorities the control over roads which they before possessed, and all the statutes which have since been passed on the subject have provided for the continued exercise of that control. A careful examination of the provision will show that it is not one which executes itself, but that it contemplates action by the legislature establishing restrictions and limitations before it becomes operative. Even then it is not in its terms exclusive, and

there is nothing which would preclude the legislature from conferring power over this subject on the township highway commissioners even if they should also provide for the exercise of similar powers by the board of supervisors in specified cases, with suitable provisions to prevent conflict.

And whatever may have been the rule before 1860—upon which we express no opinion—we are satisfied that a jury or commissioners appointed by a court of record are not now essential to the validity of action by highway commissioners in either laying out or discontinuing highways. The amendment to the constitution adopted in that year was intended to do away with that necessity, and its terms are sufficiently comprehensive to embrace all cases which fall within the official duty of the commissioners.

The second and more serious objection to the jurisdiction is based upon the fact that the road, a portion of which was sought to be discontinued, was a territorial road; and over these, it is insisted, the highway commissioners are not vested with the power of discontinuance which they possess in other cases. This objection must prevail. Ever since 1846 there have been statutes authorizing the boards of supervisors to open, alter or discontinue state and territorial roads where, in their opinion, the interest of the public demanded it.—*Laws*, 1846, *p.* 240; *Comp. L.* § 1081 *to* 1085, *and* 359 *to* 363. Before that time, although a general control over such roads, when laid out and established, had been conferred on the highway commissioners and overseers (*Laws*, 1830, *p.* 7), yet even the board of supervisors do not seem to have been vested with power to discontinue, but only to make alterations.—(*Laws*, 1834, *p.* 91.) An unrestricted power in the supervisors to open, alter and discontinue, is hardly consistent with the possession of a similar power by the highway commissioners of the township, and it is easy to

see that there might be a conflict of authority in cases where neither would be paramount. We can not suppose the legislature would intentionally authorize two bodies to act upon the same subject with co-ordinate power, and with no provision for a final arbiter between them, when the effect would be to enable each to thwart the action of the other, and to play at cross purposes as local or other influences might move them. The terms of the general statutes empowering highway commissioners to discontinue roads, are satisfied by applying them to the roads which the commissioners have laid out, or which have become such by dedication and prescription; and, there are reasons which must have had great weight in inducing the legislature to refrain from conferring upon these local boards the authority to discontinue by piecemeal the thoroughfares which have been regarded of sufficient importance to be specially provided for by the territory or state. These roads are usually constructed with reference to convenience of passage between distant localities; and the general purpose might be defeated by leaving it to every township through which they pass to change or discontinue them. We are satisfied no such authority was conferred, and that the legislative act of the last session prohibiting its exercise was, in reality what it purported to be, only declaratory of the prior law.

The proceedings of the commissioners must be reversed for want of jurisdiction.

CAMPBELL and CHRISTIANCY JJ. concurred.

MARTIN CH. J. concurred in the result.

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The People ex rel. Emil P. Benoit v. George Miller.

Informations in quo warranto: Practice. An information in the nature of a *quo warranto* contained nothing to show when it was presented; and the only allegation of the usurpation was that "for the space of two days last past the defendant has usurped," etc. *Held*,

1. That the pleadings in such cases were governed by the rules in civil cases, except so far as the statutes modifying them are inapplicable; and that the information was good without being entitled of any particular day.

2. That the words "two days last past" related to the filing of the information, and were sufficiently certain.

3. In case of a failure to obtain service on a defendant in *quo warranto*, and resort is had to advertisement, under the statute, defendant is not entitled, on appearance, to a copy of the information.

Heard May 8th. Decided May 10th.

Information in the nature of a *quo warranto.*

The defendant demurred for the reason, *first:* that the information did not state the time when the alleged usurpation commenced, or for what period it continued, and, *second:* that certain blank spaces in the information rendered it uncertain and obscure.

Wm. Gray and *T. Romeyn*, in support of the demurrer.

1. The demurrer is well taken for the want of an averment in the information showing the space of time of the alleged usurpation, and for the reason that there was an unfilled blank in a material averment in the information, and that it is uncertain and obscure.—3 *Chitty's Pl. p.* 1248.

2. The information is fatally defective in not stating in any part of it the time of the commencement or of the continuance of the alleged usurpation.

a. No time whatever appears or is averred in it, in the margin, caption, introduction or body.

b. In any point of view, treating it as a civil pleading, or as a penal proceeding (and the latter is unquestionably its true character), the want of an averment as

to the time of a material transaction is bad on special demurrer.—15 *Mich.; Stephens on Pl.* 292; 1 *Chitty's Pl.* 257; 9 *Wend.* 351, 375; 23 *Id.* 193; 1 *Chitty's Cr. L.* 217; *Archb. Cr. Pl.* 13; *Wharton's Cr. L.* § 261; 4 *Hawkins' Pl. Cr.* 86, *book* 2, *ch.* 26, § 4, *also p.* 44, § 77.

c. This averment of time must be in the pleading itself. The date of the process or of the filing or service of the pleading does not touch the question of the sufficiency of the pleading as such.

In conclusion, we refer to all the precedents, clearly showing that this case is not within their range. It is, literally, without a precedent.—*See information in case of St. Paul's Church.*

In every case in Michigan Reports, so far as the form of the information appears, there was an express averment of time. In 6 Went. Pl., from page 28 to 234, is a series of pleadings in this class of cases. In each and every information time is averred. So in New York.—15 *Johns.* 362; 4 *Cowen*, 106, 297; 6 *Id.* 196–220.

The relator in this case might have avoided these questions by amending the information, and so have enabled the defendant to safely plead what his counsel confidently rely on as his justification. He has preferred to join in demurrer, and submit to this court the legal sufficiency of this vague and anomalous presentment, without beginning of days or length of years.

William L. Stoughton, Attorney General, *Maynard & Meddaugh* and *A. Pond*, for the People.

Two causes of demurrer are assigned.

The gist of the first is that the information does not state the time of the commencement and duration of the alleged usurpation of the office of treasurer, etc., by the defendant.

The second, that there are certain blank spaces in said information which render it uncertain and obscure.

THE PEOPLE *v.* MILLER.

1. The date and duration of the alleged usurpation sufficiently appear by the record. The information alleges that defendant has usurped said office for the space of two days last past and upwards.

The endorsement upon the back shows that said information was filed on the day of January, A. D., 1867, and the record properly made up reads thus:

"And now on this — day of January, A. D., 1867, William L. Stoughton, Attorney General, etc., comes here into the Supreme Court," etc., etc. The charge, therefore, is that the defendant has usurped said office for the two days immediately preceding the day of January, A. D., 1867, and is sufficiently certain and definite.—4 *Gray*, 11.

2. It is not true that there are any void or blank spaces in the original information on file.

The demurrer in this respect we suppose to be based on the following state of facts, to wit:

Some time after the information was filed, and before defendant had appeared, his attorney informally requested a copy of the information, which request was, as a matter of courtesy, and not of duty or obligation, complied with. It turns out that the copy of the information thus furnished to defendant's attorney was an imperfect one containing certain blank spaces not appearing in the original.

The statute does not require a copy of the information to be served on the defendant or his attorney, and hence he can have no claim upon the fact that he has been furnished with an imperfect copy. This appears too clear for argument.

3. The information, if defective, either in substance or form may be amended on such conditions as the court may deem just.

We submit that the demurrer must be overruled and ask that defendant may be required to show that he has a defense on the merits, and in default of such showing that the judgment may be final.

COOLEY J.

Pleadings are required for the purpose of apprising the opposite party and the court of the matters upon which the pleader relies, and to which evidence is to be directed; and they are generally sufficient when they fully accomplish this purpose. If there still remain technical rules which go further, without serving any useful end, their application should be confined strictly to the cases where the settled practice leaves the court no discretion.

The defendant supposes this case is to be governed by the rules which apply to indictments, where it is imperative that the day and year when the offense is alleged to have been committed, be stated with precision.—*Chit. Cr. L.* 217; 1 *Archb. Cr. Pl.* 13. So strict is this rule at the common law, that if an indictment fixed no day, or an impossible day, as the time when the crime was committed, judgment against defendant upon it would be arrested. *Ibid.* See *Pennsylvania v. McKee*, *Addis.* 36. But notwithstanding the requirement of positive allegations, it never was necessary to make the proof conform; and it was no variance to show the offense to have been committed either on a prior or a subsequent day, so that it was before the finding of the indictment, and within such period that it would not be barred by the statute of limitations.—*Bac. Abr. Indictment, G.* 4; *Archb. Cr. Pl.* 14. This being so, it is wisely provided by our statute that no indictment shall be held insufficient "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on any day subsequent to the finding of the indictment, or on any impossible day, or a day that never happened."—*Comp. L.* § 6054.

The present, however, is not an indictment; and without undertaking to say whether, if this were in the proper sense a criminal proceeding, the statute could be applied by

analogy, it may be well to see whether, tested by the rules of criminal pleading before the statute, this information would be defective for the reason assigned.

The time when the information is presented is not stated in the caption, nor does the pleading name a certain day as that on which the defendant was guilty of the usurpation. The allegation is that, "for the space of two days last past," the defendant has usurped, etc. The defendant insists that this fixes no time; while the relator replies that the "two days last past" clearly refer to the two days next preceding the presenting of the information, and that therefore the period of alleged usurpation is definitely fixed. And it strikes us that this is not only the plain meaning of the information, but that this meaning is so plainly expressed, that no one can possibly be misled.

None of the authorities require a statement of time in an indictment, by day, month or year, if by other words the time is fixed with precision. Thus; the time of the caption of the indictment being stated, it is said to be sufficient to allege the offense as committed on the day after Pentecost. — *Com. Dig. Indictment, G.* 2; *Hawk. b.* 2, *C.* 25, § 78. Or on the tenth day of March last, if it can be ascertained by the style of the sessions before which the indictment is taken. — *Hawk. ubi supra;* 1 *Chit. Cr. L.* 218. This authority is directly in point in the present case, and the principle is recognized in *Commonwealth v. Wood*, 4 *Gray*, 11.

In the case of *Rex v. Gill, Russ. & Ry. C. C.* 431, the indictment, which was found in the first year of the reign of George IV, charged the defendant with the larceny of a horse on the 20th day of July, in the *fourth* year of the same reign, without otherwise fixing the year. The judges were of opinion that the words "fourth year of the" might be rejected as surplusage, and then the charge would stand, "20th of July, in the reign of King George the Fourth," which, from the time when indictment was

found, could only be the 20th of July, 1820. In other words, the allegation of an impossible time was made good by rejecting the unnecessary averment which made it impossible, and the remainder was treated as sufficient, though it named neither the year of our Lord nor the year of the King's reign, since it was impossible that any other than the 20th of July then last past could be within the allegation.

The pleadings in these cases, however, are governed by the rules in civil cases, except so far as the statutes modifying these rules are, from their terms, inapplicable. The chapter respecting amendments is expressly made to apply, *Comp. L.* § 4422: and the provision that it shall be unnecessary to entitle any declaration or other pleading of any term of the court, or of any day in term or vacation — *Comp. L.* § 4549 — is also applicable. As this information, if thus entitled, would unquestionably be good at the common law, this statute is sufficient to dispose of the case.

There is nothing in defendant's suggestion that, if judgment passes against him, the time of the usurpation is not sufficiently indicated for the purposes of an inquiry into damages. The time is fixed as definitely as if the declaration had been entitled of a certain day. The record, when made up in form, will show its presentation on that day. But the formal record is only a recital of the facts which are supposed to be constantly before the court, and the "two days last past" will relate to the time of filing the information just as much before the record is made up, as afterwards when the formal caption is added. No more particular statement — if one were possible — could be of the least service to defendant. The filing of an indictment is the only record which the court has of the time when it was presented, and the formal record is made up from that indorsement.

The only question which remains is, whether the demurrer is sustainable on the ground of the unfilled blanks in the copy of the information. We are referred to the case of *Arden v. Walden*, 1 *Edw.* 631, where it was held that one who had been served with a copy of a subpœna in chancery which contained no return day, had a right to suppose it corresponded with the original, and to disregard it. The case differs essentially from this. The subpœna was process by which the party was to be brought into court; and if it did not apprise him when to appear, he might be justified in considering it void. In the present case, the party was in court by publication. His counsel called upon a clerk in the office of counsel for relator, and asked for a copy of the information, which he could not demand as a right, but which, nevertheless, was given him. Discovering an error in the copy, the counsel for defendant called upon the opposite counsel to ask him if the copy served by the clerk should be regarded as "duly and properly served, and to be so treated," and received an affirmative reply. The question would appear to have been asked to enable the inquirer to take advantage of the error, and to elicit a response without any knowledge on the part of the relator's counsel that an error existed. The desired response was obtained, and the demurrer filed; but we do not think it can avail. The only party who appears to have been misled by the clerical error in the present case was the counsel who, in ignorance of the error, adopted the copy served. The information to which a demurrer is interposed is good in form, and there is nothing in the affidavit presented which shows that the defendant has placed reliance upon the defective copy, and been thereby misled.

The demurrer must be overruled.

The other Justices concurred.

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George W. Underwood v. David McDuffee.

Referee, oath of: Judicial power: Stipulation. A referee is not such an "officer" within the meaning of the constitution as requires him to be sworn before assuming his duties. *Const. Art.* 18, § 1. And, when testimony in a cause is submitted to such referee by stipulation, his action thereon is not in any sense judicial.—*Const. Art.* 6, § 1.

Held further, that the judicial power in the constitutional sense is not exercised by a referee in determining facts in a cause submitted to him, but by the court in giving judgment.

Amendment of statute: when valid. Where in a revision of the same subject matter the legislature substitutes one section for another, if the new section be not foreign to the subject matter indicated by the title of the law in which it is inserted, it is not invalid because it substitutes entirely new provisions, inconsistent with the old.

The constitution requires all statutory provisions to conform to the title of the act; but, while it requires all amended sections to be published at length, it imposes no other limitations upon the nature of amendments.

Heard May 3d. Decided May 14th.

Error to Hillsdale Circuit.

This was an action of assumpsit. After issue joined, the cause was referred by stipulation to a referee; and who found for the plaintiff.

A bill of exceptions was signed, and exceptions were taken to the referee's report. Both were overruled by the Circuit Court and the report was confirmed. The cause was removed to this court by writ of error.

Newberry and *Pond*, for plaintiff in error.

1. The person appointed referee had no authority to act as such until sworn, and not having been sworn, the proceedings before him were without jurisdiction, and hence, the judgment based upon his report is erroneous.

a. By the common law all officers of justice are required to be sworn.—34 *Vt.* 517, 524.

b. The constitution of this state expressly provides that all officers, executive and judicial, shall, before they enter

upon the duties of their respective offices, take and subscribe an oath provided.—*Const. Art.* 18, § 1; 1 *Comp. L.* 73.

A referee we submit is an officer within the meaning of this provision, and he is not exempted by any law from taking the oath. When the law requires a person appointed to office to be sworn before entering upon the duties of the office he does not become an officer until sworn. 34 *Vt.* 517. The proceedings before the referee and his report were, therefore, a nullity, and no judgment should have been entered upon such report.—8 *Vt.* 396.

2. The act under which the case was referred is unconstitutional, and hence all proceedings under said reference are void.

It is unconstitutional in that it undertakes to create a judicial officer unknown to and unauthorized by the constitution.

a. The constitution vests the entire judicial power in certain courts named, in justices of the peace, and in certain specified officers.—*Const. Art.* 3, § 1; *Id. Art.* 6, §§ 1, 2, 16 *and* 23.

It also designates the judicial officers who shall constitute the courts named; that is, by whom the judicial power vested in the several courts shall be exercised. *Const. Art.* 6, §§ 1, 2, 6, 7. 13, 17, 23 *and* 27. It limits the number of justices of the peace to four for each township. *Art.* 6, § 17. It provides for a limited number of officers of a judicial character, not strictly officers of either of the courts, upon whom judicial power may be conferred, and prescribes the nature of such powers.—*Art.* 6, § 16.

It is evident from these provisions, that it was the intention of the framers of the constitution not merely to invest the entire judicial power in certain officers and courts named, and leave the legislature to provide for the exercise of the judicial powers vested in the courts through or by such judicial officers as it might from time to time

prescribe, but to designate the officers through or by whom such powers should be exercised.—5 *Mich.* 409; 14 *Ill.* 419; 34 *Id.* 358.

The legislature can not provide that any Circuit Court may have more than one judge, or for the election or appointment of any person either as an officer or *attaché* of a court existing under the constitution, or otherwise, in addition to those named in the constitution, to exercise any of the judicial powers vested by the constitution in the courts and officers therein named.—5 *Mich.* 409; 4 *Green, Iowa*, 104.

The act in question does this; a referee appointed under it, exercises, in relation to the case in which he is appointed, a portion of the judicial power vested in the court.

It provides for a trial of the cause before a referee, to be conducted in the same manner as a trial by the court. His report may be filed in vacation or in term, and judgment may be entered thereon as if the case had been tried by the court.—*Laws*, 1861, *p.* 158, §§ 5, 6, 8, 10.

The only answer that will or can be suggested to this position, is that the judicial acts thus performed by the referee have no effect until adopted by, and made the acts of, the court. 5 *Minn.* 78; 32 *Mass.* 148. This is not true. Many of the judicial acts the referee performs in the trial of the cause never do or can come before the court for review. The finding of the facts is a judicial act, and such finding is as conclusive as, if not more conclusive than, the verdict of a jury.—14 *Mich.* 152.

That the reference was by stipulation of the parties does not render the proceedings valid. The parties can not by consent create a court or a judicial officer whose proceedings can be recognized as valid.—3 *Green* (*Iowa*) 458; 4 *Id.* 120.

It is also unconstitutional because the new sections purporting to amend the old are not really amendments, but

substitute provisions in no way resembling the former ones. — *Const. Art.* 4, §§ 20, 25.

We submit that the judgment should be reversed.

D. L. Pratt, for defendant in error.

1. After stipulating to try the cause before a referee, and after proceeding to the trial of the cause, and after the evidence was all put in on both sides, it was too late for defendant to object to the jurisdiction of the referee.

2. No oath is now required of the referee.

Section 4192 of the Compiled Laws required referees to be sworn. That section was repealed.—*Laws of* 1861, *p.* 158.

Referees are not judicial officers, and are not required to take the official oath. — 1 *Burrill's Prac.* 435; 1 *Johns.* 314; 12 *Id.* 129, 218.

Judicial officers have power to hear, try and determine questions submitted to them. — 2 *Burr. Law Dic.* 108, *2d edition.*

Referees have only power to hear, try and report to the court the facts found and the conclusions of law, and if the report is confirmed by the court, it stands as the finding of the court, and judgment is rendered thereon in the same manner as if the action had been tried by the court. — *Laws of* 1861, *pp.* 159, 160.

If referees are required to take the official oath, why are not arbitrators, auditors, commissioners of estates, and other persons appointed for a temporary purpose?

If those officers are required to take the official oath, then the law requiring them to take any other oath is unconstitutional.

Section one, of article eighteen, of the constitution, says: "And no other oath, declaration or test, shall be required as a qualification for any office or public trust." — *See* §§ 4192, 4198, 5158, 2925, *of the Compiled Laws, for the*

oaths required of referees, auditors, arbitrators and commissioners of estates.

3. The referee did not exercise judicial powers contrary to the constitution. He was not a judicial officer. He had no power "to hear and determine" any question of law or fact. — 5 *Mich.* 417, 419.

Circuit courts had power to refer cases to referees before the present constitution was adopted. By section one, article six, of the constitution, the same judicial powers were vested in circuit courts that they then exercised. — 7 *Mich.* 341.

4. The referee is not required to report the evidence; only the facts found. — *Laws* 1861, *p.* 159.

C. Kent, on same side.

1. The referee need not be sworn, because not an officer within the meaning of the constitutional provision requiring all officers to take a certain oath. He is a temporary officer of the court for certain purposes, but has no office. There is less reason why he should take the oath than there is that a juryman should do so.

If he be an officer, then his acts are valid as to third parties without the oath.

2. If the referee exercise judicial power at all, the power exercised is no more judicial than that of a jury, a clerk of court in taxing costs, or commissioners on estates.

The referee is part of the circuit court. The judicial power is conferred on the circuit court, including therein the judge and all the usual instruments of the court, including clerk, jury and referees. A referee law confining judicial power, if the present one does, was in existence when our constitution was formed. No fault had been found with it, and it is not supposable that the constitutional convention intended to make such a law unconstitutional by mere implication.

Only one case directly in point is to be found, and that arose in Minnesota, whose constitution is like ours so far as the subject is concerned. That decision is directly in favor of the views I maintain. — 5 *Minn.* 73.

2. Our constitution does not differ, so far as this question is concerned, from those of two-thirds of the states, and in nearly all of them either referee or arbitration laws, as objectionable as ours, have long existed. The court will not hold this law unconstitutional on any doubtful grounds.

3. If the referee law be unconstitutional, still the parties in this case are bound by their stipulation. The acts of the referee are good by virtue of the stipulation, if not under the law. The law under which the referee acted became, in substance, a part of the stipulation.

CAMPBELL J.

In this case, the parties in the court below consented to a reference of the matters put in issue by the pleadings to a referee of their own nomination, who heard the case and made his report. Exceptions were taken to it, which were overruled, and judgment was entered on the finding. The cause is now brought before this court on questions chiefly relating to the validity of the reference, and the authority of the referee.

It is first objected that the referee was not sworn. The statute does not require this, but it is claimed that the constitution of this state requires all executive and judicial officers to be sworn, before they assume their duties. — *Const. Art.* 18, § 1. The oath required is the oath of allegiance to the United States and to the state, and an oath to perform faithfully the duties of the office. The term "*officer*," as there used, can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. A designation of a person to do

some one act of duty, with no official tenure except as incident to that transitory function, can not make him a public officer, without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure. And no public office can depend upon the will of private persons, who may call it into existence for their own purposes, and at their own pleasure. In the proceedings under consideration, a referee is appointed only when parties consent, or waive their right to a jury, and the designation may be made by their private stipulation, and is confined to the particular suit. We have no difficulty in holding that such a referee can not be within the operation of the constitution as an officer of any kind.

It is also urged that the statute creating the existing system of references is invalid as not in any proper sense an amendment of the prior statutes, although purporting to be such. The constitution declares that no law shall be amended or altered by reference to its title only, but that the sections altered or amended "shall be re-enacted and published at length." The law in question was designed to remodel the entire system of references, and in lieu of several sections of the former statutes, a series of new sections was adopted, each in the room of an old one. The objection pointed out is, that some of the new sections bear no resemblance to those superseded, but relate to a different class of details. We can see no illegality in this. There is no principle which can prevent the legislature from substituting any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted. There is no other constitutional check that we have been able to discover, and in the absence of any, it certainly belongs to the legislative power to exercise its discretion in the matter.

The principal objection to these proceedings is claimed to be found in the clauses of the constitution which vest all the judicial power of the state in courts, and which provide how those courts shall be constituted, and, as is argued, leave no room for judicial action elsewhere. The judicial power, even when used in its widest and least accurate sense, involves the power to "*hear and determine*" the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body, can be properly termed judicial. A master in chancery often has occasion to consider questions of law and of fact, but no one ever supposed him to possess judicial power. A jury in a court of record determines all the facts in the case, but the judicial power is in the court which enforces the verdict by judgment. This view is very clearly explained by Kent C. J. in *Tillotson v. Cheetham*, 2 *Johns.* 63, where it was held that the sheriff himself, when presiding over a jury of inquest, acted ministerially, because he had no power to give judgment. See, also, *Story on Const.* § 1640 *and seq.; Daniels v. People*, 6 *Mich.* 381; *Chandler v. Nash*, 5 *Mich.* 409. It is the inherent authority not only to decide, but to make binding orders or judgments, which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on persons or things only through its action, and by virtue of it.

Our constitution, in ordinary civil cases, dispenses with a jury unless demanded. The facts, therefore, must usually be settled by other than common-law means. The cause may be, and in most cases will be, heard by the court itself upon facts and law, and we are not now required to consider how far this right may be restricted. But

it is unquestionably within the power of the parties to stipulate upon the facts, or for the amount of judgment, and thus save the court the labor of determining anything but the law, or even of doing anything beyond entering the judgment. This substitution of the private agreement for the verdict can not be seriously claimed to be an invasion or usurpation of judicial functions. Should the parties even agree that certain facts would appear if certain testimony were admissible, and by their stipulation submit the cause upon more than one hypothesis, according as certain proofs should be received or rejected, there would certainly be no such usurpation. This statute does nothing more, in reference to preparing facts for submission to the judgment of the court, than if the parties themselves determined them by stipulation. Instead of doing this, they agree that they will allow a common agent or arbiter to examine into the facts, and present his various conclusions, and, if required, the means and principles whereby he was enabled to arrive at them. They accept the machinery provided by the statute, in lieu of imposing any conditions of their own devising. The court receives the conclusions of this arbiter of the parties, gives each of them an opportunity of showing whether he has kept within the rules of the authority conferred upon him, in receiving or rejecting evidence, or in any other action, and, if satisfied he has complied with his duty, gives judgment accordingly. We can perceive no difference in law between an agreement that a fact exists and an agreement that the determination of a chosen umpire shall decide upon its existence. The conclusion in either case is the result of a stipulation, in one instance acting directly, and in the other by an intermediate agency.

When this common agent has performed his duty, and submitted his conclusions to the court, then the judicial power is exercised upon all that the parties have seen fit to leave to its action, by giving a binding judgment such

as in law is warranted by this finding. But, until this judgment is given, it has precisely the same force as if the parties had joined in a written stipulation, embracing the findings of the referee and the statutory provisions determining what effect should be given them. No one has ever questioned the power of the legislature to allow judgments by confession; and if such judgments, where the parties settle their own conclusions, do not infringe the judicial power, we can see no more reason for objection to references, where the consent of the parties is a condition precedent to the proceedings.

We are not required in this case to consider whether any, and if so, what, compulsory authority might be granted to referees *in invitum*. No party who has consented to their appointment can object to their conclusions except where they violate the rules of law; and then he must follow the statute which he has by his own consent made the rule of proceeding.

We do not think the constitution prevents such references by consent. And we think there is no error in the proceedings. The judgment must be affirmed, with costs.

The other Justices concurred.

Amos H. Bartholomew and another v. Washington J. Bartholomew.

Error to Hillsdale Circuit.

CAMPBELL J.

The questions presented in this case are the same as those discussed in *Underwood v. McDuffee*, and the decision of that cause disposes of this.

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

The other Justices concurred.

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John J. Campau v. Elizabeth Van Dyke, executrix, et al.

Decree, when may be impeached for fraud: Laches. Where a decree establishing title to real estate is sought to be impeached by bill in chancery, as having been obtained by fraud and collusion, the bill must be brought within a reasonable time, having reference to the nature and all the circumstances of the particular case.

The decree sought to be set aside was obtained some seven months before complainant arrived at the age of majority. He was aware of the decree and its effect, and all the material facts of the case, when he attained his majority. He delayed six years and a half after that period before bringing his bill. In the meantime, the principal party charged with the fraud, and the guardian charged with collusion, as well as the principal witnesses, who, from the nature of the case, must have been best acquainted with the facts, had all died. *Held*, that he had not brought his bill within a reasonable time, and it was dismissed on this ground.

Heard April 25th, 26th and 30th. Decided May 14th.

Appeal in Chancery from Wayne Circuit.

The bill in this cause was filed to impeach and set aside a decree rendered by the Circuit Court for the county of Wayne, April 24th, 1854, in a cause wherein James A. Van Dyke — since deceased, and whose representatives are the principal defendants in this cause — was complainant, and the complainants in this cause were defendants.

The grounds upon which said decree was sought to be impeached are, that at the time it was rendered, complainant was an infant, and that no day in court, after he should become of age, was given him by said decree to show cause against it; and also that said decree was obtained by fraud and collusion.

The bill was dismissed in the court below, with costs.

The facts are stated in the opinion.

C. I. Walker and *A. Russell*, for complainant.

The lapse of time furnishes no bar to this bill.

No lapse of time short of twenty years would do so, even if there was no fraud or trust.

The object of the bill is to vindicate the complainant's title to real property; and in analogy to the statute of limitations, this can be done any time within twenty years. 2 *Comp. L.* § 5350; 2 *Story's Eq. Jur.* § 1520–1; 2 *Curtis Ch.* 205; 6 *T. B. Mon.* 609; 7 *How.* 258; *Id.* 829; 1 *Dana*, 378, 297.

But the analogy will not apply in case of trusts, for no length of time runs in favor of a trustee as against a *cestui que trust.* — 2 *Daniells, Ch. Pr.* 735, *N.* 1; 5 *Ohio, St.* 122; 2 *Jones Eq.* 430; 24 *Penn. St.* 482.

And one dealing with the trustee, with full notice of the trust, occupies the same position. — 10 *Rich. Eq.* 221; 23 *Geo.* 76.

Newberry & Pond, for defendants.

If the complainant could have ever questioned said decree on the ground of fraud and collusion, he has lost the right.

1. By his laches.

Admitting that the decree was obtained by fraud and collusion, it was not void, but only voidable. And nothing is better settled than that a party who has a right to avoid a transaction for fraud, must make his election to do so, and act promptly. If he sleeps upon his right, the law construes it an election not to avail himself of the right. This decree was rendered October 20, 1854. Defendant became of age December, 1854. He filed this bill August 5, 1861, almost seven years after he became of age. He knew, if his own statement is to be believed, of the alleged corrupt bargain between Van Dyke and Meldrum very soon after the decree was rendered. We submit that he delayed too long.

2. By electing to take under the will mentioned in the stipulation.

It is clear that complainants claim to have the trust deed reinstated, and his claim as legatee, under said will, are wholly inconsistent.

The will was evidently made upon the basis that the testator had regained the control of his property by the decree, setting aside the trust deed; with that deed in existence, he had no property to dispose of by will.

CHRISTIANCY J.

On the 7th day of July, 1853, Antoine Beaubien, an old, uneducated and weak minded Frenchman without children, being the owner of a large landed estate in and near Detroit, the management of which he was compelled to entrust to an agent, executed a deed of trust, conveying the property to John T. Meldrum, then his confidential agent and manager of the property. This deed reserved to the grantor the possession of a small part of the property, and the income of most of it, during his life; but made full provision for the distribution of the property and its proceeds among several different persons, mostly his relatives, including his second wife, then living, and several of her children. The complainant who had been brought up in his family, and his sister, the wife of Meldrum, were second cousins of the grantor, and they were the principal beneficiaries under the deed. John T. Meldrum, however, was made a joint beneficiary with his wife.

On the 29th day of October, 1853, Beaubien, the grantor, having, for some reason, become dissatisfied with this arrangement of his property, filed his bill in chancery against Meldrum and the counsel who had drawn up and superintended the execution of the trust deed, alleging that he had been imposed upon, and fraudulently induced by them to execute the deed, under the belief, on his part, that the same was a last will and testament, and praying that it might be set aside.

While this bill was pending, and after the answer of the defendants therein had been filed, on the 4th day of February, 1854, Beaubien sold and conveyed to James A. Van Dyke, by warranty deed, the lands previously conveyed by the trust deed to Meldrum. And on the 7th day of March, 1854, Beaubien's bill was discontinued and the files withdrawn; and on the same day Van Dyke filed his bill in the Circuit Court for the county of Wayne in chancery against Meldrum, the trustee, and all the beneficiaries mentioned in the deed; setting forth his purchase of the property, alleging that said Beaubien had, notwithstanding the trust deed, remained in possession—that the trust deed was executed by Beaubien under the misapprehension that it was a will, he being unable to speak the English language and understanding it very imperfectly, uneducated, of weak mind and incapable of comprehending the legal effect of such an instrument; but making no charge of fraud against any one in the procurement of its execution—praying that the trust deed may be set aside and cancelled, and the trustee decreed to release and convey to complainant Van Dyke.

Several of the defendants in Van Dyke's suit were minors, and, among others, the present complainant; and Jeremiah Van Rensselaer, a solicitor of the court, was, on motion of Van Dyke, on the 21st day of March appointed guardian *ad litem* to the present complainant and the other infant defendants; the petition for that purpose being in the hand-writing of the present complainant. On the 23d day of March Van Rensselaer filed an answer for all the infant defendants in the usual form, submitting their rights to the protection of the court. He also, on the same day, filed the answer for Meldrum and wife as their solicitor, admitting most of the allegations of the bill, neither admitting nor denying the allegation that the trust deed was executed by Beaubien under the belief that it was a will, but declaring his belief that Beaubien had executed it with

the full understanding that it was a deed of trust. Both Meldrum and his wife, however, declaring that they have no desire or wish to hold said property or the benefits conferred by said deed in opposition to the wishes of Beaubien; and declaring that they offer no resistance to the prayer of Van Dyke's bill, aside from a simple narration of the facts set forth in the answer, and submit to such decree or order in the premises as the court may deem just and proper.

On the 18th day of April testimony on the part of Van Dyke purports to have been taken, Van Rensselaer, as solicitor and guardian, assenting: no replication having been then or afterwards filed. The witnesses were not cross-examined, and no testimony was taken on the part of the defendants. On the 20th of April, 1854, a decree was taken granting the relief prayed for, setting aside the deed of trust, and directing Meldrum to release and convey to Van Dyke. This decree was approved by the judge on the 24th of April, and directed to be entered.

Van Dyke, having previously taken possession under his deed from Beaubien, continued in possession, and proceeded to make sales of a considerable portion of the property, until his death, which happened on the 7th of May, 1855; having made a will, his executors and devisees have since continued in the possession and control of the property.

On the 11th day of December, 1854, about seven months and a half after the entry of the decree, the present complainant attained the age of majority. Complainant's bill in the present case was filed on the 5th day of August, 1861, against Meldrum and the executors, devisees and heirs of Van Dyke. This bill sets up and insists upon the validity of the trust deed from Beaubien to Meldrum, and complainant's rights under it, as one of the cestuis que trust—alleges that the decree in the Van Dyke suit was obtained by a corrupt and fraudulent agreement between Van Dyke, and Meldrum, the trustee, by which the latter received

some twenty thousand dollars in property and otherwise, on the understanding and agreement that no real or effectual defense should be made by him, and that no real defense was made—that Van Dyke controlled all the proceedings in the cause, as well on the part of defendants as his own—that Van Rensselaer, who appeared as solicitor for Meldrum and wife and as guardian for the present complainant and other infant defendants, was employed and paid by Van Dyke, to put in sham answers and defenses which were prepared by Van Dyke himself or under his direction; and that all the acts of Van Rensselaer, as such solicitor and guardian, were in the interest of Van Dyke, collusive and fraudulent—that no real defense was made or intended to be made—that Van Dyke, for the purpose of securing an influence over complainant, about the same day that he procured his deed from Beaubien, employed complainant to come into his law office as a clerk—that complainant was ignorant of the nature of the trust deed and the benefits thereby provided for himself, and was by Van Dyke induced to believe that he, Van Dyke, was acting as a friend both to complainant and Beaubien, and to get the latter out of his trouble—that by these and like plausible statements Van Dyke induced complainant to sign a paper which he did not then know, but has since learned, was a petition on the part of complainant for the appointment of a guardian *ad litem*, that complainant, upon enquiries instituted at the time of Van Dyke's death, ascertained for the first time the existence of the decree and its effect, that, till then, he had no actual notice or knowledge of said decree or of the provision made for himself in the trust deed.

The bill prays that the decree may be set aside, as obtained by fraud and collusion, and declared void; that said trust deed may be established, the trusts revested, and Meldrum decreed to execute and carry them into effect,

that complainant be let into possession, and that an account may be taken of the sales, receipts, rents and profits, etc.

The answer of Van Dyke's executors and the only one of his children then of age, denies all the material allegations of the bill, as to the validity of the trust deed, or any fraud or collusion in obtaining the decree, and insists that, if the complainant ever had any right to impeach said proceedings, he has lost the same by his laches; and they claim the same benefit of this objection as if they had demurred to the bill. Meldrum also denies all fraud or collusion on his part in that suit.

Evidence was taken only on the part of the complainant. The case was heard in the court below upon pleadings and proofs, and the bill dismissed. The evidence taken is directed mainly to sustain the validity of the trust deed, and to prove the charge of fraud and collusion in the conduct of the suit in which it was set aside.

But the first question which the statement of the case naturally presents to the judicial mind, is that of the laches of the complainant. Why — if the decree affecting his rights was obtained by the gross fraud and collusion alleged — has he delayed so long in seeking redress?

We do not mean to say that there is any fixed period, short of twenty years (or such other period as may have been adopted by courts of equity in analogy to the appropriate statute of limitation which may be in force), which would of itself operate as a peremptory legal bar to such a bill, if the facts and circumstances sufficiently account for and excuse the delay, and render it probable that the parties claiming the benefit of the decree could have lost nothing in consequence of the delay, and will not be deprived of any of the means for sustaining it, which they would have possessed had it been attacked at an earlier period.

But sound public policy and a just regard for the stability of private rights, require that the solemn judgments and decrees of courts affecting the rights of property shall not be lightly disturbed, nor, without the strongest reason, allowed to be impeached after any considerable period of time, during which the parties have been allowed to rely upon them, and others may have obtained interests on the faith of them, or the evidence by which they might have been sustained has been lost. And if a party to such judgment or decree might, after any considerable period, impeach its validity without showing a proper excuse or reasonable justification for the delay; and especially when it appears probable that material evidence to sustain it may, in the meantime, have been lost, a general feeling of insecurity and distrust, very injurious to property and business, must naturally result.

For these reasons, we think, in a case like the present, a party seeking to set aside the decree must satisfy the court that he has not slept upon his rights, and that his delay for any period after he was aware of his rights, and competent to prosecute them, has not operated to the prejudice of the other parties, nor deprived them of any of the evidence or other means for sustaining the decree, which they might have possessed had he brought his bill at as early a period as he might. In other words, we think the only just rule which can be laid down upon this point is, that such a bill must be brought within *a reasonable time;* having reference to the *nature* and *all the circumstances of the particular case.*

Such is the rule where a party seeks to repudiate or set aside a contract obtained by the fraud of the opposite party. — *Disbrow v. Jones et al., Harrington's Ch. R.* 102 (where a few month's delay was held unreasonable); *Carroll v. Rice, Walker's Ch. R.* 373, 379, 380 (where two years was held unreasonable). He must show himself

prompt and eager for redress, and any delay must be accounted for and excused.

We think the reasons for requiring promptness are equally as strong where a party seeks to impeach a judgment or decree. There is a strong analogy between the two classes of cases. If this decree was obtained by fraud, as alleged, it was not for that reason necessarily or absolutely void, as to complainant, any more than a contract into which he might have been induced to enter by the fraud of the other party. The contract is only void at his option. If he acquiesces for an unreasonable time, he will be bound. If he seeks to repudiate it, he must do so at the first opportunity, or account for and excuse the delay; in other words, he must seek his remedy in a reasonable time. — *See* 2 *Parsons on Cont.* 278, 279, *and cases cited*, and we see no sound reason why the same rule should not apply where he seeks to set aside a decree, which he had the option to affirm by his acquiescence, or to repudiate and impeach by the institution of a suit.

The same rule of diligence and reasonable time applies when property is sold by a trustee, and purchased by or for him on his private account; the purchase is void at the option of the *cestui que trust*, but he will be held to affirm it by acquiescence for an unreasonable length of time; and three years has been held unreasonable. — *Jennison v. Hapgood*, 7 *Pick.* 1. See, also, *Davis v. Cotten*, 2 *Jones Eq. R.* 430; *Monroe v. Delavan*, 26 *Barb.* 16.

Has the complainant used due diligence, and sought his redress within a reasonable time? We are satisfied, from the evidence, that prior to the institution of the Van Dyke suit, complainant was fully aware of the provision made for his benefit by the deed of trust; that during the pendency of that suit, he was aware at least of its general nature and object; that he knew of and assented to the appointment of Van Rensselaer as his guardian. The proceedings in that suit were had in March and April,

1854, and the complainant attained his majority on the 11th of December, in the same year. No laches can be imputed to him during his minority. But on attaining his majority, it can not be supposed that the notice or knowledge he had immediately preceding that event, was at once forgotten. He admits in his bill that at the time of Van Dyke's death, he became aware of the provisions made for him in the trust deed, and obtained actual notice and knowledge of the decree and its effect. It is also evident from his own testimony, and that of Meldrum, that he was then aware of all the material circumstances upon which he now relies to establish fraud and collusion.

By his own testimony, he undertakes to excuse his delay during Van Dyke's lifetime by some vague verbal assurances of Van Dyke, to do right by him; but as this, if true, must have been equally within the knowledge of Van Dyke, this testimony is wholly inadmissible under the statute of 1861. — *Sess. Laws, p.* 169, *Comp. L.* § 4341. Van Dyke died May 7th, 1855, six years and nearly three months before this bill is filed, and there is nothing to show that he received any encouragement or recognition of his claims from the executors or devisees. During the whole of this period, there is no pretense that he was not as well aware of all the facts and circumstances of the case as he has been at any time since, or as he is to-day, and we think, from the weight of the evidence, he was aware of all the material facts from the time he attained his majority; yet, he not only keeps silent until the death of Van Dyke, but delays to bring his bill until Beaubien and Van Rensselaer are both in their graves.

Van Dyke, Beaubien and Van Rensselaer, from the very nature of the case, must have been more intimately acquainted with all the material facts than any witnesses who can now be produced, and might have satisfactorily explained many facts and circumstances which can not now

be explained by others, and which are relied upon as furnishing an inference of fraud.

So far, therefore, from satisfactorily excusing the delay, that delay, under the circumstances, naturally tends to cast suspicion upon the complainant's case. And whatever tendency any of the testimony now in the cause might have to establish the fraud and collusion charged, we can feel no satisfactory assurance that a very different state of facts might not have appeared, fully establishing the validity and good faith of the proceedings, had this suit been brought, and the testimony taken, while those who best knew the facts were able to speak. Nor can we grant the relief asked without just apprehension of doing injury alike to the rights of the living and the memory of the dead.

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

MARTIN Ch. J. and COOLEY J. concurred.

CAMPBELL J. did not sit in this case.

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124	689
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137	2379
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152	131

Wm. C. Chambers v. Samuel Livermore and another.

Chambers made a contract with defendants (who were old people) to buy their farm for $11,000, paying $1,000 down and the balance at the end of ten years. By the contract a deed of the premises was to be executed on payment of the $1,000 and a mortgage given for the remainder, with a clause inserted that if he sold off any portion of the land the defendants should release that part from the effect of the mortgage, on receiving a sum proportionate to the quantity so sold.

A bill was filed for the specific performance of this contract. Defendants in their answer claimed that an acre of the said farm, (including certain buildings,) of much greater relative value than the rest, was to be excepted from the contract. Chambers denied this, and the contract contained no such exception. It did not bind Chambers personally, or compel him to purchase the land or pay the purchase money. Chambers paid the $1,000, but defendants refused to give a deed, unless with the reservation of the one acre.

Evidence was introduced before the commissioner tending to show the real understanding respecting said reservation.

CHAMBERS *v.* LIVERMORE.

Held, that whether the one acre was to be reserved or not, the contract was too unconscionable to be specifically enforced: That specific performance even of a binding contract was not a matter of right; and a court of equity will refuse it, and leave a party to his remedy at law, if not clearly satisfied that it embodies the real understanding of the parties.

Held further, that it was competent by way of defense to a bill for specific performance to show by parol evidence that either by fraud or mistake the contract did not express the real agreement of the parties or the understanding of the defendant.

Heard May 2d, 3d and 4th. Decided May 14th.

Appeal in Chancery from Saginaw Circuit.

This was a bill for specific performance. The case was heard in the court below on original and cross bill, answer and proofs.

A decree was rendered for complainant in accordance with the prayer of the bill.

The facts are stated in the opinion.

Brown and *James*, for complainant.

1. The Circuit Court properly dismissed the cross bill.

a. It does not allege an agreement to reserve an acre of land described with the requisite certainty, and the defect is not cured by the evidence taken in the case.

b. Parol evidence of fraud or mistake can not be received to vary a written contract for the purpose of carrying it into effect as varied.—2 *Lead. Cases in Eq.* 684; 1 *Id.* 741; 1 *Johns. Ch.* 273, 425; 10 *Me.* 80; 19 *Conn.* 63; 14 *Ves.* 519; 17 *Mass.* 303.

2. Courts of equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed.—1 *Story's Eq. Jur.* § 751.

The contract stated in the bill is in writing, is certain, is fair in all its parts, and is capable of being performed. It alleges an agreement to pay $11,000 for the entire farm, which contains by actual survey $28\frac{3}{100}$ acres or $392.43 an acre. The evidence shows the value of the farm to have

been $300 per acre or $8,409. It thus appears that the complainant not only agreed to pay an adequate price, but $2,591 more.

3. The specific performance of the contract is resisted on the alleged ground of a contemporaneous parol agreement, whereby one acre of land, with the buildings thereon, was reserved from the sale; not embodied therein by reason of fraud upon the part of the complainant.

4. Whether such parol agreement between the parties existed or not, there is nothing in the testimony to warrant the conclusion that it was fraudulently excluded from the written agreement.

Where fraud or mistake is set up as a defense to a written contract, clear and unequivocal proof is required to authorize the interference of the court.—5 *Mich.* 209.

Even if fraud can render a parol agreement admissible in evidence to control a deed, still the fraud should be proved before the agreement is admitted. To prove the fraud by the agreement, and then give effect to the agreement on the ground of the fraud, is obviously reasoning in a vicious circle.—2 *Lead. Cas. in Eq.* 706, *and cases there cited.*

Upon any possible construction of the testimony of the defendants, as to what transpired when the final contract of the 12th of August was signed—assuming it to be true—it can only show a parol agreement not embodied in the writing, on the faith of a promise by the complainant to perform it.

In the absence of fraud or mistake, parol evidence is inadmissible to vary a written contract, and the weight of authority is in favor of the position, that both at law and in equity the evidence must be such as to show that the contract as executed differs from that, which one or both of the parties intended to execute, and not merely that there were terms or provisions not embodied in the writing,

even where they were omitted on the faith of an understanding that it should take effect in the same manner as if they had actually been inserted.

2, *Lead. Cas. in Eq.* 673 *and* 74, 708 and cases there cited.—5 *Vesey*, 722; 1 *Barb.* 42; 1 *Bro. Ch.* 92; 2 *Id.* 219; 2 *Johns. Ch.* 74; 11 *Paige*, 650; 9 *Dana*, 108; 5 *Mich.* 218, 210; 8 *Id.* 66.

D. W. Perkins, for defendants.

1. The court will not grant a specific performance if complainant has been guilty of fraud in obtaining the contract by misrepresentation or by undue influence.—17 *Conn.* 1.

a. Misrepresentation will form a bar to specific performance, though the party representing did not know that it was false.—*Frey on Specific Performance*, §§ 430, 433, 475, *and note;* 1 *Story Eq. Juris.* § 193; 36 *Barb.* 377.

b. If there was a misunderstanding between the parties as to the terms of the agreement, courts of equity will not grant specific performance, but in such cases it will decree a performance, as parties have agreed.—*Frey on Specific Perform.* §§ 474 *to* 479 *and note, also*, §§ 484 *to* 495, § 500 *and note* 191, § 501; 21 *N. Y.* 238; 40 *Barb.* 238; 13 *Howard*, 57; 10 *Paige*, 526.

c. Courts of equity will protect old and infirm persons from the effect of bargains obtained by undue influence.—1 *Story Eq. Jur.* §§ 234, 235, 336, 221 *to* 242; 3 *Lead. Cas. in Eq.* 127, 128 *and* 129.

The law defines what constitutes fraud. That by the term fraud, the legal intent and effect of the acts complained of is meant. The law has a standard for measuring the intent of parties; and declares an illegal act prejudicial to the rights of others, a fraud upon such rights, although the parties deny all intention of committing a fraud.—*Har. Ch.* 19.

d. Where one makes false statements by means of which another is induced to enter into a contract, the

right of the latter to have the contract rescinded does not depend upon whether the person knew the statements to be false when he made them or not. The law has regard rather to the effect of the false statements upon the party to whom they are made, than to the actual intent to deceive by the other.—14 *Mich.* 109.

If one person makes a false statement to another who is about dealing with him upon the faith thereof, he shall make it good; or if he makes any representation which has induced the other to act upon it.—*Frey on Specific Performance*, 269 *and note*, 365 *and* 366; 7 *Johns. Ch.* 194.

e. The adequacy or inadequacy of price will not be inquired into where the transaction is unaccompanied with fraud. In this case there is no fraud in the sale by defendants. Chambers is informed that the other party "had backed out and would not take the farm."—1 *Story Eq. Jur.* § 345.

COOLEY J.

Complainant filed his bill to compel the specific performance of a contract, bearing date August 12, 1865, by which the defendants agreed to sell to him a small farm of twenty-seven acres and a quarter, more or less, in the city of East Saginaw, for the sum of eleven thousand dollars; one thousand dollars of which was to be paid on or before the first day of November then next, on the payment of which they were to convey the land to him, upon his giving back a mortgage conditioned for the payment of the remaining ten thousand dollars in ten years after date, with interest, with the agreement, however, that if Chambers at any time should wish to convey any part or portion of the premises, the Livermores should cancel the mortgage on such part or portion, on Chambers paying to them such portion of the mortgage as the portion of the land so to be conveyed would bear to the whole

premises; and that Chambers might make as many conveyances of parcels as he chose on these terms. The contract was signed by Chambers, but did not contain any agreement on his part to buy the land, or pay the purchase price, or give any personal obligation with the mortgage for the ten thousand dollars. Chambers averred in the bill that he had made the payment of one thousand dollars, and demanded a deed, which the defendants refused to give.

The defendants, by their answer, admit the making of a verbal contract for the sale of the farm to Livermore, at the price mentioned, but allege that there was to be reserved therefrom one acre, including their dwelling house and other buildings; that the contract was drawn by Chambers himself; that the defendants are aged people, and ignorant of legal business; that said Ermina Livermore, in whom the title to the farm was vested, inquired of Chambers if the reservation of the acre should not be mentioned in the written contract, who replied that it was of no use to do that, as it would be mentioned in the deed, and that would be sufficient; that he had got the contract drawn, and that it was all right; that defendants, relying on this statement, and confiding in Chambers, who claimed to be something of a lawyer, signed the contract; that when the one thousand dollars were paid, they had a deed prepared for Chambers, containing the reservation, which, to their surprise, he refused to accept, because the reservation was inserted; and they set up his fraud in this particular as a defense to specific performance. Many other matters are set out in the pleadings which have no bearing upon the case as it now stands before us, and a recital of them is therefore omitted.

Considerable evidence was taken in the case as bearing on the question of the alleged fraud; and the court below, not finding the fraud established, made a decree in accordance with the prayer of the bill. Among other things,

it appeared from the evidence that the value of the acre which defendants claim was to be reserved was two thousand five hundred dollars, and that if the premises should be divided into city lots for sale, the value of some lots would be two or three times as great as that of others of the same size.

On the argument, we intimated to counsel that, independent of any question of actual fraud or mistake, this contract was so one-sided and unconscionable in its provisions, that a court of equity could not enforce it. As the complainant had not in any way made himself personally liable for the purchase money, and did not undertake to do so in giving a mortgage, he was, in fact, securing by the contract the option to buy the property at any time within ten years, but with the privilege of selling off the most valuable portions in the meantime, securing their release from the mortgage by paying a proportion of the mortgage equal to the proportion which the area of the lot sold bore to the whole purchase, and then abandoning the purchase altogether by the forfeiture of the one thousand dollars paid on receiving a deed. Thus, if he went no further in his sales than to dispose of the acre where the buildings stand, and which was worth two thousand five hundred dollars, he would be entitled to have it released from the mortgage on payment of four hundred dollars or thereabouts, which was the average price of the whole by the acre, and if he abandoned the contract then, he would have sold nearly one-fourth in value of the land, without being compellable to pay therefor any more than the fourteen hundred dollars, or considerably less than one-seventh of the purchase price. It seemed to us that if a party had been able to secure such a contract, even without fraud, he could not properly ask its enforcement in equity.

To this, two answers were made on the part of complainant: *First*, admitting that this consequence might

follow, there was in that fact no sufficient objection to the relief prayed, as inadequacy of consideration was no defense to specific performance. This is true within limited bounds; but the case suggested would not be one of inadequacy of consideration. The consideration for this land, according to the theory of the bill, has been agreed upon between the parties; but in doing so, the relative value of the several parts has, of course, been taken into account; and the difficulty is that the purchaser, under this contract, may acquire the benefit of the purchase as to those valuable portions on accounting for a portion only of what was the real purchase price of such portions.

Second, the complainant says he is willing, and offers in court to waive the unjust provisions made for his benefit, and to bind himself personally for the payment of the purchase price. But he is willing to do this only on condition that the court finds the actual contract between the parties to be as set forth in the bill, and to embrace the acre where the buildings stand.

We are relieved in this case from a consideration of the general question, whether the vendee, in an unconscionable contract, is entitled to have it enforced in equity on waiving the unjust provisions, since the evidence does not satisfy us that the contract agreed upon between the parties is that set forth in the bill. The evidence tends very strongly, if not conclusively, to show that the defendants never understood their contract of sale to embrace the acre on which the buildings are situated; and whether the omission to reserve it arose from fraud in the complainant, or mistake on their part, is immaterial on the question of the specific relief here prayed.

Specific performance, even of a binding contract, is not a matter of right; and a court of equity will refuse it, and turn the complainant over to his remedy at law, if not clearly satisfied that it embodies the real understanding of the parties. The evidence of the defendants is full,

positive and circumstantial, that the reservation alleged in their answer was agreed to be made. The evidence of other persons who were at the same time negotiating with defendants, and bidding, as it were, against complainant for the land, tends strongly to support that of the defendants as to their understanding, inasmuch as it shows clearly that in their negotiations with the witnesses, it was expressly understood the acre with the buildings on, was to be reserved. The evidence of Chambers is distinctly opposed to that of the defendants, but the other evidence in the case tends to support the defense. And the clause respecting releases, which is inserted in the contract, is an important circumstance in the same direction, since it is incredible that persons competent to enter into a contract would have executed one containing that clause, if it covered the part where the buildings are situated.

Complainant, however, insists that all the parol proof introduced to show that the reservation was agreed upon as alleged in the answer, was incompetent. This objection is untenable. Without now approaching the mooted question, whether a complainant can be allowed to show by parol a mistake in a contract, with a view to having it reformed and then enforced, it is sufficient for us to say there is no dispute in the authorities that the mistake may be shown by parol, as a defense to the specific performance of the written instrument.—*See* 1 *Lead. Cas. in Eq.* 519, (*marg.*) *note, and cases cited.*

Complainant also insists that defendants are not defrauded, even if the reservation was agreed to be inserted, inasmuch as the evidence shows that the value of the whole land, at the date of the contract, was less than eleven thousand dollars. We think this position must have been taken without much consideration. It cannot, surely, be seriously urged that if a contract by fraud or mistake is made to include more than the vendor agreed to sell, it

may be enforced against him in equity, if the average estimate of witnesses makes the value of the property no more than was to be paid. The vendor has a right to put his own price upon his property, instead of having it fixed for him by witnesses. An inquiry into the value may be important in determining whether fraud or mistake has actually intervened; but the legal character of the transaction does not depend upon the question of its sufficiency. We are not satisfied, however, that the market value of the land was not more than complainant claims. Assuming the reserved acre to be worth two thousand five hundred dollars, defendants had a bona fide offer for the remainder, of a sum which would have made the whole more than complainant was to pay; and this offer, so far as the evidence discloses, was on the basis of a cash payment, and therefore more advantageous than that of complainant, if his theory of his bargain is correct.

Not being satisfied that any such contract was ever agreed upon between the parties as is set up in the bill, and without passing upon the question of actual fraud, we can not decree specific performance of the contract, notwithstanding the proposed concessions of the complainant.

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

CHRISTIANCY and CAMPBELL JJ. concurred.

MARTIN Ch. J. I concur in the result.

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Melville Newton v. Charlotte Sly.

Conveyance: Resulting trust: Dower: Purchase-money mortgage: Possessory right of mortgagee. The defendant's husband conveyed certain real estate to his sons by deed, in which she did not join. At the time of the sale the land was covered by a partly paid purchase-money mortgage, the remainder of which was afterwards paid by the said sons. It appeared that the sons were the real purchasers of the land originally, and had the land conveyed to their father, intending it to be for their own benefit, and upon the verbal understanding that he would deed to such of them as they might require; and that said conveyance finally made was in pursuance of said arrangement, and all payments on the mortgage had been made by them and not by him. *Held*, that the statute (2 *Comp. L.* § 2637) having abolished the resulting trusts formerly arising in favor of the persons paying purchase money, the legal title vested absolutely in the father, and that said verbal agreement being void (*Comp. L.* § 3177-8) the conveyance by him to the sons must be regarded as the origin of their title, and payments made by them on the mortgage prior to that conveyance must be considered as in aid of his title, and not of theirs.

Held further, that in estimating the widow's right of dower in the land so conveyed, it must be taken subject only to so much of the purchase-money mortgage as remained unpaid at the time of the conveyance by the husband, and that the sons or their grantees could not claim any deduction on account of previous payments, made before they acquired title.

Under our statutes a mortgagee obtains no possessory rights before foreclosure; and the widow's right of dower being a part of the equity of redemption, her possessory claims can not be barred or prejudiced by proceedings or agreements to which she is not a party.

Heard May 9th. Decided May 14th.

Error to Wayne Circuit.

This was an action of ejectment brought by defendant in error to recover dower in lands conveyed by her husband during their marriage.

Judgment was rendered for plaintiff below.

The facts and rulings of the Circuit Judge are stated in the opinion.

D. C. Holbrook, for plaintiff in error.

1. The plaintiff in error insists that the defendant in error is not entitled to recover at all in this case, for the reason that as to the defendant in error the mortgage is

outstanding and in the hands of the plaintiff in error; that so long as any amount remains unpaid the mortgagee or assignee, plaintiff in error, is entitled to possession and to the estate.

The plaintiff in error claims to hold under the assignee of the mortgagee by virtue of the warranty deed of such assignee of Durfee.—*Comp. L.* § 2775.

2. The plaintiff in error insists that the arrangement between Silas Sly and his sons, that he would take the conveyance for their convenience, and that he was to convey, and did convey, operated as an executed trust; but if it did not so operate, then it was a sale partially executed by delivering possession in consideration of payment of the purchase price or payment of the mortgage; and, that as the sons thereby became the owners, as of the date of the mortgage, they and their grantee, the plaintiff in error, are entitled to have deducted, as of the date of alienation, the whole amount paid by them on the mortgage, either before or after alienation.—*Comp. L.* § 2777; 6 *Mich.* 470.

3. The plaintiff in error claims that the court below erred in charging the jury that the defendant was entitled to dower in this cause as against this plaintiff, with or without deductions, and this, for the reason that if a grantor holds a mortgage for part of the purchase money, he is compelled to give up a part of the land without knowing that the whole will ever yield sufficient to pay the balance. It seems absurd that dower shall be granted in lands against the solemn pledge, agreement and mortgage of the party claiming such dower.

It is useless to cite any of the multitude of authorities holding that dower can not be claimed against a mortgage to secure the purchase money. The case of Snyder *v.* Snyder is the only one to the contrary, and there, this point was not raised.

Ward & Palmer, for defendant in error.

1. The court properly excluded all testimony tending to show that the deed from Durfee to Silas Sly was taken, and the title was to be held by him, in trust, for the benefit of his sons. The bill of exceptions states that no trust was expressed or set forth in the deed or in any writing; in other words, if any trust existed, it must have been a mere resulting trust, or a trust created by implication of law or by a parol contract.

Such estates are now abolished by statute, except such as are specifically set forth in the instrument creating them. 9 *Mich.* 365; 2 *Comp. L.* §§ 2630, 2632, 2637.

Parol evidence, therefore, could not be received to establish either an express or an implied trust. — 10 *Paige Ch.* 562; 2 *Comp. L.* § 3177-8.

2. It is claimed that the court erred also in refusing to charge that the defendant below was entitled to have deducted from the value of said premises, all that his grantors had ever paid on the Durfee mortgage, as well before, as after their alienation by Silas Sly. If it be true that all the money paid by the sons of Silas Sly, on the purchase of the premises they themselves made of Durfee, inured exclusively to the benefit of the grantee, which is most plainly declared shall be the case in the statute above cited, then in effect, so many of the payments as were made while Silas Sly owned them, and before he aliened them, were made by him, and hence could not be deducted from the value of said premises before dower was assigned, and that the defendant below had no right to have any such deductions made.

3. It is urged that the Circuit Judge erred because he would not charge that all the money the sons paid to Durfee as purchase money, on the premises they bought of him, and put in Silas Sly's name, should apply as purchase money of the same premises from Sly to his son.

If this were so, the statute could always be evaded by the simple method of the purchaser making a contract with the grantee that the money advanced by him in payment, should be the purchase money from the grantee to him, and he could take the deed when he chose, and if the grantee refused afterwards to convey, he could compel the grantee to convey to him by a bill for specific performance.

Again, such a construction of the statute could only be enforced on the ground that the money was advanced for the use of the person who paid it on such a purchase, which is directly contrary to the statute. In this case it would create a use for the sons who paid the purchase price for Sly to Durfee, in that all such money was to inure to the benefit of the sons on a purchase from Silas Sly.

4. The court did not err in charging that the plaintiff in error had a right to have deducted only such amount of the Durfee mortgage as was paid after the alienation by said Silas Sly. The charge is in strict accordance with the provisions of the statute — *Comp. L.* §§ 2777, 2778 — and the construction put on the same, by this court, in the case of *Snyder v. Snyder*, 6 *Mich.* 470.

The statute provides who may pay that mortgage and have a right of such deduction, viz: the heirs and other persons claiming under the husband. Of course, Silas Sly could have no heirs while living, and the payment made by the sons before he aliened the premises were not made as *heirs*, and until Silas Sly deeded to them, they could not claim under him, so that in either case the sons or their grantee could not claim a deduction for the payment made before alienation. The plaintiff had a right to recover such a proportion of the premises as one-third of the value at the time of alienation, after deducting the amount of incumbrance, bears to its present value.

It was further urged, also, that defendant below being the grantee of Hial P. and Nathan T. Sly, under a warrantee deed, and they being the assignees of the Durfee mortgage, plaintiff could not recover in ejectment of defendant under such circumstances, on the ground that the title passed to the mortgagee and to the assignee of said mortgage, and that their title by their warrantee was transferred to defendant. Although such might have been the case formerly, it is very clear that such is not the law now in force in this state.—2 *Comp. L.* § 4614; 6 *Mich.* 470; 12 *Mich.* 278; 13 *Mich.* 374.

CAMPBELL J.

Action was brought by Mrs. Sly to recover dower in lands conveyed by her husband, during the marriage, to his sons, by deed, in which she did not join. The land, at the time of the sale, was covered by a partly paid purchase money mortgage, the remainder of which was afterwards paid by the sons, who conveyed by warranty deed to Newton, and who subsequently took an assignment of the mortgage, after it had been fully paid. The chief contest arose out of a claim on the part of the defendant below to have deducted from the value of the premises at the time of Sly's conveyance, not only so much of the mortgage as had not then been paid, but also the sums previously paid; or, in other words, the entire mortgage money and interest originally secured.

The claim to this full deduction was based on a showing that Sly's sons were the real purchasers of the land originally, and not only paid the money which was required for the advanced instalment, but also agreed to pay, and did pay, the sums falling due on the mortgage, and had the land conveyed to their father in trust for their own benefit, and upon the understanding that he would deed to such of them as they might require; and that the conveyance which he finally made was in pursuance of this arrangement.

The Circuit Court withdrew this evidence from the jury, and confined the deductions, on account of the mortgage, to the sums paid after the conveyance.

We think this course was proper. The whole arrangement between Sly and his sons was verbal. Our statute has abolished the resulting trusts which formerly arose in favor of parties actually paying the consideration for lands conveyed to others. Now, if the conveyance to the grantee is made with the consent of the one who pays for the land, the latter can claim no interest in the estate.—*Comp. L.* § 2637. Nor can an express trust in lands be created by parol.—*Comp. L.* § 3177–8. Inasmuch as these verbal agreements were void, the conveyance from Silas Sly was the first thing which gave his grantees any interest in the land. Of course, they can not claim that previous payments were made to protect their title. The statute secures to them the advantage of all payments made thereafter.—*Snyder v. Snyder*, 6 *Mich.* 470. But the court below allowed these, and gave them all they were entitled to demand.

It was also urged that as the purchase money mortgage was valid against the right of dower, it precludes any possessory action to recover it. We have frequently decided that a mortgagee has no possessory right until foreclosure.—*Baker v. Pierson*, 5 *Mich.* 456; *Crippen. v. Morrison*, 13 *Id.* 23; *Ladue v. D. & M. R. R. Co.* 13 *Id.* 380; *Caruthers v. Humphrey*, 12 *Id.* 270. In the first case cited, a mortgagee receiving possession from the mortgagor, pending a suit for the foreclosure of a prior mortgage, to which he was not made a party defendant, was held not to be entitled to any rights as mortgagee in possession, and was treated as standing in the shoes of a mortgagor. Mrs. Sly's right of dower is embraced in the equity of redemption of the mortgage, and no agreement, to which she is not a party, can give a right of possession under that instrument as against her possessory claims.

The charge of the court below gave, therefore, to the defendant in ejectment, the benefit of every allowance which he had any possible right to assert, and there was no error in the proceedings.

The judgment must be affirmed, with costs.

The other justices concurred.

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The People v. John Pitcher and another.

Evidence: Declaration of one of several engaged in criminal enterprise. Where a person receives, with guilty knowledge, property stolen by another, and afterwards sells it, the presumption will arise that the whole transaction was on joint account; and the declaration of either of the parties, made before the sale, concerning the terms and incidents of the common enterprise, are admissible, on the same principle which allows the statements of co-conspirators to be received in evidence.

Error: Evidence: Charge of Court. Where evidence is received which could only be made pertinent by other proofs not furnished, and the jury are subsequently instructed, in the absence of such further evidence, to disregard it, the defendant can not allege error upon its admission.

Concealment of party charged with crime, evidence of guilt. The absconding of the party charged as principally concerned in stealing the property, and his concealment after his return, may properly be regarded, in connection with proof that defendant desired him to leave, as circumstances bearing upon the question of guilt.

Testimony, that an officer going to serve a subpœna on the defendant while he was, in fact, at home in bed, was informed by his wife, through the window, that he was absent; and also showing, further, that on the next day the defendant falsely stated that he had been away, and had just returned, was properly received as bearing upon guilty knowledge.

Stolen property: Proof of identity by comparison. The property stolen consisted of wool in fleeces. It was competent to prove the weight and quality of fleeces shown to a witness by defendant after the theft, and alleged to have been taken from his own sheep, for purposes of comparison; such wool being stored in defendant's house, where the stolen wool was proven to have been carried.

Heard May 4th. Decided May 14th.

Error to Lenawee Circuit.

The defendant, John Pitcher, was tried and convicted upon an information for receiving and concealing stolen

property. The fact of the larceny was proved by Arnold P. Graves, from whom the property was stolen. The testimony of David C. Newman, an accomplice, was introduced on the part of the people. This witness testified that he and Samuel Reed stole the property in question, and carried it in the night time to the house of the defendant, who received and concealed it. The leading points made in the bill of exceptions were upon the rulings of the court touching the admission of the testimony of this witness.

The exceptions are stated in the opinion.

Wm. L. Stoughton, Att'y General, and *C. E. Weaver*, for the People.

1. The first assignment of error is "In overruling the objection of the counsel for the defendant, to the question put by the counsel for the People to the witness, David Newman, as to the purpose for which he and Reed left the wool at Pitcher's."

The court only permitted the witness to respond to the question, by stating whether he knew of any arrangement between himself and Pitcher, or Pitcher and Reed, as to the purpose of delivering the wool to Pitcher; not, however, testifying to any statement of Reed's on that subject, prior to the delivery of the wool, or some portion thereof, to Pitcher. With this restriction, the question was clearly competent.

But, even if it were otherwise, the defendant would have no cause of complaint. There was no answer to the question. Error will not lie in such a case. — 13 *Mich.* 21; 4 *Parker's Cr. L.* 344, 376.

This principle also disposes of the third assignment of error. No answer whatever was given to the question objected to.

2. The second, fourth, fifth and sixth points made in the bill of exceptions, relate to the statements and acts

of Reed, from the commission of the offense up to the disposition of the wool, and the question raised is clearly set forth in the charge asked and refused, and in that given by the court. There was no error in the admission of this testimony, or in the charge of the court. In all cases of conspiracy, or other crimes perpetrated by several persons, when once the conspiracy or combination is established, the act or declaration of one conspirator or accomplice, in the prosecution of the unlawful enterprise, is considered the act of all, and is evidence against all.—1 *Greenl. Ev.* §233; 2 *Peters*, 358; 3 *S. & R.* 9; 4 *Shepl.* 293; 1 *Wheat.* 298; 1 *Wheat. Am. C. L.* 702, *and cases there cited.*

The evidence to establish the unlawful combination, need not be conclusive. It is only necessary that it should be sufficient in the opinion of the court, *prima facie*, to establish the fact of combination between the parties, or to be laid before the jury as tending to establish such fact. If there is any such evidence, it becomes a matter of discretion, and can not be reviewed.—1 *Doug. p.* 106; 12 *Mich.* 449.

3. The seventh, eighth, ninth and tenth points made in the bill of exceptions, relate to the introduction by the prosecution of evidence showing the subsequent conduct and flight of Samuel Reed, one of the defendants. Standing alone, this would not be evidence against Pitcher, but it was offered in connection with other evidence, tending to show that Pitcher incited and advised his flight, in order to prevent an investigation into the larceny and concealment of the wool. And when thus brought home to the defendant, it would be competent both as showing his guilty knowledge, and as an attempt to evade justice.—1 *Whart. Am. C. L.* § 714; 21 *Whart.* 509.

It is not necessary that the relevancy of the evidence should clearly appear at the time it is offered; and if not rendered material by proof connecting it with the issue,

it is sufficient for the court to rule it out of the case.—1 *Greenl. Ev.* § 51; 8 *Mich.* 357.

The charge of the court places the evidence on the true ground, and ruled out all except what was actually connected by the proofs, with the defendant.

4. The eleventh assignment of error is in relation to the introduction of the testimony of James K. Johnson, as to what was said and done at the house of the defendant, Pitcher, when he was there in the capacity of deputy sheriff, on the 10th or 11th of June. It clearly appeared that defendant was at home, and it was a question for the jury to ascertain whether he understood and assented to the false statements made by his wife.—1 *Whart. Am. C. L.* § 696; 3 *Hawkes*, 377; 10 *Geo.* 511.

5. The thirteenth assignment of error is based on the ruling of the court upon the objection to the question put to George Morton, as to the weight of the fleeces raised by defendant Pitcher, as he claimed at the time he examined them at defendant's house.

An examination of the evidence will at once show the materiality of this question. The defendant attempted to show, upon the trial, that the fleeces of wool which he raised were of the same weight as those stolen. For the purpose of rebutting this testimony, it was clearly competent for the prosecution to show that the fleeces which the defendant claimed he raised, at the time he sold his wool, were of much less weight.

In conclusion, we claim that no injury has been done to the defendant. Error, without injury, is no ground for reversing a judgment.—6 *Mich.* 287; 3 *Hill*, 214; 2 *Hill*, 205; 2 *Comst.* 193; 4 *Denio*, 153.

And, if, inadvertently, in the course of the trial, there was any error, which we do not, however, concede, it was corrected in the charge of the court; and all evidence not clearly competent, was withdrawn from the consideration

of the jury. They could not have been misled, and we submit that the verdict ought not to be disturbed.

C. A. Stacy, for defendant Pitcher.

The exceptions to the admission of evidence in this case, were all based on the idea that the defendant, John Pitcher, was to be held responsible for his own acts and statements alone, and not for the admission or acts of Samuel Reed or David Newman, made out of his presence, and not afterwards sanctioned or affirmed by any admission or acts of John Pitcher himself.

1. A confession is only evidence against the party himself who made it, and can not be used against the others.—5 *Ohio*, 539; 2 *Peters*, 364; 19 *E. C. L.* 428.

2. The statements or letters of another party implicated must appear to have been said or written in furtherance of the common design and not as a mere relation of a past transaction.—*Roscoe Cr. Ev.* 77, 84, *note* 1, 417; 24 *Howe State Trials*, 475; 1 *Phillipps Ev.* 95; 1 *Wharton Cr. Law*, 704, 705; 10 *Pick.* 497; 11 *Id.* 362; 12 *Conn.* 243; 19 *Id.* 250; 8 *Met.* 436; 16 *Me.* 465, 469, 293; 4 *Gray*, 411; 9 *Cush.* 36; 1 *C. and P.* 521; *Greenl. Ev.* §§ 108, 110, 111.

These cases show that in a case like the present the statement of a co-defendant, not on trial, should not be received in evidence against the defendant not present or acquiescing in the truth of the statement. Without the objectionable testimony, there was nothing to connect this defendant with the transaction but a bare statement unreasonable in itself and uncorroborated in anything tending to show the participation of the defendant in the transaction.

3. The requests of the counsel for the defendant to the Circuit Judge should have been granted. There is nothing in the testimony which shows the time of the

sale of the wool except Newman's statement, and that leaves the time indefinite.

CHRISTIANCY J.

The charge against the defendant, Pitcher, was for receiving, buying and concealing thirty-five fleeces of wool, the property of one Graves, knowing the same to have been stolen.

On the trial one Newman testified that he, the witness, and Samuel Reed (the defendant not on trial) stole the fleeces of wool from the barn of Graves, on the night of the 4th day of July, put the same into Reed's wagon, and drove in a circuitous route to the house of the defendant, Pitcher, stopping in the road opposite his house and witness remaining in the wagon; that this was about one or two o'clock on the morning of the 5th of July; that Reed got out of the wagon and went in, and when he came out, defendant, Pitcher, came out with him, having on only his shirt and pants, and being bareheaded and barefooted. That they came out near the gate, and Reed handed Pitcher the wool, who carried it in on the east side of the house, but, after they passed the corner of the house, witness could not see where they went. Reed also took a load of the wool, and so on till they took it all out.

That Reed and Pitcher had a little conversation, but witness did not know what it was; he did not see where they took the wool; he never saw it again, and knew nothing more of it except what was told him by Reed.

There was also evidence tending to show that Pitcher sold the wool on the 20th and 28th of July.

Newman was asked for what purpose he and Reed left the wool at Pitcher's. To this, exception was taken, but the witness was allowed to answer. We think the question was relevant and admissible, and if it had not been so, there was no error, as the question elicited no evidence,

except that witness knew of no arrangement with Pitcher except what Reed told him, without stating what it was.

But the same witness was afterwards allowed, in answer to other questions duly objected to, to state what Reed told him after leaving the wool at Pitcher's, and acts of Reed in reference to the matter, from which it appeared in substance that on the way home, after leaving the wool at Pitcher's, Reed told witness that Pitcher would secrete it among his wool and would dispose of it for them when he did his own, and that they would have one-third each — that witness and Reed ought to have more but that Pitcher would probably want a third — that some ten days after this, Reed said something to witness about some sheep and wool, and said he would like to have some money pretty soon, and wished Pitcher would sell the wool. About ten days after the wool was left at Pitcher's, witness saw Reed and Pitcher together by themselves, but don't know what the conversation was — saw them together after that time. That from two to four weeks after the wool was left, Reed paid witness about seventy-five dollars which he represented to be for witness' share of the wool; Reed figured the amount and represented it to be one-third of the amount for which the wool had been sold. Exceptions were taken in due form to all this testimony.

The court charged the jury upon this point that if they believed the statements of Newman as to the delivery of the wool to Pitcher, and his receipt of the same for the purpose of concealing and disposing of it, on the request or by the understanding of Reed, then the statements and acts of Reed testified to in the case, from that time up to the disposition of the wool by defendant, were competent evidence. This testimony of Newman and this charge raise the main question in the case. The general rule is well settled that, where several persons are engaged in one common unlawful enterprise, whatever is said or done by any one of them in the prosecution of the common

enterprise, or while it is still in progress, is evidence against all the parties to it. But after the common purpose or enterprise has been fully completed or terminated, the statements of one or more of them, in reference to any things connected with that past transaction, become as to the others, *res inter alios*, mere hearsay, neither binding upon nor evidence against any of the others, for the reason that they are no longer supposed to be acting with one common design, and one is in no sense the agent of the other.

The common design or concert in a common enterprise is the only basis for the admission of such statements. But like most other facts this is not required to be established by positive proof. It may be and generally is supported only by circumstantial evidence. And it is sufficient that there be evidence tending to establish the fact, and from which the jury may fairly infer it. The weight of the evidence upon this, as upon the other facts in the case, is for the jury.

Independent, then, of the statements of Reed (which upon the question of their admissibility are to be excluded), was there evidence in the cause fairly tending to show that Reed and Pitcher were engaged in a common criminal enterprise, with reference to this wool, which was yet in progress or uncompleted when those statements were made?

The only evidence that can be claimed to have had such tendency is that of Pitcher's receiving the wool at the time of night and under the circumstances mentioned by Newman, and his conversation with Reed at the time, the purport of which is not known. That this evidence had a strong tendency to show that Pitcher received the wool with the guilty knowledge that it had been stolen, will not be questioned. And as it would be unreasonable to infer that Reed and Newman were stealing the wool out of pure benevolence toward Pitcher, the tendency of the evidence was to show that

the enterprise was for the common benefit of the three; and that it was to be in some way disposed of for this purpose. It was not a kind of property which could be used or enjoyed in its then present shape. The evidence, it is true, is not such as absolutely to exclude the hypothesis that Pitcher might have purchased it of Reed, and paid or agreed to pay for it such price as to give each a share of the adventure. But, as Newman, who was there, knew or heard nothing of this kind, and no evidence of the kind appears, it can not be said that the evidence tends at all to prove such sale to Pitcher; on the contrary, much the more natural inference, it seems to me, is either that the wool was to be sold by Pitcher for the common benefit, or kept for the joint benefit of all, to be disposed of by Reed or Newman on their joint account, when a favorable opportunity should occur; and in either case the inference to be drawn, and, therefore, the tendency of the evidence, would be to show that the common enterprise was to continue until the wool should be sold and the proceeds distributed. As no statements of Reed after the distribution of the proceeds were given in evidence, and the court charged the jury, in effect, that no statements of Reed, made after the disposition of the wool by Pitcher, could affect him, I think there was no error upon this point.

There was evidence tending to show that defendant, Pitcher, some time after the sale of the wool, and before either of them had been prosecuted, was anxious that Reed should run away. And a witness was allowed under objection to testify that he (the witness) drew up a note for Reed, payable to defendant, Pitcher, for fifty dollars, just before Reed did actually leave, which was signed by said Reed, and left with the brother of Pitcher, who was present when it was drawn. But there was no evidence tending to show that the note

ever came to the defendant's hands, or that he knew of its existence, or that he paid any money upon it. This was certainly no evidence against the defendant without connecting him with it; and its admission might have been error had it been allowed to go to the jury; but the Court charged the jury that the fact of signing the note is of no import or consequence unless the same reached the defendant. This, in effect, took the evidence from the jury.

Testimony was allowed to be given that Reed was accused of the offense, that he went away and was gone some time, that when he returned he kept concealed and endeavored to evade the officers. To these matters exceptions were taken. The bearing of this evidence upon the defendant was very slight, but, taken in connection with other testimony going to show defendant's anxiety that Reed should run away, I am inclined to think there was no error in its admission.

The prosecution was allowed to prove, under objection, that an officer on going to defendants' house about eleven o'clock at night to serve a subpœna upon him, knocked at the door for some time without effect, and, failing in this, went to a window and rattled it, when, after some time, defendant's wife called out and asked who was there and what he wanted; and, the officer having answered and told his business, she told him her husband was not at home, but was gone to Ohio to buy cattle. He finally persuaded her to strike a light, showed her the subpœna, and gave her a copy through the window. Proof was also given that the defendant was in the house in bed at the time; that another man who was in bed in the same house heard the whole proceeding; that the next day Pitcher went to Adrian and falsely stated that he had just come in on the cars from Ohio. I see no legal objection to this testimony. It tended to show that he must have heard all that took place at his

house while the officer was there; and that he was in fear of arrest, which could ordinarily arise only from a consciousness of guilt.

There was no error in allowing the witness, George Morton, who had been at defendant's house and seen the fleeces of wool, represented to have come from defendants' sheep, to testify as to the kind and weight of the fleeces.

It had a tendency, in connection with the other evidence, showing the kind of wool sold by him, to show that the stolen wool was among that sold.

The charge of the court was in accordance with the views I have expressed.

I think there is no error apparent upon the record; that it should be certified to the Circuit Court for the county of Lenawee that there is no error in the proceedings, and that judgment should be given in that court upon the verdict.

MARTIN Ch. J. and COOLEY J. concurred.

CAMPBELL J.

The chief error complained of in this case is the admission of the statements of Reed, one of the thieves, to his associate, Newman, concerning the disposition to be made of the stolen property by Pitcher. These statements were made in Pitcher's absence, and after he had received the goods. If true, they tended to show that he was to dispose of the property, and pay over two-thirds of the proceeds.

I have very great doubts whether direct and legal proof of such an arrangement would render any statements of the other parties, who were merely passive, and had no further parts to perform, evidence against Pitcher, who was to be the sole actor. But without examining into this question, I have not been able to

perceive the slightest proof in the case tending to show that Pitcher had any further acts to perform on behalf of the rest, after the goods were traced into his possession, and therefore there was no ground for receiving the statements, which were only admissible on the theory of a continuing conspiracy. Newman swore positively that he had no knowledge of any such purpose, except from the subsequent statements of Reed. The reception of stolen goods has no necessary tendency to prove a purpose to sell on commission, any more than a purchase for cash. Neither the law nor common experience can raise any presumption concerning any specific rule of business in such cases. No bargain is proved, and if one is assumed, it is a pure conjecture, which, without the statements of Reed, would have had no foundation whatever.

It seems to me that to admit this evidence was equivalent to proving the conspiracy by the statements, and then basing their admissibility on the conspiracy, which was not otherwise established.

I think there was error in this, and that the verdict should be set aside and a new trial granted. Upon the other points I concur with my brethren.

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Brainard C. Knowles v. The People.

Witness: Effect of false statements on remainder of testimony. Defendant was convicted of larceny on the testimony of one McEvoy, who swore that he and defendant committed the crime. There being testimony tending to show that McEvoy had made contradictory statements on material points, the court was requested to charge the jury that if the witness had, in anything material, sworn wilfully false, that his whole testimony must be rejected by them. This was refused, but the court charged that any such testimony would seriously affect all the witness had sworn to, and that no credit should be given to any fact depending upon his statement alone; but that when corroborated by proof or circumstances, it might receive such credit as it appeared to the jury to deserve. *Held*, that there was no error in the charge.

KNOWLES *v.* THE PEOPLE.

Omission by husband, to call his wife as a witness, effect of. It is error to allow the omission by a husband to call his wife as a witness on his behalf concerning matters supposed to be known by her, to be urged to the jury as a circumstance tending to prove guilt. The privilege of calling her or not, at his option, would be done away with, if any inference of guilt were allowed to be drawn from such omission; and it was not the design of the law to interfere with the harmony and confidence of the marital relation.

Heard May 4th. Decided May 14th.

Error to Lenawee Circuit.

The defendant was convicted of larceny and sentenced to state prison.

The decision of the questions involved turns upon the charges of the court below, which, with the facts, are stated in the opinion.

C. A. Stacy, for plaintiff, in error,

1. No credit should be given to any witness (much less to a witness standing in the position of accomplice, as McEvoy did in this case,) who has committed willful and corrupt perjury in the very testimony, which is relied on to convict the defendant.

The maxim "*Falsus in uno, falsus in omnibus*," ought certainly to apply in such a case, if ever. — 5 *Cow.* 253, 246.

So if his testimony be corruptly false in any particular, the whole must be rejected. — 1 *Dev.* 508; 8 *Conn.* 323; 7 *Wheaton*, 283, 338-9; 1 *Cow. & Hill's Notes to Phillipps Ev.* 396.

2. The legislature have carefully protected the right of the husband, to refuse to call his wife if he chooses.

If the effect of a neglect or refusal to call her as a witness is to raise a presumption of his guilt, then the provision of the statute, that she shall not be sworn against him without his consent, is nugatory.

W. L. Stoughton, Attorney General, for the People,

1. The court did not err in refusing to charge the jury that if McEvoy swore willfully and knowingly false,

in a material matter, his *whole testimony* must be rejected. — 1 *Stark. Ev.* 520; *Doug.* 751; 7 *Wheat.* 2–3; 5 *Cow.* 243; 17 *Maine*, 267.

2. The charge asked was an abstract question, not necessarily arising on the evidence; and a refusal to give a charge requested in such a case, is no error. — 1 *Cranch*, 310; 1 *Curtis' Dig.* 415.

3. The omission by the defendant to call his wife as a witness, she being present in court, is a circumstance which the jury may take into consideration against him.

The Sess. L. of 1861, make the husband and wife competent witnesses for and against each other in all criminal cases. — *Sess. L.* 1861, 168. But, neither the husband nor wife can be examined for or against the other, without his or her consent. — *Ibid.* 169.

a. The general rule is, that when a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so, furnishes a strong inference against him. — *Broom's Legal Max.* 843; 3 *Stark. Ev.* 937; 1 *Greenleaf's Ev.* § 37; 1 *Whart. Am. C. L.* § 722; 3 *Phil. on Ev.* 473, *and cases there cited; Cowp.* 65.

b. The testimony of the wife is placed by the act of 1861 upon the same footing as that of any other witness, with one exception: she cannot testify for or against the husband without his consent. The right to exclude her testimony is a personal privilege with him, and his refusal to offer such evidence naturally leads to the inference that if adduced it would operate unfavorably against him.

The common law disability is removed, and the wife stands in the same relation to her husband, when on trial, as any other witness, except his right to exclude her testimony.

It will be observed that this question grew out of the evidence offered by the defendant. He attempted

to meet the case made by the prosecution by setting up an *alibi*, and for this purpose offered evidence tending to show that at the time of the commission of the offense he was at home, in company with his wife. It further appears that she was present in court. The jury were compelled to pass upon the evidence offered by him. They were entitled to a full and fair showing on his part. If it appeared from his own evidence that he had neglected or refused to call a competent witness who had superior means of information, and was within his reach, and actually in court, it would seem to be contrary to every principle of the law of evidence, and the ordinary rules for the investigation of truth, to exclude that fact from their consideration.

4. The rule at common law which excludes the husband or wife, as a witness for or against the other, was founded partly on the supposed identity of their legal interests, and partly on principles of public policy.— Neither of the reasons for the old rule can aid the case of the plaintiff in error.

The legislature has made a material change, and the true reason of that change, undoubtedly, was to enlarge the field of investigation, and to enable all the facts and circumstances surrounding a criminal case to be submitted to the consideration of the jury.

CAMPBELL J.

Defendant was convicted in the Circuit Court for the county of Lenawee of a charge of larceny, in stealing cattle. The conviction was had upon the testimony of Matthew McEvoy, who swore that he and the defendant committed the crime.

There being testimony tending to show that McEvoy had made contradictory statements on points material to the issue, the defendant asked the court to charge the jury that, if the witness had in any thing material sworn

wilfully and knowingly to that which was false, his whole testimony must be disregarded by the jury. This request was refused, and the court charged in substance that any such falsehood would seriously affect all of the witness's testimony, and that no credit should be given to any fact dependent upon his statements alone; but that where corroborated by proofs or circumstances, it might receive such credit as it might appear to the jury to deserve.

There was no error in allowing the jury, with these cautions, to consider the testimony. There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements; but when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the court, to determine. The duty of the court is to give them such full cautions as will lead them to the intelligent performance of their functions; but if the testimony produces a clear and undoubted conviction in their minds, they may act upon that conviction, whether the evidence comes from an honest or a corrupt source. The court in the case at bar gave them to understand that no statement should be credited, unless rendered probable by circumstances of a corroborating nature. We think the matter was not laid before them erroneously.

Defendant having introduced testimony tending to prove that he was at home at the time when the larceny was said to have been committed, and there being evidence tending to show that his wife was at home at the same time, the court refused to instruct the jury that they had no right to consider the omission of defendant to call her as a witness, nor to allow the omission to prejudice him

in their deliberation, and, on the contrary, instructed them that such neglect might be taken into consideration against him.

There is no doubt that a jury may regard with suspicion a failure of a party to produce testimony which is in his power, and which would throw light upon matters left without other proper evidence. But this rule has never been applied to those cases where the law, on grounds of public policy, has established privileges against being compelled to produce it. It is well settled that where a man avails himself of his privilege, to decline answering questions, no unfavorable inference can be allowed to be drawn from his silence; and in *Carne v. Litchfield*, 2 *Mich.* 340, the refusal of the Circuit Court to prevent counsel from commenting on such a claim of privilege, was held to be sufficient ground for reversing a judgment. Our statute, in changing the common law rule concerning the testimonial incapacities of husband and wife, has not made them competent witnesses for or against each other without restriction, but has prohibited either from testifying without the consent of the other, and from divulging mutual confidences without mutual consent. It is very manifest that the rule which prevents a wife from being compelled to testify against her husband, is based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection, and that this is regarded as more important to the public welfare than that the exigencies of law suits should authorize domestic peace to be disregarded, for the sake of ferreting out some fact not within the knowledge of strangers. If the omission to call a wife upon the stand is to be treated as warranting the conclusion that her testimony would be adverse, then the privilege is entirely destroyed, and she will have to be called at all events. The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect to the better feelings of

humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of a public examination, of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts. The law, in permitting husbands and wives to testify on behalf of each other, can not have contemplated that any moral coercion should enable others to force them into the witness box. Lord Mansfield, in *Blatch v. Archer*, *Cowp.* 63, admitting the general rule that an omission to produce accessible evidence is suspicious, declared that it would have been very improper, without necessity, to call a son in a case where his father was interested, and held that the principle did not apply to such a state of things. Yet a son was always competent for any party. But the relation of husband and wife has always been held as one which should not be exposed to any needless influences which might interfere with the most unreserved confidence and security.

The court should not permit counsel to comment on the failure to produce such a witness, and should not allow the jury to give it any prejudicial weight. In the present case, there was peculiar impropriety in doing so, inasmuch as the testimony, if given, could have been but cumulative. There are no degrees in parol evidence, and there is no rule which requires a fact to be proved by more than one witness, except in case of some peculiar offenses. But the main objection, and the only one urged, rests upon the impropriety of putting such a coercive influence upon parties as to compel them to do what the law leaves optional, and to make it incumbent on them to sacrifice the restraints of delicacy and affection, or stand convicted by a forced implied confession.

The ruling was erroneous, and the judgment must be reversed, and a new trial granted.

The other Justices concurred.

15 415
105 505

William C. Duncan v. Daniel J. Campau and others.

Receiver: Final order. When the appointment of a receiver is sought merely as ancillary to other equitable relief, and does not divest legal rights, an interlocutory order appointing a receiver can not be appealed from.

This case distinguished from *Lewis v. Campau*, 14 *Mich.* 458.

Heard and decided May 15th.

Appeal in Chancery from Wayne Circuit.

This was a bill for partition of the real estate of the late Joseph Campau, deceased.

A receiver was asked for, and the bill also prayed that the administrators of said Campau be enjoined from interfering with the estate; they having acquiesced in the action of several of the heirs attempting to dispose of it among themselves, in fraud of complainant, and having yielded possession.

The court below granted an order appointing a receiver with the usual powers, and from which defendants appealed.

At the hearing of the appeal in this court complainant moved that the appeal be dismissed.

D. C. Holbrook, *Maynard* and *Meddaugh*, and *C. I. Walker*, for complainant.

Levi Bishop and *G. V. N. Lothrop*, for defendants.

MARTIN CH. J.

Said he thought the appeal should be dismissed for the same reasons assigned by him in *Lewis v. Campau*, 14 *Mich.* 458.

CAMPBELL J.

This case differs entirely from *Lewis v. Campau.* I think a legal estate can not be divested by preliminary proceedings. But nothing like that is attempted here. The

receiver is appointed over nothing but the real estate. The bill shows that the administrators have given up possession of it, and they have joined with the other heirs in their attempts to divide it. We have held they were not bound to take possession unless they chose, and I doubt whether they could do so after such acts as are charged. It comes then to the simple inquiry whether a receiver can be appointed over tenants in common. I think the precedents permit this in some cases, and where, as in this case, the other tenants not only deny complainant's title, but have endeavored to entangle the whole title, and are not disposed to account for the rents and profits, there is power to make such appointment. The bill, however defective, is a bill for partition. The receivership is merely incidental and ancillary, and we can not review the discretion of the judge in granting it.

COOLEY J.

Regarded the order appealed from as clearly interlocutory within the former decisions by this court. The order in *Lewis v. Campau* gave the complainant that which his bill prayed for as the end and object of the bill upon that branch of the case; and the decision proceeded on the ground that the relief asked for, so far as the receiver was concerned, was ancillary, not to further relief to be had in that case, but to the proceedings on the probate appeal. The appointment in this case, on the contrary, is only pending the suit, and auxiliary to the principal relief which this bill prays for. Wisely or unwisely, the legislature have not authorized us to review such an order at this stage of the case.

CHRISTIANCY J.

Also concurred, considering the case quite distinct from the one referred to, though he did not think that a failure in the bill to make out a case would make any difference

as to the power of this court to review an order which in its frame and purpose was interlocutory.

The question whether an order is final or interlocutory does not depend upon the question whether it was properly or improperly granted.

Appeal dismissed.

In the matter of Samuel W. Jackson.

Habeas Corpus, where party is detained in another state. Whether a writ of *habeas corpus* will issue from the Supreme Court to a person here, to bring into this state a minor child under guardianship here, and who has been, and continues to be detained in another state, *quære*, the court being equally divided.

Heard April 30th. Decided May 16th.

In the matter of Samuel W. Jackson on petition of George W. Bissell and John Hosmer, guardians, for a writ of *habeas corpus* against Samuel S. Taff.

The petition set forth that the said Samuel W. Jackson was a minor, and that petitioners were his testamentary guardians and entitled to his custody; that the said Taff had caused said minor to be carried out of the state of Michigan and beyond the jurisdiction of the courts of said state, and still continued (through his wife) to keep him out of the state after service of the writ. The respondent moved to quash and set it aside for matters appearing on the face of the petition, and especially, for the reasons that he was in effect charged thereby with a criminal offense and was called to answer thereto; and that it appeared that the said infant had been, since May, 1866, out of this state and beyond the jurisdiction of the court, and had not been restrained of his liberty within the state.

Theodore Romeyn, for the respondent, insisted on these grounds for the dismissal of the writ.

George V. N. Lothrop, with whom was associated D. B. and H. M. Duffield, was heard for the relator and the court overruled the motion and ordered a return.

The respondent then made the following return: "that he has not the said S. W. Jackson in his custody or under his power or restraint, and that he did not have him in his custody or under his power or restraint at the time of the application for this writ, and has not had him at any time since; and he further states that he has at no time transferred the custody or restraint of said S. W. Jackson to any person."

Mr. Lothrop, for the relator, objected to the return as insufficient and moved for a further return.

Mr. Romeyn insisted that the return was sufficient; that it was in the form prescribed by the statute, (2 *Comp. L.* § 5221,) and that it was the intention of the law to allow a general form of return and denial.

Mr. Lothrop insisted that the matters alleged in the petition must be specifically answered.

The majority of the court so held and ordered the respondent to make further answer.

The defendant thereupon made a further return, setting up amongst other things that the said Samuel W. Jackson was taken out of the state by his wife in May, 1866, being before the said writ had been issued, and had never, since that time, been within the state; and that she had been duly appointed the guardian of said Jackson by the Surrogate's Court of Canada, a court of competent jurisdiction in the province of Canada West; and that the child was not, when the writ was applied for, and had not been since, and was not now under the custody or control of the respondent.

To this the relators filed a traverse, denying "that said respondent did not cause said child to be taken out of this state; that the respondent has not since such taking kept said child in the care and charge of his said wife

absent from the state; that said respondent has no control over said child; that respondent does not support his said wife and child beyond the limits of this state, for the purpose of keeping said child from the custody of the petitioners; that the respondent did not have the said child in his custody, or under his power or restraint, when said writ issued; that he has not had said child in his custody, or under his power or restraint, at any time since; and that he did not, at the time of said return, have said child in his custody, or under his power or restraint; these petitioners deny each and singular said averments, as made and alleged in said return, to be true, and they pray the same may be inquired of by this court."

Thereupon, respondent moved to quâsh the writ for want of jurisdiction, upon the case made by the papers.

On the argument, Mr. Romeyn, for the respondent, made the following points:

1. Both at common law and under the statute the writ of *habeas corpus* is confined to the relief of parties detained or restrained within the state. It has no application to a detention beyond the limits of the state.

Such detention is an offense against the realm where it is committed, and the courts of another country can not relieve against it.

2. The removal of the relator from the state, if unlawful, was a crime under its laws (2 *Comp. L.* §§ 5735–5740–1); punishable as such, even as a felony.

The crime against the people of the state was consummated when the child was removed. The further offense of unlawful imprisonment in another country is not to be remedied by this writ, issuing in the name and in behalf of the people of the state; and if the removal from the state was with intent to evade the process of its courts, then such removal was punishable as a contempt.

3. The facts in this case do not show a detention by this respondent.

4. If otherwise, the only relief in the courts of this state must be sought in equity. But,

5. The appointment of the guardian in Canada is a conclusive answer to the ruling sought by the writ, or in any form in our courts.

6. While that guardianship exists the petitioners here should go to the court in Canada and apply there for the surrender of the ward to them.

CAMPBELL J.

The question of jurisdiction presented by this motion is, whether, assuming that Taff, in May, 1866, caused the infant Samuel W. Jackson to be removed from this state, with the design of keeping him from the custody of his guardians, and has since that time been instrumental in having him detained beyond the state, this court has authority by the writ of *habeas corpus* to compel the child, who has been all this time in other territory, to be brought back to Michigan.

If the court has such authority, and if the case set up by the relators should be made out, there can be no difference of opinion as to the propriety of its exercise. The removal is charged to have been made at a time when a decision of this court was to be given, which might, and when it was made actually did, settle the rights of the testamentary guardians to have the child under their control. If the allegations should be sustained, the respondent has been concerned in a very daring violation of law, for which he should be held to a strict account.

The gravity of the charges, and the danger which must arise if such conduct can not be reached, impose upon us the duty of considering with more than common care the question of jurisdiction, where action and refusal to act involve equally serious results.

IN THE MATTER OF SAMUEL W. JACKSON.

Under the Constitution of Michigan the Supreme Court has jurisdiction to issue the writ of *habeas corpus*, and various other original and remedial writs, but in all other cases its authority is merely appellate. *Art.* 6, § 3. It is not doubted that the issuing of a writ of *habeas corpus*, when directed to bring up the body of a person not held under process, is an exercise of original and not of appellate jurisdiction. Inasmuch as the power is given in general terms, it must be held to include any recognized jurisdiction exercised through this writ heretofore, at common law as well as by statute, unless there is some inconsistency in the claim, which has not been pointed out. It is also plain that where the original jurisdiction of the court is the exception, and the appellate jurisdiction is the rule, the former can not be enlarged beyond its existing bounds.

The *habeas corpus* act of this state differs from the original English statute, in not being confined to persons held under charges of crime. Except in certain specified cases, in which the interference would be manifestly improper, the statute allows the writ, where the imprisonment or detention is "*under any pretence whatever.*" But it is also confined in its operation by the same section to persons detained "*within this state.*"—*Comp. L.* § 5210.

It is also easily seen from the statute that the attention of the legislature was directly drawn to cases like the present, where it may be supposed a design exists to evade the law. Section 5252 makes it a criminal misdemeanor to transfer the custody or change the place of confinement, with intent to elude service or avoid the effect of a writ. Section 5255 provides that when it is made to appear that a person is likely to be carried out of the state, a special warrant may issue to take such person, and, if the conduct charged is criminal, to arrest the custodian. But if the case is made

out against the latter, there is no provision authorizing anything to be done with him except to hold him to bail, or commit him in default of bail, to answer the criminal charge.—§ 5258.

The statute, then, furnishes no means for reaching a case like the present; and, according to the usual rules of construction, it is fair to presume the omission was not accidental, but was based upon some adequate reason. And it can not be supposed that the possible existence of some common law application of the writ furnished any such reason, inasmuch as the statute was framed expressly to improve upon the common law, which was alleged to be deficient from the very fact that, by not compelling an immediate return, it gave parties facilities for evading the writ. This is matter of history, and is expressed in the preamble of the English statute.

The territorial statutes are all modeled in their more important features after the act of 31, Charles II. and therefore leave much to the common law. Like that statute, however, they provide expressly for cases where prisoners are sent abroad, and, instead of furnishing means for reclaiming them, only provide actions and penalties for false imprisonment. The revised statutes of 1838 do not in terms confine the operation of the writ to persons detained within the State, but the effect is the same, as the writ is in all cases required to be directed to an officer, who is thereby ordered to take and bring before the court the body of the person detained. Of course, the officer must act within his bailiwick, and the place of the imprisonment is expressly required to be set out in the application. This statute also provides in express terms for evasive transfers and removals, but only applies a specific penalty against the wrong-doer, in favor of the party aggrieved.—*R. S.* 1838, *Part* 3, *Tit.* 4, *Ch.* 3.

Any argument derived from a legislative interpretation of the law in this country would usually deserve

very little weight. The course of legislation is notoriously careless and hasty; but there are certain classes of laws, the history of which enables us to know that they have been the result of the most diligent and exhaustive scrutiny. The *habeas corpus* acts are instances of this kind. The act of 31, Charles II. was, when passed, and has been ever since, regarded as one of the greatest bulwarks of liberty. While only embracing certain kinds of detention, it was certainly intended, so far as it went, to secure to the aggrieved person every possible safeguard which such a writ could obtain. It is not conceivable that it was supposed to leave out any means of redress which had been afforded by the common law. It was framed by the best lawyers and the most determined friends of justice of the age, and it has not been found necessary since, in improving the law, to do anything more than to extend its privileges so as to cover cases of detention other than on criminal charges, and to make some very slight changes of detail in the practice. The American statutes have usually been drawn or modified by revisers, chosen for their peculiar fitness and legal learning, to present laws as perfect as circumstances would permit. The successive enactments in Michigan have been made in the light of the English legislation, and with the aid of the researches and suggestions of the revisers of Massachusetts and New York. It appears from the revisers' notes to *part* 3, *chap.* 9, *title* 1, of the New York statutes, that it was deemed unwise by them to leave anything on so important a subject open to the necessity of recourse to the common law; and they profess to have provided every beneficial security derivable from any source, as well as to have added new ones. They had in view, and provided for, the case of removal from the State. But they suggest no means for bringing the party back.

I have not had access to the report of the Massachusetts Commissioners of 1836. The revised statutes of that state, which we followed in our revision of 1838, contained at the end of the *habeas corpus* act a clause expressly abolishing the writ *de homine replegiando*, which was a writ peculiarly adapted to do justice in cases where the prisoner had been eloigned. But it was found necessary in Massachusetts, in the year 1837 (the next year after the R. S. went into operation), to restore the abrogated remedy under the name of *Personal Replevin*, and to enact, by a new statute, the substance of the common law incidents of the old writ. (*See report of Massachusetts Commissioners in* 1858, *p.* 312.) In Michigan that writ has not been restored; and, if it had not been abolished, it may be questionable whether it would not, like other writs of replevin and private actions, have been confined to the Circuit Courts. And there can be no claim that by abolishing one writ the functions of any other become enlarged, without some legislative enactment.

It will be proper, then, to consider the Act of 31, Charles II. in connection with the authorities, to see whether, as far as it extends, it leaves out any of the safeguards of the common law. The only point on which we need now examine it, is in respect to the persons and places subject to its operation. This is provided for by section 11, which is in these words: "And be it declared and enacted by the authority aforesaid, that a *habeas corpus*, according to the true intent and meaning of this act, may be directed and run into any County Palatine, the Cinque Ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, and the island of Jersey or Guernsey; any laws or usages to the contrary notwithstanding." The 12th section provides

for the case of any inhabitant or resident of the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, who shall be sent prisoner "into *Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be, within or without the dominions of his Majesty, his heirs or successors.*" For this an action is given, which is very safely guarded, and the offending parties are also brought under the pains and penalties of a *præmunire*. It will at once be noticed that this section would be a dead letter if the offenders should not be found within reach of "*any of His Majesty's courts of record,*" whose process could only be served within the realm. Yet the statute makes no mention of the issue of any writ or process to bring back the prisoners.

The islands of Jersey and Guernsey are the only places mentioned in both sections of this act, and they are the only two places concerning which it was doubted whether they formed a part of the realm of England. They originally formed a part of the Duchy of Normandy, and subsequently became a part of the English dominions, but it was said, in *Calvin's case*, that they were not parcel of the realm. 7 *Co.* 21 *A.* And *Lord Coke* says the King's writ does not run there. — 4 *Inst.* 236. *Selden*, on the other hand, says they were a part of the realm. — *Seld. Mar. Clau.* 4, 1351, *cited Comyn's Dig.* "*navigation*," *F.* 3. This question came up again in 1855, before the Court of Exchequer, in a revenue case, where Baron *Alderson* uses this language: "When Calais was under the dominion of the English crown, it was part of the realm of England. Children born there were Englishmen, and could inherit property in England; and a writ of error to the King's Bench would lie on a judgment given there. — 4 *Inst. c.* 68. It is not so with the Channel Islands." — 32 *L. & Eq.* 539 (*Shepherd v. Hills*). It has been generally conceded that the writ of *habeas corpus*

ad subjiciendum, runs from the chancery or King's Bench, as representing the prerogative, into those islands. *Rex v. Overton. Sid.* 386; *Carus Wilson's Case*, 7 *Q. B.* 984. But it is equally clear that writs not prerogative do not run there, and that the proceedings there have no resemblance to those at common law.—*In re Belson*, 3 *L. & Eq.* 49; *Brenan's Case*, 10 *Q. B.* 492; *Carus Wilson's Case*, 7 *Q. B.* 984. In *Brenan's case*, it was said by *Patteson J.* that "the law of Jersey is, in our courts, the law of a foreign country, and to be proved by evidence."—*p.* 497. In this confused state of things, removal of a prisoner into those islands might very well, until recent times, have been regarded as substantially sequestering him from all ordinary means of obtaining his liberty, or redress for its infringement. The other places named, Berwick, the counties Palatine and the Cinque Ports, were all within the realm, and it had been held from early times that the writ of *habeas corpus* would run there.—*Palmer*, 54; *Sid.* 431; *Bourne's Case*, *Cro. Jac.* 543; *Jobson's Case*, *Latch*, 161. In the two cases last cited, reference is made to the fact that the French possessions of the crown were regarded as in the realm, which agrees with the statement of *Alderson* B. before quoted. Scotland, Ireland, and the Isle of Man, although under the same crown, were all then regarded as separate kingdoms. *Com. Dig.* "*Ireland*," *A.*; "*Navigation*" *F.* 2, 3; "*Scotland*" *A.* The Isle of Man has now become annexed directly to the realm of England, and the common law writ of *habeas corpus* probably now runs there, although it has not been expressly decided.—*Crawford's Case*, 13 *Q. B.* 613. For the former condition of affairs, see *Earl of Derby v. Duke of Athol*, 2 *Ves. sen.* 337. The statutory writ now applies to Ireland and the Isle of Man, but has never been extended to Scotland.—*Chitty's note to* 3 *Bl. Com.* 132.

It is universally admitted that there are no precedents for issuing the writ to any of the places mentioned in the twelfth section but Jersey, and that it can in no case

run beyond the dominions of what is technically the crown of England. The only disputes have been as to what countries were crown dominions. In *Rex v. Cowle*, 2 *Burr.* 834, Lord *Mansfield* states the rule, and in some loose *dicta* includes both Ireland and the Isle of Man within the crown dominions, contrary to the settled law. But he states that while there may be an abstract right in the King's Bench to issue the writ to any part of the crown dominions, he never knew the writ to issue to any places out of the realm; although, as he says, cases had arisen where such a writ would have been a very desirable remedy. — *p.* 856.

The question then arises, whether the running of this writ is determined by the situation of the person to be relieved, or by that of the persons concerned in the unlawful detention. Among all the precedents, ancient and modern, which I have been able to find, there is none which does not show the question, as to whether the writ would run into the privileged places, to have arisen concerning an imprisonment there. No point was ever made upon the service of the writ upon the wrong-doer outside of the place of imprisonment, as making any difference. And there can be no doubt that the legal purpose of the writ is to relieve from the illegal restraint, on the ground of its illegality, and on no other ground.* It is not a private remedy in favor of the parent or guardian, or even, except indirectly, of the prisoner himself. It is a prerogative writ, issued on behalf of the King, who is entitled to "*have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, to return the cause with paratum habeo corpus,*" *etc.* — *Bourne's Case, supra.* The exigency of the writ is to bring up the body, and there is no instance in the law where a writ requires any act to be done beyond the jurisdiction which issues it. If there are attachments and penalties, they all refer to some refusal or neglect to do

an act lawfully prescribed; and no one can maintain that if a person, to whom such a writ is directed, should do anything abroad towards complying with it, he could thereby justify himself against conflicting claims asserted in the foreign jurisdiction. A writ must spend itself in the jurisdiction which issues it; and there is no principle which can give one state a right to consider an act, done in another to an individual, as an offense against itself. If a person is unlawfully held in New York, and a person in Michigan is implicated at all, it is as an offender against New York, and not against Michigan. It is a principle of universal application in the criminal law, that the place of the wrong done, and not the place of the wrong-doer, is the *locus delicti.* The kidnapper completes his offense against the state when he removes the victim from its borders. He can no more be responsible to that state for detention abroad than for murder abroad. The private grievance is the subject of a private action. The *habeas corpus*, while practically aiding the prisoner, is professedly for the public grievance. In the cases of *The King v. Reynolds*, 6 *T. R.* 497, and *The King v. Edwards*, 7 *T. R.* 745, it was held that the court would not interfere at the instance of a master to release an apprentice who was old enough to speak for himself, and who made no complaint; because the writ was designed to protect liberty, and not to determine the right of a third person to the custody of the party. And in *Rex v. Delaval*, 3 *Burr.* 1434, this doctrine is very clearly laid down by Lord *Mansfield.* He says: "In cases of writs of *habeas corpus* directed to private persons (to bring up infants), the court is bound *ex debito justitiæ*, to set the infant free from an improper restraint; but they are not bound to deliver them over to anybody, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them."—*p.* 1436. In that case, he refused to deliver the infant to any person, but

discharged her, and left her to go where she pleased. He refers to three decided cases for the same doctrine. And it appears that any unauthorized control, whether kind or unkind, comes within the same principle, and is treated as unlawful imprisonment. Thus, in *Rex v. Johnson*, 2 *Ld. Raym.* 1334, the infant was anxious to remain with her relatives, and reluctant to go to her guardian, yet being too young to judge for herself, the court held the custody wrongful, and allowed the legal guardian to take her. In both of the other cases cited by Lord *Mansfield*, the infant was left to her own choice; and he declares explicitly, "The true rule is, that the court are to judge upon the circumstances of the particular case, and to give their directions accordingly."

While in such cases the guardians are unquestionably entitled to be favored, unless circumstances show convincing reasons to the contrary, yet they can not be considered as parties aggrieved, nor as entitled to control the proceedings on the writ. The infant is the subject of the false imprisonment, and his detention is the grievance which concerns the public, and it can not concern any commonwealth but that where he is restrained. The remedy is *quasi* criminal, and analogous to the proceedings of conservators of the peace. The American cases take the same view of the discretion to be exercised in determining the custody of infants where the detention is unlawful. — *People v. Mercein*, 8 *Paige*, 47; *Com. v. Harrison*, 11 *Mass.* 63; *Com. v. Hamilton*, 6 *Id.* 273; *Com. v. Hammond*, 10 *Pick.* 274; *Com. v. Addicks*, 5 *Binn.* 520; *Com. v. Robinson*, 1 *S. & R.* 353; *State v. Fraser*, *Dudley*, *Ga.* 42.

This question of locality was referred to as furnishing the ground of jurisdiction, by the Supreme Court of the United States, in 21 *How.* 523, in the case of *Ableman v. Booth*, which was the foundation of the ruling of a majority of this court in *Spangler's case.* — 11 *Mich. R.*

298. In this latter case, *Manning J.* concisely explains the object of the writ issued by the State as being "*to release from imprisonment, within its judicial limits, persons entitled to its protection, who are deprived of their liberty without warrant of law.*" — *P.* 309. On page 310, he speaks of the writ again, as designed "*to inquire into the legality of the imprisonment of any person deprived of his liberty within the state.*" And, on page 311, he refers to a person in custody of the United States as being beyond the reach of the state writ, as completely "*as he would be if he were not within the state.*"

These references are chiefly valuable as showing the natural inference which occurs to every one, concerning the rule of locality and the object of interference on *habeas corpus*. The able treatise of Mr. Hurd does not even allude to any question upon the subject. The only case which has been thus far discovered, in which the writ has been made a foundation for reaching persons restrained of freedom beyond the jurisdiction, is that of *United States v. Davis.* — 5 *Cranch C. C. R.* 622. There it does not appear that the application for the writ disclosed the absence of the parties. But, it appearing after the writ issued, that Davis had sent them out of the District of Columbia, he was attached until he produced two of them, the third being under arrest in Maryland. This case is entirely bald of reasons, and the most that can be said in its favor is that the judges probably decided the matter in haste, and looked more to the demerits of the respondent than to any rules of law. The present statutes regulating the power of the courts of the United States to punish contempts could not be legitimately construed to authorize such a proceeding. — *See Act of March* 2, 1831. The facts were such as to make it very desirable to deal with the wrong-doer; and if courts were allowed to devise remedies at their option, there could be no objection to following

the precedent. But it seems difficult to maintain it upon any sound principle.

I have already alluded to the fact that, in the English acts, provision is made for vindicating with great severity cases of removal of prisoners beyond the reach of *habeas corpus*, but none is devised for securing their return. The unrestrained power of Parliament could very easily have made the writ run anywhere into British possessions, except into Scotland, and could have provided compulsory means for putting the offender under such terms as would have made it desirable for him to make efforts to produce the persons restrained of liberty. But the form of the writ does not adapt it to any such indirect purpose, and it was contrary to the common law to disregard the locality of crime as an element of jurisdiction; and every false imprisonment was an indictable misdemeanor, punishable where committed.

But no such provision was necessary to obtain redress for the person aggrieved. The writ *de homine replegiando* was the remedy secured to the party for obtaining his liberty, in those cases where the remedy by *habeas corpus* was inapplicable. We have already seen that it has been restored in Massachusetts as a supplement to that. Under this writ, which was directed to the sheriff of the county where the party was taken or held, if the officer return that the defendant has eloigned the body, the plaintiff may have a capias *in withernam*, to take the defendant's body and hold it until he make return of the plaintiff's body. In such case, as in case of *habeas corpus*, the privilege of peerage can not exempt the defendant from arrest. — *Fitzh. N. B.* 66, 68. And the writ runs, as it would seem, into privileged places, not subject to the ordinary writs — as the Cinque Ports. — *Fitzh. N. B.* 67. The writ is not bailable, and bail can only be allowed by the court. The proceedings in *Designy's case* — *T. Raymond*, 474, (*also reported more at length in Showers'*

R. 225 *to* 232) — exemplify its operation in a case not unlike the present. There a boy had been spirited away to Jamaica. A return of *elongatus* being made on the writ, defendant was arrested upon a *withernam*. The court refused to release him without a payment into court of a thousand pounds, to be forfeited unless the boy was produced. It appears from the report in Shower that security was subsequently accepted in the same amount, conditioned for such production within six months, "death and perils of the sea excepted." The lad was subsequently brought in, and the sureties were discharged. — *See also Vin. Ab. Tit.* "*Homine Replegiando.*"

The remedy by *habeas corpus* is so much more satisfactory, that it is not to be wondered at that the other writ should rarely be resorted to. There are no common law countries where liberty is not protected. It can not often happen that the favorite remedy will not prove adequate. But this will not justify us in substituting it where, by law, it is not appropriate. Under a government of law it would not become the courts to set the example of usurpation. They are not in fault for affording no relief, when the power to grant it has been withheld. It may be worthy of consideration, whether the case does not come within the jurisdiction of equity. But it would be out of place now to make any investigation on that point. If the writ of *habeas corpus* does not lie, we are precluded from any further inquiry.

I have arrived at these conclusions with regret. A criminal complaint does not afford the redress needed. It is true that the obstinacy of a party might prevent any means of obtaining an infant who has been concealed elsewhere. But coercive measures would in most cases be effectual, and I should be glad to believe we could inquire into the merits of this matter. But for the reasons given, I think the writ must be quashed.

MARTIN CH. J. concurred.

IN THE MATTER OF SAMUEL W. JACKSON.

COOLEY J.

I have not yet seen sufficient reason to doubt the power of this court to issue the present writ on the petition which was laid before us. The subject of the petition was a minor of tender years, incapable of judging and acting for himself, whose custody was sought by his legal guardians, and who, according to the petition, had been removed from this state where his residence was, apparently to avoid the process of this court, by a person who was a party to litigation before us respecting the guardianship, and who was still within the jurisdiction. The writ, if issued, would not be for the purpose of releasing the child from custody, but to subject him to the custody of those who had been adjudged by our decision to be lawfully entitled to it; but the case stood upon no different ground than if a citizen *sui juris* had been kidnapped, and removed, or enticed beyond the limits of the state, and was now confined abroad by a person resident here, and within reach of our process. The question nakedly presented, therefore, was whether we had any jurisdiction to relieve from unlawful imprisonment a person confined beyond the limits of the state, but who was one of our citizens, removed wrongfully to evade process, and for the purpose of the unlawful confinement, and whose jailer was here, and might be compelled to open his prison doors by our order, if we have power to make one. It appeared to me at the outset, that we were able to give the proper relief; and examination and reflection have only tended to confirm my first impressions.

It would be strange indeed, if, at this late day, after the eulogiums of six centuries and a half have been expended upon Magna Charta, and rivers of blood shed for its establishment; after its many confirmations, until Coke could declare in his speech on the petition of right that "Magna Charta was such a fellow that he will have no

sovereign," and after the extension of its benefits and securities by the Petition of Right, Bill of Rights and *Habeas Corpus* acts, it should now be discovered that evasion of that great clause for the protection of personal liberty, which is the life and soul of the whole instrument, is so easy as is claimed here. If it is so, it is important that it be determined without delay, that the legislature may apply the proper remedy; as I can not doubt they would, on the subject being brought to their notice. Bounded as we are on two sides by a foreign nation with whom we are liable at any time to have such relations as will not permit us to rely upon the cordial enforcement of the usual rules of inter-state comity, we are peculiarly interested in knowing whether our laws are so defective that one of our own citizens may imprison his fellow across the border, and avow the act with impunity in our courts, while the person thus deprived of his birthright of liberty has no resource but to appeal to the justice of the foreign power, which may or may not feel an interest in his release and protection.

The argument in favor of this position at the bar seemed to be based mainly on two propositions: *First*, That the act of removing the child in the manner charged was a criminal offense, and the person guilty thereof could only be proceeded against for the crime; and, *second*, that the statutory provisions respecting the writ are applicable by their express terms only to the case of confinements within the state.

The first proposition certainly has no force. It would be a monstrous anomaly in the law if to an application by one unlawfully confined, to be restored to his liberty, it could be a sufficient answer that the confinement was a crime, and therefore might be continued indefinitely until the guilty party was tried and punished therefor by the slow process of criminal procedure. If this were so, personal liberty would be better protected by at once repealing all laws which provide such criminal punishment;

leaving the courts to enforce obedience to the writ of *habeas corpus* by the process of attachment, which in most cases is ample for the purpose. In the course of my examinations I have not chanced to meet with this objection in any prior case; and I presume it is raised now for the first time. This is somewhat remarkable, if the objection is well taken. The English statutes contain similar provisions to our own for the punishment of those who evade the writ (*Act* 31, *Car. II.* § 5; *see statute in full, Appendix to Hurd on Hab. Corp. p.* 657, *and Appendix to Lieber, Civil Liberty, etc.*,) and also highly penal provisions for confining persons in prisons beyond the seas (*ibid.* § 12); and it is scarcely possible, if the objection now taken has force, that it should not have been raised before. It would certainly be as applicable to the case of a person removed beyond the limits of the state for confinement as to that of a child eloigned from his guardian; but I can not conceive of any sound reason for it in either case.

If this were an attempt to compel a respondent to answer to facts set forth in a petition which amounted to a criminal offense by him, and he should claim exemption from answer on the ground that it might tend to criminate him, considerations would be presented different from any now before us. Neither at the outset nor since has the respondent claimed his privilege; and he has now answered, as he claims, fully to all the facts. The sole question, then, on this branch of the case, is, whether the fact that respondent may be liable criminally for what he has done precludes our compelling the delivery of the child to his guardians on this writ. Clearly it does not. This writ is given as a speedy and effectual remedy in the cases to which it is applicable; and its object is, not the punishment of the respondent, but to relieve the petitioner from unlawful custody. Usually it does not go further. Whatever may be the rights or liabilities of the parties beyond those which relate to the custody, they are left untouched

by the decision on this writ, and may be enforced by the ordinary remedies. It is no objection to civil prosecutions that criminal proceedings are in progress for the same act—1 *Bish. Cr. L.* § 327, *et seq.*—much less that the party in whose person the state is wronged is seeking to recover his liberty that he may be in position to assert and defend his rights.

The second proposition—that the statutory provisions are confined to the case of imprisonment within the state—seems to me to be based upon a misconception as to the source of our jurisdiction. It was never the case in England that the Court of King's Bench derived its jurisdiction to issue and enforce this writ from the statute. Statutes were not passed to give the right, but to compel the observance of rights which existed. The writ is so ancient that its origin is lost in obscurity, and the *Habeas Corpus Act of* 31, *Car. II.*, introduced no new principle. *Hallam Const. Hist. ch.* 13; *Beeching's case*, 4 *B. & C.* 136; 2 *Kent*, 26—*marg.* Indeed that statute was aimed mainly at judicial and ministerial officers—1 *Chit. Cr. L.* 131; *Kirk's case*, 5 *Mod.* 454—and it provided heavy penalties for failure to observe and perform those duties which the common law, as declared in Magna Charta, enjoined upon them. The act itself was much less broad than the remedy had been before; being confined in its scope to imprisonment for criminal or supposed criminal matters—*Case of Lord Mayor of London*, 3 *Wils.* 198; *Wilson's case*, 7 *Q. B.* 984—and the contest in Parliament nearly a century later, over the attempt to extend its provisions to other cases, was defeated by the memorable opposition of Lord Mansfield, expressly on the ground that it was unnecessary, and that the remedy at the common law was ample.—*Hurd on Hab. Corp.* 102; *Life of Mansfield by Lord Campbell*, 2 *Lives of Chief Justices, chap.* 35; 15 *Hansard's Debates*, 897 *et seq.*

The opposition was disingenuous, and did not satisfy the majority of the House of Commons; but it was effectual for the time, and the attempt was not successfully renewed until 1816. But the answers given by the judges to the questions put to them by the parliament of 1758, and which are fully reported by *Hansard*, show very clearly that the difficulty sought to be remedied was not the want of power, but the disposition to procrastinate and evade the performance of duty. Lord Mansfield himself in the case of *Rex v. Cowle*, *Burr.* 856, decided in the next year after this great debate, and involving the right to issue the writ to Berwick-upon-Tweed, declared that the Court of King's Bench, as representing the Crown, had power to issue the writ, not only to any place within the kingdom of England, but to Ireland, the Isle of Man, the Plantations, and to every other dominion of the crown of England. And, as he said in that case, the question of issuing the writ, where the place was under the subjection of the crown of England, was not one of power, but of propriety. In *Siderfin*, a case is noted where the writ issued to the Governor of Jersey—*Roy v. Overton*, *p.* 386; and a recent case, (*Wilson's case*, 7 *Q. B.* 984, decided in 1845,) to the same island, was very fully considered, though the court would not even take judicial notice of the law which must govern.

The English statute authorized proceedings by warrant to take the body of a party in danger of being removed from the realm; and a like process is authorized by our law. It is of utmost importance, because, where the party restrained of his liberty is removed, the restraining power, except as that may rest in the executive in some cases, is almost invariably removed also. And there was abundant reason for the penal provisions in the English statute against imprisonments beyond the seas, without seeking it in the absence of this specific remedy at home. Those imprisonments were in derogation of common law right, and opposed to the traditional instincts of the English

mind. Declaring them illegal under all circumstances, relieved not only the home courts, but the courts elsewhere of any question that might possibly have been raised on that point. Moreover, such imprisonments would generally be directed by the executive; and — not to speak of any disputed question before — from the time of the accession of the Stuarts, there were always countries over which the King of England was sovereign which did not pertain to the crown of England, and where, although the King had authority, the writs from the King's English courts did not run. Not only, therefore, might those questions of expediency arise to which Lord Mansfield alluded in *Rex v. Cowle*, *Burr.* 856, when the imprisonment was abroad, though within reach of prerogative writs, but there might be other cases which no English writ could reach; and a prudent jealousy of a race of kings of foreign descent and ruling over several realms, would sufficiently account for these provisions. They by no means exclude the idea of other remedy within the realm by resort to this writ in cases where it can be made effectual.

I have spoken of the remedy in the King's Bench, because it is to that our jurisdiction must be likened. It would appear that the jurisdiction of chancery within the realm was also general before the *Habeas Corpus* Act — 2 *Inst.* 55, *a;* 4 *Inst.* 290 — and though it was formerly held that the Common Pleas and Court of Exchequer had jurisdiction only for privileged persons, the contrary was decided in the important case of *Bushell*, who was imprisoned for his verdict acquitting Penn — *Vaughn's Rep.* 135 — and this case was followed in *Wood's case*, 3 *Wils.* 172. When the constitution gave this court jurisdiction of the writ, I think it conferred the same full powers upon the court, as representing the sovereignty of the people, which the court of King's Bench possessed as representing the Crown of England. Our jurisdiction does not depend upon

the statute, and the main purpose of that, here as in England, is to compel the performance of judicial and ministerial duties. Chancellor Kent says — 2 *Kent*, 27 — "The right of deliverance from all unlawful imprisonment, to the full extent of the remedy provided by the *Habeas Corpus* Act (*of* 31, *Ch. II.*), is of common law right." And by this he means, as the context shows, without regard to the cause of imprisonment, so that it be unlawful. The statute does not give the writ, but renders it more effectively and actively remedial. I therefore attach no special importance to the particular wording of the statute where it speaks of the cases in which the writ is to be issued; though I should not concede that, within the words employed, the actual presence of the body of the petitioner within the state was a controlling circumstance. If the statute lacks comprehensiveness, it may be that the same opportunities are afforded for evasions of duty by courts that existed in England before the statute 31, Charles II. but until a disposition to evade duty shall be manifest, it will not be important. The common law jurisdiction is ample. As it came from no statute, it is not confined in its scope to any prescribed limits, but is coextensive with the cases to which its principles can be applied, and in which it can afford a remedy. I am aware of nothing which limits the power of the court upon this writ, but its capacity to give relief in the particular case in accordance with the settled rules which govern this mode of proceeding. I know of no other test that can have determined its jurisdiction at the common law; and while the law holds the right to personal liberty in the same high regard as now, the same test will probably continue to be applied.

The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter.

The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent; and if he fails to obey it, the means to be resorted to for the purposes of compulsion are fine and imprisonment. This is the ordinary mode of affording relief; and if any other means are resorted to, they are only auxiliary to those which are usual. The place of confinement is therefore not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp. The difficulty of affording redress is not increased by the confinement being beyond the limits of the state, except as greater distance may affect it. The important question is, where is the power of control exercised? And I am aware of no other remedy. The writ *de homine replegiando* was repealed in this state in 1838. — *R. S.* 1838, *p.* 521. Long before that, it had fallen into disuse, and the cases are very rare in which it was ever resorted to in this country. Hurd (on *Hab. Corp.* 144), gives as a reason for this, that, though used to attain a similar object with the present writ, it was more limited in its application, and more complicated and slow in its operation. As it has never been the object of our legislation to diminish the safegards of personal liberty, we must presume the legislature repealed this, among other obsolete writs, in the full belief that the writ of *habeas corpus* gave ample remedy in the cases where resort to personal replevin might before have been had. That, certainly, was the view of Chancellor Kent when he spoke of the present writ as the "easy, prompt, and efficient remedy afforded *for all unlawful imprisonment.*" — 2 *Kent's Com.* 32.

What I say on this subject is carefully restricted to the case of a citizen of our own state unlawfully held in custody elsewhere by another person, who is himself within

the jurisdiction of this court. If he is here, the wrong is being done here; for the wrong is done wherever the power of control is exercised. There is no inherent difficulty in the case; and the court of chancery, in the exercise of its power to compel specific performance, frequently exerts an authority over a subject matter in a foreign jurisdiction similar to that which is sought for here. I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis*, 5 *Cranch. C. C.* 622, is in point, and will warrant it. There are no conflicting decisions. The incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state, seem to me of no significance. In none of those cases was attention directed to this particular point; and I have already indicated my opinion that imprisonment, within the meaning of the law, may be held to be wherever the person is who imprisons. This writ is based upon no technical reasons, but its scope is as broad as its power to give redress.

It remains to be seen how the case is affected by the subsequent pleadings.

The motion to dismiss, when renewed, was in the nature of a demurrer to the traverse of respondent's answer. The answer denied, with considerable particularity, the principal facts set out in the petition; averred the child to be in Canada, in the custody of respondent's wife, who refused to submit to respondent's control, and declared her purpose of remaining abroad, with a view to retaining the child's custody. The answer also averred that on application to a court of competent jurisdiction in Canada, the wife had been appointed the child's guardian, and now held and controlled it under that appointment; and that the child was in no degree under the power, custody or control of the respondent. This last averment of the answer, as well as the respondent's denial

that the child was originally removed from the State by his means, are put in issue by the answer.

I am constrained to say that, in my opinion, the traverse does not cover the ground of the answer. It is not denied that the wife has procured herself to be appointed guardian of the child abroad, and that she now assumes to hold it under that appointment. This fact is an element in the case which cannot be overlooked, and which quite distinguishes it from the simple case of a detention by a person here by means of an agent abroad. Leaving out of view all those delicate questions which might arise as to compelling the delivery up of the child by the wife against her will, through the coercion of the husband, and coming directly to the point which alone we must consider now, whether the coercion can be applied when it already appears that the wife is acting as guardian under an appointment which we must assume to be good in form, and recognized there as valid, I am unable to see upon what ground we could base our justification in issuing compulsory process against the husband.

The fact that he originally connived at and assisted in removing the child, is not important now, unless it is still within his control. This is not the proper proceeding in which to punish him for that act, except by way of compelling him to deliver the child to the proper custody, if he now has the power to do so. If the child is held in a foreign jurisdiction by one appointed his guardian there, the respondent has legally no such power as is claimed, even though the person having the custody may have been his agent, and, as such, procured the appointment. The agency does not enter into the guardianship. The law there will know nothing of such an agency, and will refuse to recognize it. The custody has ceased to be that of the individual, and has become that of the agent of the law. That law is the foreign law; and we must come directly in conflict with it, if we exercise jurisdiction on

the facts here shown. The case, as it would stand in Canada, would be that of a guardian appointed by its courts over a minor within its jurisdiction, coerced indirectly by a foreign court to remove the child abroad, and there deliver it to custodians whose authority would not be recognized in Canada while the present appointment stands. It would be an indirect assumption of jurisdiction by the court in Michigan over the appointment made in Canada, even to the extent of reversing that action. I know of no precedent for such a course, and a due regard to inter-state comity should incline us to forbear.

It is quite probable that the appointment in Canada was made in ignorance of the real facts of the case. I can not doubt if these were fully presented, the court there would revoke its action, and cause the child to be delivered to the testamentary guardians. In my opinion, that court is the tribunal to appeal to under the facts disclosed by the pleadings.

CHRISTIANCY J. concurred.

The Justices all concurring that the proceedings should be dismissed, it was ordered accordingly.

NOTE.—On page 427, 6th line from the bottom, after the word "writ," insert the word *but*.

Alexander R. Linn and another v. James Roberts.

15 443
137 640

Certiorari: Weight of evidence. The Supreme Court will not review a case, on the weight of evidence on certiorari.—*Hyde v. Nelson*, 11 *Mich.* 353.

Power of Commissioner to impose costs. The statute empowers the commissioner to impose costs upon the defeated party.—*Comp. L.* 4776.

Heard May 16th. Decided May 21st.

Certiorari to T. K. Gillett, a Circuit Court Commissioner of Wayne county.

LINN v. ROBERTS.

This writ was sued out for the purpose of reviewing the proceedings of the Commissioner on a motion to dissolve an attachment.

The facts are stated in the opinion.

Geo. A. Wilcox and *G. V. N. Lothrop*, for plaintiff.

1. This court will examine into the evidence on certiorari to "determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved."—9 *Mich.* 111; 10 *Id.* 9; 11 *Id.* 353.

2. The statute, authorizing proceedings before a commissioner for dissolution of attachment, provides that "if said judge or commissioner shall be satisfied that such plaintiff has not a good and legal cause for suing out said writ, the said judge or commissioner may order such attachment to be dissolved, etc.—*Comp. L.* 4775.

This provision clearly limits the inquiry of the commissioner to the grounds for suing out the writ, and he has no jurisdiction to dissolve an attachment which is legally sued out. In other words, if the plaintiff has a "good and legal cause" for commencing his action by attachment, this right of attachment can not afterward be taken from him by a proceeding before the commissioner.

3. The commissioner exceeded his jurisdiction in imposing costs against plaintiffs.—10 *Mich.* 9; 2 *Tidd's Prac.* 1179.

C. Hunt, for defendant.

The record fully discloses the fact that there is no question of law raised; and the office of a certiorari is not to review questions of fact, but questions of law.—3 *Mich.* 612; 5 *Id.* 532; 8 *Id.* 424; 9 *Id.* 111; 10 *Id.* 9; 27 *Ill.* 141.

The statute, *Comp. L.* 1275, gives jurisdiction of parties and subject matter to the commissioner, and the record

shows that the proceedings were regular; evidence was introduced on both sides; no question of law was raised, and we therefore insist that no question is presented, upon which this court can pass, and the writ should be dismissed.

COOLEY J.

The plaintiffs being creditors of defendant to the amount of $310, attached his stock of goods at No. 156 Gratiot street, Detroit, January 15, 1867, on the alleged ground that he had assigned or was about to assign his property with intent to defraud his creditors. On application by the defendant to a Circuit Court Commissioner, the attachment was dissolved, after a hearing on the merits. The question before us is, whether there was any evidence before the commissioner to warrant the dissolution.

It appeared that the Linns commenced dealing with defendant May 1, 1865, when he was doing business at 99 Gratiot street, and that he made purchases and payments from time to time until September 24, 1866, when he sold out his stock at that place. On the first of the preceding January he owed them $281.77, which was afterwards paid in small sums. June 1, 1866, defendant put a mortgage for $1,000 on his stock of goods, payable to one Hill on the 16th of September following; and when this time expired he put another on record for the same amount, also payable to Hill, and due August 1, 1867.

These mortgages were unquestionably mere covers for defendant's property, and no attempt is made to excuse the giving of them.

Defendant went into business where he now is, in November, 1866, and plaintiffs continued to deal with him there, and, according to some of the testimony, pressed goods upon him when he was not anxious for

them. They knew he had sold out his old stock, but had no actual knowledge of the fraudulent mortgages which had been upon it. He gave no incumbrance upon the new stock, and if his testimony is believed, it shows that he is able to pay all his debts and have a surplus. When plaintiffs began to press for payment, he paid small sums from time to time, but not, as would seem, to the satisfaction of the plaintiffs, who at length offered to take their pay in goods. Their testimony tends to show that at first he agreed to pay in this way, but afterwards refused. They then sued out an attachment.

If the plaintiff's debt had existed before the sale of defendant's stock, at 99 Gratiot street, and they had ceased to deal with him at that time, we should not hesitate to say that a case for an attachment had been made in their behalf which remained entirely unexplained by defendant's testimony. The two mortgages, so far as the testimony in this case shows, were unquestionably fraudulent as to his creditors, and were such a disposition of his property as would warrant this proceeding. It could hardly be held, however, that they were necessarily fraudulent as to one who, with full knowledge of their existence, should afterwards become his creditors. But it appears in this case that the plaintiffs continued their dealings with defendant, and contracted the present demand after he had disposed of his whole interest in the goods which had been mortgaged, and when, of course, they could not have relied at all upon that property for their payment. His sale was a more complete disposition of his interest in the property than the mortgages were; and if their mutual dealings still continued with knowledge of that fact, it can hardly be said that an unquestionable case of intent to defraud them is made out by the mortgages alone. The fraudulent intent existing at one time, may not continue

indefinitely, and some weight is to be given to the acts of the creditors themselves, so far as they have continued to repose confidence with knowledge of the facts.

The subsequent evidences of intent to defraud were not strong, and a case was fairly presented of conflicting evidence for the commissioner to act upon. We have heretofore decided that we can not review a case upon the weight of evidence on certiorari. — *Hyde v. Nelson*, 11 *Mich.* 353.

The statute empowers the Commissioner to impose costs upon the defeated party. — *Comp. L.* § 4776.

There is, therefore, no error of law which we can review, and the proceedings must be affirmed.

The other Justices concurred.

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69 284
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83 122
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92 365
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94 235
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110 500
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111 216

James W. Tillman and others v. Emily Shackleton.

Married Women: Power to contract in relation to sole property. Where a married woman keeps a boarding house with the consent of her husband, and controls the entire business, contracts of purchase made by her for the purpose of such business, must be considered as contracts in relation to her sole property, and therefore binding upon her.

Whether her power to contract for property is limited to cases resting on similar principles *quaere:* COOLEY and CAMPBELL, JJ. holding it to be general; CHRISTIANCY J. regarding it as limited by the circumstances, and MARTIN, Ch. J. dissenting.

Heard May 16th. Decided May 21st.

Error to Wayne Circuit.

This was an action of assumpsit brought against defendant in error — a married woman who was engaged in keeping a boarding house — for certain furniture purchased by her, for said business.

Judgment was rendered for plaintiff.

The facts are stated in the opinions.

C. J. O'Flynn and *G. V. N. Lothrop*, for plaintiff in error.

1. The defendant purchased the property *in her own name*, for herself, and not for her husband, or as his agent. Section 1, of the act of 1855. — *Comp. L.* § 3292 allows her to acquire property, both real and personal, "by gift, grant, inheritance, devise, or in any other manner." The term *grant*, is comprehensive enough to embrace a purchase of personal property — 44 *Barb.* 374; 27 *N. Y.* 277; 33 *Id.* 518.

If it is not, the clause *in any other manner*, certainly is.

a. The furniture can in no sense be considered as a part of the earnings of the boarding house. Had it been paid for by money received from the boarders, the case might be different. The only question then, before the court, is, whether a married woman can become the owner of personal property by purchasing the same in her own name or credit?

b. It is to be presumed from the evidence in the case, that defendant carried on the boarding house with the consent of her husband. Is there anything to prevent a husband from giving his wife her time and earnings? He can give her anything of value which he owns, and no one has a right to object but a creditor. There is no objecting creditor in this case.

2. If the furniture became the sole property of defendant, then an action is maintainable against her for the purchase money. — *Comp. L.* § 3294.

An action for the purchase price of a thing, is certainly an action in relation to it.

Even if the furniture did not become the sole property of defendant, nevertheless, she is liable personally for the contract price.

Under section 4 of the act of 1855, as amended by the act of 1857, — *Comp. L.* § 3295 — a married woman is

liable to be sued upon any contract made by her, in cases where her husband is not in law liable. The husband is certainly not liable in this case. The furniture was not sold to, or purchased by defendant, as the wife, or as the agent of her husband, but was purchased by, and sold to her, *individually*, and upon *her sole credit.* — 3 *Campb.* 22; 5 *Taunt.* 356; 2 *Hill, S. Car.* 335; 1 *Car. & P.* 16; *Story on Agency.* § 447.

Under the original act of 1855, the wife was, undoubtedly, only liable to be sued upon contracts in relation to her sole property. The amendment of 1857, however, has clearly made her liable in all cases where her husband is not liable. We submit, that the court did not intend to decide this point formally, in Glover *v.* Alcott.

J. Caplis and *F. H. Canfield,* for defendant in error.

The only question presented to this court is, whether the contract sued upon is a valid one, and upon which the defendant in error is personally liable.

We insist that it is not. At common law, there is no doubt that such a contract by a *feme covert* would be wholly void

The statute of this state has, to a certain extent, modified the common law. — 2 *Comp. L. pp.* 966, 967.

But it has not invested the *feme covert* with an unlimited power of contracting in her own name, or to the extent claimed by plaintiff in error in the present action.

By section 1 of this act, it is provided that all the property of every married woman, howsoever or whensoever acquired, shall be and remain her own estate; that the same shall not be liable for her husband's debts, and that it may be contracted, encumbered and conveyed by her in the same manner, and with like effect, as if she were unmarried.

Section 3 provides for the bringing of suits by and against married women in relation to their own separate

property, "and also in cases where the property of the husband can not be sold, mortgaged or otherwise encumbered, without the consent of the wife, to be given in the manner prescribed by law, or when his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property, as aforesaid."

Section 4 exempts the husband from liability upon any contracts made by the wife in relation to her sole property.

This action can not be maintained under any of the sections alluded to, which relate simply to the separate property of *femes covert*, for the following reasons:

First. The power of a married woman to bind herself by contract exists only where she has, at the time of making the same, separate property in her own right.

Second. There is no proof that the defendant in error had any property at the time the contract was made, in relation to which she could contract. The contract was therefore void *ab initio*, and cannot be enforced. Nothing has since transpired to give it validity.

Third. The property purchased under the alleged contract sued upon, became the property of the husband. He, therefore, is alone liable for its payment. — 17 *Iowa*, 393; 42 *N. H.* 381; 36 *Penn.* 410; 38 *Id.* 279; 21 *Id.* 349; 3 *E. D. Smith*, 310; 5 *Wis.* 253; 5 *Duer*, 477; 3 *Law Register*, 229; 21 *Barb.* 546, 551; 38 *Id.* 27; 4 *Duer*, 96; 35 *Maine*, 332; 11 *Mich.* 470; 18 *N. Y.* 272.

The presumption of the law on the facts of this case is, that the defendant acted merely as the agent of her husband. The property was brought to his house, was received by him, and he has enjoyed the use of it. He must have known of the purchase at the time it was made, and will be presumed to have assented to and ratified it. The following authorities support fully the proposition: —

Chitty on Cont. 166, 161; *Story on Agency*, §§ 160, 161, 270, *note* 3; *Parsons on Cont.* 288; 6 *N. H.* 124; 15 *Conn.* 357.

This suit can not, therefore, be maintained, by virtue of section 3 of the acts upon which the plaintiffs in error rely.

This action can not be maintained by virtue of the provisions of section 4. This section, it is contended, provides for three cases in which suits may be maintained against a married woman.

First. Upon contracts made by her in relation to her sole property.

Second. Upon contracts where her husband is not in law liable.

Third. Where he refuses to perform such contracts.

The most liberal construction of this section will not warrant the conclusion that the defendant in error is liable upon the contract sued upon. We have already shown that it is not a contract in relation to her sole property. And in the absence of proof that the contract was in relation to her sole property, the law will presume that she acted simply as the agent of her husband. He is liable upon the contract, and there is no proof that he ever refused to perform it.

This court can not maintain this action without violating the well established rule of construction, that statutes in derogation of the common law must be strictly construed. — 2 *Mich.* 486; 3 *Id.* 309; 4 *Id.* 332; 21 *Barb.* 558.

The object of the statute was the protection of married women in the enjoyment of their own property, and the protection of creditors upon contracts made with them in relation to such property. It was not intended to repeal all the restrictions imposed by the common law upon the power of *femes covert* to do business on their own account. But such will be its effect if the construction contended for by the plaintiffs be correct. If the defendant in error was capable of making the contract in this

cause, then there is no contract, not in itself void, which a married woman can not legally make, and no commercial enterprise in which she may not engage.

We submit that the judgment of the Circuit Court should be affirmed.

CHRISTIANCY J.

This suit was originally brought by the plaintiffs in error against the defendant in error in a Justice's court, to recover the price of certain furniture sold to the defendant. The Justice rendered judgment for the plaintiffs for two hundred and twenty dollars and costs.

The defendant removed the cause to the Circuit Court by certiorari, where the judgment of the Justice was reversed, and the original plaintiffs have brought the cause to this court by writ of error to reverse the judgment of the Circuit Court.

It appears by the return of the Justice to the certiorari, that on the trial of the cause before him, it was admitted by the parties that the plaintiffs in that suit "sold, and the defendant purchased in her own name, certain furniture of the value of two hundred and twenty dollars; that at the time of said sale and purchase the defendant was a married woman, living with her husband, in a house in Detroit, which was kept as a boarding house; that she had the sole control and management of the house, and received the pay of the boarders; that the furniture, to recover the value of which this suit was brought, was purchased by her for said boarding house, and that it was used for such purpose, and that her said husband had nothing to do with the management of said boarding house, and received none of the profits arising therefrom."

If this evidence fairly tends to show a state of facts which would warrant the judgment rendered by the Justice, then it could not properly be reversed on certiorari,

though the Circuit Court or this Court were of a different opinion upon the weight of the evidence.

We think the evidence clearly tended to show: 1st, That the wife was carrying on the business of keeping a boarding house exclusively on her own account, with the consent of the husband; that she was the sole proprietor of the business and of the property necessarily incident to it, such as the supplies, and the money received for board, and that the husband had in fact no control or management of the business; and 2d, That the sale of the furniture was made to her on her own credit, and not upon that of the husband, and that it was purchased for and used in that separate business. Such we think the Justice was well authorized to find from the evidence to be the state of facts; and, if at liberty to weigh the evidence, we could not find otherwise. To render the husband liable at all, even at common law, for this furniture, the sale must have been made in some way upon his credit, whereas it appears to have been made upon the sole credit of the wife. — *Metcalf v. Shaw*, 3 *Campb.* 22; *Bently v. Griffin*, 5 *Taunt.* 356; *Legget v. Reed*, 1 *C. and P.* 16; *Stammers v. Macomb*, 2 *Wend.* 454; *Shelton v. Pendleton*, 18 *Ct.* 417; This furniture does not appear to come within the range of ordinary necessaries for the use of the family, nor does it appear that the goods came to the use of the husband — (if either of these facts would render him liable when the credit was not given to him.)

The question of the wife's liability, however, depends upon our statute in reference to married women. *Act of* 1855, *as amended in* 1857. — *See Comp. L.* § 3292 *to* 3295.

By the first section of this act all the property, real and personal, to which the wife "may become entitled by gift, grant, inheritance, devise *or in any other manner*, shall be and remain her estate and property, and shall not be liable for the debts, obligations and engagements of

her husband, and 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."

By the second section, any person who may hold any property, real or personal, as a trustee for any married woman, may convey to her all or any of the property, or the rents, issues and profits thereof, for her sole and separate use and benefit.

By the third section, actions may be brought by and against her in relation to her sole property, "in the same manner as if she were unmarried." This section would doubtless, of itself in connection with the first, without the aid of the fourth section, render valid her contracts in reference to her sole property already acquired.

But, by the fourth section, it is provided that the husband of any married woman shall not be liable to be sued upon any contract made by such married woman in relation to her sole property, and the wife shall be liable to be sued upon any contract or engagement made by her in cases where her husband is not in law liable, or where he refuses to perform such contract or engagement. Whether this section renders the wife competent to make any contract having no relation to her sole property, is a question which I do not think necessarily involved in the present case, because I think the facts admitted clearly tended to show, not only that the wife was the sole proprietor of the business of keeping the boarding house (which, of itself, may be regarded as coming fairly within the equity and spirit of the statute as a sole property), but that she also had the sole property, at least in the income of the business; and this furniture being purchased by her upon her own credit, and not that of the husband, for the benefit of, and to be used in carrying on that business, she had

full power to bind herself by the contract of purchase; and that such contract, as well as the action upon it, was "in relation to her sole property," unless it shall be found that she had no power to carry on the business in question on her separate and individual account, and that the business and the property incident and necessary to its prosecution must have vested in the husband.

We have already held that a husband may, under this statute, convey land by deed directly to his wife; and where there are no conflicting claims of the husband's creditors involved, and it is not done for the purpose of shielding his property from his creditors, we can see no legal objection to her acquiring any amount of property directly from the husband, and holding it as her sole property.

And as to the right of the wife to carry on a separate business, upon her own means and credit — while a majority of the court in *Glover v. Alcott*, 11 *Mich.* 471, (where the question was one of fraudulent concealment of the husband's property to defraud creditors,) held that the wife could not carry on upon credit the general trade or business of a flouring mill, buying wheat and manufacturing and selling flour, the proper attention to which would require all her time and services, and render her incompetent to attend to the duties of her household — yet in that case it was intimated that it was not intended to include within the rule there laid down "any business usually carried on by females, and which consists largely, and almost necessarily of female labor, such for example as that of a milliner." The present is a case which comes clearly within the exception there intimated — a case in which the wife, almost of necessity, becomes practically the head and manager of the business. And we can see no legal objection where the husband assents, to her carrying on the business of keeping a boarding house as her own separate business, and upon her own account, either upon

cash or credit; and we think, under the facts of this case, she must be held competent to make the contract of purchase for the furniture purchased for, and used in her separate business.

The husband's rights are not injured by it. He is in no respect bound by her contract, when the credit is not given to him, and satisfaction of her personal liability can only be enforced against her sole property. We think her contract of purchase comes within the fourth section of the act, and that the judgment of the Circuit Court should be reversed and that of the justice affirmed, with costs.

COOLEY J.

I agree with my brother, Christiancy, that the defendant was liable for the purchase, under the circumstances, appearing in this case, and that the judgment of the Circuit Court should be reversed. I do not place my concurrence, however, on the peculiar nature of the business for which the purchase was made, or regard her contract as depending for its validity on the question whether the defendant was previously possessed of any sole property. There was never any impediment to the acquisition of property through purchase by a married woman: the difficulty was, that at the common law the ownership passed immediately to the husband by virtue of the marriage relation. The statute — *Comp. L.* § 3292 — establishes a new rule, by providing that the property, however acquired, shall be and remain the sole property of the wife, with the same power of control as if she were unmarried. Another section (3295) provides that the husband shall not be liable to be sued upon any contract made by her in relation to her sole property, but that the wife shall be; and I think a contract of purchase is within this section whether she had property before or not. The contract is for the acquisition of sole property; and her title to it, or at least a right in relation to it, vests when the contract is made.

There is, therefore, no straining of terms in saying that the contract has relation to her sole property. The statutes on this subject establish a new system, and are to be construed with a view to give them the effect designed by the legislature, rather than with an effort to retain as much as possible of an old system which they were meant to displace. The rule which they establish is one of general capacity to own property, and to make valid contracts, binding at law and in equity, in relation to it; and I discover nothing in the statute which so limits that capacity as to prevent her making the first acquisition any more than any subsequent one, on credit. Although it was once held (*Brown v. Fifield*, 4 *Mich.* 322) that even the constitutional provision on this subject was to receive a strict construction, because contravening the common law, the subsequent decisions have been based on a different principle, and justly, as I think, have recognized the change designed to be made as quite radical in its nature. And I should be unwilling to lay down any rule which should seem to put upon the wife's power to make contracts on her own behalf, any limitations based upon a strict or technical construction of the statute.

While, therefore, I agree fully with the opinion of my brother, Christiancy, I do not base my judgment exclusively upon the views which he has presented, but should think the action sustainable notwithstanding some of the circumstances upon which he remarks, were absent from the case.

CAMPBELL J. concurred.

MARTIN CH. J.

I do not concur with my brethren. I can not hold that a wife, living in her husband's home with him, can be made liable for necessary household obligations.

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Detroit and Milwaukee R. W. Co. v. Chas. E. Adams and others.

Common carrier: Effect of special notice, after acceptance of goods. A portion of a certain quantity of wool was delivered to the D. and M. R. R. Co., by the owner, and received by their agent for transportation, with the understanding that the balance should be sent to their depot as soon as they should give notice that they had cars to ship it.

The company having notified the owner, the balance of the wool was delivered to and accepted by them, whereupon the owner signed a shipping request, furnished to him, to the effect that said company would forward all of said wool, according to certain special conditions endorsed thereon, and limiting said company's liability.

Suit being brought for the value of a part of said wool, which it appeared was lost before the balance was shipped, it was held, that whatever might have been the effect of such a notice, if given before the delivery of the property at the depot, it came too late to affect the question of a prior delivery to, and acceptance by the company as a common carrier. At the time of the receipt of the notice, plaintiffs had a right to consider it as intended to refer only to the liability of the company in respect to the carriage of the property.

Heard May 18th. Decided May 21st.

Error to Oakland Circuit.

This action was brought against plaintiffs in error to recover the value of one sack of wool alleged to have been delivered to them, as carriers, for transportation.

Judgment was rendered in the court below for plaintiff (defendant in error).

The facts are stated in the opinion.

Geo. Jerome, H. H. Emmons and *Geo. W. Swift*, for plaintiffs in error.

Until the shipping request was sent and directions were given to ship the wool, it being retained at the request of the plaintiffs, the company did not assume the liability of common carriers.—4 *Allen* 520; 5 *Mich.* 420; 7 *Id.* 515; 2 *Pars. on Cont.* (*5th Ed.*) 179; *Angell on Carriers.* § 134; *Edwards on Bailm.* 448; *Parson's Mercantile Law*, 203; *Story on Bailm.* §§ 533, 537.

If the plaintiffs seek to hold the defendants as carriers, it is for them to show that they had the missing sack in their possession in that capacity. Now the evidence not only does not prove this, but renders it extremely probable that that sack, if it ever was at the depot at all, had disappeared before the liability of the defendants as common carriers commenced.

While the plaintiffs, by permission of the defendants' agent, were using a place in the depot for weighing and marking their wool, having full possession for that purpose, it is difficult to understand how the defendants were liable for wool in any capacity. The plaintiffs occupied a part of the depot for their own convenience, and the wool was no more in possession of the defendants than if they had leased the same part of the depot to the plaintiffs.

The plaintiffs do not show that the missing sack was ever delivered to the defendants in any capacity, inasmuch as it is just as consistent with the testimony, and far more probable, that it was taken away while their draymen were drawing wool to the depot, and they were weighing and marking it, as at any time afterwards.

The defendants, up to the time when the shipping request was sent to the depot, if liable at all, were only liable as gratuitous bailors. — 7 *Mich.* 515; *Edwards on Bailm.* 47; *Story on Bailm.* 41.

As such they were only liable for gross negligence. *Story on Bailm.* §§ 62, 67; *Edwards on Bailm.* 47; 2 *Pars. on Cont.* (*5th Ed.*) 89; 17 *Mass.* 500; 38 *Me.* 55.

M. E. Crofoot, for defendant in error.

1. The railroad company is liable, as a common carrier, for the bale of wool.

The company received it into its warehouse, for shipment, in the ordinary course of business; and the delay

in shipping was for its own convenience, so as to obtain cars to ship with.

The full directions were marked on the sacks, and its agent says he did not know to whom wool was consigned, except from marks on bales, until the shipping request came.

CHRISTIANCY J.

This was an action brought by defendants in error against the company, in a justice's court, to recover the value of one sack of wool, alleged to have been delivered to them as common carriers, for transportation.

The justice found the defendants below liable for the wool as common carriers. The proof of the loss was clear and uncontradicted, and that it occurred before the balance of the wool (of which it was a part) was shipped from the depot of the defendants.

And if there was evidence before the justice tending to show that the wool was delivered to, and accepted by the company as common carriers, then the finding of the justice must be held conclusive, though the case should be such that we, if allowed to weigh the evidence, might have arrived at a different conclusion — unless, indeed, it should appear that admitting the truth of the evidence, the plaintiffs, for some reason, had no right to rely upon it, or admitted upon the trial some fact, or state of facts, which would clearly defeat or avoid such tendency. Was there, then, any evidence in this case tending to show that this sack of wool was delivered to, and accepted by the company as common carriers?

It was shown, and not disputed, that the general business of the company was that of common carriers of goods and passengers for hire or reward; that they kept a building or depot in Pontiac for the reception of property for transportion over their road, and for the delivery of property coming to that place upon their road. There

was evidence that the plaintiffs sent one hundred and two packages of wool to this depot, at different times between the 15th and 25th of October. (On which particular day the package subsequently lost was sent, did not clearly appear). That this wool was sent to the defendants' depot for the purpose of transportation over their road, consigned to H. Hollister, Hartford, Ct., which was plainly marked upon the packages, and that the freight agent in charge of the depot was notified of the purpose for which it was sent there, and of the wish of the plaintiffs that the whole might be sent off together. That the agent told the plaintiffs where to leave the wool, and pointed out the place in the depot where it should be put, and defendants' men assisted in unloading the wool and putting it in. That after part of the wool had been thus delivered, the agent saying he could not then get cars to send it all together, it was agreed that plaintiffs should not send up the balance, until notified by the agent that he could ship it, as he said they were considerably filled up then in the depot with produce; that in a few days after, and about the 24th or 25th of October, having received notice from the agent of his readiness to ship, the balance was sent to the depot. Part of the wool was shipped on the 26th of October, and part on the third of November, but the sack in question was not shipped, and could not be found.

We think this evidence tended strongly to show the delivery to, and acceptance by the defendants as carriers; that it was thus delivered and accepted as it came, and was placed in the depot, and that the delay in the shipment was for the convenience of the company, till the necessary cars could be got ready. But it is insisted by the company that the effect of this evidence was entirely destroyed by a notice to plaintiffs that the company would not be responsible, except upon certain conditions, presently to be mentioned.

The only proof of such notice, and of the time and manner in which it is claimed to have been brought home

to the plaintiffs, is this: After the defendant's agent had given the notice that he was ready to ship, and the balance of the wool had been brought to the depot, the plaintiffs signed a shipping request in the following words:

"The Detroit and Milwaukee Railroad Company will please receive the undermentioned property, addressed to H. Hollister, Hartford, Ct., and transport over its line, subject to its tariff, and forward under condition stated on the other side.

"102 sacks wool. 20,300 lbs.

"H. HOLLISTER, Hartford, Ct."

(Signed by plaintiffs.)

The printed form was furnished by the company, and the blanks filled by the plaintiffs. On the opposite side of the same sheet, under the head of "GENERAL NOTICES AND CONDITIONS OF CARRIAGE," was, among others, the following printed notice:

"That they will not be responsible for any article or articles conveyed upon their railroad, unless the same be signed for as received by a duly authorized agent, and a declaration or shipping note upon the regular printed form, as provided, presented to the agent, setting forth the description of the goods, and the parties to whom they are to be delivered. And when goods are intended, after being conveyed by this railroad, to be forwarded by some other company or conveyance to their final destination, the duplicate receipt furnished by the consignor must specify the same, and the articles marked accordingly."

Whatever might have been the effect of this notice, if given in this manner before the property was delivered at the depot, it certainly came too late to affect the question of a prior delivery to and acceptance by the company, as carriers, or their liability for its safe keeping, while awaiting transportation. At this stage of the transaction, if the property had already been accepted by them as carriers, the plaintiffs had a right to treat the notice as only intended to affect the liability of the company in respect to the *carriage* of the property; if, in fact, it could have

been construed as anything more than this, if given before the property was received in the depot.

The judgment of the Circuit Court, affirming that of the justice, must be affirmed, with costs to defendants in error, in the circuit and in this court.

COOLEY J. and MARTIN Ch. J. concurred.

CAMPBELL J. did not sit.

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The People v. Matthew H. Maynard.

Washington County invalid. The organization of Washington county out of part of Marquette county, held invalid.

County organization, what requisite. An act purporting to organize a new county out of territory detached from an old one, but which contains no organized townships, and makes provision for none, is inoperative and void; as without such townships there can be no legal elections, and no means of organizing.

Such an act is not made effective by the subsequent passage of an act organizing a single township in the new territory, leaving the remainder not provided for.

A county can not be organized without the means of exercising all its necessary functions, and requires more than one organized township, as the board of supervisors can not exist without more than one member, and there can be no county without such a board.

Where townships have become organized under a statute and have acted for many years, and have been recognized by the various state and local authorities, it is too late to inquire into the validity of the law providing for their original creation, and their corporate existence can not be questioned.

The legislature can not lawfully deprive qualified voters of a county of their right of suffrage, by organizing townships in only a portion of it; leaving the remainder unorganized.

The division of a single county attached to an existing judicial district into two counties, will, unless otherwise provided, leave both counties within the same district.

Heard May 16th. Decided May 25th.

Quo Warranto.

The information in this case was filed by William L. Stoughton, the Attorney General, against the defendant for intruding into and usurping the office of county treasurer of Marquette county.

THE PEOPLE *v.* MAYNARD.

The defendant pleaded that by the organization of Washington county the residence of the treasurer of Marquette county was thrown into the new county, thereby creating a vacancy in the office, to fill which the board of supervisors of Marquette county appointed him treasurer. One of the pleas relied on the "*act to organize the county of Washington*," and the other on that act, and also an additional "*act to organize the township of Negaunee, in the county of Washington.*" The replication to the first plea alleges that the county of Marquette consisted of but three townships, viz: Marquette, Negaunee and Chocolay, and that only parts of the former two were embraced in the new county, and that such parts contain 3,500 inhabitants and 700 electors. The replication to the second plea alleges the same facts as replied to the first, and also sets forth the portions of the parts of the two townships, which portions were included in the new township, and avers the number of inhabitants and electors of the portions of those parts, which portions were not included in the new township; and also sets forth the part of Negaunee remaining in Marquette county, and left, by the new township act, without any township organization; and avers the number of inhabitants and electors of that part. To these replications a demurrer was interposed, and the principal questions in the case relate to the validity of the acts aforesaid.

A. W. Buel, A. Pond, C. I. Walker and *G. V. N. Lothrop*, for the People.

1. The act of 1867 substantially violates the constitution in its letter and spirit, on the following grounds:

a. It undertakes to make the new county a corporation without giving it any corporate power to act, or accomplish any end or purpose whatever. — *Const. Art.* 10, § 1.

b. It makes no provision for the election of county officers; nor for a judiciary; nor could a board of supervisors exist under its provisions.

c. The constitutional right of suffrage and voting in all elections, with power and means for exercising such right, is taken from the electors.

The position that the county act is unconstitutional is fully sustained by the following cases.—2 *Gray*, 84; 20 *N. Y.* 447; 30 *Barb.* 349; 11 *Mich.* 63.

d. It makes no provision for organized townships, and without which the new county can never act, or exercise or assert the smallest right or power.

2. The county act, if not unconstitutional, is, at least, inoperative and void.

3. The township act does not aid the county act, to render it constitutional or operative.

Levi Bishop, for respondent.

1. The act of February 15, 1867, is not void, because it did not provide all the details for holding elections in the county of Washington.

It is a general rule in this country that there are no limits upon the legislative power of a state, except such as are created by the federal or the state constitution. The legislative body represents the sovereign power of the people.—20 *Wend.* 381; 27 *Barb.* 593; *Smith's Com.* 236–309; 1 *Mich.* 295, 306, 307; 5 *Id.* 251; 13 *Id.* 127, 481.

A statute can not be declared void on the ground that it violates the fundamental principles of republican government, unless it comes clearly in conflict with some express constitutional provisions.—4 *Mich.* 244; 13 *Id.* 481.

The act does not take away the elective franchise, or change the qualifications of voters. It simply creates or re-arranges the boundaries of certain municipal corporations. It does not violate any principles of free government, and it would not be void if it did.—4 *Mich.* 244; 13 *Id.* 481.

A township which has not all the full details of an ordinary town organization may be still a body corporate

in law. Such seems to be the opinion of this court.—10 *Mich.* 250.

2. The act of February 15, 1867, which created the new county of Washington was not null and void on the ground of unconstitutionality.

a. The act by its terms creates a new county of part of the territory of another. By its terms it creates a municipal corporation, "with all the powers, privileges and immunities to which by law the other organized counties of the state are entitled."

b. If Washington county was created as such, then the office of treasurer of Marquette county became vacant, because the treasurer thereof did not reside therein. *Const. Art.* 10, § 4; 1 *C. L.* §§ 390, 475. And the board of supervisors of Marquette county had power to appoint the defendant to that office, as they did do.—1 *C. L.* § 380.

No given form, power, duty or property is essential to the existence of a corporation. If an act of the legislature creates it as a corporate body, no given form, power or property is essential to its vitality.

We claim, then, that this act created a new county by the name of Washington, and though imperfect, it was still a legal corporation.

3. The two acts of February 15, and February 27, must have had the effect to create a county, even if the first did not. If the existence of a township was essential to the existence of a county corporation, we have it in the second act. This, too, in addition to the fact that a large part of the old town of Negaunee, and a still larger part of the old town of Marquette were in the new county, and may be claimed to be the main bodies of those towns.

CAMPBELL J.

Defendant, being called upon to show by what warrant he exercises the functions of treasurer of Marquette county, pleaded that by the organization of Washington county,

the residence of the treasurer of Marquette was thrown into the new county, thereby creating a vacancy, which defendant was appointed to fill by the supervisors. One of the pleas relied on the "*Act to organize the County of Washington*," *approved February* 15, 1867; and the other relied on the same act, and a further "*Act to organize the Township of Negaunee, in the County of Washington*," *approved February* 27, 1867. Both acts were directed to take effect immediately.

The replication to the first plea sets up that the county of Marquette consisted of but three townships, to wit: Marquette, Negaunee, and Chocolay, and that only parts of the former two were embraced in the new county, and that such parts contain 3,500 inhabitants and 700 electors.

The replication to the second plea sets up the same facts as to the division of territory, and contains averments of the number of electors and inhabitants in the part of Negaunee left in Marquette county, and in the part of Marquette township of Washington county.

To these replications defendant demurred. And the principal legal questions refer to the validity of the statutes purporting to create and organize the county of Washington and town of Negaunee, and cut them off from Marquette, without making provision for the proper transaction of business, and the protection of the rights of the inhabitants.

The first statute declares that the territory described in it "is hereby organized into a separate county by the name of the county of Washington, with all the powers, privileges and immunities, to which, by law, the other organized counties of this state are entitled." The second section fixes the county seat. The third provides that at the annual township meeting in April thereafter, county officers should be elected, who should go into office on the first Monday of May thereafter. The fourth section names several persons as county canvassers. The fifth

provides that certain buildings in Negaunee may be used for county purposes, and makes the county a part of certain senatorial and representative districts.

The second statute undertakes to make the part of Negaunee contained in the new county successor to the entire town of that name, and to keep the old officers in office until superseded by new ones; and provides for a settlement of property and accounts between the two parts.

An organized county, under our constitution, signifies a county having within itself the necessary means for performing its functions independently of any other county; with its lawful officers and machinery for carrying out the powers and performing the duties belonging to that class of corporate bodies.

Among the necessary incidents to a county are subdivisions in which electors can lawfully vote, and townships whose supervisors conjointly may exercise the legislative and administrative powers of the corporation. The county officers are all elective, and the supervisors are necessary for taxation and for various other matters of business. Under the constitution, no one can vote except in the township or ward where he resides. — *Art.* 8, § 1. The same section gives the right of voting to all white male citizens who have resided here a sufficient length of time. And the townships in which elections are held must be organized townships. — *Art.* 11, §§ 1, 2.

Inasmuch, then, as a county can not become organized without the existence of townships, where elections may be held, and whose supervisors may constitute a county board, we must see whether this is provided for. The provisions requiring this board can not be construed as directory, or as compatible with its indefinite postponement. No county can subsist without it. The whole financial concerns of the county depend upon it.

The first statute does not undertake to create or organize townships. If such were already in active existence,

of course no such creation was necessary, as the general laws would then furnish the guide for their action in holding elections. The statute provides for the election of all county officers, and locates the new county in the proper legislative districts. It was claimed on the argument that no provision was directly made for placing it in a judicial district. But, inasmuch as the whole of the county was in the twelfth district, we think it still remains there. Had it included a part of two judicial districts, we might have found some difficulty in dealing with this objection, but, as it stands, we see no occasion for legislation on this point. The only inquiry must be, whether organized towns were already to be found in the new county. If they were, we see no difficulty in the way of the complete organization through the spring elections.

The pleadings show that there were but three townships in the county before the division. One of them remained untouched within the old county, and two were divided. These would, of course, continue as existing towns, and the territory taken away from them, until newly organized, or attached to some other town, would cease to have any township existence. This act, then, provided no means for organizing this detached territory, and no general law reaches the case, and, consequently, no elections could be had in it. And without such elections the act would be entirely inoperative and void.

It was suggested by an *amicus curiæ*, that, as we were bound to know judicially the existence of the various township organizations, we might be of opinion, upon examining the case, that there were townships actually organized within the territory set off. It may be well, therefore, to investigate this subject. At the beginning of the year 1857, the county of Marquette included on the north no higher than the 49th tier of towns. All the land east of range 26 was in the town of Marquette. Range 26 was all in the town of Carp River. All west of range 26 was in the

town of Iron. The present alleged county of Washington embraces all of the old town of Iron, a single section in Carp River (containing the public buildings), and some towns north of the 49th tier which were subsequently annexed to the town of Marquette. On the 10th of February, 1857, an act was passed entitled "*An act to provide for the organization of the township of Teal Lake, in the county of Marquette, and to define the boundaries thereof.*" This act created the town now known as Negaunee, by including in it parts of the towns of Iron and Carp River. It then abolished those towns, by transferring all their remaining territory to the town of Marquette. It is now suggested that no such purpose could be legitimately connected with the title of the act, which under the constitution must indicate the single object to be provided for. If this question had been raised immediately, we are not prepared to say that it would have been altogether free from difficulty. But, inasmuch as the arrangement there indicated had been acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it can not now be disturbed. Even in private associations, the acts of parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as, on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question. See *Rumsey v. People*, 19 *N. Y.* 41, and *Lanning v. Carpenter*, 20 *N. Y.* 447;

where the effect of the invalidity of an original county organization is very well considered in its public and private bearings. There have been direct legislative recognitions of the new division on several occasions. *Laws*, 1858, *p.* 23; *Laws*, 1861, *p.* 556; *Laws*, 1863, *p.* 22. The exercise of jurisdiction being notorious and open in all such cases, the state as well as county and town taxes being all levied under it, there is no principle which could justify any court at this late day in going back to inquire into the regularity of the law of 1857.

The conclusion, then, is inevitable, that the act to organize the county of Washington can not of itself work any such organization, and, unless aided by the subsequent statute, must fall. It was enacted for no purpose but that of organizing the new county.

The second statute provides for the organization of the town of Negaunee in the county of Washington, by adopting an existing township. It provides, therefore, the means of holding one township election. But it makes no provision whereby the electors of the rest of the county can vote, and it deprives of their suffrages the inhabitants of a portion of Marquette county. And it is claimed by the Attorney General that a county can not be organized under such provisions.

Leaving out of view the consequences in Marquette county, the result of this legislation would be to give the people of the single township of Negaunee the right to elect the whole body of county officers, and would cut off from the right of voting, not only now but forever—unless the legislature should intervene—a considerable body of electors who have hitherto had the means of exercising that right. And it would have the further effect of leaving this county with only one supervisor.

The constitution requires the county officers to be chosen in each county "*by the electors thereof*," and, as has

already been seen, each man must vote in his own township. We held in the case of the *Attorney General v. Supervisors of St. Clair*, 11 *Mich.* 63, that a law which provided no means for taking votes in cities upon the question of the removal of a county seat was invalid, although all the townships had the opportunity of voting. We think this case comes within the same principle, and that the deliberate exclusion of the electors outside of Negaunee was illegal.

We also think that no county organization can be complete without more than one township. There is no method by which one supervisor can be legislated or construed into a "board." The powers of the board are of the most important character, and it is designed that every part of the county should be represented by its members. Their duties are such as are never allowed to be exercised by single persons, and this is the first instance in our history where the legislature have acted (if they really did so act) upon the theory that such a delegation of authority to one officer was possible. The board of supervisors is one of our long established institutions, and no one can doubt, in reading the constitution, that it was designed to be perpetuated in its existing form, as an aggregation of town officers, and not as a single individual.

The intrinsic defects of the first act are not aided by the second. Neither can stand alone. And we are compelled to the conclusion that no change has been legally made in the organization of Marquette county. It follows that the old treasurer was not removed from office, and there was no vacancy to be filled. The appointment of the respondent was therefore unauthorized, and judgment of *ouster* must be entered against him; the demurrer not being well taken, and the pleas also being insufficient.

MARTIN Ch. J. and CHRISTIANCY J. concurred.

COOLEY J.

If this proceeding had been instituted against the officers assuming to act as the county officers of Washington county, and who would have been interested in presenting all the considerations which might tend to defeat it, I should have felt less reluctance in entering upon a full examination of all the points involved. But as it is doing no injustice to any one to say that this is not an adversary proceeding, and the parties who would have been defendants in a more direct attempt to reach the same end, have declined to speak to the present record, I prefer to reserve an opinion upon some of the very grave questions involved until a case shall arise rendering a decision necessary.

I agree with my brother, Campbell, that the two acts of the legislature, now in question, do not, of their own force, organize the county of Washington, or provide any machinery by means of which such organization can be effected without further legislation. I put my concurrence upon the ground that there can not be an organized county with a single township only, nor a board of supervisors with only one member. The powers conferred upon that body by the constitution are of very high importance; some of them, legislative in their character, requiring consultation, discussion and deliberation; and such as in no part of our political system are conferred upon single individuals. The implications from the constitution are all strongly against any intention that such large and varied powers should be thus concentrated; and the term "board," in its derivation as well as in its ordinary use, indicates a deliberative body, composed of more than one person. Without, therefore, considering whether there is any constitutional infirmity in either of the acts in question, which would render it invalid, I think the people are entitled to judgment for the reason stated.

George Duffield v. The City of Detriot.

Street openings: Jury must make separate findings of damages and benefits. Where, under section 38, chapter 7, of the charter of Detroit, a jury in a street opening case is directed, where only part of a lot is taken, to "determine the benefits or enhanced value that will accrue from the improvements to the portion or portions not taken, and deduct the same from the damages or compensation they would otherwise award to the owner or owners," there must be separate findings, so as to show what the entire jury consider the amount of damages, and what the amount of benefits; and a verdict simply showing the balance, after deducting the one from the other, is invalid. The jury must concur on both items, and report them.

Recorder's Court: Recorder must make written finding of all questions acted upon in street opening cases, not appearing on the record. The statute giving jurisdiction to the Supreme Court to review all legal questions arising in the proceedings before the Recorder's Court, and requiring a certified copy of all such proceedings to be returned on appeal, necessarily contemplates a written finding or report to be prepared and filed by the Recorder, setting forth all questions arising, and action had before him, which will not otherwise appear on the record. Upon the return of the proceedings on appeal, such report will then furnish the means of determining how far the action below was open to complaint, and no ruling can be reviewed which does not appear in that or in some other part of the return.

Heard May 10th and 11th. Decided May 25th.

Appeal from the Recorder's Court in the city of Detroit.

Proceedings were had in the Recorder's Court to open a street running through appellant's premises, and which would leave part of said premises on each side of said street.

By stipulation, it was agreed that appellant's counsel request the court to charge—

"That if they found that it was necessary to take the property of said George Duffield for the intended improvement, that then in determining the just damages and compensation to be paid to him, they had no right to assess or apportion any supposed benefit that, in their judgment, might accrue by reason of said improvement, to the remaining portion of the property of said owner."

It was also stipulated "that the court declined and refused so to charge, and that to such refusal the counsel

for said owner noted an exception. But that the court instructed the jury that in view of all the circumstances of the case, they should award the owner of the land proposed to be taken just damages and compensation, that in assessing such damages and compensation, they should consider all damages that might accrue to any portion of his lot or lots not taken, and might also determine the benefits or enhanced value that would accrue from the improvements to the portion of his lot or lots not taken, and deduct the latter from the damages they would otherwise award the owner."

To which instruction the counsel for said owner noted an exception in writing.

The jury brought in a verdict that it was necessary to take the premises described, and awarded to appellant the sum of one thousand dollars as his damages and compensation, without stating the damages and compensation separately.

D. B. & H. M. Duffield, for appellant.

1. The verdict of the jury is defective, because it does not show to the court or to the owner the amount of damage suffered, or the amount of benefits received.

This is necessary, in order that the court may review aright the action of the jury on objections made to confirmation.

It is also necessary, that the owner may learn how he is compensated, or how refused compensation.

The principle is applied under section twelve, chapter seven, of city charter, as every man is thus advised of his proportion of benefits, and the total damages for the proposed improvement.

The language of the law of 1865 clearly instructs the jury on this point, and their record-verdict must show that the requirements of the law have been complied with.

When power is given a corporation to take property, it must be strictly pursued, and ordinarily it must appear to be so, on the face of the proceedings. — 25 *N. J.* 413; 29 *Id.* 111; 9 *Wend.* 251; 17 *Id.* 663.

The record being defective, the other points made by counsel become immaterial.

Wm. Gray and *L. Cochrane*, for the City.

The verdict of the jury is not defective. They have followed the precise language of the charter. — *Charter*, *p.* 75, § 14.

It will be presumed that the jury have assessed the "just compensation," that they have "determined the benefits," and "deducted the same from the damages." The statute makes no requirement of them to report them. After determining and deducting, their duty relative to them ceases.

The means by which they have arrived at the amount of compensation might gratify curiosity, sometimes even serve a useful purpose; but, ordinarily, courts appear to desire to have little to do with the mathematical calculations of the jury room — they only look to the final result.

The form insisted upon in the objection has nowhere in this country been the practice, under laws precisely similar to the one in question, with one or two exceptions.

The sole issue and real point in this case, was as to the amount of compensation to which the appellant was entitled. The verdict or report sets it forth. The issue is supported, and this is all that is required. — 8 *Port.* 66, 69; 3 *Sneed*, 17.

The court can fully understand it; it is therefore good. 12 *Ind.* 275.

The benefits are precisely in the nature of an offset; nothing need be stated in the verdict relative to offset. — 8 *B. Mon.* 227.

Even where there is a substantial defect in the verdict, it will not be set aside, unless the party making the application would be injured by allowing it to stand. — 1 *Morris*, 18.

CHRISTIANCY J.

We can not, I think, in the present condition of this record, properly make a final disposition of this cause by reversing or affirming the judgment and proceedings in the Recorder's Court.

The only portions of the proceedings properly authenticated or certified are the verdict or report of the jury, the objections filed to its confirmation, certain affidavits, the order confirming the report, and the appeal.

These are properly certified by the clerk. The request to charge the jury, and the charge or instructions given, are not officially authenticated in any way. In fact, the clerk could not properly certify them, unless they were put in writing and filed. The clerk, however, has not attempted to certify either the request or the charge; but an attempt has been made to bring these before us by stipulation of counsel for the respective parties.

It is not competent for parties, by stipulation, to determine for review in an appellate court what were the rulings or the judicial action of the judge, of which a review is sought. This information must in some way come to us under the sanction of the judge himself.

Again, it does appear that certain affidavits were filed in support of the objections to the confirmation of the report; and these are properly certified by the clerk. But it does not appear whether these affidavits were received and considered, or rejected by the court. His action in this respect must be stated by himself. The clerk can certify nothing which does not appear of record or upon the files. The statute giving this appeal is peculiar. It gives the right to a review in this court by appeal, but

it confines the power of review to questions of law merely. (*Sec.* 23, *chap.* 7, *of Charter.*) It makes no express provision for the mode in which the proceedings are to be authenticated, except that provided in section twenty-two, which is, that "in case of appeal, as above, it shall be the duty of the clerk of said Recorder's Court, forthwith, or as soon as practicable, to transmit to the Supreme Court a certified copy of all the proceedings in the case, which may be filed in the office of any clerk of said court," meaning, doubtless, that the certified copy may be filed in the office of the Supreme Court, which has more than one clerk. And yet it is evident, from the twenty-first and twenty-third sections, that the legislature intended to give to any party considering himself aggrieved, the right to review on appeal of any question of law which might arise in the course of the proceedings.

We think, therefore, the statute, by fair intendment, must be understood as requiring of the Recorder a special report or finding as to all the objections (filed) to the confirmation under section sixteen, and set forth in the specification of errors, on appeal under section twenty-one, and all his judicial action in reference thereto, except what already appears upon the files; and that such report or finding should be filed by him with the clerk, and come up with the record.

Among the specifications of errors stated in the appeal, it is alleged that the Recorder refused to charge, as requested, against the assessment of benefits in reduction of damages, and that he did charge the jury that they were at liberty to determine the benefits or enhanced value that would accrue from the proposed improvement to the portion of said property not taken, and deduct the same from the damages or compensation they would otherwise award.

If this charge was given, it became the duty of the jury, under section thirty-eight, chapter seven (amendment of 1865), if that act is valid, to determine the benefit or

enhanced value, and deduct the same from the damages; but, unless the charge was thus given, they had no such duty to perform, or at least there was nothing requiring them to find specially the amount of benefits, and the general finding of damages was all that was required. But if the charge or instructions were given as stated, and this fact were officially before us, we might perhaps dispose of the case upon the question of the sufficiency of the report, which does not find separately the amount of benefits and the amount of damages, and, therefore, might have been concurred in by all the jury, without any two of them agreeing upon the amount of either.

But it does not appear by the record, in its present shape, whether *such* instructions were given. This appears only by the stipulation, which, as we are all agreed, can not be recognized as proper evidence of *what the instructions were.* If it be competent to determine by stipulation the abstract fact that instructions were given by the Recorder, this does not advance us a single step, as we can not from this infer what the instructions were; and they may have been directly the reverse of what is supposed.

The fact that but one thousand dollars damages were given, while the affidavits show the property worth seven thousand, may furnish an inference that the jury probably allowed benefits in reduction of damages. But this may have been without any instructions, or contrary to instructions, or because they took a different view of the value. But to reverse the proceedings upon the loose inference of such instructions, to be drawn from facts stated in these affidavits, would be to substitute these affidavits for the report or finding of the Recorder, which would be quite as objectionable as to substitute the stipulation for such finding or report. I see no proper justification for such substitution of either, while the report of the Recorder can so easily be obtained. Until we have such report,

there is, it seems to me, no question before us upon which we can make a final decision.

As it was the duty of the Recorder to have made and filed such finding or report, I can see no reason to doubt our power to require of him the performance of that duty now.

The appeal has been properly taken, and we ought not, therefore, to dismiss it for any defect for which the appellant is not in fault. I think, therefore, an order should be entered requiring a special report or finding by the Recorder as to all the matters above indicated, which should be filed with the clerk of that court, and by him be certified to this court, as a part of the record, for such further action as the case may require.

MARTIN Ch. J. concurred.

COOLEY J.

In this case objections are made to the charge by the Recorder to the jury; to the rule of damages supposed to have been adopted by the jury; to the form of the verdict or report, and to the ruling supposed to have been made by the Recorder upon affidavits presented to him in opposition to the motion for confirmation of the report. The record, as filed in this court, is exceedingly imperfect, and none of the questions are presented as they should be for our decision.

The charge made by the Recorder appears in the case in no other way than by a stipulation of the parties. It has been frequently decided that parties could not be allowed, in this way, to settle for themselves the decisions made by the courts—*Niagara Fire Insurance Co. v. De-Graff*, 12 *Mich.* 10—and the reason for this is too conclusive to warrant the practice being departed from in any case. Wherever the statutes provide for a review by this court of the decisions made by other tribunals, they contemplate that the proceedings of those tribunals should be

placed before us in an official form; and it would be unfair to other courts to hold them bound by rulings which the parties say have been made by them, but which might assume a different phase if stated in their own words, and with such qualifications as may have accompanied them.

It is difficult to read the provisions on the subject of opening streets in the Detroit charter without being struck with their obvious deficiencies. The provision for instructing the jury in their duties would seem to leave it optional with the Recorder whether they should be instructed to allow benefits: *Laws*, 1865, *p.* 681; and there is no provision which, in express terms, requires the Recorder to put in writing his rulings. As, however, an appeal is allowed to this court, by which the rulings of the Recorder in matters of law are to be reviewed: *Laws*, 1857, *p.* 124, §§ 21 *to* 25; and as the only return provided for is of a certified copy of the proceedings, to be sent up by the clerk of that court—§ 22—and as it is impossible for the clerk to return the proceedings which show the rulings of the Recorder anterior to the final decisions, except as they may be put in writing by the Recorder himself, and placed on file, the implication from the statute that this must be done is so strong as to be imperative. The impossibility of protecting parties in their rights without doing this, is very apparent in the present case. We are informed of what is said to be the Recorder's charge by a stipulation; but we can only infer what the rule of damages adopted was, and what was the Recorder's ruling upon the admission of affidavits in opposition to the confirmation of the report. Indeed, upon the latter point the parties are directly at variance.

It remains to be determined whether we shall dismiss this appeal, order a further return, or endeavor by an examination of the record as it now stands to ascertain whether any error of which the appellant can justly complain satisfactorily appears. As the defects in the record are not

such as the appellant is necessarily responsible for, the first proceeding would be manifestly unjust. To order a further return would be unavailable, as it is to be presumed the clerk has already sent up everything now on file. And although we might possibly go further, and require the Recorder to put on file such a report or finding as would show his own doings and rulings—and which we think is necessary in these cases—yet, as this would inevitably result in considerable delay, perhaps to the public detriment, it may be well to examine the record further to see if we can dispose of the case properly as it now stands.

Amended section 38 of the charter provides that, "In assessing the damages and compensation * * * where only a portion or portions of a lot or lots are taken, the court may instruct the jury to, and in case of such instruction, the jury shall determine the benefits or enhanced value that will accrue from the improvements to the portion or portions not taken, and deduct the same from the damages or compensation they would otherwise award to the owner or owners." A fair construction of this section will require the benefits or enhanced value to be assessed separately. The verdict should contain the finding of the jury upon the value of the land taken, and also upon the enhanced value of the remainder by means of the improvement; and their award of damages to the owner should be the diminution, if any, of the value of his estate thus ascertained. It is impossible that there should be a satisfactory review by the Recorder's Court without such a finding; and what is quite as much to the purpose, it might well happen, if a general verdict upon the damages was sufficient, that twelve men would agree upon that, without being at all able to agree either upon the value of the land taken, or the enhanced value of the remainder; the two facts upon which the statute contemplates the jury are to unite. There is sound reason for requiring a separate report upon these points; for a more accurate and

careful application of the judgment of the jurors may be looked for with confidence if they are to make each estimate by itself, so that it will be subject to separate examination and criticism, than if the two estimates were combined, and the difficulty in ascertaining the elements that entered into the computation in the minds of the jurors thereby, as it must be, greatly increased. This appears to us to be the clear intent of the section in question; and it is so just to all parties concerned, and so necessary to insure his rights to the person whose land is taken, that it can not be treated as mere matter of form. If, as might well happen, twelve men should be entirely unable to agree upon the benefits that would be likely to accrue, but should nevertheless be able to agree upon the damages, because differing in like degree upon the value of the land taken, it would be somewhat difficult to say that they had determined "the benefits or enhanced value" as the statute requires. The land owner is entitled to have the benefit of the judgment of the whole jury upon each element of the verdict; and there is no determination upon either point without agreement upon that separately.

I have already said, however, that the wording of the statute would seem to leave it with the Recorder to instruct the jury to deduct the benefits or not at his option. It is difficult to believe that the charter designed to leave an arbitrary power of this kind in the hands of any one; and if the charter is subject to this construction, a grave question might arise as to its validity. Assuming, however, that it would be the duty of the Recorder to make a like charge in all cases where benefits could be supposed to accrue, the question arises whether it appears from this record that such a charge was made in this case as would require the separate findings.

And upon this point I think the stipulation of the parties was competent. There is a manifest difference between stipulating as to what the rulings of a court were, when

the object is to obtain a review of those rulings, and stipulating the same thing for some collateral purpose. In the first case, justice to the court requires that its rulings be reviewed only upon its own report; but when they are not under review, and are only important as bearing upon some other fact, it is as competent to stipulate in regard to them as it would be to show any other collateral circumstance in the same way. The reason which excludes the stipulation in the one case has no application in the other; for the court, in respect to whose decision the stipulation is made, has no concern with the inquiry involved if the correctness of its ruling is in no way called in question. Indeed it often becomes necessary to prove the rulings of courts in the ordinary mode in collateral inquiries.

It appears, then, that under the charge of the Recorder it became the duty of the jury to assess the value of the property taken, and the benefits or enhanced value of the remainder of the premises separately. This has not been done, and the proceedings I think should be reversed. The question then remains whether the case shall be remanded. The statute—*Laws*, 1857, *p.* 125, § 24—authorizes us, if the reversal is for an error "which it is practicable for the Recorder's court or jury to correct with due regard to the public interest and rights of individuals," to remand the case for such correction. The particular error here in question might, perhaps, be corrected on a remand; but as we can not pass upon the other questions raised upon this record, and the statute prohibits a second appeal, justice to all parties seems to require that the proceedings be altogether set aside. We can do this with the less reluctance inasmuch as the affidavits returned on the appeal, and which stand uncontradicted, make a strong showing against the correctness of the report, and lead to the inference that perhaps the jury took into consideration supposed

benefits to the appellant which could not have been allowed by law.

CAMPBELL J.

The appellant is owner of certain premises in Detroit, a portion of which has been taken for a public street, and the regularity of the proceedings is now brought up on appeal from the Recorder's Court, where the jury's verdict was confirmed.

The jury, by their finding, assess appellant's damages at one thousand dollars, but do not show by what process they arrived at that amount, nor whether it does or does not include any deductions for supposed benefits. Until this appears in some way, unless the matter is made pertinent by the other proceedings, it will be difficult and irregular to discuss any constitutional question arising out of it.

The thirty-eighth section of chapter seven of the city charter contemplates that, where only part of a lot of land is taken for a public improvement, the Recorder may direct the jury to determine the benefits or enhanced value that will accrue to the property not taken, and deduct the amount from the damages or compensation they would otherwise award. If — as is, perhaps, the fair construction — this section leaves it to the Recorder to determine in what cases this discrimination is permissible — this determination, being judicial, must rest upon some existing or supposed rules or reasons, which ought to be announced, and the jury should receive such general directions and cautions as would be appropriate to guide them in coming to a right decision.

We have not before us the general or particular instructions which the Recorder gave, and which the various sections of the charter contemplate he shall give upon the duties of the jury. The statute is express that the court shall "*instruct said jury as to their duties, and the law*

applicable to the case."—*Sec.* 9. All we have is a stipulation showing that the Recorder did instruct the jury in this case to consider and deduct the amount of benefits or enhanced value from the damages.

This does not inform us, even if we could act upon such information by stipulation, of the precise character and extent of the instructions given to the jury. It is plain enough that the stipulation does not embrace the entire charge. We can not, upon such a showing, proceed to review the correctness of the Recorder's charge, because, if he were to report his own doings, we might learn, what now we can not know, how far his instructions may have gone in furnishing to the jury a rule of action. But I do not see any good reason for declining to receive this stipulation as evidence that this case was committed to the jury as one arising under the thirty-eighth section, and as one in which the question of benefits was to be considered. While we can not review the correctness of this ruling in the form in which it is presented, I see no reason for rejecting this admission of it for any other purpose.

The question then arises whether the finding of the jury complies with the law. Upon this we have no doubt. The statute, in plain terms, requires the jury to "*determine the benefits or enhanced value*," and "*deduct the same from the damages or compensation they would otherwise award to the owner or owners.*"

This involves a double duty, upon each branch of which the whole jury must come to an agreement. They must first determine the damages "they would otherwise award," without reference to any benefits. They must then determine how far the remaining portion or portions of property will be benefitted or enhanced. The sum of these amounts estimated for advantages will then be deducted from the gross damages, by a simple computation. The language of the section will not admit of any other construction. And it

must be remembered that a jury in these cases does not merely make a general verdict of damages, but is required to report its proceedings at large upon other matters besides the computation or determination of single money results. The law contemplates that there may be mortgages, leases or agreements, which may cover all, or only parts of the property taken or affected, and, in such cases, compensation is to be apportioned among those interested, by the jury. — *Sec.* 11. It is quite manifest that if damages and deductions from damages are not kept separate, the rights of such parties could not be easily determined. The jury, for example, might, in a case like this, possibly reduce the damages very much below what would have been given if such benefits were excluded. Yet it might easily happen that encumbrances should exist on the portion taken, which did not cover the rest, and where, of course, the enhanced value of the rest would not aid the security. The same might be true as to leases. In such cases, the deductions which might properly reduce the compensation of the adjacent land owner, could not be made against the others, without great injustice. The statutory rule, therefore, can not be regarded as only directory, and a failure to comply with it vitiates the verdict. And for this reason the proceedings should have been set aside.

The statute provides that where the proceedings are reversed for errors which can be corrected, "*with due regard to the public interests and rights of individuals,*" they shall be remanded to the Recorder's Court, with directions that such errors be corrected. — *Sec.* 24. When the jury correct the errors, the verdict is to be confirmed, "*without any further right of appeal.*"

If this case is remanded, without a review of the law questions (which are not before us in any proper shape for review), the result will be that the jury will, by a new verdict, discriminate between damages and benefits, upon a view of the law which we can not, by means of

another appeal, be enabled to consider. This would not be consistent with a due regard for the rights of individuals, to whom the law intends to secure full means of legal redress upon an appeal. We should, therefore, content ourselves with reversing and annulling the entire proceedings, and decline to remand them.

Although the statute is silent upon the means of perpetuating the law questions presented and decided, it distinctly authorizes us to review all the law points, and it provides that this shall be done on a return made by the clerk of the Recorder's Court. He can certify nothing but that which is written. It follows, of necessity, that upon all questions which arise, and are disposed of, the parties have a right to require the written statement of the Recorder, to be placed on file. Whether this is put in the form of a bill of exceptions, or case made, or otherwise, is not, perhaps, very material, but it must be drawn up in some reliable and authentic form, certified by the Recorder.

In the absence of such a statement, we are precluded from considering any of the important constitutional and statutory questions arising on the correctness of the supposed rulings of the Recorder.

I think the proceedings should be reversed, with costs.

The Court being thus equally divided upon the jurisdictional question, COOLEY J., in order that the case might be disposed of, assented to the course suggested by CHRISTIANCY J. that a further return be made by the Recorder, showing the ruling and proceedings not now regularly appearing in the record.

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Charles Dawson v. The Danbury Bank.

Validity of title, by foreclosure of first mortgage: When assailed by suit on second mortgage, special averments must be set up. A title obtained under the foreclosure of a first mortgage is presumptively prior in right to a second mortgage, and its validity can not be assailed in a suit to foreclose the latter, without special averments showing why it ought to be postponed.

Foreclosure suit: General averment that defendant is a subsequent purchaser, etc., relates only to his subsequent encumbrance. Where the second mortgage covered additional lands over which it was prior to an encumbrance held by the party claiming the former premises under the first mortgage, and said party was made a defendant under the mere general averment that he held or claimed some interest in the mortgaged premises or some part of them as subsequent purchaser or encumbrancer or otherwise, he may properly treat such averment as relating only to his subsequent encumbrance in the other lands, and his title to the first premises will not be affected by the decree. *Wurcherer v. Hewitt*, 10 *Mich.* 453.

Possession of land by grantor, when notice of rights in him, to third parties. A person remaining in possession of lands which he has conveyed by a mortgage which has been foreclosed against him will be presumed to hold subject to the title so created, and his possession will not be constructive notice of any other interest or title which he may have acquired, but which does not appear of record in him.—Affirming *Bloomer v. Henderson*, 8 *Mich.* 395.

Heard May 7th and 8th. Decided May 25th.

Appeal in Chancery, from Oakland Circuit.

This was a bill to quiet title.

The case was heard on bill, answer and proofs, and a decree rendered for complainant.

The facts are stated in the opinion.

G. V. N. Lothrop and *M. E. Crofoot*, for complainant.

1. Where a party represents a prior lien derived from the same source, he and his grantees are proper parties to a foreclosure bill.—*Story Eq. Pl.* § 186 *and notes; Id.* 193 *and notes; Hill. on Mort.* (*3d ed.*) *p.* 159, § 70; 11 *Wheat.* 304, 306; 11 *Paige*, 28, 29, 39, 40; 3 *Johns. Ch.* 459.

2. The defendants claim that none but subsequent encumbrancers are proper parties defendants to a foreclosure suit, and that nothing but the interests in the equity of redemption can be litigated and settled in such suit.

The following are among the cases cited:—6 *Paige*, 635; 2 *Barb.* 23; 3 *Mich.* 448; 2 *Seld.* (6 *N. Y.*) 82; 5 *Id.* 502, 516.

In all of the above cases the question sought to be raised, and which the courts held could not be considered, was the litigation of the title of a third party set up in hostility to the title of the mortgagor.

3. Besides the question of these mortgages being cut off by the decree in the Moss case, the question of their being an equitable lien on the premises as against the title of this complainant notwithstanding the decree, arises.

We insist that whatever title passed to Drake at the foreclosure sale was but passing the title to Stewart, the mortgagor of Moss and others.

Drake purchased for Stewart, and as his agent.

The evidence shows that no possession was ever taken by Drake, or by Baines; nor was there any possession surrendered by Stewart, or taken from him; but he continued in possession of the premises claimed, as owner, as fully after the deed to Drake as before.

His possession and ownership was notice to all the world of his title. Drake could give no mortgage while Stewart was thus in possession, as owner, that could defeat Stewart's title. Nor could he make a deed, nor could Baines make a mortgage that would confer equities against the possessor's real title.

The consideration expressed in the assignment to the bank was merely nominal, $1; and defendants claim they were assigned to secure a pre-existing indebtedness.

Whatever title stood in Drake as purchaser at sale, or Baines as his grantee, was the title of Stewart, the mortgagor; and he could not himself, nor could his grantees, trustees or agents, hold an outstanding title to defeat the mortgage title.

And to this point we cite, 12 *Mich.* 346.

Walker and *Kent*, for defendants.

1. Defendants are not concluded by the decree in the foreclosure suit of Moss and others.

a. That suit was not a proper place to litigate the claims of Baines and Litchfield to the Pontiac Lot.

Their claim was prior to the mortgage of Moss and others, because derived through a prior mortgage, and it is well settled that a foreclosure suit is not the proper place to litigate claims to the mortgaged premises prior to the mortgage.—3 *Mich.* 448; 13 *Id.* 409.

The bill made them parties only as subsequent encumbrancers.

b. Litchfield did not, in his answer, aver the existence of the mortgages assigned to him on the Pontiac Lot, or claim any rights thereunto.

Baines did aver the conveyance from Drake to himself and the mortgage assigned to Litchfield, and sought to defend on this account, but clearly his action did not bind Litchfield.

The evidence shows that Litchfield's solicitor knew nothing of the defense set up by Baines. This defense ought not to have been litigated in that suit. Litchfield did not litigate it, and did not know that it was litigated by his co-defendant. Hence, so far as Litchfield is concerned, the case stands as though Baines' answer had not been put in.

c. Litchfield was not bound by the decree as to the mortgages held by him upon the Pontiac property because the question of their priority was not in issue between him and complainants in that suit.

The general rule is, that a decree is conclusive upon the parties to a suit only as to the point in issue.—12 *Barb.* 184; 14 *Conn.* 61.

And this doctrine is applied to cases like the one at bar in the following: 5 *Seld.* 502; 13 *Wis.* 10; 14 *Id.* 509 4 *Halsted Ch.* 571.

d. If Litchfield were bound by the decree in the former suit, still defendants would not be. They purchased during the pendency of the suit, and are bound by everything in the *lis pendens* filed, but this gave them notice only that a bill was filed to foreclose a mortgage subsequent to theirs, and the bill itself could have given them only the same notice. They could not have known that the validity of the mortgages they purchased were involved in that suit.—*Comp. L. p.* 1011, § 29.

2. The facts appearing in the case do not entitle the complainant to the relief asked, or to any relief.

a. Admitting that it is proven that Drake was the mere agent of Stewart in purchasing the premises at the sale under the Cooper foreclosure, still the purchase money was paid by Dey, and the mortgage was given as security therefor.

As against Dey, complainant had no equity more than against Cooper. Clearly, Dey, having paid a mortgage which was a lien upon the premises prior to complainant's title, was entitled to hold his mortgage against complainant's title, and defendants having, through Litchfield, received Dey's mortgage, have all his rights.

b. Defendants are *bona fide* purchasers of both mortgages. They gave up for them other valuable security. They received them without notice of complainant's alleged rights. The record shows these mortgages to be prior to complainant's title.

Defendants took these assignments subject only to those equities which existed between the mortgagors and mortgagees, but not to an unknown equity between the mortgagors and those from whom complainant's title comes. It was enough for defendants that they found the legal title to have been in the mortgagors, respectively, when the mortgages were made, and knew of no equities to the contrary.—8 *Mich.* 395.

DAWSON *v.* THE DANBURY BANK.

COOLEY J.

The complainant filed his bill to quiet the title to certain premises formerly owned by N. P. Stewart in the present city of Pontiac.

The facts upon which legal questions arise are the following:

In July, 1855, Stewart gave a mortgage on the premises to Cooper, Storm & Smith, which was foreclosed in chancery, and a decree for sale made September 27, 1857. Notice of *lis pendens* was duly filed in this suit.

May 21, 1859, Stewart gave another mortgage to Moss, Medbury & Duffield, covering the Pontiac Lot, and also a large amount of other real estate.

June 16, 1860, the Pontiac Lot was regularly sold under the Cooper, Storm & Smith decree, and bid off by Morgan L. Drake who had been acting as attorney for Stewart, and who undoubtedly bid for Stewart's benefit, and with an understanding that he should hold in trust for him. The sum bid was $1,050, which was procured from Alexander H. Dey, to whom Drake gave a mortgage to secure its re-payment. It would appear from Dey's testimony that Stewart also gave collaterals for this loan.

July 20, 1860, Drake deeded the Pontiac Lot to Baines, a brother-in-law of Stewart, and took back from him a mortgage conditioned for the payment of the Dey mortgage, and also four negotiable promissory notes of $1,000 each, the first of which fell due one year from date. We have no doubt the giving of the deed and the taking back of the mortgage were by direction and for the benefit of Stewart.

Stewart, during all this time, was in possession of the premises by tenants. Being indebted to Elisha C. Litchfield in a large sum, an arrangement was made by which the Drake and Baines mortgages were assigned to Litchfield as collateral security; the loan to Dey being paid

by either Stewart or Litchfield — the evidence leaves it uncertain which. These assignments were made, one on the same day with the Baines mortgage, and the other a few days before, and it is highly probable that Litchfield was fully aware of the fact that the title to the lot in the hands of Drake and Baines was held in trust for Stewart.

August 30, 1860, Moss, Medbury and Duffield, filed their bill in chancery to foreclose their mortgage, making Drake, Litchfield and Baines, defendants, under the general allegation that they had, or claimed to have, some interest in the premises as subsequent purchasers, incumbrancers or otherwise. Litchfield, it appears, actually claimed rights in the equity of redemption in other parcels covered by this mortgage, and he filed his answer assailing the validity of the mortgage, but making no mention of his interest as assignee of the Drake and Baines mortgages.

Baines also put in an answer, by which he set up and relied upon the title acquired by Drake at the foreclosure sale. The two answers were filed by different solicitors, and there does not seem to have been any concert of action in the defense. The court sustained the mortgage, decreed a sale of the mortgaged premises to satisfy it, and, by a special clause in the decree, adjudged the Drake purchase to have been for the benefit of Stewart, and the title to the Pontiac lot, in Baines' hands, to be subordinate to the rights of complainants. The solicitors for Litchfield appear not to have been aware of this clause until the time for appealing had expired, and it is not shown that they were aware of the issue which had been made by Baines, by his answer. Under this decree, the premises were subsequently sold and bid in by complainants, who afterwards sold the Pontiac lot to the present complainant.

While these proceedings were pending, Litchfield transferred the Drake and Baines mortgages to the President,

Directors and Company of the Danbury Bank, for a valuable consideration, and we see no reason to doubt that they became purchasers in good faith. On their taking steps to foreclose one of these mortgages, the present bill was filed to quiet the complainant's title as against them.

The complainant insists, *first*, that the proceedings and decree in the Moss, Medbury and Duffield foreclosure suit, are a bar to any further claim by Litchfield or his assignees under these mortgages. If this position is correct, it must result either from the mere fact of Litchfield being made a party, or from the special clause inserted in the decree, and which has been referred to.

From the facts recited, it will be seen that Litchfield was not properly made a party in respect to the Drake and Baines mortgages, if the purpose was to obtain a decree postponing them to the mortgage then in suit. The title under which those mortgages were given, was, *prima facie*, paramount to the Moss, Medbury and Duffield mortgage, and if they sought to postpone them to their own, it would be necessary to make special allegations, setting forth the facts which gave the mortgage then being foreclosed an equitable precedence. This is a well settled rule of chancery pleading, and rests upon sound reasons.—*Wurcherer v. Hewitt*, 10 *Mich.* 453. In the absence of such allegations, the validity of the mortgages held by Litchfield, as against that to Moss, Medbury and Duffield, was not in issue, and could not be affected by the decree. We are not called upon to say whether this would be different if Litchfield had been privy to the defense made by Baines, as nothing of the kind is shown in the case, and he was certainly not bound to take notice of any other issue than that joined on his own pleading. His own defense was held to be unsustained, and he was to presume that the court would decree accordingly; but he had no right to suppose any clause would be inserted in the decree affecting his rights, which was not warranted

by the issue between him and the complainants. The fact that he was present, by counsel, when the sale to Moss, Medbury and Duffield was confirmed, has no significance, as the sale could not be more far-reaching in its scope than the decree, but, like that, must have been made subject to his rights under the two mortgages so assigned to him.

But complainant insists, *secondly*, that as Drake's bid was for the benefit of Stewart, the mortgage given to Moss, Medbury and Duffield, was not affected by it, and the two mortgages given by Drake and Baines, while they held the title for Stewart, stand on no different footing than if they had been given by Stewart himself, and must, in equity, be regarded as subsequent incumbrances by Stewart.

If the Drake and Baines mortgages were still held by Litchfield, and we should be satisfied that the evidence shows — as, perhaps, it does — that Litchfield was aware, when he took the assignment of these mortgages, that Drake had bid in the premises for Stewart's benefit, and paid the bid with money borrowed by or for Stewart, it is probable we should have no difficulty in holding that the Drake bid was fraudulent as to the Moss, Medbury and Duffield mortgage, and to be regarded in equity for the protection of their rights as a payment of the prior mortgage to Cooper, Storm and Smith. But it is not claimed that the defendants in the present suit, at the time they took an assignment of the Drake and Baines mortgages, had any knowledge of the circumstances under which Drake had acquired the title, or that he, or Baines after him, held it in any other way than for his own benefit. No fraud, either actual or constructive, can, therefore, be charged upon these defendants. So far as appears, they acquired title to the mortgages in good faith, and in reliance upon what appeared to be a regular title of record. They were not, therefore, to be affected by any equities,

not attaching to the mortgages in favor of the mortgagors, but existing against their mortgagors in favor of third persons. The suggestion that Stewart's possession of the premises was notice to them of defective title, can have no force, under the circumstances of this case. There is no claim that Stewart, while so remaining in possession, claimed rights adverse to the Drake and Baines mortgages; and the bank officers, if they had inquired of him on the subject, would probably have been informed by him that he did not. At any rate, they had a right to suppose that his possession was subordinate to the right of Baines, who appeared, by the record, to have acquired the title of Stewart through the first foreclosure. It was decided in *Bloomer v. Henderson*, 8 *Mich.* 395, that the possession by a grantor of the premises which he had conveyed, was no notice of any claim adverse to his conveyance; and the rule is not different where his title is divested by judicial sale, instead of his own conveyance.

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

The other Justices concurred.

Louis M. Smit v. The People.

Fraudulent assignment, evidence of. A sudden assignment of property to a brother, made after demand of payment of a debt, under fear of an attachment, and a refusal on the part of vendor and vendee to give any information concerning the terms of the transfer, will justify an inference of fraud.

Heard May 21st. Decided May 25th.

Certiorari to T. K. Gillett, a Circuit Court Commissioner for Wayne county.

Plaintiff in error was found guilty by the Commissioner of fraudulently disposing of his property, against the provisions of the "*Fraudulent Debtor Act*"; and this writ was sued out to review the proceedings thereon.

SMIT *v.* THE PEOPLE.

D. C. Holbrook, for plaintiff in error.

Newberry & Pond, for the People.

CAMPBELL J.

This is a certiorari to review the finding of a Circuit Court Commissioner, holding Smit guilty of fraudulently disposing of his property, against the "*Fraudulent Debtor Act*"; and it is claimed the complaint did not make out such a case as to give the Commissioner jurisdiction.

It appears, from the showing, that Smit, being called upon by an agent of his prosecuting creditors for an unpaid balance of five hundred and fifty dollars, stated that he then had no money to pay, but had on hand a stock of nine thousand dollars, while he owed between four and five thousand. Upon being requested, he refused to make payment in goods. The next day, hearing Smit had disposed of his property to his brother, the same agent went to the store and found the brother in possession, claiming title by purchase and payment, but refusing to give any information. The day after that, Louis M. Smit was also found, and refused to state the terms of sale, or to turn over any of the proceeds, and also said he sold out because he feared the agent would sue out an attachment for the debt.

We think this is a very plain case of fraud, which, if true, it would be difficult to extenuate. Nothing but a fraudulent design could be inferred from the facts. The Commissioner was authorized to proceed, and his action should be affirmed, with costs.

MARTIN Ch. J. and COOLEY J. concurred.

CHRISTIANCY J. did not sit in this case.

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James M. Smith v. Horatio I. Lawrence and others.

Specific performance of contract: Reasonable time. Courts will only enforce the specific performance of contracts where, in view of all the circumstances of the case, it seems just and equitable to do so; and where a party has laid by, without performance on his part, until there has been such a change in the value of property sold as to render the contract unequal if made now, the court will refuse relief.

Smith purchased pine lands of defendant by contract, in October, 1856, and paid the first instalment—the balance, of $3,800, to be paid in three annual instalments. He sold off $1,200 of the timber. The land becoming unsaleable, he failed to make the other payments. After considerable correspondence in regard to the payment, defendant wrote plaintiff, in 1862, that the contract had been long since forfeited. Up to this time, defendant had paid the taxes on the premises. In 1863, defendant sold the lands to third parties. Plaintiff thereupon notified them that he claimed the lands under his said contract, but took no steps to enforce his claim. The purchasers went upon the premises, and lumbered during one season. The land having increased largely in value, Smith, in 1865, filed his bill against them and defendant for a specific performance of the contract. *Held*, that if plaintiff had desired to perform his contract, he should have done so within a reasonable time.

Heard May 21st. Decided May 25th.

Appeal in Chancery from Muskegon Circuit.

This was a bill to enforce the specific performance of a written contract for the sale of land.

A cross bill was also filed by defendant, for the purpose of having the contract cancelled and delivered up.

A decree was rendered in the court below dismissing the bill, and ordering the contract to be cancelled.

The facts are stated in the opinion.

S. T. Douglass and *S. D. Miller*, for complainant.

This court has uniformly assumed discretionary power in enforcing the specific performance of contracts, and, while declaring that the exercise of the jurisdiction could not be demanded, as a matter of course, or *ex debito justitiæ*, no uniform rules, no unbending principles, no technical

abstractions, have been laid down as governing the reasonable discretion of this court. — *Har. Ch.* 124; 5 *Mich.* 123; 7 *Id.* 405; 8 *Id.* 463; 11 *Id.* 9; 12 *Id.* 193; 14 *Id.* 105; 15 *Id.* —; 2 *Story Eq. Jur.* §§ 724, 742, 750, 769, 771, 776.

The burden, therefore, rests upon the party seeking relief to present such superior equities that the court can not remain passive, but must interfere for the protection of justice and fair dealing. — 13 *Ves.* 324; 1 *Johns. Ch.* 370; 6 *Id.* 222.

From the evidence, it appears that complainant has acquiesced in the assertion of defendants' title to the land, and that he has abandoned and rescinded the contract.

He is also estopped by inaction, loss of time, and the intervention of the rights of third parties, from asserting any equitable rights, under the contract.

C. I. Walker and *Geo. Gray*, for defendants.

1. Time is not made the essence of the contract between these parties, and, in such case, mere delay or neglect on the part of the vendee to make the required payments, is no ground for denying specific performance, unless that delay or neglect has been very great, and without reasonable excuse. — 3 *Lead. Cas. in Eq. pp.* 7, 5, 8, 83, 84, 86, 87; 8 *Mich.* 46, 49, 472; 11 *Id.* 9; 14 *Peters*, 175.

And in this case there has been no great increase in the value of the property, that would make it inequitable for the complainant to enforce specific performance. — 2 *Lead. Cas. in Eq.* 80; 6 *Wheat.* 528; 11 Paige, 354.

Nor is there any evidence that the complainant at any time intended to abandon the contract, and any presumption of abandonment that would have arisen from the length of time, is repelled by all the circumstances of the case; including the possession of Smith, through S. Lawrence, as late as 1861, and until H. I. Lawrence forbid further cutting or removal of timber. — 3 *Lead. Cas. in Eq.* 87.

2. But when, as in this case, there had been an acquiescence on the part of the vendor in the delay or neglect of the vendee to make the payments, the vendor is not at liberty to declare the contract forfeited, without clear notice to the vendee, and without giving him a reasonable time within which he may perform and make payment. — 3 *Lead. Cas. in Eq. pp.* 66, 86, 87; 4 *Mich.* 573; 11 *Id.* 19; 4 *Johns. Ch.* 560; 8 *Paige* 426, *and note;* 1 *Hoff.* 137; 5 *Rich. Eq.* 570; 6 *Id.* 324; 2 *Ohio St.* 332; 2 *Clark's Ia.* 126; 26 *Ill.* 611; 2 *Beav.* 183; 6 *Id.* 126.

At the very time when the defendant, H. I. Lawrence, made this contract of sale to his co-defendants, he was entirely at liberty to have enforced the specific performance of the contract in question with Smith, or to have sued him on his covenants for his purchase money; and these rights to specific performance are mutual. — 3 *Jones' Eq.* 84.

COOLEY J.

The specific performance of contracts must always rest in the sound discretion of the court; to be decreed or not as shall seem just and equitable under the peculiar circumstances of each case. It is frequently ordered in favor of a party who has been for a considerable period in default, if he has never abandoned the contract, and the other party has suffered nothing from the delay for which he can not be compensated in the decree. If, however, succeeding the default, there has been a considerable change in the value of the property, this may be reason sufficient for denying the specific relief, inasmuch as the contract would thereby become an unequal one, and to enforce it would be to encourage delays by enabling the party to take advantage of changes in his favor, though he might have delayed performance intentionally, and not meaning to perform unless favorable changes should occur.

The contract in question in this case was made October 1, 1856. It is apparent from the evidence that it was entered into by Smith as a matter of speculation, and in the hope of making money by the sale of the pine timber. Before the first annual payment fell due, the depression in business circles was so great as to render that which before seemed likely to result in profit, a losing bargain. That payment was not made; and it is highly probable that there was no time from thence until the sale to Lawrence and Backus, nearly six years later, when Smith would not gladly have been relieved of his contract if practicable without actual loss.

Horatio I. Lawrence, however, did not press for payment, and the correspondence between the parties shows clearly that he was willing to receive payment and to recognize the contract as valid up to the 25th of February, 1862. At that time he writes Smith that the contract had long been forfeited as far as the latter was concerned, and that he, Horatio I. Lawrence, was only hesitating as to what he would do on his part.

To know what was meant by this last clause of the letter, it may be necessary to look a little into the prior correspondence between the parties. It appears that Smith had been making propositions looking to a surrender of the contract on being repaid what he had expended under it, and that he had also proposed to take a part of the land only on payment of a sum named. Lawrence had not accepted either of these offers, but had proposed to Smith that the latter surrender the contract cancelled, without any re-payment. This, Smith had declined for the time, assigning as a reason that he needed it for the purposes of a suit which he had brought against Sidney Lawrence for the price of pine timber sold him from the lands in 1857, but saying that when that suit was disposed of he trusted the business could be settled between them. In another letter, apparently referring to the same proposition

by Horatio I. Lawrence, he says that when he can make the collections due from Sidney Lawrence he shall be willing to accede to a former proposition of Horatio I. Lawrence if still made.

Without looking at the case as it stands upon the evidence aside from this correspondence—which is certainly the most favorable view to take for the complainant—we think it apparent that for some time preceding February 25, 1862, Smith had not contemplated performing the contract, but had relied upon being able to make some more satisfactory and advantageous arrangement for himself when the suit with Sidney Lawrence was disposed of. And although it is probable that nothing had occurred up to this time which would preclude a specific performance on his behalf if he had sought it, yet the letter from Horatio I. Lawrence of that date, apprising Smith that he considered the contract forfeited, was a sufficient notification to the latter, under the circumstances, that if he desired to perform, he must apply in a reasonable time thereafter for the purpose.

The statement by Lawrence that he was hesitating as to what he should do on his part is very far from an intimation that he concurred in any further extension of time, and may have had reference either to Smith's proposition to purchase a portion of the land, or to proceedings against him for declining to cancel the contract, or to sales to others. Whatever it may have meant, it certainly is no such clear assent to the extension of the contract as we think should be shown where a party claims an extension after the long delay which had here intervened, and after being fairly notified that the vendor considered the contract forfeited.

Smith, however, took no steps towards performance; and in June, 1863, the lands, so far as they were of value, were sold to the defendants, Sidney Lawrence and Backus. Up to that time the taxes had for the most part been paid by Horatio I. Lawrence, and although Smith claims to have

paid a small amount to apply on the contract besides the down payment of $1,000, yet the proof on the subject is not very clear, and the amount as claimed was of small importance. Although after the sale to Sidney Lawrence and Backus, Smith informed them that he claimed rights under the contract of sale to himself, he still took no steps to enforce that contract, and it was only after they had taken off timber for one season that he commenced the present suit. In the meantime it is apparent that a great change had taken place in the value of the land. Horatio I. Lawrence had sold the second time at a considerable deduction from the first contract price, but in January, 1865, when the present suit was commenced, pine timber on the stump is shown to have been worth twice as much as it was sold for by Smith the year after he made his contract. In this great rise in the value of the timber is the secret, so far as we can discover it from this record, of Smith's willingness and anxiety to have this contract performed in his favor. He waited until the circumstances were all changed; until the land had been sold; until his losing bargain had become a speculation, and nearly three years after being notified that the contract was considered forfeited, before filing the present bill. At no time had he ever tendered performance, though he had said on one occasion that he was ready to perform, but without adducing any evidence of readiness. The payments which he had made, conceding the most that could be claimed on the evidence, were less than the interest over due on the contract. We are unable to perceive any circumstance upon which a court of equity could seize as warranting specific performance in his favor, and we think the Circuit Court was correct in dismissing his bill and ordering the contract to be cancelled.

Decree affirmed with costs.

The other Justices concurred.

Francis W. Fifield v. Marvin J. Close.

Stamp Act: Process. So much of the Internal Revenue Law as requires process in state courts to be stamped, as a condition of the validity of legal proceedings, is unconstitutional and void.

Heard April 27th. Decided May 25th.

Error to Oakland Circuit.

This was an action of trespass, commenced before a justice of the peace. There was no appearance on the return day, and judgment was rendered for plaintiff for one hundred dollars damages and costs.

The case was removed by certiorari to the Circuit Court, on the ground that the summons issued by the justice of the peace was void, because no United States revenue stamp was attached thereto.

The Circuit Court reversed the judgment of the said justice of the peace.

M. E. Crofoot, for plaintiff in error.

The act of Congress taxing the process of state courts, is void.—2 *Pet.* 449, 467; 22 *Ind.* 276; *Law. Reg. Jan'y*, 1865, *p.* 157; 19 *Wis.* 369; 5 *Mich.* 368; 26 *Howard's Pr.* 119; 29 *Id.* 253, 357; 19 *Abb. Pr.* 121; 30 *Id.* 378.

O. F. Wisner, for defendant in error,

Cited 19 *Wis.* 380.

CAMPBELL J.

There is but one question raised in this case, and that is, whether the stamp tax on legal process in state courts is valid. The power of Congress to impose such a charge, as a condition upon litigation, is denied by the plaintiff in error, as inconsistent with the control which the Constitution of the United States guarantees to the state

authorities over all such matters as have been left by that instrument under local regulation. The question is one of much importance, inasmuch as it involves fundamental principles bearing upon the nature and attributes of both local and general governments.

In order to comprehend the full meaning of the inquiry, it will be well to consider how far this power of taxation may be carried, if it exists, and what consequences it will draw after it. For, while consequences can not alter the law, they may be of the utmost value in aiding us to discover what the law is, in reference to such constitutional questions as refer to the nature of our institutions, and the distribution of the various functions of government.

If this power exists, it is derivable from the specific power vested in Congress "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." — *Art.* 1, § 8. It is very well settled that such a tax as is involved in this cause is not a *direct* tax, within the sense of the constitution, and, therefore, need not be distributed by the rule of population. — *Hylton v. United States*, 3 *Dall.* 171. The constitution imposes no limit on any but direct taxes, beyond the requirement that they "*shall be uniform throughout the United States.*" — *Art.* 1, § 8. There is, therefore, no limit upon the power of Congress (if it can levy these taxes at all), to select any objects within the taxing power, and draw from them any amount of uniform contributions which it may see fit to require. The power to tax any specific thing is unlimited, or it is entirely wanting. There are no bounds within which the discretionary action must be confined. The legislature levying the tax is the sole and ultimate judge of the expediency or necessity of requiring it, and of the extent to which it shall be charged upon any class of taxable articles. And where a legislature acts within the line of its constitutional powers, the motives of its action

can never be judicially reviewed, nor can courts in any way determine the propriety of its enactments. Its expressed will disposes of all questions of reason or policy.

Having this unqualified discretionary power to tax to any extent whatever is taxable, that power may easily be extended far enough to destroy anything on which burdens may be imposed, by making those burdens so heavy as to become prohibitory. It is within the experience of most countries that duties may become prohibitory, and where taxes are chargeable specifically, so that particular objects may be taxed at pleasure, the same result may easily be reached by specific impositions upon domestic interests. The argument that such prohibitory action is improbable, has no force whatever in determining the existence or non-existence of the power. There is no legitimate power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable. Where a constitution does not limit the action of such an assembly, it must be assumed that the people do not regard a right or institution as important enough to be removed from the control of their representatives. And when those representatives make up their minds that policy requires the abrogation of any system over which they have complete authority, they can not be held legally incompetent to abolish it. The principle that an unrestrained right to tax involves in law a right to destroy by taxation, has been recognized from the beginning by our courts. It is the foundation of all of those decisions which have been made by the Supreme Court of the United States, asserting the immunity from state interference of the United States government, and its various offices and instrumentalities. In some of the tax cases, the danger of destruction to the agencies of the

government was more than theoretical, and the design of the obnoxious legislation was to defeat the measures which Congress had determined on for the public interest. And, therefore, in holding that the general government, and its various agencies and machinery, are exempt from state taxation, the Supreme Court expressly rested their decisions upon the assumption that the power to tax involves the power to control and to destroy. — *McCulloch v. Maryland*, 4 *Wheat.* 316; *Osborn v. Bank of the United States*, 9 *Id.* 733; *Weston v. City Council of Charleston*, 2 *Peters*, 449; *People of New York v. Commissioners of Taxes*, 2 *Black*, 620; *Bank Tax Case*, 2 *Wallace*, 200; *Van Allen v. The Assessors*, 3 *Id.* 573; *Dobbins v. Commissioners of Erie County*, 16 *Pet.* 435. A similar principle has led to the protection from State interference of all privileges lawfully granted by the United States.— *Hays v. Pacific Mail Steamship Company*, 17 *How.* 596; *Gibbons v. Ogden*, 9 *Wheat.* 1; *Passenger Cases*, 7 *How.* 283; *Sinnott v. Davenport*, 22 *Id.* 227.

If Congress has the right to impose a duty or tax upon suits in courts of the states, it follows, as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the states.

Presented in this form, the inquiry involves little short of absurdity. It is one of the cardinal principles of political science that no government can exist without a judicial system. It is the only peaceable means of enforcing private rights, and of protecting the community or the citizen from violence and fraud. A state without courts to enforce its own laws, is an impossibility. And if Congress can

destroy or control the State judiciary, it can utterly abrogate the state itself.

No one would contend that the system of government established by the constitution of the United States can possibly permit of any diminution by the general government of any of the functions which are left under state control. The judicial powers, like the other powers of the Union, are enumerated. They do not cover any considerable number of those subjects which concern the ordinary interests of the people. They punish no ordinary local crimes against the peace and good order of society, committed within the states, and they can entertain jurisdiction of no ordinary litigation between members of the same community. Congress can not enable the courts of the United States to entertain any except what — as compared with ordinary interests — must be regarded as exceptional cases. The great mass of common law rights and remedies, asserted by one citizen against his neighbor, are beyond their reach. Our whole system is based upon the principle that local affairs must be administered by state authority, unless where peculiar circumstances have led to the establishment of definite exceptions, resting on special reasons of public policy. The same supreme power which established the departments of the general government, determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature, as if the interference were direct and extreme.

We are not, therefore, at liberty to give weight either to the moderate amount of the tax, or to the solicitude manifested by Congress to exempt those cases more immediately concerning the state as a community. We are bound, of course, not to decide against the validity of any law, unless we are forced into a clear conviction of its conflicting with the constitution. But the uniform decisions of the United States Supreme Court against the validity of any taxes which would destroy those immunities which are secured by the constitution, seem to leave no room for doubt concerning the case before us. The courts of Indiana and Wisconsin have arrived at the same result. — *Warren v. Paul*, 22 *Ind.* 276; *Jones v. Keep*, 19 *Wis.* 369. The interference is not remote, but direct, and prevents any action whatever by the courts of justice in private suits, until the tax is paid. It makes this payment a condition of jurisdiction.

The stamp could not lawfully be required, and the decision of the court below, dismissing the case, and annulling the judgment for want of it, was erroneous, and should be reversed, with costs.

CHRISTIANCY J. and COOLEY J. concurred.

MARTIN Ch. J. concurred in the result.

JULY TERM, 1867, AT LANSING.

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Catharine Hawkins v. William H. Clermont and another.

Foreclosure bill: Mortgage conditioned to board and support: When general demurrer lies. Where a mortgage was given to an old person to secure the payment of a debt by boarding and supporting her for five years, *held*, that the mortgagee was absolutely entitled to the support for the entire period, and that the mortgagor was bound to furnish it—*Evans v. Norris*, 6 *Mich.* 369—and was not at liberty to furnish the support, or pay the money, at his option.

The bill in this case contained an averment that the mortgage sought to be foreclosed had been taken from the register's office before recording, and that defendant Clermont threatened to sell the premises; and also a prayer for an injunction. *Held*, further, that even though the mortgage were not due, the bill should not have been dismissed, as complainant was entitled to an injunction as prayed, to prevent such conveyance or incumbrance of the premises as might deprive her of all remedy.—*Woodward v. Clark*, 15 *Mich.* 111.

A general demurrer to a bill will not lie, if any relief whatever is warranted by the bill.

Heard and decided July 9th.

Appeal in Chancery, from Kalamazoo Circuit.

This was a bill to foreclose a mortgage. It alleged that complainant being seized of certain real estate, and being old and infirm, entered into an agreement with her son-in-law, William H. Clermont, by which in consideration of her conveying to him said real estate that he would execute back to her a mortgage upon said premises—conditioned to pay to her the sum of $500 in five years from

the date thereof—but to be paid by furnishing said complainant with a good and sufficient home and support in all things during said five years.

That said deed and mortgage were duly executed and delivered, but that said mortgage after being left at the recorder's office was lost and never recorded. That defendant had failed and refused to perform the conditions of said mortgage, and that he had threatened to sell the premises so conveyed by complainant.

The bill asked for a foreclosure of the mortgage, and that defendant be enjoined from disposing of or encumbering the premises, and that he be decreed to re-execute and deliver to complainant a mortgage in lieu of the one alleged to have been lost.

Defendants filed a general demurrer, which was sustained by the Circuit Court, and the bill was dismissed without prejudice.

From this decree an appeal was taken to this court.

May and *Buck*, in support of the demurrer.

The demurrer must be sustained, for the bill of complaint does not show anything due under the mortgage.

The undertaking of the defendants which the bill sets up was "to pay, or cause to be paid, five hundred dollars in five years from the date thereof, (July 23d, 1867,) to be paid in furnishing your oratrix, during the said five years, a good and sufficient home and support."

The mode of payment did not change the amount of the indebtedness nor the time when it was to be paid. In view of any default or contingency, the parties fixed the time absolutely when the five hundred dollars should be due.

Under this agreement the defendants had their election whether they would furnish the "home and support," or pay the money.—2 *Pars. on Cont.* 492; 3 *Conn.* 58, *and cases cited;* 1 *Blackf.* 342; 5 *Wend.* 393.

2. But if we consider the gist of the promise to be the "furnishing a home and support," and the sum named not an existing debt, but liquidated damages or a penalty fixed by the parties, we still must arrive at the same conclusion, that nothing is yet due on the mortgage; for the parties, in that case, settled not only the amount of the damages or penalty, but the time of payment as well.

In no view can the mortgage be foreclosed till the time agreed for the payment of the five hundred dollars—July 23d, 1867.

If this was a promise to pay money, either directly or alternately, the demurrer must be sustained. That it was so understood by the parties is apparent from the fact that it was made to run to the complainant, "her heirs, executors, administrators and assigns."

A. Brown, for complainant, was stopped by the court.

Per Curiam.

There are two objections to the demurrer. A general demurrer will not lie, if any relief whatever is warranted by the bill. Even if this bill could not be sustained as a foreclosure bill, it nevertheless makes out a case for an injunction to restrain a threatened transfer in fraud of the unrecorded mortgage, and, therefore, can not be demurred to generally for want of equity.

But we think it a good foreclosure bill. The mortgage was given to secure the payment of the complainant's debt, by boarding and supporting her during five years. This boarding and care are the very method of payment contemplated, and the performance of this condition is distinctly secured. Complainant had a perfect right to require it, and any failure would be a breach which would justify proceedings under the mortgage. Defendant had no option in the matter, and could not refuse to support complainant in the manner provided for.—*Evans v. Norris*, 6 *Mich.* 369.

The decree dismissing the bill must be reversed with costs of both courts, the demurrer must be overruled, and defendants must answer the bill within the time fixed by the rules.

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Elliott F. Covell v. Charles Mosely and others.

Chancery practice: When appeal will be dismissed: Appeal bond. When the return to an appeal in chancery is filed, before the motion to dismiss is called on, it will not be dismissed, in the absence of gross negligence.

The claim of appeal forms no necessary part of an appeal. The filing of the bond, properly approved, is the only condition required by law; but it is valid only for those parties in whose behalf it purports to have been filed.

When no bond filed. Amendment. A party in whose behalf no bond has been filed can not be allowed to file one after the time for appeal has expired. The statute allowing bonds to be amended does not reach the case of such an omission.

Costs on motion to dismiss, when allowed. On a motion to dismiss, where it appears that the party in default, on being notified, offered at once to do all that justice required, no costs will be awarded against them.

Heard and decided July 9th.

Appeal in Chancery from Kent Circuit.

Motion to dismiss for want of prosecution.

An appeal was taken by a portion of the defendants, and in giving directions to the clerk for making a return, he was, by mistake, ordered only to return so much of the record as embraced the matters in which those defendants were concerned.

Upon the filing of this imperfect return, notice of a motion to dismiss was made, and the parties at once, on receiving such notice, directed the clerk to make a further return, and offered to the appellee to pay the costs of the motion.

This further return was made before the motion was reached.

A claim of appeal was filed in the name of three defendants, but an appeal bond was filed only on behalf of two of them.

The motion was based on the imperfection of the original return, and on the variance between the claim of appeal and the appeal bond.

Upon the hearing of the motion, the defendant, who had failed to file any appeal bond, offered to file a new or amended bond, under the statute referred to in *Beebe v. Young*, 13 *Mich.* 221.

A. Pond, for appellant.

A. E. Cowles, for appellee.

PER CURIAM.

It has always been held by this court that unless in case of gross negligence, no appeal will be dismissed where the return is filed before the motion to dismiss is called on.

In this case, the parties being apprised of the irregularity of the return, at once took such steps as were in their power to have the mistake rectified.

They are not, therefore, in fault, and the appeal can not be dismissed on that ground.

The claim of appeal forms no necessary part of an appeal, and the filing of a bond, properly approved, is the only condition required by law. This bond is a valid bond of appeal for those parties in whose behalf it purports to have been filed, and the fact that all the parties whose names appear in the claim for appeal have not joined in it, can not invalidate it as to those parties who did not join. As to them, therefore, the appeal is valid, and the motion to dismiss must be denied, and inasmuch as upon being notified they at once offered to do all that justice required, no costs will be awarded against them.

Lena Young, one of the defendants, not having joined in the bond, and the bond not appearing to have been made in her behalf, she can not be regarded as having

appealed. There being no bond in her behalf, there is nothing to amend; and having lost her appeal by lapse of time, it is out of the power of this court to relieve her.

Motion on her behalf denied.

Louis M. Smit v. The People.

Where action of Circuit Court Commissioner is affirmed, Supreme Court may issue warrant. Where this court affirmed the action of a Circuit Court Commissioner, under the fraudulent debtor's act, *held*, that the power to hear and dispose of the case finally, involved the power to order such action as would make the judgment effective. Warrant ordered to issue.

Heard and decided July 9th.

Motion for warrant of commitment.

In this case the Supreme Court at its last term affirmed the action of a Circuit Court Commissioner holding the defendant liable under the fraudulent debtor's act for having disposed of his property with intent to defraud his creditors. (For the facts see, *ante*, *Louis Smit v. The People*, *p.* 497.)

No warrant of commitment having been issued by the commissioner, an application was made to this court for an order of commitment, to carry out its previous judgment.

A. Pond, in support of the motion,

Claimed this court has power to issue process necessary to carry out its judgments, and inasmuch as no other relief can be granted in this case the order of commitment must be made by this court.

D. C. Holbrook, for defendant,

Insisted this court had no jurisdiction to grant such an order, claiming that the statute being one in relation

to special proceedings must be strictly construed, and that it provided for no warrant in an order of commitment except such as might be issued by the commissioner who adjudicated on the fraud.

Per Curiam.

The power to hear and dispose finally of these cases necessarily involves the power to order such action as will make the judgment of this court effective.

Let a warrant issue as prayed for.

Uri Raymond v. Samuel Hinckson and another.

Notice of motion: Computation of time: Usual route of travel. The usual route of travel must govern in the computation of the time required to be given by rule in the service of notices.

Heard and decided July 9th.

Motion for re-hearing.

D. L. Pratt, for defendants.

Objected that the notice of the hearing of this motion was not for a sufficient length of time under rule 26; Hillsdale, where it was served being over one hundred miles from Lansing by the usual route of travel, which was by railroad.

W. T. Mitchell, for plaintiff:

Claimed that the actual distance must determine, and that there being regular wagon roads between the points, they must regulate the distance.

The court held that the usual route of travel must govern, and that being over one hundred miles by railroad, the plaintiff must comply with the rule.

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The People ex rel. Taylor v. E. D. Tripp.

Replevin: Judgment by discontinuance: Assessment of defendants' damages. When judgment of discontinuance, in replevin, is rendered by a justice against plaintiff, if defendant waive a return of the property, he is entitled to have his damages assessed.

Heard and decided July 9th.

Motion for mandamus.

Taylor was defendant in a replevin suit before Tripp, who was a justice of the peace in Clinton County. The writ of replevin was not served a sufficient time before the return day, and the justice declined to proceed.

The defendant thereupon waived a return of the replevined property, and asked the justice to proceed to assess its value, which he declined to do.

R. Strickland, for the motion.

H. Walbridge, contra.

PER CURIAM.

Where a plaintiff in replevin, before a justice of the peace, has judgment of discontinuance rendered against him by the justice, it is the duty of the justice to proceed and assess damages in favor of defendant, when he waives a return; and if the justice refuses to do this, a writ of mandamus will be allowed, to compel him to do so.

Mandamus issued.

The People ex rel. Mead v. Commissioners of Highways.

Costs where plaintiff in motion makes default. The party appearing to resist a motion where the moving party makes default, is entitled to the costs of the motion.

Heard and decided July 10th.

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George Sheldon v. Josiah L. Hawes.

Alteration in written instrument: When to be explained. Where there are circumcumstances and appearances rendering an alteration in a written document suspicious, the party relying upon the document, as altered, is bound to explain it before he can recover.

Handwriting: Inspection by court. Where there was evidence introduced to show in whose handwriting a certain interlineation was made, and there was no evidence showing, or tending to show it to be in the handwriting of the defendant, it was held incompetent for the court, upon its own unaided inspection, and contrary to the testimony, to find it to have been written by him.

Re-hearing: When should be allowed. Where the only positive testimony in his own behalf came from the complainant, and after the hearing, a re-hearing was asked upon a showing of newly discovered evidence that complainant had made statements contradicting his evidence in the material points, in such a way as to be decisive of the case, the refusal of such re-hearing was held erroneous. Complainants' denial of the truth of the newly discovered evidence should not be regarded upon such an application.

Heard July 8th and 9th. Decided July 11th.

Appeal in Chancery from Kalamazoo Circuit.

This was a bill to foreclose a mortgage given to secure the payment of a note.

The defense was a material alteration in the note.

A decree was rendered in favor of complainant, and a petition for re-hearing was filed, but denied.

The facts are stated in the opinion.

Balch, Smiley & Balch, for defendant.

1. The burden of proof rests upon the party who alleges the alteration of a note as a defense. There seems to be a conflict of authority upon the subject, but the best considered cases hold the burden to be upon the defendant. The following cases are cited to sustain this view.— 2 *Me.* 147; 13 *Id.* 386; 7 *Shepley* (*Me.*) 337; 1 *Halst.* 215; 6 *Wheat.* 481; 20 *Vt.* 205; 5 *Har. & J.* 36; 11 *Conn.* 531; 7 *Jones' Law* (*N. C.*) 455; 12 *Rich. Law* (*S. C.*) 387; 7 *Clarke* (*Iowa*) 143; 2 *Johns. Cas.* 198; 1 *Cowen and Hill's*

Notes, Phil. Ev. 606 (*4th Am. Ed.*); 16 *Sergt. & Rawle*, 47; *Best on Presump.* 58.

The distinction sometimes made as to negotiable paper, can not be made here, as this note was not made negotiable.

The reason of this rule seems to be that to adopt a different rule would be to presume the plaintiff guilty of a fraud or crime, which would violate one of the strongest presumptions of the law; the presumption of innocence. It appears by the evidence that the complainant was complained against and discharged for making the alleged alteration. Would this court presume him guilty of a crime of which he has been acquitted upon an examination in a court of justice?

The presumption of fact is naturally in favor of the fairness and innocence of the alteration. — 1 *Wait's Law and Practice*, 913; 20 *Vt.* 205.

Especially, and with great force, ought this principle to prevail in a new country like this, or as this was when these papers were executed, and when the papers are drawn by the parties themselves; but even if the *onus probandi* rests upon the complainant, he is only bound to prove the signature of the defendant, which establishes *prima facie* that the defendant signed it as it appears, and shifts the burden upon him to show that he did not. — 2 *Bosw.* 352.

J. L. Hawes, in person.

1. Where an alteration is material and apparently suspicious, it is incumbent on the complainant to explain it.— 6 *Cush.* 34, 22; *Eng. L. & Eq.* 208; 7 *Bar. S. C.* 564; 8 *Id.* 514; 9 *Cow.* 125; 3 *Ohio*, 445; 9 *Bar.* 186; 19 *Penn.* 178; 1 *Greenl. Ev.* 564–5; 2 *Id.* 160; 2 *Pars. on Con.* 716; 8 *Ad. & E.* 215; 11 *N. H.* 395.

2. The alteration in such a case is presumed to have been made after signing, and by the holder or person to be benefitted by it. — 35 *N. H.* 351; 9 *S. & M.* 375; 9

Wend. 555; 2 *Rich. Eq.* 49; 11 *N. H.* 395; 13 *Id.* 385; 2 *Pars. on Con.* 721; *Chit. on Bills*, 624.

2. It is not competent for the court or jury to institute a comparison even between writings properly in evidence, except in corroboration of other testimony. The comparison made by the Circuit Judge was unauthorized, there being no evidence or pretense that defendant wrote the alteration, but proof that he did not write it. — 5 *A. & E.* 514, 703; 4 *Carr. & P.* 267; 9 *Cow.* 100, 112; 13 *Johns.* 238, 97; 2 *Phil. Ev. C. & H. N.* 611, *note* 483.

3. The decision of the Circuit Judge being founded entirely on inspection and comparison of writings, uncorroborated by any evidence, was erroneous, and a re-hearing should therefore have been granted. The petition for such re-hearing was regular, and stated reasons which would constitute a good cause for a new trial at common law. — *Dan. Ch. Pr.* 1232, 1615, *note;* 2 *Wood & Minot*, 168; 4 *Wend.* 639; 2 *Johns. Ch.* 488; 14 *Id.* 481.

By the English practice, one re-hearing was a matter of course, when the application was sanctioned by two counsel. — *Dan. Ch. Pr.* 1620, 1624; 1 *Bar. Ch. Pr.* 356. Under our practice, after decree a re-hearing rests in the sound discretion of the court, and is not a matter of course. — *Rule* 81, *Dan. Ch. Pr.* 1625; 1 *Hopk.* 112; 1 *Story C. C.* 198; 4 *Id.* 173.

The grounds upon which a party may appeal from a decree or order, or apply to have it re-heard, are as numerous and various as the cases themselves. Whenever a question of law or fact is determined, the decisions may be the subject of re-hearing or appeal by any party who conceives himself aggrieved. — 3 *Dan. Ch. Pr.* 1606. Those grounds in this case were,

a. The decision of the Circuit Judge, and order thereon, was contrary to law and evidence.

b. The newly discovered evidence was material and pertinent to the issue, and such as to deny a party the

benefit of, especially in view of the opinion filed by the Circuit Judge, would be an act of the grossest injustice, and the denial of a sacred right, which the defendant had not waived by any act, or forfeited by any latches. — 2 *Wend.* 225; 4 *Id.* 579; 1 *Johns. Ch.* 494, 502.

CAMPBELL J.

The bill in this case was filed to foreclose a mortgage, given to secure a note made by defendant to plaintiff. The defense rested upon an alleged alteration of the note, whereby it was made payable with ten per cent. interest. The note was originally drawn and signed without any such clause, and the question was whether the words in the margin, "*at ten pr. ct.*," were inserted before the delivery, or were added after the papers went into complainant's possession, without defendant's assent.

The only positive testimony attempting to fix the time and circumstances of the alteration was given by the complainant, who swore the words were inserted after the signing, and before the delivery, by one E. B. Bassett, the subscribing witness, with the assent of defendant. This the defendant denies. Bassett can not speak positively to the handwriting, and has no recollection whatever of the facts, but thinks it probable that he wrote the words. The remaining testimony was all the opinion of witnesses upon the handwriting and other indications appearing on the face of the paper.

The words alleged to have been interpolated are in a different ink from the rest of the note, and are not written in the manner usually to be expected in such papers. The alteration being so peculiar in appearance, and being favorable to the complainant, by adding three per cent. to the interest, creates sufficient ground of doubt to require some explanation. And unless upon a review of the whole testimony it produces a belief in the genuineness of the instrument as altered, of course complainant could not claim to recover upon it.

The court below sustained the bill, but, as set forth in a petition for re-hearing, upon the hypothesis that defendant himself made the alteration. As there was no evidence to that effect, and as there was positive evidence to the contrary, we think it was not competent to act upon any such hypothesis from a mere inspection and comparison of documents. Shortly after the decision was rendered and a computation ordered, and before the case was ready for decree, defendant presented a petition to open the case for a re-hearing on newly discovered evidence, of which defendant was first informed a few days after the decision was rendered. This testimony was set forth in the affidavit of one John E. Babbitt, who states in substance that complainant was in January, 1860, examined before deponent as a magistrate upon the charge of forging the alteration in the note in controversy, upon which Bassett swore that from the fact of his being a subscribing witness he thought he might have written the words inserted; that the decision being postponed until the next day, complainant called in early in the morning and was informed he would be discharged, and the entry was made upon the docket; that he still remained in the office, appearing troubled and as if he wanted to say something, whereupon Babbitt, as they were alone, said to him, "now this matter is ended, and I have discharged you, I should like to have you tell me all about how this alteration came in the note." Sheldon then went on to state that Bassett was mistaken about it, and did not write the words and figures on the note. He further, in answer to questions, said that Hawes, the defendant, did not write it, but refused to say who did, although giving Babbitt to understand he knew all about it.

The court refused to open the case on this showing. We think this was wrong, and that the evidence should have been taken. Sheldon's denial of the truth of Babbitt's affidavit, is not entitled to any weight on such an

application. This testimony was offered for the very purpose of disproving his previous statements as a witness, and to allow a witness to exclude contradictory testimony by denying its truth, would lead to very absurd results. The claim that defendant had been guilty of laches in not obtaining it before, is met by conclusive proof that Babbitt never disclosed it until after he heard of the decision, and it can not be presumed that defendant could have surmised what had been kept secret from every one. And although he previously obtained leave to examine this witness, yet that can have no bearing upon this new discovery. Nor is the testimony merely cumulative in any proper sense of the term. It is the only positive testimony which has come to light in the whole record, except that of the interested parties, and, if true, it would entirely overthrow the case sworn to by the complainant. We think justice required that testimony of this kind should be secured, and that the cause should have been opened for that purpose.

We do not think the case, as presented by the other testimony in the cause, is by any means satisfactorily made out, in such a way that we should feel at all confident that we could fully see through the mystery in which it is involved. We therefore prefer reversing the decree on the ground already mentioned, and opening the case to further light, instead of deciding it upon the imperfect proofs now in.

The decree must be reversed, with costs, and the order of reference must be vacated, and the proofs must be opened to allow the examination of Mr. Babbitt, and the case must be remitted to the Circuit Court for further proceedings. Proofs to be taken upon the usual notice, and to be closed within forty days from the filing of remittitur, unless otherwise ordered by the Circuit Court.

COOLEY and CHRISTIANCY JJ. concurred.

MARTIN Ch. J. did not sit in this case.

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f151 [3]428
151 [2]432

The Western Union Telegraph Co. v. John H. Carew.

Telegraph Companies, liability of, over their own and other lines: Repeated Messages: Printed Blanks: Special Contract: Agency. Telegraph Companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position.

When a person writes a message under a printed notice, requesting the company to send such message according to the conditions of such notice, *held* that the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the Company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions.

Where a telegraph company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeated messages and for which an increased charge would be made, and further, that it would assume no liability for any error or neglect committed by any other company over whose lines a message might be sent in the course of its destination, *held*, that such regulations were reasonable and binding on those dealing with the company.

Error to Wayne Circuit.

This was an action of assumpsit, brought by defendant in error to recover damages for the failure on the part of plaintiff in error to transmit a certain telegraph message from Detroit to Baltimore. The charges were paid to Baltimore, though plaintiff in error's lines only extended to Philadelphia. The message was correctly sent to Philadelphia, and delivered there to the agent of the Baltimore line. The error occurred between this point and Baltimore.

The message was written upon one of the printed blanks of the company, at Detroit, containing certain conditions, but which defendant in error had never read; neither was his attention ever called to them.

The charge of the court is stated in the opinion. Judgment was rendered for plaintiff below.

Walker & Kent, for plaintiff in error.

1. Telegraph companies are in no proper sense common carriers, or indeed bailees of any sort.

Bailment in all its forms, is a contract on the part of the bailee to take some particular thing or person, and deliver again the same thing or person.

The telegrapher receives a certain message, written or spoken, and undertakes, not to convey the identical message or words, but by means of a new and wonderful process to reproduce the same words at another place and to another person. He may neglect or refuse to perform his promise, but the thing received cannot be stolen, cannot be lost.

The ground on which, by the policy of the law, the common carrier is made an insurer, is that the goods entrusted to him, are absolutely in his power, that without danger of detection he might claim that they had been lost or stolen.—1 *Pars. on Cont.*, 634.

The reason of the rule failing as to Telegraphers, it is unjust to apply to them a rule confessedly harsh in its application to carriers.

The reasonable and just rule which should be applied to him seems to us to be the same applied to most other callings. Holding himself out to the public as a telegrapher he should be held to the exercise of reasonable skill in his occupation. He should also be bound to have reasonably good instruments.

He should not be held responsible for mistakes without negligence and from causes beyond his control.

A declaration against him should always aver that he promised to use reasonable diligence and skill; and the breach should be an allegation of neglect.

In this view of the promise implied in law, it is plain that the court below erred in not giving the last request to charge, made by defendant. The declaration averred

an absolute contract to transmit the message to Baltimore. The contract proven was an agreement to use reasonable diligence and skill in sending. Hence, of course, a fatal variance.—2 *Com. Bench*, 7.

2. The law imposes upon all telegraph companies the duty of receiving dispatches for other lines.—1 *Comp. L. p.* 676.

But, from the nature of the case, their contract with the public is only to transmit a message over its own lines, and deliver it to the next line in the course of its journey.—16 *Upper Canada*, 530.

3. The contract is a special one. The printed conditions form a part of it:

a. The contract was made through an agent. It is well settled that an agent can bind his principal only when the act in question is within the authority of the agent, or the principal has so acted as to give the party contracting, reason to believe the agent authorized.

In the case at bar, the agent testifies, without contradiction, that he had no authority to receive messages except in accordance with the printed conditions.

b. The conditions were general regulations made by the company. They are reasonable regulations, and Carew was bound to take notice of them. If he wanted to send a message he should have inquired on what terms the company sent messages.

c. By writing his message upon the company's blank, Carew assented to the conditions written thereon, and is now estopped from denying his knowledge of them. Even though telegraph companies were to be held to the strict rules of a common carrier, still they could make special contracts limiting their general liability.

This doctrine is settled in this state.—6 *Mich.* 243; 25 *New York*, 442; 5 *H. & N.*, 867; 45 *Barb.*, 274; 33 *E. L. & Eq.*, 180; 18 *Md.*, 341; 1 *Metc. Ky.*, 164.

C. Hunt, for defendant in error.

It is not claimed that defendant in error ever read the conditions on the printed blanks of the company, or that his attention was ever called to them.

1. The principle is elementary that no party can be bound by an instrument, the contents and conditions of which are concealed, or even if the same were not disclosed by the party benefitted thereby.

Telegraph companies, like common carriers, may limit their liability by a special acceptance when the message is delivered to them, but it must be brought home to the knowledge of those employing them. — 3 *Mich.*, 39; 6 *Id.*, 257.

2. The same rule must apply to telegraph companies that applies to common carriers who receive the whole compensation for the carriage of a package addressed to a place beyond the limits of their own route. That is, that he engages for the due delivery of the package at the place of destination, unless he expressly limits his responsibility to his own route, or the circumstances are such as to clearly indicate that that was the understanding of the contracting parties. — 19 *Wend.*, 534; 25 *Id.*, 660; 8 *M. & W.*, 421; 3 *Sand., S. C.*, 610; 24 *Barb.*, 382; 43 *Id.*, 225; 8 *Pick.*, 23; 5 *B. & P.*, 182; 4 *Dall.*, 206; *Law Reg., May*, 1866, *p.* 414.

3. Where a party assumes to act for another, and where, through his own or his agent's neglect, the interests of the party reposing the trust are damnified, the party assuming the trust shall answer to the party injured. — 12 *Mod.*, 490.

It has been held in numerous cases, both in England and this country, where railway companies were defendants, that where the carriage money was only paid as far as the terminus of defendant's road, and the rest was to be collected on delivery, still the defendants were liable for loss on another and connecting road. — 3 *Eng. L. & E.* 497.

It has been held in numerous cases that a plaintiff could not recover damages from a connecting line for a loss occuring on such connecting line, on the ground that there was one contract for the entire sum with the original company, and no contract with any of the connecting companies; thus cutting off all redress whatever should these decisions govern, and the proposition affirmed by the plaintiff in error, be correct. — 4 *H. & N.*, 614; 5 *Id.*, 274; 7 *Id.*, 986.

There was no variance between the contract declared upon, and the one proven.

No reference was made to the paper on which the words were written, nor did plaintiff introduce it as part of his proof; he claimed nothing under it, and in fact never had it in his possession after having used it to write the message on. There was nothing contained in it on which plaintiff could sue. It contained no promise on the part of the company to safely and correctly transmit the words thereon written, to Baltimore. The paper contained no undertaking on the part of the company for a breach of which plaintiff could sue. The paper was utterly worthless to him for any purpose whatever. His case was made out by parol proof of the parol agreement, made with plaintiff to send certain words to Baltimore; of the consideration paid therefor; of the failure of the company to transmit the words as agreed, and the damage resulting therefrom.

CHRISTIANCY J.

Carew, the plaintiff below, wishing to order an amount of oysters from Rowe, Schoolfield & Co., of Baltimore, went to the office of the plaintiffs in error, at Detroit, and wrote and delivered for transmission the following message:

"*Rowe, Schoolfield & Co.—Carleton, Baltimore, Md.:*

Send immediately (40) forty cases cans, (5) five sacks kegs. Don't fail.

J. H. CAREW."

and paid for its transmission one dollar and ninety-five cents, the price of an unrepeated message from Detroit to Baltimore.

On the face of the paper upon which the message was written, was printed the following immediately above the written message:

"WESTERN UNION TELEGRAPH CO.—COMMERCIAL MESSAGE.

SEE CONDITIONS ON BACK.

Write plainly. Give full address. Use no abbreviations or figures. Send the following message, without repeating, subject to above conditions and agreement indorsed on back."

On the back of the same paper, in full and clear type, was printed the following:

"WESTERN UNION TELEGRAPH COMPANY.

CONDITIONS.

In order to guard against and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated by being sent back from the station at which it is received to the station from which it is originally sent. Half the usual price will be charged for repeating the message. And while this company in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays in the transmission or delivery, nor for the non-delivery of repeated messages beyond two hundred times the sum paid for sending the message, unless a special agreement for insurance be made in writing, and the amount of risk specified on this agreement, and paid at the time of sending the message. Nor will the company be responsible for any error or delay in the transmission or delivery or for the non-delivery of any unrepeated message beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated thereon and paid for at the time. No liability is assumed for error in cypher or obscure messages. Nor is any liability assumed by this company for any error or neglect of any other company over whose lines this message may be sent to reach its destination. And this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company.

"No agent or employee is allowed to vary these terms, or to make any other or verbal agreement, nor any promise as to the

time of performance; and no one but a Superintendent is authorized to make a special agreement. These terms apply through the whole course of this message, on all lines by which it may be transmitted."

The plaintiff below testified — and there was no evidence to the contrary — that he never read the above conditions, nor had his attention called to them — that he was not informed, nor did he know that the message passed over the line of any other Company on its way to Baltimore, or that it was necessary to repeat the message in order to hold the Company responsible for mistakes.

The line of this Company extended only to Philadelphia. The message was correctly transmitted to that point, and there correctly delivered to the agent of the line from Philadelphia to Baltimore. But when received at Baltimore the message read "four cases," instead of "forty," and the four cases only were sent by Rowe & Co. This action is brought to recover the damages resulting from this error.

The court charged the jury:

"1. That the plaintiff was not bound by the conditions on the back of the dispatch, unless his attention was called to them.

"2. That it is immaterial on which line the error occurred; the defendant having received the pay for the proper transmission of the dispatch from Detroit to Baltimore.

"3. That if the plaintiff's attention was not called to the necessity of repeating the message in order to secure its correct delivery, he was not bound so to do, to entitle him to recover."

To each of these charges exception was taken; and the court was requested, but refused, to charge directly the contrary, and that there was a fatal variance between the contract declared upon and that proved (the declaration being upon an absolute undertaking to send to and

deliver the message at Baltimore). If the printed request on the face of the paper, to "send the message without repeating subject to above conditions and agreement on back," together with the terms and conditions referred to, constituted or governed the contract for transmission, then the entire charge of the court was wrong, and the plaintiff below had no right to recover.

The competency of the parties to enter into such a contract is not denied; but it is insisted that telegraph companies are common carriers; that carriers cannot limit their common law liability by a mere notice, because the other party has the right to insist upon having his goods carried by them, subject to their common law liability, notwithstanding the notice; that the parties employing them are not bound to pay any attention to such notice; and to exempt the carrier from such liability it must be shown, not only that the notice was brought home to the party dealing with him, but that he actually assented to the terms.

We do not deem it necessary to discuss the case upon this theory. Our opinion upon its application to carriers will be expressed in the several cases of the Michigan Southern and Northern Indiana R. R. Co., now before us. We are all agreed that telegraph companies, in the absence of any provision of statute imposing such liabilities, are not common carriers, and that their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract or otherwise, they choose to assume that position, or hold themselves out as such to the public, or to those who employ them. The statute of this state, authorizing such companies, and, to some extent, prescribing their duties and liabilities, imposes no such liability.—*Comp. L. Ch.* 70.

Impartiality and good faith are the chief, if not the only, obligations required by the statute so far as relates to the question here involved. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognized alike by common sense and the common law. The statutes of the other states in reference to this branch of business are in the main substantially like our own.

Telegraph companies, like common carriers, it is true, exercise a public employment, and the former are bound to send messages for those who apply, and are ready to pay the usual or settled charges, as the latter are bound to transport goods for those who seek their services upon similar terms; and doubtless the same rules for securing impartiality would apply to both, except as modified by statute — *see Section* 15 *of Chapter* 70, *above cited.* But beyond this, as relates to the actual transportation of goods in the one case, and the transmission of ideas in the other, there is, in the nature of things and the different means and agencies employed, but very little substantial resemblance; and any analogy must be more fanciful than real, and likely to lead to error and injustice. This is not a case which calls upon us for laying down the rules, which must be held to govern as to the degree of skill, care and diligence to be required in the transmission of messages. But doubtless the use of good apparatus and instruments would be required, and reasonable skill, and a high — perhaps the very highest — degree of care and diligence in their operation. And when an error has occurred in the transmission of a message, it may be found that they ought to be held *prima facie* guilty of negligence, the *onus* of proof resting

upon them to show diligence, the means for doing this being peculiarly within their knowledge and power.

But it would be extremely unjust, and, considering the small amount of compensation for sending a message, would effectually put an end to this method of correspondence, to hold them absolutely liable as insurers for the entire correctness of all messages transmitted, or to hold them responsible for all damages which might accrue from an error, especially when only a single transmission without repeating, is relied upon or paid for; or, to deny them all power by rules, regulations or notices to *limit* their liability even in the case of repeated messages. And it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission.

And while, in settled weather, or, when the normal condition or operation of the electrical currents is not affected by any temporary or local disturbance, a single transmission by a skillful operator may be relied upon, as a *general rule*, and for matters of comparatively small importance, yet it must be well known to most men (if not to all who have such a degree of intelligence as to be likely to resort to this mode of correspondence), that the electrical state of the atmosphere is liable to sudden and violent changes, extending over areas of greater or less extent, which cannot be foreseen or guarded against, and which materially affect the currents transmitted from a battery along the wires, and for a time render the operation of the instruments uncertain and unreliable; that these disturbances often affect distant portions of the line or of a connecting line, while their influence may be scarcely felt or not felt at all at the station from which a message is sent, and that therefore to insure entire and uniform correctness, the only safe method is to have the message verified by repeating it back to the station from which it was sent.

The regulation therefore of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question.

And as the compensation ought always to be in proportion to the risk assumed, the provision in these regulations in reference to insurance, must be regarded also as just and reasonable.

As the statute of this state (and of the other states so far as we have examined them) requires them to receive dispatches from and for other telegraph lines, and to transmit, etc., it is but reasonable, when the same message is to pass over the lines of more than one company, that each should be responsible only for the errors occurring on its own line; and the receipt of the money by the company first transmitting the message, as the agent of the other lines, is much more for the convenience of the person sending the message, than for that of the company.

Such being the reasonable and settled rules, regulations and usage of this company, it was, we think, for the plaintiff, before sending his message, to acquaint himself with those rules, regulations and usages, and the terms upon which messages would be sent. And in the absence of any special inquiry by him upon the subject, the natural inference would seem to be, either that he already knew and assented to such rules, regulations or usages, or that he intended to assent to them whatever they might be.

But to give to all who should wish to send messages full information upon these matters, in an authentic and reliable form, which could not so well be done verbally

by special explanations to each applicant, this company has very properly printed their rules and regulations upon the very paper upon which each message is to be written; and upon the very face of the paper immediately preceding the blank space on which the message is written, is the printed request to send the message "subject to above conditions and agreement indorsed on back." The signature of the message becomes also an adoption of, and signature to this request. The party sending the message fills up and signs the printed blanks; and, in form, at least, it is as much his contract as if he had written the whole printed conditions or a contract in which they were inserted with his own hand.

This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind, who should write a message upon the paper. He must at least know that there is some printed matter on the face of the paper, and he must be held to know that it has been placed there for some purpose connected with the message. It is therefore no excuse for him to say he did not read this printed matter before his eyes. It was gross carelessness on his part if he did not.

The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions. *Breese v. United States Telegraph Co.*, 45 *Barb.*, 274, a parallel case, in all material respects, with the reasoning of which we are fully satisfied. See also *Lewis v. Great Western Railway Co.*, 5 *H. & N.*, 867; *Bryant v. Telegraph Co.*, 1 *Daly*, 578; *McAndrews v. Telegraph Co.*, 33 *Eng. L. and Eq.*, 180.

The conditions on the back of the message, it is true, did not state where the line of this company terminated,

nor what other line the message must pass over. But the reference to the terms of sending over other lines, was sufficient, if the plaintiff deemed it of any importance to him, to put him upon enquiry, when the fact would at once have been ascertained.

The contract, which the evidence tended to show, was for a single transmission by the company over its own line without repetition, and for delivering the message as the agent of the plaintiff to the next line in its course to Baltimore; a contract which the evidence tended to show had been fully complied with. The contract, therefore, was essentially different from that declared upon. The charge was erroneous upon all the points stated in the record.

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

CAMPBELL and COOLEY JJ. concurred.

MARTIN CH. J. was not present.

Ira W. Case v. John Rorabacher.

Exemption from service of process, without arrest, while in attendance on court. There is no general exemption from the service of process without arrest, merely because a party is attending court awaiting the trial of a case.

Heard July 9th. Decided July 11th.

Error to Livingston Circuit.

This was an action upon a promissory note.

The defendant filed a plea, in substance, that he was attending the Circuit Court in a suit wherein he was a party defendant, and while in such attendance that the summons in said suit was served upon him; and that

he claimed exemption from the service of such process during such attendance. Plaintiff demurred to the plea. The demurrer was overruled and the plea sustained.

Norris & Uhl, for plaintiff in error.

The question presented is, can a suitor in attendance, in the county of his residence, upon a suit then pending and for trial, be served with a summons as commencement of another suit in the same court.

The demurrer was overruled upon the authority of the case of *Lyell v. Goodwin*, 4 *McLean*, 29. This is not a case in point, and if it was, we must be permitted to doubt its authority.

We can find but one case directly in point in favor of the ruling below. — *Hays v. Shields*, 2 *Yeates*, 222, (1797).

A better reasoned case, directly the other way, is found in 1 *Peters C. C.* 222, (1809).

Most of the cases in which the matter is discussed are cases of privilege claimed from arrest. — 4 *Dall.* 388, 107; 40 *Eng. Com. L.* 464; 1 *Dall.* 296; 1 *Binney*, 77; 9 *Serg. & R.*, 150; 1 *Miles*, 237; *Andrews*, 275; 1 *N. J.* 300, (*Pennington*); *Coxes'*, 142; 6 *Mass.* 245, 264; 8 *Johns.* 350; 18 *Id.* 520; 4 *Litt.* 123; 2 *Wend.* 586.

It would seem that suitors have been, and would be, sufficiently well protected by restraining their arrest, and that the simple reading of a summons, inviting their attendance, by attorney, some weeks thereafter, is not a very formidable breach of their privilege, nor a dangerous contempt of court.

O. Hawkins, for defendant in error.

CAMPBELL J.

Rorabacher, the defendant in error, having been sued by service of summons, pleaded in abatement that at the time

of service he was attending court as a party to another law suit which had been noticed for trial at that term, and he therefore claimed privilege from such process. This plea was demurred to, and the demurrer was overruled, and error is brought upon that decision.

We are not prepared to say that cases may not exist where a party to a suit may be entrapped into attendance for vexatious purposes, and where service of process may not be an abuse to be relieved against. But we think any general exemption from service of process without arrest, merely because a party is attending court awaiting the trial of a cause, is unauthorized by any settled rule of law, and is not required by public policy. We do not feel called on to enlarge personal immunity to such a needless extent, and we can conceive of no legal principle which demands it. Privilege from legal process is, in general, only needed in cases where an arrest is allowed, and where, therefore, service of process directly interferes with liberty of action. There were at Common Law some privileges also against being sued except in particular courts, and some arising out of peculiar official duties or relations. It is very certain, however, that under our non-imprisonment system very few of these privileges are required for any legitimate purpose, and we think it would be improper to extend them by any supposed analogies, when so much of their reason has ceased to exist.

We think the demurrer should have been sustained, and the judgment must be reversed with costs, and the defendant must plead over within twenty days.

CHRISTIANCY and COOLEY JJ. concurred.

MARTIN Ch. J. did not sit.

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2. *Board of Supervisors, effect of adjournment of: Tax, mode of determining amount of.* The law (1 *C. L.* § 807,) requires supervisors to act at "their session in October." They met in pursuance thereof, and at a subsequent adjourned meeting—November 12th—fixed the amount of taxes for the ensuing year. Instead of fixing a specific sum, to be raised by taxation, the Board directed a *per centage* on the assessed value. *Held*, that the session in October embraced all adjournments, although they might run into another month; and that the law merely refers to it by way of designation. *Held further*, that the designation of a *per centage* on a definite sum was just as certain as though it were calculated; nothing remaining to be done except simple computation.—*Ibid.*

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Attorney General v. Supervisors of St. Clair, 11 Mich. 63; *cited* 472.
Baker v. Pierson, 5 Mich. 456; *cited* 396.
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Lewis v. Campau, 14 Mich. 458; *cited* 415.
Moran v. Palmer, 13 Mich. 367; *cited* 155.
Nevius v. Bank of Lansingburg, 10 Mich. 547; *cited* 243.
Niagara F. Ins. Co., 12 Mich. 10; *cited* 480.
Peckham v. Buffam, 11 Mich. 529; *cited* 155.
People v. Dean, 14 Mich. 406; *cited* 159.
People v. Higgins, 3 Mich. 233; *cited* 16.
People v. Kent, 1 Doug. 42; *cited* 18.
People v. Mayworm, 5 Mich. 148; *cited* 181.
People v. River Raisin R. R. Co., 12 Mich. 398; *cited* 181.
People v. Tisdale, 1 Doug. 59; *cited* 16.
Rathbun v. Ranney, 14 Mich. 382; *cited* 328.
Rood v. School District, etc., 1 Doug. 502; *cited* 33.
Smith v. Kendall, 9 Mich. 241; *cited* 291.

Snyder v. Snyder, 6 Mich. 470; *cited* 396.
Spangler's case, 11 Mich. 298; *cited* 430.
Spears v. Carter, 1 Mich. 19; *cited* 32.
Thomas v. Dodge, 8 Mich. 51; *cited* 243.
Underwood v. Waldron, 12 Mich. 90; *cited* 244.
Warner v. Whittaker, 6 Mich. 133; *cited* 155.
Webb v. Mann, 3 Mich. 139; *cited* 79, 82.
White v. Zane, 10 Mich. 333; *cited* 72.
Wilson v. Davis, 1 Mich. 156; *cited* 32.
Wurcherer v. Hewitt, 10 Mich. 453; *cited* 495.

CAVEAT EMPTOR.

Sale of chattels. Complainant being owner of certain real estate in Detroit, sold the same to defendant, and received in payment therefor certain copper stock and defendant's note. Defendant directed complainant before taking the stock, to make inquiries as to its value and not to rely upon his, defendant's, estimation of it. The stock proved worthless. *Held*, that in such a case, where parties stand upon equal terms as to their opportunity of obtaining information concerning the subject matter of sale, each is bound to rely upon his own judgment and means of knowledge. — *Beeker v. Hastings*, 47.

CERTIORARI.

Weight of evidence. The Supreme Court will not review a case, on the weight of evidence on certiorari. — *Hyde v. Nelson*, 11 *Mich.* 353; *Linn v. Roberts*, 443.

CHANCERY.

See EQUITY.

Practice in: See EQUITY PLEADINGS, etc.

CHANCERY PLEADINGS AND PRACTICE.

See EQUITY PLEADINGS AND PRACTICE.

CHARGE OF COURT.

See PRACTICE IN CIRCUIT COURT, 2, 3.

And see EVIDENCE, 9, 10.

CHATTELS.

Sale of: See CAVEAT EMPTOR.

CIRCUIT COURTS.

Jurisdiction in actions ex contractu. In a suit commenced by attachment, the declaration set forth a justice's judgment amounting with interest to less than $100, and contained no other counts and no *ad damnum* clause. *Held*, inasmuch as the Constitution gives to Justices of the Peace exclusive jurisdiction in suits arising *ex contractu*, where the amount claimed is less than $100, that the Circuit Court had no jurisdiction of the cause, and the judgment was void. — *Raymond v. Hinckson*, 113.

CIRCUIT COURT COMMISSIONER.

1. *Habeas corpus: Notice to creditor: Waiver.* In a habeas corpus proceeding before a Circuit Court Commissioner, in behalf of a party held under an execution against the body, a plaintiff in execution is entitled to four days notice before any order of discharge is made; and the appearance of his attorney for the purpose of objecting to the hearing for the want of such notice, is no waiver of the same. — *People v. Kehl*, 330.

2. *Fraudulent debtor's act: Prima facie case.* An application to a commissioner under the fraudulent debtor's act must make out facts amounting to a *prima facie* case of fraud. — *In Re., Teachout*, 346.

3. *Power to impose costs.* The statute empowers the commissioner to impose costs upon the defeated party. — *Comp. L.* § 4776; *Linn v. Roberts*, 443.

4. *Where action of Circuit Court Commissioner is affirmed, Supreme Court may issue warrant.* Where the Supreme Court affirmed the action of a Circuit Court Commissioner, under the fraudulent debtor's act, *held*, that the power to hear and dispose of the case finally, involved the power to order such action as would make the judgment effective. Warrant ordered to issue. — *Smit v. People*, 516.

For discussion of irregularities in summary proceedings for possession of land. — *Allen v. Carpenter*, 25.

CITY OF DETROIT.

1. *Liability of, for injuries resulting from defective sidewalks.* Under the charter of the city of Detroit all repairs of sidewalks are required to be made under the supervision of the street commissioners in their respective districts, and under the direction of the common council. The charter further provides that one or more commissioners may be appointed for the city.

   In an action against the city for damages resulting from a defective sidewalk, it was held that the commissioner may in such matters be fairly regarded as representing the corporation. If a defect is found which he ought to have known, and which he has failed to repair within such reasonable time after such knowledge may be presumed to have reached him as, under the circumstances, was sufficient to provide for such repairing, then the city would be liable, but not otherwise.—*Dewey v. The City of Detroit*, 307.

2. The extent of the duty resting upon the city depends upon the means provided for its performance; and while responsible for neglect where reasonable diligence has not been exercised, it is not responsible where it is not reasonably capable of acting efficiently by its proper agencies.—*Ibid.*

3. *Municipal Corporation: Power of determining number of officers, discretionary.* The discretionary power under the charter of determining how many officers are required for certain duties, is one of a legislative character, which can neither be reviewed, nor made the basis of an action against the city. The number fixed must be assumed to be all that were needed for the proper care of the interests intrusted to them.—*Ibid.*

As to construction of contract for paving: See Contract.
And See STREETS.

CITY CHARTER.

Enforcing by-laws by penalties. Where a city charter specifically enumerates various powers which the Common Council may render effectual by penal prosecutions, such enumeration is an implied exclusion of the right to impose penalties in other cases.—*City of Grand Rapids v. Hughes*, 54.

CLAIMS.

Against estates of deceased persons: See ATTACHMENT.

CLOUD UPON TITLE.

Bill to remove, what should set forth: See EQUITY PLEADINGS and PRACTICE, 14.

COMMISSION.

On advances by mortgagor: See MORTGAGE, 2.

COMMISSIONERS (OF STREETS).

See CITY OF DETROIT, 1.

COMMISSIONERS TO HEAR CLAIMS.

When lien obtained before decease: See ATTACHMENT.

COMMON CARRIERS.

1. *Of passengers. Liability for money stolen from passenger in room.*— Plaintiff took passage on the steamer of the defendants, and paid her fare, which included her board on the passage, a state-room and lodging. She was assigned to the room by the proper officer of the boat; and another lady, a stranger to the plaintiff, was afterwards also assigned to the same room. Plaintiff, when she retired to bed, left her dress, in the pocket of which was her portemonnaie, with some personal jewelry and money for her traveling expenses, on an upper unoccupied berth. During the night, while the plaintiff was asleep, the money and jewelry were claimed to have been stolen, but whether by some one from without, or by the other lady within, did not conclusively appear, though the evidence tended to show that it was stolen from without, through a window, which the steward of the boat knew to be broken.

   Whether the defendants were liable for the property if stolen, *Quaere?* The court being equally divided in opinion.

   CHRISTIANCY J. COOLEY J. concurring, holding the defendants liable as carriers to the same extent as an innkeeper would have been for a similar loss by a guest occupying a room at his inn.

   CAMPBELL J. the Ch. J. concurring, denying the liability.

   The respective liabilities of carriers and innkeepers fully discussed. — *McKee v. Owen*, 115.

2. *When intermediate consignee liable for deduction of freight.* In an action by a carrier against an intermediate consignee for a deduction of freight, by virtue of an alleged custom permitting shortage to be deducted when it did not arise from the fault of the prior carrier: *Held*, that the action was properly brought, if the deduction was made under protest, and the carrier had not accounted with the owner of the cargo when suit was commenced. — *Strong v. Grand T. R. R. Co.*, 206.

3. *Mercantile custom, when void.* A custom that an intermediate carrier, who received property subject to charges, may deduct from the freight earned by a prior carrier the value of any deficiency between the quantity delivered and that stated in the bill of lading, and that the prior carrier shall not be allowed to show that an error occurred in stating the amount in the bill of lading, is not such a valid custom as the courts will enforce. — *Ibid.*

4. *Effect of special notice after acceptance of goods.* A portion of a certain quantity of wool was delivered to the D. and M. R. R. Co., by the owner, and received by their agent for transportation, with the understanding that the balance should be sent to their depot as soon as they should give notice that they had cars to ship it.

The company having notified the owner, the balance of the wool was delivered to and accepted by them; whereupon the owner signed a shipping request, furnished to him, to the effect that said company would forward all of said wool, according to certain special conditions endorsed thereon, and limiting said company's liability.

Suit being brought for the value of a part of said wool, which it appeared said company had never shipped, it was held, that whatever might have been the effect of such a notice, if given before the delivery of the property at the depot, it came too late to affect the question of a prior delivery to, and acceptance by the company as a common carrier. At the time of the receipt of the notice, plaintiffs had a right to consider it as intended to refer only to the liability of the company, in respect to the carriage of the property. — *D. & M. R. W. Co. v. Adams*, 458.

As to liability of telegraph companies; See TELEGRAPH COMPANIES.

COMMON COUNTS.

Suit for value of goods; when time of credit has elapsed: See PLEADING, 10.

COMPUTATION OF TIME.

Mode of, in giving notice of motion: See PRACTICE IN SUPREME COURT, 6.

CONCEALMENT

Of party charged with crime; effect of: See EVIDENCE, 5.

CONSIDERATION

As to voluntary subscription: See PLEADINGS, 7.
As to money paid: See LEASE, 2.
Absence of, in voluntary deed, without fraud or mistake, does not raise resulting trust in grantor.—*Jackson v. Cleveland*, 94.

CONSIGNEE.

When liable for freight: See COMMON CARRIER, 2.

CONSTITUTIONAL LAW.

1. *Powers of Highway Commissioners and Supervisors.* Under the Constitution — *Art.* 10, § 11 — "the Board of Supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law." *Held*, that such provision did not contemplate exclusive control over the subject-matter by the supervisors; neither was it inconsistent with the exercise by Highway Commissioners of the power to lay out, alter or discontinue highways. — *People v. Nankin*, 347.

2. That by the amendment to the Constitution — *Laws* 1859, § 1102 — Highway Commissioners had authority to discontinue such roads as came within the exercise of their official duty without the intervention of a jury. — *Ibid.*

3. That the Board of Supervisors, having full control over the opening, altering and discontinuing of state and territorial roads (1 *Comp. L.* § 1081), the exercise of such power by Highway Commissioners was repugnant thereto, and not contemplated by the statutes. — *Ibid.*

4. *Referee, oath of: Judicial power: Stipulation.* A referee is not such an "officer" within the meaning of the constitution as requires him to be sworn before assuming his duties. *Const. Art.* 18, § 1. And, when testimony in a cause is submitted to such referee by stipulation, his action thereon is not in any sense judicial. — *Const. Art.* 6, § 1. — *Underwood v. McDuffee*, 361.

5. *Held* further, that the judicial power in the constitutional sense is not exercised by a referee in determining facts in a cause submitted to him, but by the court in giving judgment. — *Ibid.*

6. *Amendment of statute: when valid.* Where in a revision of the same subject-matter the legislature substitutes one section for another, if the new section be not foreign to the subject matter indicated by the title of the law in which it is inserted, it is not invalid because it substitutes entirely new provisions, inconsistent with the old. — *Ibid.*

7. The constitution requires all statutory provisions to conform to the title of the act; but, while it requires all amended sections to be published at length, it imposes no other limitations upon the nature of amendments. — *Ibid.*

8. *Stamp act: process.* So much of the Stamp Act as requires process in state courts to be stamped, as a condition of the validity of legal proceedings, is unconstitutional and void. — *Fifield v. Close*, 505.

CONSTRUCTION OF STATUTES.

See STATUTES.

CONSTRUCTIVE NOTICE.

From possession: See NOTICE.

CONTRACT.

Construction. Under an ordinance of the city of Detroit, the complainants contracted "to pave their railway track (on a certain street) and two feet and four inches on either side thereof, at their own expense—if the city should pave said street cotemporaneously with the construction of complainants' "railway." The city did so, and having assessed said complainants for the cost of the excavation, as well as the paving, of said portion of said street, it was held that under said ordinance and contract, the complainants were only liable to pay for their proportion of the paving.—*Fort St. and Elmwood R. W. Co. v. Schneider*, 74.

Mistake in contract, when Court of Equity will correct: See EQUITY JURISPRUDENCE, 1.

By Married Women: See MARRIED WOMEN.

Effect of Surrender: See EQUITY PLEADINGS AND PRACTICE, 5.

Unconscionable Contracts: See EQUITY JURISPRUDENCE, 7.

Construction of Rail Road Ticket: See PASSENGER.

Agreement to convey specific lots: See EQUITY JURISPRUDENCE, 4.

Action for damages, when contract is repudiated for fraud: See DAMAGES, 1.

Assignment of Land Contract: See EQUITY PLEADINGS AND PRACTICE, 4, 5.

Parol evidence to explain contract in defense to specific performance: See EQUITY JURISPRUDENCE, 8.

For sale of land: See EQUITY PLEADINGS AND PRACTICE, 4.

As to reasonable time: See SPECIFIC PERFORMANCE.

By Telegraph Company: See TELEGRAPH COMPANY.

CONVERSION.

See TROVER.

CORPORATION.

Power of municipalities to determine number of officers: See CITY OF DETROIT, 3.
And see MUNICIPAL CORPORATIONS.

Description of information in *quo warranto:* See PLEADINGS, 1 to 5.

COSTS.

Where plaintiff in motion makes default. The party appearing to resist a motion where the moving party makes default, is entitled to the costs of the motion.—*People v. Highway Commissioners*, 518.

When subsequent purchaser to pay: See EQUITY PLEADINGS AND PRACTICE, 10.

Power of Circuit Court Commissioner to impose: See CIRCUIT COURT COMMISSIONER, 3.

When allowed on motion to dismiss chancery appeal: See EQUITY PLEADINGS and PRACTICE, 24.

COUNTY.

1. *Organization of, what requisite. Townships. Board of Supervisors* An act purporting to organize a new county out of territory detached from an old one, but which contains no organized townships, and makes provision for none, is inoperative and void; as without such townships there can be no legal elections, and no means of organizing.—*People v. Maynard*, 463.

2. Such an act is not made effective by the subsequent passage of an act organizing a single township in the new territory, leaving the remainder not provided for.—*Ibid.*

3. A county can not be organized without the means of exercising all its necessary functions, and requires more than one organized township, as the board of supervisors can not exist without more than one member, and there can be no county without such a board.—*Ibid.*

4. Where townships have become organized under a statute and have acted for many years, and have been recognized by the various state and local authorities, it is too late to inquire into the validity of the law providing for their original creation, and their corporate existence can not be questioned.—*Ibid.*

5. The legislature can not lawfully deprive qualified voters of a county of their right of suffrage, by organizing townships in only a portion of it; leaving the remainder unorganized.—*Ibid.*

6. The division of a single county attached to an existing judicial district into two counties, will, unless otherwise provided, leave both counties within the same district. — *Ibid.*

7. *Washington County, invalid.* The organization of Washington County out of part of Marquette County, *held* invalid — *Ibid.*

Effect of division of, upon judicial districts: See JUDICIAL DISTRICTS.

COUNTY SEAT.

As to removal: See SUPERVISORS, 1, 2.

COUNTY CLERK.

Signing jurat by initials: See AFFIDAVIT.

COURT.

As to exemption from service of process: See PROCESS.

CREDIT.

When suit may be brought for sale of goods on credit: See PLEADINGS, 10.

CREDITORS.

Voluntary Deed: See DEED, 1.

As to notice in *Habeas Corpus* before Commissioner: See CIRCUIT COURT COMMISSIONER, 1.

CRIMINAL LAW.

1. *Informations in criminal cases: when more than one filed: rights of prisoner: practice.* The Prosecuting Attorney put on file two informations in the same case, one of which did not contain certain words supposed to be essential in charging the offense, whilst the other was deemed correct. The party was tried on the latter, but the former was copied into the record

by the Clerk, in making his return. It was proposed to establish these facts by affidavits. *Held*, that it does not rest with the Prosecuting Attorney to say which shall be considered as the record in the case, but that all doubts on the subject should be solved in favor of the prisoner. *Held*, further, that the return filed in this Court was the proper record on which the argument must be had. — *Rice v. People*, 9.

2. *Jurat signed by initials. Statutory offense, how described.* The information in this case charged defendants below with an assault "with intent to kill and murder," omitting the words, "feloniously, wilfully, and of malice aforethought." It was sworn to before the County Clerk, who, in signing the jurat, gave the initials only of his christian name. *Held*, that the signing by the Clerk was sufficient, and that the decisions in this State, under certain election cases, declaring that when such initials were used it was no name, would not be extended to embrace other cases. *Held*, further, that the offense being a statutory one, was sufficiently charged in the words of the statute. — *Ibid.*

As to effect of declarations upon others engaged in same enterprise: See EVIDENCE, 3.

As to concealment of party charged with crime: See EVIDENCE, 5.

As to guilty knowledge: See EVIDENCE, 5, 6.

As to proof of identity of stolen property by comparison: See EVIDENCE, 7; See STATUTES, 1.

Effect of false statements, on remainder of testimony: See EVIDENCE 9.

Effect of omission by husband or wife to call each other: See EVIDENCE, 10.

As to construction of criminal statutes concerning punishment for larceny: See STATUTES, 1.

As to effect of illegal sentence: See STATUTES, 1.

CURTESY.

Tenancy by the Curtesy, repeal of. The acts of 1844, 1846 and 1855, relative to the protection of the rights of married women, together with the constitutional provision on the same subject, entirely abrogate the existence of prospective tenancy by the curtesy. Every quality and incident that is necessary to constitute such a tenancy is destroyed by the provisions of these acts. — *Tong v. Marvin*, 60.

CUSTOM.

When mercantile custom void: See COMMON CARRIER, 3.

DAMAGES.

1. *Action for damages.* Where a contract has been repudiated on the ground of fraud, the party defrauded may bring an action for the damages sustained. — *Warren v. Cole*, 265.

2. *Actions of tort: Rule of damages: Cost of litigation.* In an action of tort, where, from the circumstances, no certain pecuniary standard can be obtained by which to ascertain the amount of damages, the jury have a wide range of discretion, and no absolute rule can be laid down; but where, from the nature of the case, a rule can be discovered by which adequate compensation can be given, the rule should be applied to actions of tort, as well as upon contract. *Held, further*, that the expenses of litigation can not be considered in estimating the damages. — *Ibid.*

In opening streets: See STREETS, 2.

In quo warranto: See PLEADING, 10.

Against City of Detroit for defective walks: See CITY OF DETROIT, 1.

In Trover, between co-tenants: See TROVER.

In replevin, on judgment of discontinuance: See REPLEVIN.

DECEASED PERSONS.

As to effect of attachment against real estate in their life-time: See ATTACHMENT.

DECLARATION.

In Justice's Court: See PLEADINGS, 6.

When goods sold on credit: See PLEADINGS, 10.

DECLARATIONS.

Of one of several engaged in criminal enterprise: See EVIDENCE, 3.

DECREE.

When may be impeached for fraud: See EQUITY PLEADINGS and PRACTICE, 16.

Of Divorce: See ALIMONY.

Appeal from, when not drawn up: See EQUITY PLEADINGS and PRACTICE, 7.

DEED.

1. *Voluntary Deed.* A voluntary deed, intentionally and deliberately made, is good against the grantor and his heirs, and can only be avoided by creditors or others having superior equities to the grantee. The rule which has been sometimes applied, raising trusts in favor of the grantor in a voluntary deed, was technical, and could not apply when a valuable consideration was recited, or beneficial uses in favor of the grantee were expressed in the deed. — *Jackson v. Cleveland*, 94.

2. *Record of Deed: Delivery.* Where a deed has been recorded, and acted upon by the mutual concurrence of grantor and grantee, that amounts to a delivery, and the fact that it was originally made without the knowledge of the latter, and not manually delivered to him, is of no importance. — *Ibid.*

3. *Patent right: Construction of deed.* A agreed to sell to B an interest in two inventions, for the former of which only a patent had been issued. A deed was duly executed by A, conveying his interest in said patent to B. Subsequently, A received a patent for the second invention. *Held*, that inasmuch as the conveyance from A referred only to the description in the first patent, it could not be construed so as to include the invention in the second. — *Warren v. Cole*, 265.

4. *Resulting Trust: Purchase-money mortgage.* The defendant's husband conveyed certain real estate to his sons by deed, in which she did not join. At the time of the sale the land was covered by a partly paid purchase-money mortgage, the remainder of which was afterwards paid by the said sons. It appeared that the sons were the real purchasers of the land originally, and had the land conveyed to their father, intending it to be for their own benefit, and upon the verbal understanding that he would deed to such of them as they might require; and that said conveyance finally made was in pursuance of said arrangement, and all payments on the mortgage had been made by them and not by him. *Held*, that the

statute (2 *Comp. L.* § 2637) having abolished the resulting trusts formerly arising in favor of the persons paying purchase money, the legal title vested absolutely in the father, and that said verbal agreement being void (*Comp. L.* § 3177-8) the conveyance by him to the sons must be regarded as the origin of their title, and payments made by them on the mortgage prior to that conveyance must be considered as in aid of his title, and not of theirs.—*Newton v. Sly*, 391.

Tax title deed: See EQUITY JURISPRUDENCE, 5.

As to consideration: See RESULTING TRUST.

DELEGATION OF AUTHORITY.

See SUPERVISORS.

DELIVERY.

Record of deed by consent, equivalent to: See DEED, 2.

DEMURRER.

1. Where only general demurrer is interposed complainant may amend.—*Woodward v. Clark*, 104.

2. A general demurrer to a bill will not lie, if any relief whatever is warranted by the bill.—*Hawkins v. Clermont*, 511.

DETROIT.

See CITY OF.

DIVORCE.

As to Alimony where decree denied: See ALIMONY.

DOWER.

1. In estimating a widow's right of dower in land conveyed by certain children to their father, for their own benefit, and afterwards re-conveyed by him to them in pursuance of a previous agreement, and upon which was a partly paid purchase-money mortgage, it must be taken subject only to so much

of the purchase-money mortgage as remained unpaid at the time of the conveyance by the husband, and that the sons or their grantees could not claim any deduction on account of previous payments, made before they acquired title.—*Newton v. Sly*, 391.

2. Under our statutes a mortgagee obtains no possessory rights before foreclosure; and the widow's right of dower being a part of the equity of redemption, her possessory claims can not be barred or prejudiced by proceedings or agreements to which she is not a party.—*Ibid.*

DRAWEE OF BILL OF EXCHANGE.

Twenty-four hours allowed to examine bill before acceptance.—*Case v. Burt*, 82.

EQUITABLE SET OFF.

As to professional services in accounting with mortgagee: See MORTGAGE, 3.

EQUITY JURISPRUDENCE.

GENERAL PRINCIPLES.

1. *Mistake in contract, when Court of Equity will correct.* In this case a bill to correct a mistake, by making a contract apply to lands which had been omitted from it, instead of those which were mentioned in it, and to enforce the contract when corrected, was dismissed; the parties not having acted upon the contract, and there being no equitable circumstances requiring such correction.—*Climer v. Hovey*, 18.

2. *Equitable relief: Treasurer's bond, effect of delay in filing: Assessment roll. Warrant.* The proceedings required by law, and the filing of the Treasurer's bond having taken place after the time designated by law, but before the time required for the handing over of the assessment roll, it was *held*, that the delay was immaterial. *Held further*, that delay, beyond the time required by law, in appending the warrant to the assessment roll, furnished no ground of relief.—*Hubbard v. Winsor*, 146.

3. *Equitable relief: Misdescription of lands for assessment by owner.* Where a misdescription of lands in an assessment roll was caused by following a list furnished by the parties themselves, they were not allowed to claim it as a ground of equitable relief, and were remitted to their legal remedy.—*Ibid.*

4. *Agreement to convey specific lot, performance of.* Where a contract to convey a number of lots of land at a gross sum, gave the grantee an option to select others in lieu thereof, to be laid out on certain streets not then platted, the grantor had no right to compel the acceptance of any undesignated lots, except such as the grantee should choose, and a deed, embracing some designated and some not designated, which the grantee refused to receive, was held no performance, but entirely void as against the latter, as the price could not be apportioned.

   And the grantor had no right to debar the grantee from such selection, by so platting his new lots as not to conform in size with the lots designated.—*Robinson v. Cromelein*, 316.

5. *Bill to quiet title: Tax title deed: Vacant lands: Right to jury.* The law of 1865, page 576, provides that "any person claiming title to lands through the Auditor General's deed, executed upon a sale thereof for non-payment of taxes, may file a bill in chancery to quiet his title thereto, *without taking possession* thereof," etc.

   In a proceeding in chancery to quiet title by a person claiming through such a deed against one holding the premises under an adverse claimant, it was held—

   That the act of 1865 does not authorize such a proceeding against a defendant in possession—its purpose being to extend the remedy by bill in equity to cases where the land was vacant, and where, under the then existing law, the complainant could not file a bill without first taking possession.—*Tabor v. Cook*, 322.

6. That under the Constitution—*Art.* 6, § 27—the legislature could not authorize such a proceeding without providing a mode by which the defendant could have a jury trial, if he so elected, where the right existed when the Constitution was formed.—*Ibid.*

7. *Specific performance: Discretion of Court: Parol evidence.* Chambers made a contract with defendants (who were old people) to buy their farm for $11,000, paying $1,000 down and the balance at the end of ten years. By the contract a deed of

the premises was to be executed on payment of the $1,000 and a mortgage given for the remainder, with a clause inserted that if he sold off any portion of the land the defendants should release that part from the effect of the mortgage, on receiving a sum proportionate to the quantity so sold.

A bill was filed for the specific performance of this contract. Defendants in their answer claimed that an acre of the said farm, (including certain buildings), of much greater relative value than the rest, was to be excepted from the contract. Chambers denied this, and the contract contained no such exception. It did not bind Chambers personally, or compel him to purchase the land or pay the purchase money. Chambers paid the $1,000, but defendants refused to give a deed, unless with the reservation of the one acre.

Evidence was introduced before the commissioner tending to show the real understanding respecting said reservation.

Held, that whether the one acre was to be reserved or not, the contract was too unconscionable to be specifically enforced: That specific performance even of a binding contract was not a matter of right; and a court of equity will refuse it, and leave a party to his remedy at law, if not clearly satisfied that it embodies the real understanding of the parties.—*Chambers v. Livermore*, 381.

8. *Held*, further, that it was competent by way of defense to a bill for specific performance to show by parol evidence that either by fraud or mistake the contract did not express the real agreement of the parties or the understanding of the defendant.—*Ibid.*

9. *Misdescription of lands for assessment by owner.* Where a misdescription of land in an assessment roll was caused by following a list furnished by the parties themselves, they were not allowed to claim it as a ground of equitable relief, and were remitted to their legal remedies.—*Hubbard v. Winsor*, 146.

10. *Mortgage: Injunction: Demurrer.* Where a bill contained an averment that the mortgages sought to be foreclosed had been taken from the register's office before recording, and that defendant threatened to sell the premises; and also a prayer for an injunction: *Held*, that even though the mortgage was not due, the bill should not have been dismissed, as complainant was entitled to an injunction as prayed, to prevent such conveyance or incumbrance of the premises, as might deprive her of all remedy.—*Hawkins v. Clermont*, 511.

A general demurrer to a bill will not lie, if any relief whatever is warranted by the bill.—*Ibid.*

See SPECIFIC PERFORMANCE.

EQUITY PLEADINGS AND PRACTICE.

1. *Fraud, when allegations of, sufficient in bill: What facts necessary to state.* The bill in this case alleged that the mother of complainant, being seized of certain real estate in Michigan, died in 1857, leaving her husband, Proctor Tong, and the complainant (who was then seven years old) her sole heir at law; that a mortgage upon said premises had been foreclosed by advertisement during said year, and the land sold for about $700; that one Daniel Marvin, father of defendants, desiring to own said land, obtained a quit-claim deed thereof from complainant's father, by false and fraudulent representations, and afterwards procured the appointment of his son Lucius Marvin as guardian for complainant, to have her interest in the premises sold; that he then loaned said Lucius sufficient money to redeem said premises from said foreclosure; that said land was afterwards sold at guardian sale, and bid off by said Daniel for the sum of $925, the real value being $2,000 and over; and that the acts of said guardian originated with, and were directed by, said Daniel Marvin for the purpose of enabling him to become the purchaser of said land below its true value. *Held*, that said allegations, if sustained by evidence, made out a case of legal fraud. — *Tong v. Marvin*, 60.

2. Equity must have regard to the effect of false and fraudulent statements, rather than to the person to whom they are made.— *Ibid.*

3. Where allegations of fraud are stated in a bill, it is not necessary that the facts and circumstances which tend to establish the fraud should be detailed. Where the facts which constitute the fraud are set forth with an averment of the injurious result, the case is sufficiently made by the pleadings, and a detail of the circumstances which tend to establish a dishonest intent in defendant's action is more properly left to the evidence. — *Ibid.*

4. *Party: Amendments. Decree. General Demurrer.* One Woodward made a contract with Clark, in 1862, for the purchase of four tracts of land, to be paid in instalments. In 1863 he made

an agreement with Fisher and Corning by which said premises were to be divided: Woodward taking two lots, and Fisher and Corning each one. To effect this, Woodward assigned his contract to Fisher, with the proviso that he would not assign it without his consent, and Fisher gave him back a contract to deed the two lots on his making the proportionate payment, and also Corning a similar contract for his. Fisher soon after made an arrangement with Clark by which the original contract was surrendered up and cancelled, and Clark then sold Woodward's two lots to Bradley and Sprague; Woodward being in possession at the time. *Held*,

That as Woodward must claim his rights through his contract with Fisher, the latter was a necessary party to the bill, but that the bill should not have been dismissed on that ground, where only a general demurrer was interposed; but that complainant should have had leave to amend. — *Woodward v. Clark*, 104.

5. That when Clark took from Fisher a surrender of his contract, he took it subject to all the obligations which Fisher had assumed, and was consequently bound to perform Fisher's contracts with Woodward and Corning, and Woodward was entitled to a decree declaring his rights under the Fisher contract, unaffected by the surrender, and for an injunction as prayed. — *Ibid.*

6. *Evidence.* Where evidence is not applicable to any allegations in the pleadings, it can form no basis for relief. — 6 *Mich.* 133; 11 *Id.* 529; 13 *Id.* 367. — *Hubbard v. Winsor*, 146.

7. *Decree not drawn up. Appeal.* Where a decision is announced, but no decree is actually drawn up or filed, *Held*, there is no legal determination of the cause, and therefore nothing to appeal from. — *Newbould v. Stewart*, 155.

8. *Affidavit of regularity: Recital in order, effect of: Subsequent purchaser, when to pay costs:* The affidavit of regularity required by chancery rule 92, previous to the taking of a bill as confessed, is for the convenience of the judge only; the rule only requiring that evidence in that form, or some other, should be furnished of the regularity of the proceedings on taking the bill as confessed. — *Ireland v. Woolman*, 253.

9. When a recital in a chancery order is not essential to its validity, it may be treated as surplusage. — *Ibid.*

10. When a subsequent purchaser is made a party to a foreclosure bill, and contests the amount due upon the mortgage, a decree for costs may be rendered against him, if the mortgaged premises prove insufficient. — *Ibid.*

11. *Mortgage premises, in what order sold: Notice of foreclosure sale: Practice in computing amount due.* Where there is nothing on the record to show the propriety of any other disposition, a sale of premises in the inverse order of alienation is proper. — *Ibid.*

12. The decree in this case directed that notice of the foreclosure sale be given "according to the course and practice of the court." *Held*, that the practice in this state had become so uniform as to make this direction sufficiently clear to be valid. — *Ibid.*

Reference on mortgage.

13. The court may dispense with a reference to compute the amount due on a mortgage, and make its own computation, if it sees fit. — *Ibid.*

14. *Bill in Chancery to remove cloud upon title, what should set forth: Allegation of illegal taxes, how made.* A bill to restrain the collection of taxes on the ground that they constitute a cloud upon the title, must set forth the description of the lands, or it cannot be sustained. And where it alleges that a part only of the taxes are illegal, it should furnish the court with the information which will enable it to separate the legal from the illegal. — *Conway v. Town of Waverly*, 257.

15. *Answer to bill in chancery, when responsive.* Where a bill to foreclose a mortgage alleged it to have been given in consideration of an actual indebtedness, to an amount named, which it was stated remained unpaid, and called for an answer under oath, an answer purporting to set forth the real circumstances under which the mortgage was given, and showing it to have been in part for money advanced, and in part for property at a valuation, which the party had failed to convey according to agreement, was held to be responsive, inasmuch as it explained the whole transaction out of which the mortgage originated, and upon which its validity depended. — *Robinson v. Cromelein*, 316.

16. *Decree, when may be impeached for fraud: Laches.* Where a decree establishing title to real estate is sought to be impeached by bill in chancery, as having been obtained by fraud

and collusion, the bill must be brought within a reasonable time, having reference to the nature and all the circumstances of the particular case.

The decree sought to be set aside was obtained some seven months before complainant arrived at the age of majority. He was aware of the decree and its effect, and all the material facts of the case, when he attained his majority. He delayed six years and a half after that period before bringing his bill. In the meantime, the principal party charged with the fraud, and the guardian charged with collusion, as well as the principal witnesses, who, from the nature of the case, must have been best acquainted with the facts, had all died. *Held*, that he had not brought his bill within a reasonable time, and it was dismissed on this ground. — *Campau v. Van Dyke*, 371.

17. *Injunction Bill, when not to be dismissed.* An injunction bill is not to be dismissed on the ground that complainant can not have the further relief prayed; since he is entitled to protection, by that process, against such acts of the defendant as would deprive him of all remedy in the future. — *Woodward v. Clark*, 104.

18. *Receiver: Final order.* When the appointment of a receiver is sought merely as ancillary to other equitable relief, and does not divest legal rights, an interlocutory order appointing a receiver can not be appealed from.

This case distinguished from *Lewis v. Campau*, 14 *Mich.* 458. *Duncan v. Campau*, 415.

19. *Foreclosure suit: General averment that defendant is a subsequent purchaser, etc., relates only to his subsequent incumbrance.* Where the second mortgage covered additional lands over which it was prior to an incumbrance held by the party claiming the former premises under the first mortgage, and said party was made a defendant under the mere general averment that he held or claimed some interest in the mortgaged premises or some part of them as subsequent purchaser or encumbrancer, or otherwise, he may properly treat such averment as relating only to his subsequent incumbrance in the other lands, and his title to the first premises will not be affected by the decree. *Wurcherer v. Hewitt*, 10 *Mich.* 453. — *Dawson v. Danbury Bank*, 489.

20. *Re-hearing: When should be allowed.* Where the only positive testimony in his own behalf came from the complainant, and after the hearing, a re-hearing was asked upon a showing of

newly discovered evidence that complainant had made statements contradicting his evidence in the material points, in such a way as to be decisive of the case, the refusal of such re-hearing was held erroneous. — *Sheldon v. Hawes*, 519.

21. *When appeal will be dismissed: Appeal bond.* When the return to an appeal in chancery is filed, before the motion to dismiss is called on, it will not be dismissed, in the absence of gross negligence. — *Covell v. Mosely*, 514.

22. The claim of appeal forms no necessary part of an appeal. The filing of the bond, properly approved, is the only condition required by law; but it is valid only for those parties in whose behalf it purports to have been filed. — *Ibid.*

23. *When no bond filed: Amendment.* A party in whose behalf no bond has been filed cannot be allowed to file one after the time for appeal has expired. The statute allowing bonds to be amended does not reach the case of such an omission. — *Ibid.*

24. *Costs on motion to dismiss, when allowed.* On a motion to dismiss, where it appears that the party in default, on being notified, offered at once to do all that justice required, no costs will be awarded against them. — *Ibid.*

25. A general demurrer to a bill will not lie, if any relief whatever is warranted by the bill. — *Hawkins v. Clermont*, 511.

ERROR.

In charge of court: See EVIDENCE, 2, 4, 9, 10.
And see PRACTICE IN CIRCUIT COURT, 2, 3.

ESTATES OF DECEASED PERSONS.

When lien is acquired by attachment during life time of defendant, judgment may be enforced, regardless of the appointment of commissioners to hear claims. — *Smith v. Jones*, 281.

EVIDENCE.

1. *Assumpsit: Competency of evidence.* The plaintiff below had for some years kept a set of range lights and stakes on the St. Clair flats, to aid vessels in navigating the channel, and relied upon such compensation as he could obtain from vessel owners.

In a suit against defendant for the value of such services rendered to his tug boat, evidence was offered tending to show that the lights were of great benefit to navigation, and that without them it was dangerous for vessels to pass the channel at that point at night; that defendant was the owner of steam tugs engaged in towing vessels through said channel; that defendant had paid $25 for the use of said lights for the season of 1863, and that on being called upon by plaintiff for the payment of the use of said lights for the season of 1864 replied that he would pay what his captain certified was right; that the plaintiff's bill of $40 for said services was certified to as correct, and that the captain of his tug boat had subscribed as master, to pay the sum of $40 for said season of 1864. *Held*, that the testimony relating to the payment by defendant of $25 was competent as it tended, in connection with the other evidence, to show that defendant had been fully informed as to the nature of plaintiff's services, and that he acknowledged their value, and a willingness to pay for them.—*Strong v. Saunders*, 339.

2. *Held*, further that it was a question for the jury whether from the evidence a promise to pay could be implied, and that, as the services had already been performed, the plaintiff would be entitled to recover if the jury should find a promise to pay, either expressed or implied.—*Ibid.*

3. *Declaration of one of several engaged in criminal enterprise.* Where a person receives, with guilty knowledge, property stolen by another, and afterwards sells it, the presumption will arise that the whole transaction was on joint account; and the declaration of either of the parties, made before the sale, concerning the terms and incidents of the common enterprise, are admissible, on the same principle which allows the statements of co-conspirators to be received in evidence.—*People v. Pitcher*, 397.

4. *Error: Charge of Court.* Where evidence is received which could only be made pertinent by other proofs not furnished, and the jury are subsequently instructed, in the absence of such further evidence, to disregard it, the defendant cannot allege error upon its admission.—*Ibid.*

5. *Concealment of party charged with crime, evidence of guilt.* The absconding of the party charged as principally concerned in stealing the property, and his concealment after his return, may properly be regarded, in connection with proof that defendant desired him to leave, as circumstances bearing upon the question of guilt.—*Ibid.*

6. Testimony, that an officer going to serve a subpœna on the defendant while he was, in fact, at home in bed, was informed by his wife, through the window, that he was absent; and also showing, further, that on the next day the defendant falsely stated that he had been away, and had just returned, was properly received as bearing upon guilty knowledge.—*Ibid.*

7. *Stolen property: Proof of identity by comparison.* The property stolen consisted of wool in fleeces. It was competent to prove the weight and quality of fleeces shown to a witness by defendant after the theft, and alleged to have been taken from his own sheep, for purposes of comparison; such wool being stored in defendant's house, where the stolen wool was proven to have been carried.—*Ibid.*

8. *Weight of Evidence.* Supreme Court will not review a case on the weight of evidence, on *certiorari*.—*Linn v. Roberts*, 443.

9. *Witness: Effect of false statements on remainder of testimony.* Defendant was convicted of larceny on the testimony of one McEvoy, who swore that he and defendant committed the crime. There being testimony tending to show that McEvoy had made contradictory statements on material points, the court was requested to charge the jury that if the witness had, in anything material, sworn willfully false, that his whole testimony must be rejected by them. This was refused, but the court charged that any such testimony would seriously affect all the witness had sworn to, and that no credit should be given to any fact depending upon his statement alone; but that when corroborated by proof or circumstances, it might receive such credit as it appeared to the jury to deserve. *Held*, that there was no error in the charge.—*Knowles v. People*, 408.

10. *Omission by husband, to call his wife as a witness, effect of.* It is error to allow the omission by a husband to call his wife as a witness on his behalf concerning matters supposed to be known by her, to be urged to the jury as a circumstance tending to prove guilt. The privilege of calling her or not, at his option, would be done away with, if any inference of guilt were allowed to be drawn from such omission; and it was not the design of the law to interfere with the harmony and confidence of the marital relation.—*Ibid.*

11. *Alteration in written instrument: When to be explained.* Where there are circumstances and appearances rendering an alteration in a written document suspicious, the party relying upon the document, as altered, is bound to explain it before he can recover.—*Sheldon v. Hawes*, 519.

12. *Handwriting: Inspection by court.* Where there was any evidence introduced to show in whose handwriting a certain interlineation was made, and there was no evidence showing, or tending to show it to be in the handwriting of the defendant, it was held incompetent for the court, upon its own unaided inspection, and contrary to the testimony, to find it to have been written by him.—*Ibid.*

As to re-hearing: See EQUITY PLEADINGS AND PRACTICE, 20.

When not applicable to allegations in pleadings: See EQUITY PLEADINGS and PRACTICE, 6.

As to parol evidence to explain contract when specific performance is sought: See EQUITY JURISPRUDENCE, 8.

When Supreme Court will review, on Certiorari: See CERTIORARI.

Of fraudulent assignment: See FRAUD, 2.

Allegations as to fraud in bill in chancery: See EQUITY PLEADINGS and PRACTICE, 3.

When evidence conflicts: See PRACTICE IN CIRCUIT COURT, 2.

As to charge of court: See PRACTICE in the CIRCUIT COURT, 3.

As to delivery by recording of deed: See DEED, 2.

EXCHANGE.

See PROMISSORY NOTE.

EXECUTION.

Alias execution in trespass may issue against the body. In an action of trespass, where an original execution can issue against the body of a defendant, an alias execution may also issue against the body upon the return of the previous one, "not found."—*People v. Kehl*, 330.

On judgment obtained, through lien, in lifetime of defendant: See ATTACHMENT.

EXEMPTION.

From service of process: See PROCESS.

FALSUS IN UNO FALSUS IN OMNIBUS.

See EVIDENCE, 9.

FINAL ORDER.

As to appointment of Receiver: See EQUITY PLEADINGS and PRACTICE, 18.

FORECLOSURE BILL.

Answer to, when responsive: See EQUITY PLEADINGS and PRACTICE, 15.

When subsequent purchaser to pay costs: See EQUITY PLEADINGS and PRACTICE, 10.

Effect of general averment that defendant is a subsequent purchaser, &c.: See EQUITY PLEADINGS and PRACTICE, 19.

As to validity of title by foreclosure of first mortgage: See MORTGAGE, 4.

As to effect of possession by grantor: See NOTICE, 1.
And see MORTGAGE, 5, 6.

FORECLOSURE SALE.

Notice of: See EQUITY PLEADINGS and PRACTICE, 12.

As to possessory rights: See DOWER, 2.

FRAUD.

1. When contract has been repudiated on the ground of fraud, action may be had for damages. — *Warren v. Cole*, 265.

2. *Fraudulent assignment, evidence of.* A sudden assignment of property to a brother, made after demand of payment of a debt, under fear of an attachment, and a refusal on the part of vendor and vendee to give any information concerning the terms of the transfer, will justify an inference of fraud. — *Smit v. People*, 497.

When allegations in bill in chancery sufficient: See EQUITY PLEADINGS, 1 to 3.

When decree may be impeached for fraud: See EQUITY PLEADINGS and PRACTICE, 16.

As to *prima facie* case: See FRAUDULENT DEBTOR'S ACT.

FRAUDULENT DEBTOR'S ACT.

Prima Facie case of fraud must be made out before Commissioner. *In Re Teachout*, 346.

FREIGHT.

As to deduction of, by intermediate consignee: See COMMON CARRIER, 2.

GUARDIAN.

As to lease by special guardian: See LEASE, 1, 2.

GUILTY KNOWLEDGE.

Evidence of: See EVIDENCE, 5, 6.

HABEAS CORPUS.

Where party is detained in another state. Whether a writ of *habeas corpus* will issue from the Supreme Court to a person here, to bring into this state a minor child under guardianship here, and who has been, and continues to be detained in another state, *quære*, the court being equally divided.—*In re Jackson*, 417.

As to notice to plaintiff in execution, before Circuit Court Commissioner: See CIRCUIT COURT COMMISSIONER, 1.

HANDWRITING.

Evidence of: See EVIDENCE, 12.

HIGHWAYS.

Opening by Commissioners: See CONSTITUTIONAL LAW, 1, 2, 3.

HIGHWAY COMMISSIONERS.

As to power to open, etc. State Roads, etc.: See CONSTITUTIONAL LAW, 1, 2.

HUSBAND AND WIFE.

Voluntary deed: See RESULTING TRUST.

Omission to call each other as a witness, effect of: See WITNESS.

Power of wife to contract in relation to her sole property: See MARRIED WOMEN.

IDENTITY.

Proof of, in criminal cases by comparison: See EVIDENCE, 7.

INFORMATIONS.

Where more than one filed: See CRIMINAL LAW, 1.

In quo warranto: See QUO WARRANTO, 1 to 5.

Mode of charging statutory offense: See CRIMINAL LAW, 2.

INJUNCTION BILL.

When not to be dismissed: See EQUITY PLEADINGS and PRACTICE, 17.

INITIALS.

Signing by: See CRIMINAL LAW, 2.

INVERSE ORDER OF ALIENATION.

See EQUITY PLEADINGS and PRACTICE, 11.

JOINT PROMISE.

To pay debt of one: See STATUTE OF FRAUDS.

JUDGMENTS.

Suit on justices judgment of less than $100: See CIRCUIT COURT.

JUDGMENT BY DISCONTINUANCE.

As to damages in replevin in Justice's Court: See REPLEVIN.

JUDGMENT OF NON-SUIT.

Refusal of justice to proceed in a cause: See PLEADINGS, 8.

JUDICIAL DISTRICTS.

How affected by division of county: See COUNTY, 6.

JUDICIAL POWER.

Of Referee: See CONSTITUTIONAL LAW, 5.

JURAT.

Signing by initials: See CRIMINAL LAW, 2.

When words "*before me*" unnecessary: See AFFIDAVIT.

JURISDICTION.

In actions *ex contractu*, when amount claimed is less than $100: See CIRCUIT COURT.

JURY.

Right of, as affected by Law of 1865, p. 576, authorizing bill to quiet title to be filed: See EQUITY JURISPRUDENCE, 6.

Duty of, as to finding damages and benefits in street opening cases: See STREETS, 2.

When entitled to consider evidence: See EVIDENCE, 2, 4. 9.

JUSTICE OF THE PEACE.

Effect of refusal to proceed: See PLEADINGS, 8.

As to jurisdiction in actions *ex contractu:* See CIRCUIT COURT.

Suits on judgments rendered by them: See CIRCUIT COURT.

JUSTICE'S COURT.

As to what is a substantial cause of action: See PLEADINGS, 6.

As to judgment of non-suit: See PLEADINGS, 8.

As to damages in replevin where judgment by discontinuance is rendered: See REPLEVIN.

LACHES.

In filing bill to impeach decree: See EQUITY PLEADINGS and PRACTICE, 16.

LANDS.

As to vacant lands: See BILL TO QUIET TITLE.

LANDLORD AND TENANT.

Notice to quit: See TENANCY.

LARCENY.

Punishment for attempt to commit: See STATUTES, 1.

LEASE.

1. *Lease by Guardian: Ratification.* The special guardian—*Laws* 1862, *p.* 11—of *a non compos* made a lease of lands for a term of years, and a portion of the rent was paid in advance. The ward died soon after. The lessees thereupon applied to the heirs to execute an instrument confirming the lease—this they declined to do, but were silent as to expressing any intention to disaffirm the lease.

   In an action by the lessees to recover from the estate the rent paid for the unexpired portion of the term for which it was paid: *Held*,

   That the special guardian had power to execute such lease; but had no power to create a term which should remain valid by virtue of the lease alone, beyond the life time of the ward; and further, that he was accountable for the rent in his official capacity at the time it was received.—*Campau v. Shaw*, 226.

2. That the lessees might treat the conduct of the heirs as a refusal to ratify, and that they might recover from the estate the rent paid for the unexpired portion of the term for which they had paid, as money paid without consideration. — *Ibid.*

LESSEE.

As to right to recover back rent paid in advance: See LEASE, 2.

LIEN.

By attachment against real estate of deceased persons: See ATTACHMENT.

LIMITATIONS.

See STATUTE OF.

LITIGATION.

Expenses of, not considered in estimating damages: See DAMAGES, 2.

MANDAMUS.

When an issue will be directed: See BOARD OF REGISTRATION, 2.

MARRIAGE.

Under the age of consent: Separation: Bigamy. When persons are married, one of whom is over and the other under the age of consent, the former by the statutes of this State is bound by the marriage unless they separate by consent before the other reaches lawful age, and do not co-habit afterwards; or, unless the other refuses consent on arriving at that age. And a second marriage by the former, in the absence of such mutual separation, or of such refusal to consent, is bigamy. — *People v. Slack*, 193.

MARRIED WOMEN.

1. *Married Women: Power to contract in relation to sole property.* Where a married woman keeps a boarding house with the consent of her husband, and controls the entire business, contracts of purchase made by her for the purpose of such business, must be considered as contracts in relation to her sole property, and therefore binding upon her. — *Tillman v. Shackleton*, 447.

2. Whether her power to contract for property is limited to cases resting on similar principles *quaere:* COOLEY and CAMPBELL, JJ. holding it to be general; CHRISTIANCY J. regarding it as limited by the circumstances, and MARTIN, C. J. dissenting. — *Ibid.*

Repeal of tenancy by curtesy: See CURTESY.

MASTER OF VESSEL.

When a master subscribed for the use of certain lights used on the St. Clair flats: *Held*, that the power to bind the owner for such expense did not come within the ordinary general powers incident to the employment as master, and that, therefore, the said subscription was not binding upon the owner. — *Strong v. Saunders*, 339.

MERCANTILE CUSTOM.

When void: See COMMON CARRIER, 3.

MESSAGES.

See TELEGRAPH COMPANIES.

MINOR.

When out of the State: See HABEAS CORPUS.

When married under age of consent: See MARRIAGE.

MISDESCRIPTION.

Of lands in assessment roll: See EQ. JURIS. 3.

MISJOINDER.

See PLEADINGS, 5.

MISTAKE.

In contract for sale of lands: See EQUITY JURISPRUDENCE, 1.

MONEY PAID WITHOUT CONSIDERATION.

Right of lessees to recover of heirs rent paid in advance, where a minor (lessor) dies before term expires: See LEASE, 2.

MORTGAGE.

1. *When security for advances. Commissions: Accounts current. Equitable set off.* S. made a mortgage to J. S. and W. P. L. for $15,000, for which they gave their receipt which concluded as follows: "*from which we are to deduct our account with him, and to pay him the balance, or to be returned to him at our option.*" That account was a balance due upon mutual accommodation, discounts and acceptances, or indorsements. The parties subsequently pursued a similar course of business accommodations; the balance of advances being always against S., but never equaling the face of the mortgage and interest.

Held, that the mortgage should be considered as security for all such dealings and advances. — *Brackett v. Sears*, 244.

2. *Held*, further, that no commissions could be allowed to the mortgagees on their discounts or advances so long as the account in their favor did not suffice to pay the amount of the mortgage; and that the security could only cover the sums actually remaining due, excluding such commissions. — *Ibid.*

3. *Held*, further, that from the nature of the dealings between the parties and the course of their accounts, their mutual dealings were evidently considered as dependent, and therefore, the professional charges of S. should be regarded as equitable set-offs in the accounting on the mortgage; and that where it was assigned to secure a sum less than the whole amount due, with a residuary interest in the mortgagees, such services subsequent to the assignment might also be set-off upon such residuary interest. But accounts for services rendered, not to the firm, but to the individual partners or to third persons could not be set-off against the firm, unless by some valid agreement the firm had made itself liable for them. — *Ibid.*

4. *Validity of title, by foreclosure of first mortgage: When assailed by suit on second mortgage, special averments must be set up.* A title obtained under the foreclosure of a first mortgage is presumptively prior in right to a second mortgage, and its validity can not be assailed in a suit to foreclose the latter, without special averments showing why it ought to be postponed. — *Dawson v. Danbury Bank*, 489.

5. *Mortgage conditioned to board and support: When general demurrer lies.* Where a mortgage was given to an old person to secure the payment of a debt, by boarding and supporting her for five years, *held*, that the mortgagee was absolutely entitled to the support for the entire period, and that the mortgagor was bound to furnish it—*Evans v. Norris*, 6 *Mich.* 369—and was not at liberty to furnish the support, or pay the money, at his option.—*Hawkins v. Clermont*, 511.

6. The bill in this case contained an averment that the mortgage sought to be foreclosed had been taken from the register's office before recording, and that defendant Clermont threatened to sell the premises; and also a prayer for an injunction. *Held*, further, that even though the mortgage were not due, the bill should not have been dismissed, as complainant was entitled to an injunction as prayed, to prevent such conveyance or incumbrance of the premises as might deprive her of all remedy.—*Ibid.*

As to notice to third parties by possession of grantor: See NOTICE, 1.

As to dower in purchase money mortgage: See DOWER, 1.

As to possessory right of mortgagee before foreclosure: See DOWER, 2.

As to reference to compute amount due: See EQUITY PLEADINGS and PRACTICE, 13; And see FORECLOSURE BILL.

MORTGAGED PREMISES.

In what order sold: See EQUITY PLEADINGS and PRACTICE, 11.

Practice in computing amount due: See EQUITY PLEADINGS and PRACTICE, 13.

MUNICIPAL CORPORATIONS.

Power to impose penalties for encroachments on streets: See STREETS.

Liability for injuries resulting from defective walks: See CITY OF DETROIT, 1.

Power of determining number of officers, discretionary: See CITY OF DETROIT, 3.

And see CONTRACT, 1.

MURDER.

How described under the statute: See CRIMINAL LAW, 2.

MUTUAL DEALINGS.

When considered dependent: See MORTGAGE, 3.

NEGOTIABLE INSTRUMENT.

Note made "with current rate of exchange," is negotiable.—*Johnson v. Frisbie*, 286.

NEGLIGENCE.

As to sidewalks: See CITY OF DETROIT.

NON-COMPOS.

As to lease by special guardian: See LEASE, 1.

NON-SUIT.

What is, in Justice's Court: See PLEADINGS, 8.

NOTARY PUBLIC.

Where notary agrees to present bill again, a new demand is required before protest.—*Case v. Burt*, 82.

NOTICE.

1. *Possession of land by grantor, when notice of rights in him, to third parties.* A person remaining in possession of lands which he has conveyed by a mortgage which has been foreclosed against him will be presumed to hold subject to the title so created, and his possession will not be constructive notice of any other interest or title which he may have acquired, but which does not appear of record in him.—*Bloomer v. Henderson*, 8 *Mich.* 395. *Dawson v. Danbury Bank*, 489.

2. Where purchaser buys land, occupied by third party, he is constructively notified of such person's rights.—*Woodward v. Clark*, 104.

Where Sunday intervenes: See PRACTICE IN SUPREME COURT, 1.

To creditor, in *habeas corpus*, before commissioner: See CIRCUIT COURT COMMISSIONER, 1.

Effect of, by carrier: See COMMON CARRIER, 4.

To quit: See TENANCY.

Mode of computing time in giving notice of motion: See PRACTICE IN SUPREME COURT, 6.

NOTICE OF FORECLOSURE SALE.

Practice in this state: See EQUITY PLEADINGS and PRACTICE, 12.

OATH.

Of Referee: See CONSTITUTIONAL LAW, 4.

OFFICE.

Mode of describing in *quo warranto*. See PLEADINGS, 4.

OFFICERS.

As to power of determining number of: See CITY OF DETROIT, 3.

ORDERS IN CHANCERY.

Effect of recital in: See EQUITY PLEADINGS AND PRACTICE, 9.

As to final order: See EQUITY PLEADINGS AND PRACTICE, 18.

PAROL EVIDENCE.

To explain contract, in defense to specific performance: See EQUITY JURISPRUDENCE, 8.

PARTNERSHIP.

Assessment of partnership lands: See ASSESSMENT, 1.

As to set off: See MORTGAGES, 3.

PARTIES.

In suit on voluntary subscriptions: See Pleadings, 7.

To Bill in Chancery: See EQUITY PLEADINGS AND PRACTICE, 4.

PASSENGERS.

Railroad tickets over separate roads. Where a passenger bought tickets of a railroad agency in Buffalo, one from Buffalo to Stratford, in Canada, over the B. and L. H. Railway and the other from Stratford to Detroit over the G. T. Railway, and after a delay of two months, from the time of using the former ticket commenced his journey from Stratford to Detroit on the second, it was *Held* that, although printed on the same piece of paper, yet, as they contained no restrictions, they were distinct contracts and vouchers for separate journeys, and the validity of the last ticket was not affected by the delay. — *Brooke v. Grand Trunk R. R. Co.* 332.

As to money stolen: See COMMON CARRIER, 1.

PATENT RIGHT.

Construction of: See DEED, 3.

PENALTIES.

Power of Municipal Corporations to impose penalties for encroachments on streets: See STREETS.

See also CITY CHARTER.

PLEADINGS.

1. *Quo warranto: Pleading: Misjoinder.* The information charged defendants with intrusion into the offices of Wardens and Vestrymen of St. Paul's Church, Detroit, "*a corporation created by the authority of this State.*" *Held*,

   That inasmuch as the court had no judicial knowledge of the existence of any such corporation, the information was defective in not setting forth such facts as in connection with the public statutes, of which the court can take judicial notice, would show such corporate existence. — *People v. De Mill*, 164.

2. Where a corporation is created by special statute, such existence need not in general be shown by further averment; but where not so created it must be made out according to the facts. — *Ibid.*

3. Where an information is filed for usurpation of office, the existence of the corporation is a jurisdictional fact, which must be averred unless judicially known. — *Ibid.*

4. When the court is not judicially informed concerning the nature of an alleged office in a corporation, it must be so described as to its nature and duties as to show whether it is such an office as comes within the purview of the law relative to the usurpation of franchises.—*Ibid.*

5. Persons claiming to be wardens and vestrymen of a church can not join as relators to test in one proceeding their rights to the offices respectively, against adverse claimants.—*Ibid.*

6. *Declaration in assumpsit: Cause of action: Justice's Court.* In an action to recover the amount of a subscription to provide for a public dinner, the declaration filed in the justice court alleged that the "defendant, with others, desiring to serve a free dinner to the soldiers, and desiring to raise money therefor, did designate plaintiff as a proper person to raise said money by subscription, and to disburse the same; all which was agreed to and accepted by said defendant; and that defendant, for the carrying on of said purpose, became indebted to plaintiff, and promised to pay," etc., referring to the subscription on file. *Held*, that under the rules of pleading in justice's courts, a substantial cause of action was set forth.—*Comstock v. Howd*, 237.

7. *Voluntary subscription: Consideration: Parties.* A subscription, by which several persons promise to pay the sums set opposite their names, to provide such free dinner is legally binding, notwithstanding no promisee is named; and it may be collected in the name of one of the number, who is selected by the rest to collect and disburse the money. *Held*, also, that the object being a meritorious one, and the subscription by defendant being an inducement to others to subscribe and pay their money, both constituted a valid consideration.—*Ibid.*

8. *Justice's Court: Adjournment: Judgment of non-suit: Appeal: Statute of limitations.* Where a cause was adjourned in a justice's court, by consent of parties, before any pleadings were made, and the justice on the adjourned day refused to proceed with the cause, it was held that such refusal might be treated as a judgment of non-suit, and that an appeal would lie therefrom.—*Pattridge v. Lott*, 251.

9. And where such appeal was dismissed by the Circuit Court, it was further held that it must be regarded as an avoidance of the action for matter of form, and that the time for further suit ran from such dismissal.—*Ibid.*

10. *Goods sold on credit: Common counts.* In a suit for the value of goods where the sale was made on credit, to be paid for by a note, the declaration must be special for a refusal to give the paper when the period for which the note was to run is yet unexpired; but after the expiration of such period, the plaintiff may recover upon the common counts. — *Gibbs v. Blanchard*, 292.

11. *Quo Warranto: Pleadings on suggestion of damages.* The statutes having established the form of pleadings on a suggestion of damages in *quo warranto*, the Supreme Court will not prescribe any other. — *People v. Sackett*, 315.

Amendment of: See PRACTICE IN CIRCUIT COURT, 1.

Rule to plead in *quo warranto*: See PRACTICE in SUPREME COURT, 2.

Amendment of pleading, when general demurrer is filed: See EQUITY PLEADINGS and PRACTICE, 4.

POSSESSION

Of grantor, when notice to third parties: See NOTICE, 1.

By third parties: See NOTICE, 2

See BILL TO QUIET TITLE.

POSSESSORY RIGHT.

See DOWER, 2.

PRACTICE IN CHANCERY.

See EQUITY PLEADINGS and PRACTICE.

PRACTICE IN THE CIRCUIT COURT.

1. *Amendment of pleadings in the Circuit Court, when discretionary.* — On the trial in the Circuit Court, the defendant applied for leave to interpose the defense of the Statute of Limitations, after having plead the general issue. *Held*, that this was a matter of discretion in the court below, and its denial could not be reviewed by this court. — *Ripley v. Davis*, 75.

2. *Conflict of evidence.* When the evidence conflicts, it is error in the court to decide the point in conflict and take it from the jury. — *Brooke v. G. T. R. R. Co.*, 332.

3. *Error: Evidence: Charge of Court.* Where evidence is received which could only be made pertinent by other proofs not furnished, and the jury are subsequently instructed, *in the absence of such further evidence*, to disregard it, the defendant can not allege error upon its admission. — *People v. Pitcher*, 397.

As to inspection by Circuit Judge of writings for comparison: See EVIDENCE, 12.

As to statute of limitations, where appeal from justice's court is dismissed: See PLEADINGS, 9.

As to jurisdiction in actions *ex contractu:* See CIRCUIT COURTS.

When jury to judge of the weight of evidence: See EVIDENCE, 2, 4, 9.

PRACTICE IN RECORDER'S COURT.

As to Recorders making written finding, etc.: See RECORDER.

PRACTICE IN SUPREME COURT.

1. *Notices: When Sunday to be included in computation.* In notices required by the rules of court, when Sunday is an intervening day, it is to be included in computing the time. — *Corey v. Hilliker*, 314.

2. *Quo Warranto: Rule to plead.* The statute which authorizes the Attorney General to enter a rule requiring the defendants to plead to the information within twenty days after service of a copy — *Comp. L.* § 5306 — is enacted altogether, for his benefit, and to enable him to expedite the proceedings. — *People v. Peter E. De Mill*, 161.

3. *Mandamus, when issue ordered.* Where a return to a *mandamus* is made by a respondent, denying that relator was entitled to be registered as a voter, an issue will be directed to determine the fact. — *People v. Nunkin*, 156.

4. *Weight of Evidence.* The Supreme Court will not review a case on the weight of evidence on *certiorari*. — *Linn v. Roberts*, 443.

5. *Where action of Circuit Court Commissioner is affirmed, Supreme Court may issue warrant.* Where the Supreme Court affirmed the action of a circuit court commissioner under the fraudulent debtor's act: *Held*, that the power to hear and dispose of the cause finally, involved the power to order such action as would make the judgment effective — warrant ordered to issue. — *Smit v. People*, 516.

6. *Notice of motion: Computation of time: Usual route of travel.* The usual route of travel must govern in the computation of the time required to be given by rule in the service of notices. — *Raymond v. Hinckson*, 517.

7. *Costs where plaintiff in motion makes default.* The party appearing to resist a motion, where the moving party makes default, is entitled to the costs of the motion. — *People v. Highway Commissioners*, 518.

As to pleadings in *quo warranto*, in suggestion of damages: See PLEADINGS, 11.

As to control of proceedings in *quo warranto*: See ATTORNEY GENERAL, 1.

As to charge of *venue* in *quo warranto*: See QUO WARRANTO, 1.

As to written finding by Recorder: See RECORDER.

PRISONER.

Where record is defective, doubts to be solved in his favor: See CRIMINAL LAW, 1.

Also, INFORMATIONS.

PROCESS.

Exemption from service of process, without arrest while in attendance on court. There is no general exemption from the service of process without arrest merely because a party is attending court, awaiting the trial of a cause. — *Case v. Rorabacher*, 537.

In State Courts: See STAMP ACT.

PROFESSIONAL CHARGES.

Professional charges will not be rejected merely for want of success in the litigation, where there is no clear proof of mismanagement. But where several suits were made to depend on the argument of one, the charges should not be multiplied at the full rate as if there had been separate hearings in each, but should be confined to such services as were actually rendered. *Brackett v. Sears*, 244.

Also see MORTGAGE, 2, 3.

PROMISSORY NOTE.

Negotiable instrument: Rate of exchange. A promissory note made in Michigan, and payable "with current rate of exchange on New York," is a negotiable instrument. — *Johnson v. Frisbie*, 286.

PROSECUTING ATTORNEY.

Right to select one of two informations in the same case: See CRIMINAL LAW, 1.

PROTEST.

Where time is allowed: See BILL OF EXCHANGE, 1.

PURCHASER.

When subsequent purchaser to pay costs, in foreclosure suit: See EQUITY PLEADINGS and PRACTICE, 10.

QUO WARRANTO.

1. *Change of venue.* In *quo warranto* cases the statute being silent as to the place of trial of issues of fact involved therein, the Supreme Court will not send any such case for trial to a court other than that where the election took place, without the same showing as would authorize a change of venue.

Section 5300 of the Compiled Laws which authorizes an issue to be sent to such county as the Supreme Court may direct, refers only to issues arising on the question of damages for the detention of the office, and not to those referring to the office itself.—*People v. Cicott*, 326.

2. *Informations in quo warranto: Practice.* An information in *quo warranto* contained nothing to show when it was presented; and the only allegation of the usurpation was that "for the space of two days last past the defendant has usurped," etc. *Held*,

That the pleadings in such cases were governed by the rules in civil cases, except so far as the statutes modifying them are inapplicable; and that the information was good without being entitled of any particular day.—*People v. Miller*, 354.

3. That the words "two days last past" related to the filing of the information, and were sufficiently certain.—*Ibid.*

4. In case of a failure to obtain service on a defendant in *quo warranto*, and resort is had to advertisement, under the statute, defendant is not entitled, on appearance, to a copy of the information.—*Ibid.*

As to rule to plead: See PRACTICE IN SUPREME COURT, 2.

As to the sufficiency of the information: See PLEADINGS, 1.

As to control of proceedings: See ATTORNEY GENERAL.

Pleadings on suggestion of damages: See PLEADINGS, 11.

RAIL ROAD COMPANY.

Liability of, for goods delivered, before notice of conditions: See COMMON CARRIER, 4.

As to tickets over separate roads: See PASSENGER.

RATE OF EXCHANGE.

See PROMISSORY NOTE.

RATIFICATION.

Right of lessees when heirs refuse to ratify lease: See LEASE, 2.

Reasonable time: See SPECIFIC PERFORMANCE.

RECEIVER.

When order appointing may be appealed from: See EQUITY PLEADINGS AND PRACTICE, 18.

RECORDER.

Must make written finding of all questions acted upon in street opening cases, not appearing on the record. The statute giving jurisdiction to the Supreme Court to review all legal questions arising in the proceedings before the Recorder's Court, and requiring a certified copy of all such proceedings to be returned on appeal, necessarily contemplates a written finding or report to be prepared and filed by the Recorder, setting forth all questions arising, and action had before him, which will not otherwise appear on the record. Upon the return of the proceedings on appeal, such report will then furnish the means of determining how far the action below was open to complaint, and no ruling can be reviewed which does not appear in that or some other part of the return.—*Duffield v. City of Detroit*, 474.

RECORDING OF DEED.

As to evidence of delivery: See DEED, 2.

REFEREE.

1. *Oath of: Judicial power: Stipulation.* A referee is not such an "officer" within the meaning of the constitution as requires him to be sworn before assuming his duties. *Const.*

Art. 18. § 1. And when testimony in a cause is submitted to such referee by stipulation, his action thereon is not in any sense judicial.—*Const. Art.* 6, § 1. *Underwood v. McDuffee*, 361.

2. *Held* further, that the judicial power in the constitutional sense is not exercised by a referee in determining facts in a cause submitted to him, but by the court in giving judgment.—*Ibid.*

REFERENCE.

To compute amount due upon mortgage: See EQUITY PLEADINGS and PRACTICE, 13.

REGISTRATION.

Duty as to mode of determining qualifications of voters: See BOARD OF REGISTRATION.

REGULATIONS.

See TELEGRAPH COMPANY.

RE-HEARING.

When allowed: See EQUITY PLEADINGS and PRACTICE, 20.

RENT.

As to rent paid in advance to special guardian when ward dies before expiration of the term: See LEASE, 2.

REPLEVIN.

Replevin: Judgment by discontinuance: Assessment of defendant's damages. When judgment of discontinuance, in replevin, is rendered by a justice against plaintiff, if defendant waive a return of the property, he is entitled to have his damage assessed.—*People v. Tripp*, 518.

RESULTING TRUST.

When not created. A husband and wife being about to separate, certain property was, at the husband's instance, (in order to avoid questions of dower,) conveyed to a third person by a deed in fee simple, absolute in form, and purporting to be upon a valuable consideration. *Held*, that the absence of consideration in fact was not sufficient without fraud, mistake or contrivance, to raise any resulting trust in favor of the grantor.—*Jackson v. Cleveland*, 94.

As to voluntary deed: See DEED, 1.

And See DEED, 4.

REVENUE LAW.

As to process: See CONSTITUTIONAL LAW.

ROADS.

As to opening, by Highway Commissioners: See CONSTITUTIONAL LAW.

RULES OF COURT.

Mode of computation of time in notice when Sunday intervenes: See PRACTICE IN SUPREME COURT, 1.

SALE OF CHATTELS.

See CAVEAT EMPTOR.

On joint credit and promise of two, though property purchased by one: See STATUTE OF FRAUDS.

Form of pleadings when goods sold on credit: See PLEADING, 10.

SALE.

Notice on sale of Mortgage Premises: See EQUITY PLEADING AND PRACTICE, 12.

Mistake in contract for sale of land: See EQUITY JURISPRUDENCE, 1

SECURITY FOR ADVANCES.

When mortgage considered as such: See MORTGAGE, 1.

SENTENCE.

When void for excess: See STATUTES, 1.

SET-OFF.

When professional services may be set off against mortgage: See MORTGAGE, 3.

SHORTAGE.

See COMMON CARRIER, 2.

SIDEWALKS.

Action against City for defective walks: See CITY OF DETROIT.

SIGNING.

By initials in jurat: See CRIMINAL LAW, 2.

SPECIAL GUARDIAN.

Power to execute a lease: See LEASE, 1.

SPECIAL NOTICE.

By Carrier: See COMMON CARRIER, 4.

SPECIFIC PERFORMANCE.

Specific performance of contract: Reasonable time. Courts will only enforce the specific performance of contracts where, in view of all the circumstances of the case, it seems just and equitable to do so; and where a party has laid by, without performance on his part, until there has been such a change in the value of property sold as to render the contract unequal if made now, the court will refuse relief.

Smith purchased pine lands of defendant by contract, in October, 1856, and paid the first instalment—the balance, of $3,800, to be paid in three annual instalments. He sold off $1,200 of the timber. The land becoming unsaleable, he failed to make the other payments. After considerable correspondence in regard to the payment, defendant wrote plaintiff, in 1862, that the contract had been long since forfeited. Up to this time, defendant had paid the taxes on the premises. In 1863, defendant sold the land to third parties. Plaintiff thereupon notified them that he claimed the lands under his said contract, but took no steps to enforce his claim. The purchasers went upon the premises, and lumbered during one season. The land having increased largely in value, Smith, in 1865, filed his bill against them and defendant for a specific performance of the contract. *Held*, that if plaintiff had desired to perform his contract, he should have done so within a reasonable time.—*Smith v. Lawrence*, 499.

To convey specific lots: See EQUITY JURISPRUDENCE, 4.

As to discretion of court: See EQUITY JURISPRUDENCE, 7.

As to parol evidence to explain contract: See EQUITY JURISPRUDENCE, 8.

STAMP ACT.

Process. So much of the Stamp Act as requires process in state courts to be stamped, as a condition of the validity of legal proceedings, is unconstitutional and void.—*Fifield v. Close*, 505.

STATE AND TERRITORIAL ROADS.

As to power to open: See CONSTITUTIONAL LAW, 3.

STATUTES, CONSTRUCTION OF.

1. *Criminal Statutes: Construction: Void Sentence.* Subdivision 2, of section 5947, of the Compiled Laws, provides that if an offense *attempted* to be committed "be punishable by imprisonment for five years or more, the person convicted of such attempt shall be punishable by imprisonment, etc., not more than three years, etc."

   In subdivision 3, providing for the punishment of the attempt to commit a crime of lesser grade, the following provision is made: "But in no case shall the punishment by imprisonment exceed one-half of the greatest punishment which might have been inflicted, if the offense so attempted had been committed."

   The defendant in this case was convicted of an attempt to commit larceny from the person, the punishment of which offense—2 *Comp.* L. § 5761—was imprisonment for a period not exceeding five years. He was sentenced to be imprisoned for three years in the State Prison. *Held*, that under the above statute, the proviso in subdivision 3 applied to all the different grades mentioned in the second and third subdivisions to said section. The sentence was held void, and the prisoner was discharged.—*O'Neil v. People*, 275.

2. *Construction of legislative acts.* Courts will always construe a legislative act so as to give it effect as law, if it be practicable to do so. An intent to violate the Constitution is not to be presumed in any case; and a construction which would have that effect is not to be adopted unless forced upon the court by the terms employed.—*Tabor v. Cook*, 322.

Liability of City of Detroit for damages resulting from defective walks: See CITY OF DETROIT.

As to imposing of penalties by Common Council, under the Charter: See CITY CHARTER.

Tenancy by the Curtesy: Acts of 1844, 1846 and 1855 relative thereto, repealed.—*Tong v. Marvin*, 60.

As to filing bill to quiet title obtained through tax title under law of 1865, page 576: See EQUITY JURISPRUDENCE, 5.

As to place of trial in *quo warranto* Compiled Laws, § 5300: See QUO WARRANTO.

When passage of subsequent act operative upon prior act: See COUNTY, 2.

As to validity of amendments: See CONSTITUTIONAL LAW, 6.

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STATUTE OF FRAUDS.

Joint promise to pay debt of one. When a sale of goods is upon the joint credit and promise of two, though the property is purchased for and delivered to but one of them, the legal effect as between them and the vendor, is a sale to the two jointly. Such a promise is an original one as between them and the promisee, and does not come within the Statute of Frauds.—*Gibbs v. Blanchard*, 292.

STATUTE OF LIMITATIONS.

As to amendment of pleadings: See PRACTICE IN CIRCUIT COURT, 1.

Where appeal from "Justice's Court was dismissed by Circuit Court": when statute commences to run: See PLEADINGS, 8.

STIPULATION.

Control of, in *quo warranto:* See ATTORNEY GENERAL.

As to effect of evidence submitted to referee: See REFEREE, 1.

STOLEN PROPERTY.

Proof of identity by comparison: See EVIDENCE, 7.

STREETS.

1. *Municipal corporations: Encroachments on streets.* Under the laws of Michigan, relating to streets and public ways, obstructions which cumber the open way and render passage and travel more difficult and dangerous, and encroachments which undertake to appropriate a portion of a street, by fences, walls or buildings, have always been carefully distinguished, and different proceedings and penalties provided therefor; the power therefore given to a municipal corporation to impose penalties for cumbering streets, would not warrant imposing them for encroachments upon streets.—*City of Grand Rapids v. Hughes*, 54.

2. *In opening of streets jury must make separate findings of damages and benefits.* Where, under section 38, chapter 7, of the charter of Detroit, a jury in a street opening case is directed, where only part of a lot is taken, to "determine the benefits or enhanced value that will accrue from the improvements to the portion or portions not taken, and deduct the same from the damages or compensation they would otherwise award to the owner or owners," there must be separate findings, so as to show what the entire jury consider the amount of damages, and what the amount of benefits; and a verdict simply showing the balance, after deducting the one from the other, is invalid. The jury must concur on both items, and report them.—*Duffield v. City of Detroit*, 474.

As to general powers in laying out highways: See CONSTITUTIONAL LAW, 1, 3.

As to written finding of Recorder: See RECORDER.

STREET COMMISSIONERS.

See CITY OF DETROIT, 1.

SUBSCRIPTION LIST.

Liability of subscribers, though no promisees be named: See PLEADINGS, 7.

SUBSEQUENT PURCHASER.

When to pay costs: See EQUITY PLEADINGS and PRACTICE, 10.

As to sufficiency of answer to bill: See EQUITY PLEADINGS and PRACTICE, 19.

SUGGESTION OF DAMAGES.

In *quo warranto:* See PLEADINGS, 11.

SUMMARY PROCEEDINGS FOR POSSESSION OF LAND.

Discussion of the extent to which irregularities and errors in summary proceedings for possession of land, render the proceedings void and inadmissible as evidence.—*Allen v. Carpenter*, 25.

SUNDAY.

When it intervenes in notice, to be computed.—*Corey v. Hiliker*, 314.

SUPERVISORS.

1. *Removal of County Seat: Delegation of authority.* Where the Board of Supervisors, by a vote of two-thirds, resolved that the county seat of St. Clair should be removed to Port Huron, provided "suitable guarantees" should be given within ninety days for the erection of county buildings free of cost to the county, but submitted to the popular vote the simple resolution of removal, without including the proviso, that submission was held void, as the statute contemplates that the people and the Supervisors shall vote on precisely the same questions.—*L.* 1863, *p.* 30; *People v. St. Clair County*, 85.

2. No subsequent action by less than a two-thirds vote could lawfully modify the first resolution, and accordingly a majority vote referring it to a committee to examine and approve the proposed security, and an approval by such committee before election, could not make the original resolution cease to be conditional.—*Ibid.*

3. The Board of Supervisors cannot delegate such powers as the law requires to be submitted to their corporate discretion and judgment.—*Ibid.*

4. *Effect of adjournment of: Tax, mode of determining amount of:* The law (1 *C. L.* § 807,) requires Supervisors to act at "their session in October." They met in pursuance thereof, and at a subsequent adjourned meeting—November 12th—fixed the amount of taxes for the ensuing year. Instead of fixing a specific sum, to be raised by taxation, the Board directed a per centage on the assessed value. *Held*, that the session in October embraced all adjournments, although they might run into another month,

and that the law merely refers to it by way of designation. *Held further*, that the designation of a per centage on a definite sum was just as certain as though it were calculated; nothing remaining to be done except simple computation.—*Hubbard v. Winsor*, 146.

Necessity of Board of, in organizing County: See COUNTY, 3.

As to control over State Roads: See CONSTITUTIONAL LAW.

As to mode of determining tax: See ASSESSMENT, 2.

SUPREME COURT.

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TAXES.

See ASSESSMENT.

Allegation of illegal taxes in bill: See EQUITY PLEADINGS AND PRACTICE, 14.

Mode of determining amount by Supervisors: See SUPERVISORS.

TAX TITLE DEED.

When bill to quiet title is filed against one in possession: See EQUITY JURISPRUDENCE, 5.

TELEGRAPH COMPANIES.

1. *Liability of, over their own and other lines: Repeated Messages: Printed Blanks: Special Contract: Agency.* Telegraph companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position.—*Western Union Co. v. Carew*, 525.

2. When a person writes a message under a printed notice, requesting the company to send such message according to the conditions of such notice, *held* that the printed blank was

a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions.—*Ibid.*

3. Where a Telegraph Company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeated messages and for which an increased charge would be made, and further, that it would assume no liability for any error or neglect committed by any other company over whose lines a message might be sent in the course of its destination, *held*, that such regulations were reasonable and binding on those dealing with the company.—*Ibid.*

TENANCY.

Notice to quit: Under what circumstances a person holding over after foreclosure of a mortgage of the premises, will be entitled no notice to quit; *Quaere*, the Court being equally divided. *Allen v. Carpenter*, 25.

By the Curtesy: See CURTESY.

TICKET.

As to Railroad Ticket over separate roads: See PASSENGER.

TIME.

Allowed to drawee before acceptance of bill: See BILL OF EXCHANGE.

As to reasonable time: See SPECIFIC PERFORMANCE.

Computation of, in giving notice of motion: See PRACTICE IN SUPREME COURT, 6.

TITLE.

Bill to quiet: See EQUITY JURISPRUDENCE, 5.

Bill to remove cloud: See EQUITY PLEADINGS AND PRACTICE, 14.

When assailed by suit on second mortgage: See MORTGAGE, 4.

TORT.

As to rule of damages: See DAMAGES, 2.

TOWNSHIP.

1. *Necessary to formation of counties.* An act purporting to organize a new county out of territory detached from an old one, but which contains no organized townships, and makes provision for none, is inoperative and void; as without such townships there can be no legal elections, and no means of organizing. — *People v. Maynard*, 463.

2. Such an act is not made effective by the subsequent passage of an act organizing a single township in the new territory, leaving the remainder not provided for. — *Ibid.*

3. A county can not be organized without the means of exercising all its necessary functions, and requires more than one organized township, as the board of supervisors cannot exist without more than one member, and there can be no county without such a board. — *Ibid.*

4. Where townships have become organized under a statute and have acted for many years, and have been recognized by the various state and local authorities, it is too late to inquire into the validity of the law providing for their original creation, and their corporate existence can not be questioned. — *Ibid.*

5. The legislature can not lawfully deprive qualified voters of a county of their right of suffrage, by organizing townships in only a portion of it; leaving the remainder unorganized. — *Ibid.*

TREASURER'S BOND.

Effect of delay in filing: See EQUITY JURISPRUDENCE, 2.

TRESPASS.

As to alias execution against the body: See EXECUTION.

TROVER.

Conversion: damages. Where one co-tenant was bound to the other by contract, to deliver and divide joint property at a certain place, but appropriated it to his exclusive use, and under circumstances which rendered a division and delivery in the manner agreed upon impracticable: *Held*, that it

amounted to a conversion, and that trover would lie. *Held, further*, that in the absence of special circumstances requiring a different measure of damages, it was proper to award to the plaintiff the value of the property at the time of conversion, with interest from that time.—*Ripley v. Davis*, 75.

TRUSTS.

See RESULTING TRUST.

As to voluntary deed: See DEED, 1.

TWO-THIRD'S VOTE.

When required: See SUPERVISORS.

UNITED STATES STAMP ACT.

As to process in state courts: See CONSTITUTIONAL LAW.

VACANT LANDS.

When bill to quiet title is filed, based on tax title deed: See EQUITY JURISPRUDENCE, 5.

VENUE.

Change of, in quo warranto: See QUO WARRANTO.

VERDICT.

Of jury in street opening cases: See STREETS, 2.

VESSEL.

Power of Master to bind: See MASTER.

Liability as carrier for money stolen from passenger: See COMMON CARRIER, 1.

VESTRYMEN.

As to misjoinder: See PLEADINGS, 5.

VOLUNTARY DEED.

When valid: See DEED, 1.

VOTER.

As to mode of determining qualification of: See BOARD OF REGISTRATION.

When can not be deprived of right of suffrage by Legislature in organizing townships: See COUNTY, 5.

WAIVER.

Appearance before a Commissioner to object for want of notice is no waiver.—*People v. Kehl*, 330.

WARD.

As to lease by special guardian: See LEASE, 1.

WARDENS AND VESTRYMEN.

As to *misjoinder*: See PLEADINGS, 5.

WARRANT.

Effect of delay in appending warrant to assessment roll: See EQUITY JURISPRUDENCE, 2.

When will be issued by Supreme Court to enforce judgment in proceedings before Commissioner: See CIRCUIT COURT COMMISSIONER, 4.

WASHINGTON COUNTY.

Organization of: See COUNTY.

WITNESS.

Effect of false statement on remainder of testimony: See EVIDENCE, 9.

Omission of husband to call his wife as a witness, effect of: See EVIDENCE, 10.

WRITTEN FINDING.

By Recorder: See RECORDER.