MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 1, TO JULY 26, 1893.

WILLIAM D. FULLER,

STATE REPORTER.

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Rec. Dec. 26, 1893

SUPREME COURT.*

FRANK A. HOOKER (CHIEF JUSTICE), ... CHARLOTTE.
[Term expires Dec. 31, 1893.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
JOHN W. McGRATH, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.
ROBERT M. MONTGOMERY,	GRAND RAPIDS, . .	Dec. 31, 1901.

COURT OFFICERS:

CHARLES C. HOPKINS, .	CLERK, ...	LANSING.
MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
ADOLPHUS A. ELLIS, . .	ATTORNEY GENERAL, . .	IONIA.

* The Court was composed of the above-named Justices during the period covered by this volume.

CIRCUIT JUDGES.

1.	VICTOR H. LANE,	ADRIAN.
2.	THOMAS O'HARA,	BERRIEN SPRINGS.
3.	GEORGE GARTNER, HENRY N. BREVOORT, CORNELIUS J. REILLY, GEORGE S. HOSMER, ROBERT E. FRAZER,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
11.	JOSEPH H. STEERE,	SAULT STE. MARIE.
12.	WILLIAM D. WILLIAMS,	MARQUETTE.
13.	J. G. RAMSDELL,	TRAVERSE CITY.
14.	ALBERT DICKERMAN,	MUSKEGON.
15.	NOAH P. LOVERIDGE,	COLDWATER.
16.	ARTHUR L. CANFIELD,	MT. CLEMENS.
17.	WILLIAM E. GROVE, ALLEN C. ADSIT,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	PHILIP PADGHAM,	ALLEGAN.
21.	HENRY HART,	MIDLAND CITY.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	WILLIAM H. SIMPSON,	AU SABLE.
24.	WATSON BEACH,	LEXINGTON.
25.	JOHN W. STONE,	MARQUETTE.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.
30.	ROLLIN H. PERSON,	HOWELL.
31.	S. W. VANCE,	PORT HURON.
32.	NORMAN W. HAIRE,	IRONWOOD.
33.	CHARLES J. PAILTHORP,	PETOSKEY.
34.	NELSON SHARPE,	WEST BRANCH.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder

Terms of Court.

Nov. 1, 1893.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME

Terms of Court.

Dec. 11, 1893, March 12, 1894.

TERMS OF COURT FOR 1893.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Alcona	23	January 3.	June 6.	October 3.	
Alger	11	May 9.	Nov. 14.		
Allegan	20	February 13.	May 15.	October 2.	December 4.
Alpena	26	February 14.	May 2.	August 8.	November 7.
Antrim	13	February 7.	April 25.	July 18.	November 27.
Arenac	34	February 27.	Aug. 28.		
Baraga	12	January 3.	July 4.	October 3.	
Barry	5	February 13.	May 1.	August 21.	November 13.
Bay	18	March 7.	June 6.	September 5.	December 5.
Benzie	28	April 4.	Aug. 1.	December 12.	
Berrien	2	January 10.	March 21.	May 16.	October 17.
Branch	15	March 6.	June 12.	October 2.	December 4.
Calhoun	5	March 13.	June 5.	September 11.	December 4.
Cass	2	February 21.	April 25.	September 26.	December 5.
Charlevoix	13	January 24.	April 11.	July 11.	November 20.
Cheboygan	33	January 24.	April 25.	July 25.	September 26.
Chippewa	11	February 14.	May 16.	September 19.	November 28.
Clare	21	January 2.	March 27	June 26.	September 18.
Clinton	29	February 6.	April 24.	June 26.	November 13.
Crawford	34	January 10.	June 13.	October 10.	
Delta	25	January 17.	April 18.	July 24.	October 24.
Dickinson	25	January 3.	April 10.	July 17.	October 9.
Eaton	5	January 9.	April 10.	July 3.	October 9.
Emmet	33	January 3.	April 4.	July 11.	September 5.
Genesee	7	January 2.	April 4.	August 7.	October 9.
Gladwin	34	April 10.	Oct. 16.		
Gogebic	32	February 14.	May 9.	August 15.	November 21.
G'd Traverse	13	January 2.	April 4.	July 4.	November 13.
Gratiot	29	March 13.	June 5.	September 11.	December 4.
Hillsdale	1	January 10.	March 21.	September 5.	November 14.
Houghton	12	January 17.	April 25.	August 1.	November 7.
Huron	24	January 2.	March 13.	June 5.	October 23.
Ingham	30	January 9.	March 13.	May 15.	September 25.
Ionia	8	February 6.	May 1.	September 18.	November 6.
Iosco	23	February 7.	May 2.	August 1.	November 7.
Iron	25	February 13.	June 5.	October 2.	
Isabella	21	February 27.	May 15.	September 4.	October 23.

TERMS OF COURT FOR 1893.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	Jan. 2, March 6.	May 1.	September 11.	November 13.
Kalamazoo	9	February 20.	May 15.	October 9.	December 11.
Kalkaska	28	January 17.	April 18.	July 25.	November 7.
Kent	17	March 6.	May 1.	September 25	December 4.
Keweenaw	12	January 10.	July 11.	October 10.	
Lake	19	February 20.	June 19.	October 9.	
Lapeer	6	January 9.	March 13.	July 10.	November 6.
Leelanaw	13	February 14.	May 16	October 3.	
Lenawee	1	February 14.	April 25.	October 3.	December 12.
Livingston	30	February 13.	April 17.	June 19.	November 13.
Luce	11	May 2.	Nov. 7.		
Mackinac	33	February 28.	June 27.	August 15.	October 24.
Macomb	16	January 9.	April 10.	June 19.	October 9.
Manistee	19	February 6.	May 1.	August 14.	November 13.
Manitou	33	May 16.	Oct. 17.		
Marquette	25	February 20.	May 16.	September 12.	December 5.
Mason	19	January 2.	April 3.	July 3.	October 2.
Mecosta	27	January 3.	April 4.	July 4.	November 7.
Menominee	25	February 1.	May 1.	August 21.	November 14.
Midland	21	January 16.	April 10.	August 28.	October 2.
Missaukee	28	March 7.	May 23.	September 5.	December 5.
Monroe	22	February 7.	April 4.	September 12.	November 7.
Montcalm	8	March 6.	June 5.	October 2.	December 4.
Montmorency	26	May 16.	Oct. 17.		
Muskegon	14	February 13.	May 8,	September 11.	November 27.
Newaygo	27	March 7.	June 6.	October 3.	December 5.
Oakland	6	February 6.	May 1.	September 18.	December 4.
Oceana	14	January 9.	April 17.	August 21.	October 23.
Ogemaw	34	January 17.	June 20.	October 17.	
Ontonagon	32	February 7.	June 20.	October 17.	
Osceola	19	March 6.	June 5.	September 18.	December 11.
Oscoda	23	January 24.	June 27.	October 24.	
Otsego	34	January 17.	June 20.	October 3.	
Ottawa	20	January 9.	March 13	August 7.	November 6.
Presque Isle	26	January 10.	June 13.	October 10.	
Roscommon	34	January 10.	May 9.	September 12.	
Saginaw	10	January 9.	March 13.	May 8, Sept. 11.	November 13.
Sanilac	24	January 16.	April 17.	June 26.	September 25.
Schoolcraft	11	January 10.	April 18.	September 5.	
Shiawassee	7	February 13.	May 8.	September 4.	November 20.
St. Clair	31	February 6	Apr. 3, Jun 5	October 2.	December 4.
St. Joseph	15	January 17.	March 28.	July 11.	October 24.
Tuscola	24	February 14.	May 9.	September 5.	December 5.
Van Buren	9	January 9.	April 10.	September 11.	November 13.
Washtenaw	22	March 6.	May 1.	October 2.	December 4.
Wayne	3	January 3.	April 4.	June 20.	September 12.
Wexford	28	March 14.	June 6.	September 19.	December 19.

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[1] See *Quarles v. State*, 14 L. R. A. 192, for note on question of Sunday labor; and note to *Kelley v. Cosgrove*, 17 L. R. A. 779, as to the remedy for the rescission of a Sunday contract.

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[1] See *Hubbard v. Preston*, 15 L. R. A. 249, for an exhaustive note on the question of the right to kill another's dog.

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APRIL TERM, 1893.*

THE PEOPLE v. MAY WHEELER.

Liquor traffic—Saloon open on Sunday—Complaint—Jurors—Bias—Challenge for cause.

1. A complaint alleging that the respondent was on a given day, and at a specified city in the county where the complaint is made, the proprietor of a place where spirituous and intoxicating liquors were by her kept to be sold, said place not being a drug-store, and that she did on the day named, being the first day of the week, commonly called "Sunday," keep her said place, where said liquors were by her kept as aforesaid, open, and did not keep her said place of business closed, as required by law, sufficiently charges the respondent with a violation of 3 How. Stat. § 2283*e*, which provides that all saloons, etc., and all other places, except drug-stores, where any intoxicating liquors are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called "Sunday;" citing *People v. Robbins*, 70 Mich. 130.
2. A juror in a liquor case, who testifies on his *voir dire* examination that he thinks he has a prejudice against persons engaged in the liquor traffic, and that he has always been down on liquor selling, whether legal or illegal, and that such prejudice might extend to the respondent, and might not be removed, is subject to a challenge for cause, although, after being prompted by the prosecuting attorney with the statement that he did not understand that the juror had a prejudice against the person, but the business, he states to the court that, if the rights of such a person came up to be adjudicated before him as a juror, he would not be prejudiced against him by reason of the fact that he was engaged in that

*Continued from Vol. 95.

business; citing *Theisen v. Johns*, 72 Mich. 285; *Brockway v. Patterson*, Id. 122.

Exceptions before judgment from Hillsdale. (Lane, J.) Argued April 21, 1893. Decided June 1, 1893.

Respondent was convicted of keeping a saloon open on Sunday. Conviction reversed. The facts are stated in the opinion.

Ware & Price and *William C. Chadwick*, for respondent.

A. A. Ellis, Attorney General, and *Spencer D. Bishopp*, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was convicted of keeping open a saloon on Sunday. She has appealed to this Court, and assigns numerous errors.

1. It is contended that the complaint charged no offense. The complaint charged that she was the proprietor of a place where spirituous and intoxicating liquors were by her kept to be sold, said place not being a drug-store, and that she did, on the 29th day of November, 1891, that being the first day of the week, commonly called "Sunday," keep her said place, where said spirituous and intoxicating liquors were by her kept as aforesaid, open, and did not keep her said place of business closed, as required by law. This charges the offense substantially as described by the statute. Section 2283*e*, 3 How. Stat., provides as follows:

> "All saloons, restaurants, bars, in taverns or elsewhere, and all other places, except drug-stores, where any of the liquors mentioned in this act are sold or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called 'Sunday.'"

This complaint was sufficient. *People v. Robbins*, 70 Mich. 130. The cases cited by counsel in support of the objections—*People v. Telford*, 56 Mich. 544; *People v. Haas*,

79 Id. 449—have no application, as they were prosecutions for carrying on the business without having paid the tax required by law, and were under other sections of the statute, requiring different averments.

2. Exception was taken to the refusal of the trial judge to allow a challenge to certain jurors on the ground of bias. The case of Juror Metcalf will be sufficient to illustrate the tendency of the rulings. On his examination on the *voir dire* he was asked:

"*Q.* Have you any prejudice against persons engaged in the liquor traffic?

"*A.* I don't know but what I have.

"*Q.* You think you have, do you?

"*A.* Yes, sir; I might, a little of that nature.

"*Q.* Well, would you, if that appears here, would that prejudice you against her, and against her testimony, for instance, if she should be sworn as a witness?

"*A.* No, sir; I don't think it would.

"*Q.* You think you have a prejudice against persons engaged in that business?

"*A.* Yes, sir.

"*Q.* Why do you think you have such prejudice, and state that you would not have prejudice against the respondent if you should find that she was engaged in the same business?

"*A.* Well, I have always been down on liquor selling.

"*Q.* I suppose you mean by that you are down on liquor selling any way, whether it is legal or illegal; isn't that true?

"*A.* Yes, sir; it is, to a certain extent.

"*Q.* Now, you don't feel free and unbiased towards the people who are engaged in selling liquor?

"*A.* No; I don't know as I do.

"*Q.* You have a sort of prejudice against such people?

"*A.* Yes, sir.

"*Q.* Now, if that is so, why is it that you say here now that you would not have a prejudice against the respondent if you should learn from the evidence here, or otherwise, that she was engaged in the same business,—why would not that prejudice extend to her as it does to others engaged in that business?

"*A.* Well, I don't know but what I might be a little prejudiced.

"*Q.* Mr. Metcalf, when I first asked you about this matter, not a very great while ago, you said you were prejudiced against people who were engaged in selling liquor. Then you further said that you would not be prejudiced against this respondent if you should learn that she was engaged in the same business. Then afterwards you said, in your last answer, that you might be prejudiced against her somewhat, or a little prejudiced against her, or words to that effect. Now, is there anything special in the case which would lessen your prejudice against this respondent particularly?

"*A.* I don't know as there is. I have always been down on liquor selling.

"*Q.* Now, when you are sitting upon the trial of a case where a liquor seller is interested as a defendant or a witness, you have a prejudice against that person, have you not, on account of the business in which they are engaged?

"*A.* Yes, sir.

"*Q.* And you can say, can you, that that prejudice would be removed entirely, or at all, in the case of this respondent?

"*A.* I don't hardly believe it would be."

On a further examination by the court he somewhat modified his statement, and stated, in answer to a question by the court, that if the rights of such a person came up to be adjudicated, and he was called upon to pass upon such rights as a juror, he would not be prejudiced against him by reason of the fact that he was engaged in that business; but before this answer was given he was prompted by the prosecuting attorney by the statement, "I don't understand he has a prejudice against the person, but the business." We feel constrained to hold, under the rulings of this Court in *Theisen v. Johns*, 72 Mich. 285, and *Brockway v. Patterson*, Id. 122, that this juror was rendered incompetent by his *voir dire* examination, and that the challenge for cause should have been allowed.

The other questions presented are not liable to arise upon a new trial.

The conviction is reversed, and a new trial ordered.

The other Justices concurred.

DAVID GRIMM v. THE ESTATE OF THOMAS TAYLOR, DECEASED.

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Estates of deceased persons—Claims—Contract for support—Consideration.

1. The words, "aiding and supporting Ann Grimm and children," used in a claim filed against the estate of a deceased person, are broad enough to include aid and support by the contribution of money.
2. Where, upon the divorce of his parents, a minor son is emancipated by his father, and, at the request of his mother's brother, remains at home and aids in the support of his mother and minor brothers and sisters, upon the uncle's promise to pay him for his services, he can recover the value of the services so rendered of his uncle's estate.[1]
3. Where, on the hearing of a claim filed by a son against the estate of his uncle for aiding in the support of his mother at the uncle's request, the only testimony tending to show an agreement by the uncle to pay a specified sum for such services is the statement of the deceased that he had hired the claimant, and intended when he died to leave him $1,000, it is error to submit that question to the jury.

Error to Macomb. (Canfield, J.) Argued April 20, 1893. Decided June 1, 1893.

Appeal from the disallowance of a claim against the estate of decedent. The executor brings error from a

[1] See *Howe v. Hyde*, 88 Mich. 91.

judgment of allowance. Reversed. The facts are stated in the opinion.

Dwight N. Lowell (Eldredge & Spier, of counsel), for appellant.

Franklin P. Monfort, for plaintiff.

MONTGOMERY, J. The deceased, Thomas Taylor, and claimant's mother were brother and sister. In 1875 the sister, Mrs. Grimm, was divorced from her husband, and at this time the claimant was 16 years of age. The claimant introduced evidence tending to show that at this time, and at various times thereafter, Mr. Taylor requested David to remain at home with his mother, and to care for her and his minor brothers and sisters, contributing from his wages and earnings, and promised him that he would pay him well for it when he was through with his money. The claimant offered further testimony to show that he did remain at home with his mother, and did contribute to her support, and to that of the minor children, and that Mr. Taylor at various times acknowledged himself satisfied with the manner in which he was complying with his request. The claimant recovered a verdict of $1,000. The executor appeals.

The assignments of error are numerous. We do not deem it necessary to discuss all the questions raised, as many of them are not likely to arise upon another trial. The questions which we deem important are whether the claim filed in the probate court was broad enough to admit the evidence offered; whether the testimony offered tended to show a valid agreement; and whether the proofs were such as to admit of submitting the question to the jury as to whether there was an express agreement to leave to plaintiff $1,000 by will.

1. The claim filed was not a formal document. It

had not the elements of a declaration, but this is not required. It was in the form of an account, and read as follows:

"*Estate of Thomas Taylor, Deceased,*

"IN ACCOUNT WITH DAVID GRIMM, DR.

"To services in the care and aiding and supporting Ann Grimm, sister of deceased, and minor children of said Ann Grimm, from November 15, 1875, up to the time of the death of the deceased, February, 1889, at the special instance and request made by said deceased in his life-time, at $150 a year,—
15 years and 3 months.....$2,287.50."

It is claimed that this account did not admit of proof that the claimant contributed money to the support of the family; but we think the language, "aiding and supporting Ann Grimm and children," is broad enough to include aid and support by the contribution of money.

2. Did the contract, as proven, create a valid obligation? It is said that the claimant did no more than he was legally and morally bound to do; but this is not so. The father was the one legally entitled to the claimant's services, and it is fairly inferable from the testimony that he was emancipated by the father. He might have left home, but the testimony offered on behalf of the claimant tended to show that he remained at the special request of the deceased, and upon his promise to pay him for his services. This furnished a sufficient consideration. *Waldron v. Alexander,* 133 Ill. 30; 136 Id. 550 (24 N. E. Rep. 557; 27 Id. 41); *Hamer v. Sidway,* 124 N. Y. 538 (27 N. E. Rep. 256). It was strenuously insisted upon the argument that the evidence offered amounted to no more than an assurance by the deceased that he would remember the claimant in his will, and that claimant did not rely upon such assurance as in the nature of an express contract or promise. We agree, fully, that the danger attendant upon the assertion of claims of this character is such that

the trial court should see to it that the jury are not misled into assuming an express promise from mere loose expressions of commendation or assurances; but there is sufficient evidence in this record to justify submitting the question to the jury as to whether the services were in fact rendered in reliance upon the uncle's promise.

3. The circuit judge instructed the jury, among other things, as follows:

"If you find from the evidence that David Grimm was induced to perform the services in question for the family of his mother upon the promise of his uncle, Thomas Taylor, to give him $1,000 upon his death, by and through a will, and you also find that no compensation was made in and by the will,—and about that there is no dispute, that the compensation was not so made,—then you will find for the plaintiff in the sum of $1,000."

It is contended by the counsel for the estate that there was no evidence to justify submitting this question to the jury. The testimony offered on behalf of claimant was that of his mother, who testified, in answer to the question, "Did he say when or how he would pay him?" "Well, it was when he was done with the property. He always told me he would leave me a thousand dollars, too, as well as him." Referring again to the same conversation: "I heard him tell Dave to stay, and be a good boy, and work, and turn all he could, and get things, what he could, for the benefit of the children and myself. "*Q.* Was that all that was said? "*A.* That is all I heard,—all but that he would pay him well if he would stay and do what he could."

Again, on redirect examination she testified, in answer to the question, "What did he say about how he would pay him?" "*A.* Well, when he was through with his property, after his death,—that was the time. He was to give me $1,000, too."

Charlotte Grimm, a sister of claimant, testified that, in

1883, claimant told her uncle that he wanted to go away, because he thought he could do better. The uncle said, "No, he did not want him to go; to stay here, help all he could, give all the service he could to help mother bring up the rest of us; and he would pay him, and would pay him well, if he would." In answer to the question, "Did he in either of these conversations say how he would pay him?" she testified: "He spoke several times about his death. He was speaking several times about willing so much at his death."

Martha Chamberlain testified to a statement made by the deceased; that on one occasion the deceased said to her that "he had helped them [referring to Mrs. Grimm's family] some, and intended to help them more. He said, 'I must have that boy David stay with his mother;' and, said he: 'I shall give him a thousand dollars, or more, if necessary. I shall stand by him just as long as I live.' I did not hear him speak of any arrangement with David." On cross-examination she testified: "He said he would stand by him as long as he had anything, and give him a thousand dollars, and even more. He said he had no children, and he thought it was a charity for him to do this."

Hiram Eldred testified for the claimant to a conversation with the deceased, in which he said "he had hired him to stay at home; said he wanted to go off with the other boys,—Al., I think,—and David wanted to go, but he had hired him to stay. Don't remember of his saying when or how he was to pay him."

Margaret Hovey testified to a statement of the deceased, in which he said "David had done well; he was a good boy. Said he had hired him, and he intended, when he died, to leave him a thousand dollars. Had no other talk with him on that subject after that."

Ann Wood testified to a statement of the deceased, as follows: "'I promised to pay him well for his work, and I am going to do it.' He said David had done just what he had hired him to do, and he had been a faithful boy."

George Wood testified to a conversation with the deceased: "He said he hired him to take care of his mother, and to look after the family; that he had no fault to find, and he intended to pay him. Didn't say how he calculated to pay him."

This comprises the testimony offered on behalf of claimant upon the subject-matter of how he was to receive his pay. The only testimony tending, in the slightest degree, to support an agreement to pay a thousand dollars at his death, is that of Mrs. Hovey, who couples the statement of the deceased that he had hired the claimant with the statement that he intended to leave him a thousand dollars. This, however, is not inconsistent with the alleged contract which the other testimony tended to show,—that he was to pay him well for his services,—and does not tend to show that the agreement between the deceased and claimant was that he was to receive $1,000. This might not have been damaging error, but for the fact that the claimant's mother was permitted to testify to an understanding that the deceased was to leave her a thousand dollars, as well as the claimant, and the jury might have confounded the two statements. We think that in a case of this nature, where loose statements of the deceased are so liable to misconstruction, extreme care should be exercised that the jury be not permitted to determine the case upon their own ideas of justice, without regard to whether a distinct contract was made; and that it was error to submit to the jury the question of whether there was a distinct contract to pay the claimant $1,000 for his services rendered.

For this error the judgment will be reversed, and a new trial ordered.

The other Justices concurred.

ADELAIDE CORBY v. EDGAR O. DURFEE, JUDGE OF PROBATE OF WAYNE COUNTY.

Mandamus—Authority of probate court—Setting aside orders.

1. *Mandamus* will not lie where the person to whom it is addressed has no power to obey its mandate.[1]
2. The probate court has no power to vacate an order admitting a will to probate; citing *Grady v. Hughes*, 64 Mich. 545.

Mandamus. Argued April 25, 1893. Denied June 1, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order admitting a will to probate. The facts are stated in the opinion.

Atkinson & Atkinson (Don M. Dickinson, of counsel), for relator.

DeForest Paine, for respondent.

HOOKER, C. J. Relator asks a *mandamus* to compel the probate judge to vacate an order admitting to probate the will of relator's father, Robert Trombley. This order was made in 1872, by respondent's predecessor, and relator claims to have been ignorant of the proceedings until recently, and that the will is fraudulent; that a petition was filed by herself and sisters with the probate court,

[1] See *Turnbull v. Giddings*, 95 Mich. 314.

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alleging these facts, and that the probate court did not obtain jurisdiction in the original proceedings, concluding with a prayer that the order admitting the will to probate be vacated, and petitioners permitted to contest the will. After a full hearing the probate court denied the relief prayed.

Belator has mistaken her remedy. If not satisfied, she should have appealed from the order of the probate court. How. Stat. § 6779.

A *mandamus* will not be granted where another adequate legal remedy exists. *People v. Circuit Judges,* 1 Doug. 302; *People v. Judge,* 1 Mich. 359; *People v. Circuit Judge,* 19 Id. 296; *Wiley v. Circuit Judge,* 29 Id. 487.

A further reason for denying the relief prayed is the want of power in the probate court to vacate its decree admitting the will in question to probate. In *Grady v. Hughes,* 64 Mich. 545, it is said that—

"The probate court derives none of its jurisdiction or power from the common law, but must find the warrant for all of its doings in the statute. Its jurisdiction, powers, and duties are prescribed by law. Article 6, § 13, Const.; How. Stat. chap. 248. * * * We find no authority given to the probate court to review such decree or to set the same aside."

We do not decide that the jurisdiction of equity is not broad enough to furnish relief in such a case as this is claimed to be.

The writ will be denied, with costs.

The other Justices concurred.

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WILLIAM L. JENKS v. REBECCA HORTON.

Estates in land—Life-tenant—Liability for taxes—Remedy of reversioner—Appointment of receiver.

1. The law imposes upon a life-tenant the duty of paying the taxes assessed upon the land.[1]
2. The agreement by a reversioner, in a mortgage of his reversionary interest, to pay the taxes assessed on the land, is not of itself a release of the life-tenant from the duty of making such payment.
3. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all of the rights of the original reversioner as against a life-tenant.
4. Under the method of enforcing the collection of unpaid taxes upon real estate, and the system of foreclosing liens, in this State, the appointment of a receiver of the rents and profits of land, on default of a life-tenant to pay the taxes due thereon, is not the proper remedy.

Appeal from St. Clair. (Canfield, J.) Argued April 28, 1893. Decided June 1, 1893.

Bill to declare taxes paid by the owner of the reversion a lien upon the estate of a life-tenant. Defendant appeals. Decree modified and affirmed. The facts are stated in the opinion.

P. H. Phillips, for complainant.

A. E. Chadwick, for defendant:

1. In support of the contention that the appointment of a receiver was unauthorized, counsel cited How. Stat. § 7847; *Wagar v. Stone,* 36 Mich. 364; *Livingston v. Hayes,* 43 Id. 129; *Hazeltine v. Granger,* 44 Id. 505; *Reading v. Waterman,* 46 Id. 107.

GRANT, J. The agreed facts in this case are as follows: 1. Prior to May 8, 1869, the ownership of the land was

[1] See *Smith v. Blindbury,* 66 Mich. 319.

in Rebecca Horton, as widow of Nelson D. Horton, deceased, and Carlos D. Horton and Mary E. Beard, the children and heirs at law of Nelson D. Horton, and the property was the homestead of Nelson D. Horton.

2. May 8, 1869, the said Carlos D. Horton and Mary E. Beard gave to Rebecca Horton a life-lease of said premises.

3. By sundry and mesne conveyances the title of Carlos D. Horton was conveyed to Frances S. Farrand.

4. May 22, 1884, Frances S. Farrand conveyed the interest acquired from Carlos D. Horton to Etta M. Beard, and upon the same day the said Etta M. Beard gave to B. C. Farrand a mortgage on the entire reversion for $918.90, to secure the purchase price of the interest conveyed to her. Said mortgage contained a covenant on the part of the mortgagor to pay all taxes assessed upon said premises.

5. Said mortgage was assigned, June 16, 1884, to George S. Barrett, and by him foreclosed for the interest accrued and unpaid; the sale taking place February 27, 1886, and a sheriff's deed being made to George S. Barrett. Redemption expired.

6. May 7, 1887, the said George S. Barrett, by his attorney in fact, conveyed, by ordinary quitclaim, the said premises to B. C. Farrand and W. L. Jenks, and on the 18th day of September, 1889, the said Barrett executed in person a conveyance by quitclaim, in usual form, of the said premises to the same grantees; and the said Farrand conveyed by ordinary warranty deed, except as against existing tax claims and mortgages, his interest in the said premises to Sheldon A. Wood, on September 23, 1889; and after the filing of the original bill in this case the said Sheldon A. Wood conveyed, without covenants, his interest in the said premises to complainant.

7. September 20, 1886, the said George S. Barrett redeemed the said premises from the sale made for unpaid taxes of 1882 and 1883, paying therefor, for the taxes of 1882, the sum of $84.90, and, for the taxes of 1883, $71.14.

8. September 27, 1887, the said B. C. Farrand and W. L. Jenks redeemed for the taxes of 1884, paying therefor $62.94; September 25, 1888, the said parties redeemed for the taxes of 1885, paying therefor $68.70; September 27, 1889, the said Jenks and Wood redeemed for the taxes of 1886, paying therefor $71.56; and all the rights of said Barrett for taxes paid were transferred to said Farrand

and Jenks, and the rights of said Farrand and Jenks transferred to Jenks and Wood, and the rights of said Wood transferred to said complainant by assignment.

9. At the time of filing the original bill there were the ordinary city, State, and county taxes assessed upon said premises for the years 1887, 1888, and 1889, in all amounting to upwards of $161, unpaid.

10. Said Rebecca Horton has occupied a portion of the premises continuously since the life-lease given to her in May, 1869, and has not paid any taxes assessed thereon beginning with the year 1882.

11. From September 1, 1885, to January 20, 1890, Etta M. Beard and her family occupied the property described in the bill as a home; Mrs. Horton also living there during the same time.

The court entered a decree that the complainant had a lien upon the life-estate of the defendant for the taxes of 1882 to 1886, inclusive, which had been paid by the complainant and his assignors, and for the unpaid taxes of 1887, 1888, and 1889; that she pay the amount of such taxes within 60 days after service upon her of a certified copy of the decree, and that, in default thereof, her interest be sold by the sheriff of the county, in the manner provided for the sale of real estate on execution, for the taxes to and including the year 1886; and that, in default of the payment of the taxes for the subsequent years above named, a receiver be appointed to receive the rents and profits of the premises for the purpose of paying such taxes.

Defendant's counsel insists (1) that complainant has no lien or right of action for the taxes prior to and including 1886; and (2) that under our system of taxation complainant is not entitled to a receiver for the unpaid taxes.

1. It is conceded that the law imposes upon a life-tenant the duty to pay the taxes assessed upon the land. It is insisted, however, that the personal covenant of the reversioner in the mortgage to B. C. Farrand to pay the taxes, and the joint occupancy of the premises by the

defendant and her daughter, the reversioner, operated to relieve the defendant from the payment thereof.[1] The defendant, however, was a stranger to the agreement between the reversioner and B. C. Farrand. The fact that a reversioner mortgages his reversion, and in the mortgage agrees with the mortgagee to pay the taxes, is not of itself a release of that duty on the part of the life-tenant. Had there been a contract between the defendant and her daughter by which the daughter had agreed to pay the taxes, a different question would have been presented, which we are not now called upon to determine. A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all the rights of the original reversioner as against a life-tenant. The agreed facts contain nothing showing any intention or agreement to release defendant from this duty to pay the taxes. The decree, therefore, covering the taxes which the complainant and his assignors have paid, is affirmed.

2. In New York the practice of appointing receivers in similar cases prevails (*Cairns v. Chabert*, 3 Edw. Ch. 312; *Sidenberg v. Ely*, 90 N. Y. 257); but under our method of enforcing the collection of unpaid taxes upon real estate, and under our system of foreclosing liens, we do not think the appointment of receivers the proper remedy. When it is determined by adjudication that defendant is under obligation to pay the taxes, it is quite probable that she will do so. The appointment of a receiver is a harsh proceeding, and should be resorted to only in extreme cases. In this respect the decree will be modified. The taxes, however, for the years named are past due, and, if not paid within 60 days after service upon the defendant of a certified copy of this decree, the complainant may pay

[1] Counsel cited, in support of this contention, *Conduitt v. Ross*, 102 Ind. 166; *Graber v. Duncan*, 79 Id. 565; *Shelton v. Codman*, 3 Cush. 318; *Ladd v. Noyes*, 137 Mass. 151.

them, and include the amount thereof in the sale ordered by this decree.

The complainant will recover costs of the court below, and the defendant costs of this Court.

The other Justices concurred.

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f153	338

FREDERICKA LUDEMAN ET AL. v. PAUL HIRTH.

Ejectment—Declaration—Amendment—Nonsuit—Execution sale—Statute of limitations.

1. It is error to refuse to allow a plaintiff in ejectment to amend his declaration, after issue is joined on the merits, by setting forth the estate which he claims in the land.
2. Where a plaintiff in ejectment has been denied the right to amend his declaration by setting forth the estate he claims in the land, it is error to refuse to permit him to submit to a nonsuit.
3. An execution cannot be issued and a levy made after a right of action on the judgment is barred by the statute of limitations; citing *Jerome v. Williams*, 13 Mich. 526; *Parsons v. Circuit Judge*, 37 Id. 287.
4. A lien upon real estate by virtue of a levy under an execution is not lost by delay in proceeding to a sale, where no fraudulent purpose is shown on the part of the judgment creditor; citing *Ward v. Bank*, 46 Mich. 332.
5. Where proceedings for sale under an execution levy are instituted before a right of action on the judgment is barred by the statute of limitations, a sale thereafter made in pursuance of such levy is valid.

Error to Wayne. (Brevoort, J.) Argued April 28, 1893. Decided June 1, 1893.

Ejectment. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

George W. Radford (*Edward A. Barnes*, of counsel), for appellants.

William Look and *H. F. Chipman*, for defendant, contended:

1. The requirement of How. Stat. § 7797, is mandatory, and the declaration was fatally defective; citing *Goodall v. Henkel*, 60 Mich. 382.
2. The statute of limitations bars plaintiffs' case; citing *Ten Eyck v. Wing*, 1 Mich. 40; *Jerome v. Williams*, 13 Id. 526; *McKinney v. Miller*, 19 Id. 151; *Warren v. Slade*, 23 Id. 1; *Parsons v. Circuit Judge*, 37 Id. 287; *Ward v. Bank*, 46 Id. 332.

GRANT, J. The declaration in this case was defective, in that it did not set forth the estate which the plaintiffs claimed. How. Stat. § 7797. No demurrer was interposed, but the defendant pleaded the general issue, with notice of the statute of limitations, and a claim for improvements. Upon the trial, plaintiffs asked leave to amend their declaration, setting forth the estate claimed. The court refused to permit the amendment. Thereupon, plaintiffs asked leave to submit to a nonsuit, which was also denied, and the court directed a verdict for the defendant.

The plaintiffs claimed title under an execution sale. The judgment was rendered April 2, 1878, and execution issued and levy made on the same day. On March 29, 1888, the land was advertised for sale, was sold May 16, 1888, and deed executed August 28, 1889.

The court erred in not permitting the plaintiffs to amend their declaration, and also, after refusing the amendment, in not permitting them to submit to a nonsuit.

The question raised upon the statute of limitations is not without difficulty. In this State a judgment creates no lien upon the property of the judgment debtor. No

lien is created until the levy has been made, and notice thereof filed in the office of the register of deeds. Until 1889 no limitation was placed upon the existence of the lien by execution levy. A statute was then passed, enacting that all levies theretofore made should cease to be a lien at the expiration of five years from the time the act became a law, and that all levies thereafter made should become and be void after the expiration of five years from the making thereof. 3 How. Stat. § 6173*a*.

Actions upon judgments must be brought within 10 years after the entry of the judgment.[1] How. Stat. § 8736. In the present case, proceedings for sale were commenced before the right to bring suit upon the judgment had expired by limitation, but the sale took place after it had expired. Executions cannot be issued, and levies made, after the right of action is barred. *Jerome v. Williams*, 13 Mich. 526; *Parsons v. Circuit Judge*, 37 Id. 287. The manifest reason on which these decisions are based is that when the judgment is dead no action can be taken to revive it. But they do not hold that during the life of the judgment any action authorized by law may not be taken to enforce it, although the sale cannot take place till after the right of action upon the judgment is gone. They therefore throw no light upon the present controversy. A lien upon real estate by virtue of a levy under execution is not lost by delay in proceeding to sale, where no fraudulent purpose is shown on the part of the execution creditor. *Ward v. Bank*, 46 Mich. 332. It follows that the lien remains in force until the statute of limitations has barred any right to proceed to foreclose it. The record of the levy is notice to every one of its existence, and is equivalent to actual possession of personal property taken under execution. Publication of the notice of sale

[1] See *Snyder v. Hitchcock*, 94 Mich. 313, holding that an action of *assumpsit* may be so brought.

before the right of action is barred is an open assertion of the non-payment of the judgment. The debtor is presumed to know that the lien is being enforced. If the judgment has been paid, or if he has lost any right by the failure to proceed earlier to a sale, for which the judgment creditor is responsible, the courts are open to him to restrain the sale. We think that, when any proceedings authorized by law to enforce the lien are instituted before the right of action upon the judgment is barred, they are valid, and the sale in pursuance thereof legal. Plaintiffs' deed, therefore, was not void because the sale took place more than 10 years after the rendition of the judgment.

Judgment reversed, and new trial ordered, with costs, and leave to plaintiffs to amend their declaration.

The other Justices concurred.

THE NEW YORK LUMBER & WOOD-WORKING COMPANY v. THE PEOPLE'S FIRE INSURANCE COMPANY.

Fire insurance—Contract—Recalling policy.

Where a policy of insurance sent to an agent without an application by the insured therefor, but with the expectation that the agent will tender it to the insured in renewal of a policy which has expired, reaches the agent on Sunday, and after the destruction of the property on the previous day, and the agent who forwarded the policy telegraphs on Sunday to the agent to whom it was sent not to deliver it, to which he answers, "all right, will return," which facts he communicates to an agent of the insured on the same day, who notifies the agent on the following day to hold the policy, which is not done, and on the fourth and fifth days thereafter the agent of the insured demands the policy, on which latter day the premium

is for the first time tendered, no valid contract of insurance is made.

Case made from Bay. (Cobb, J.) Argued April 26, 1893. Decided June 1, 1893.

Assumpsit. Plaintiff assigns error. Affirmed. The facts are stated in the opinion.

Hatch & Cooley, for appellant, contended:

1. A contract consists of an offer and its acceptance; citing 1 Whart. Cont. § 8: and here we have both; citing Anson, Cont. 15; *Wilcox v. Cline,* 70 Mich. 517; and other authorities cited under paragraph 2.
2. If the acceptance was otherwise good, the destruction of the property between the date of the offer and the acceptance did not prevent the consummation of the contract; citing *Hallock v. Insurance Co.,* 26 N. J. Law, 268; *Whitaker v. Insurance Co.,* 29 Barb. 312; *Lightbody v. Insurance Co.,* 23 Wend. 18; *Mead v. Davidson,* 3 Adol. & E. 300; *Baldwin v. Insurance Co.,* 56 Mo. 151; 1 Wood, Ins. §§ 15, 18-21, 31.

Elbert H. Gary, for defendant, contended:

1. Such a withdrawal as is shown in this case may be made at any time before acceptance; citing *Weiden v. Woodruff,* 38 Mich. 130; *Manufacturing Works v. Macalister,* 40 Id. 88; *Wardell v. Williams,* 62 Id. 57; *Smith v. Brennan,* Id. 354; *Larmon v. Jordan,* 56 Ill. 204; *Corcoran v. White,* 117 Id. 118; *School Directors v. Trefethren,* 10 Ill. App. 127; *Lipe v. Ludewick,* 14 Id. 372; 1 Pars. Cont. 483.
2. Where an offer and reply thereto are made by letter, the offer may be withdrawn at any moment, and is withdrawn as soon as a notice of such withdrawal reaches the offeree; citing *Tayloe v. Insurance Co.,* 9 How. 390; May, Ins. § 49.

MONTGOMERY, J. The plaintiff corporation is engaged in the manufacture of lumber at East Tawas, Mich. On the 1st day of July, 1889, the defendant company issued to the plaintiff a policy of insurance in the sum of $1,250. This policy was written by Frank L. Wands, the company's agent at Bay City, and was sent to one James H. Schmeck, at East Tawas, for delivery. The policy

expired on July 1, 1890, and no application for renewal was made by plaintiff. On the 5th of July, 1890, Mr. Wands prepared a new policy, dated July 1, 1890, for one year, and forwarded it to Mr. Schmeck, in the expectation that it would be tendered to the plaintiff in renewal of the former policy. At the same time, another policy, of like amount, in another company, in which plaintiff had previously insured, was prepared, and forwarded in the same envelope. These policies were received by Schmeck on Sunday morning, the 6th of July. In the meantime, on Saturday, a fire had occurred, and the property covered by the policies had been consumed. The agent, Wands, learning of this on Sunday morning, telegraphed to Schmeck not to deliver the policies. Schmeck replied: "All right. Will return." On the same day, Smith, an agent of the plaintiff, was seen by Schmeck, and for the first time informed that the policies had been received, and was at the same time informed that they had been recalled. On Monday, July 7, Mr. Smith telegraphed to Schmeck, "Hold Wands' $2,500 policy." By mistake of Schmeck's clerk, as it would appear, the policies were not retained, but were returned to Wands. On the 11th they were demanded of Wands by Smith, and on the 12th they were again demanded, and the premium for the first time tendered.

The sole question for our determination is whether a contract of insurance was effected. It is ingeniously argued by the plaintiff's counsel that the case is to be determined solely by reference to what took place in regard to the policy on secular days; and it is urged that as the policy was transmitted to Schmeck on a secular day, and as Smith signified his willingness to accept the policy on a secular day, this completed the contract; that Wands had no authority to recall the policy by telegram sent on Sunday.

We think this a novel application of the Sunday law. The act of Wands in recalling the policy of insurance from Schmeck was not the making of a contract, but was an effort simply to reclaim the property of the company. At that time no contract had been made, and none tendered. But, apart from this, if all that was communicated by Schmeck to the plaintiff is considered, it did not amount on his part to an offer of any contract of insurance to the plaintiff's agent. In the same conversation in which he was advised that he had received a policy, he was told that the policy had been recalled; and it does not appear that he was ever told, either by Wands or Schmeck, that the company would enter into contract relations with him. He could not compel the defendant to contract with him. As was said by the learned circuit judge:

"If Schmeck had authority to offer the policy to the plaintiff, he was under no legal obligation to do so, but might lawfully refuse. To make such an offer was not a duty which he owed to either the plaintiff or the defendant. But supposing that such authority was conferred upon him, and he accepted it, yet, until he should actually make such an offer on a secular day, the plaintiff could acquire no rights, as against said defendant, or as against said Schmeck."

The case does not call for extended discussion. The circuit judge was entirely right in his conclusion that the minds of the parties never mutually assented to the same proposition, and that no contract of insurance was made.

The judgment will be affirmed, with costs.

The other Justices concurred.

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104	128
104	493
96	24
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SAMPSON BICE, JOSEPH H. BICE, AND CLARENCE E. BICE v. THE MARQUETTE OPERA-HOUSE BUILDING COMPANY.

Statute of frauds—Promise to pay the debt of another—Estoppel.

1. Where at the request of contractors who are unable to procure the materials called for by their contract, which provides that in case they neglect to supply such materials the owner of the building to be erected may do so, and deduct the cost of the same from any moneys due or to become due the contractors, the owner of the building agrees to pay the material-men for all materials thereafter furnished, his agreement is not within the statute of frauds.[1]
2. The fact that the material-men still make a claim against the contractors for the value of the materials furnished under said agreement, and seek to enforce the same by suit against them and by garnishment proceedings, will not affect their rights in a suit brought against the owner upon said agreement; nor will the recovery of a judgment against the contractors bar plaintiffs' claim against the owner, unless the judgment is satisfied.

Error to Marquette. (Stone, J.) Argued April 26, 1893. Decided June 1, 1893.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Clark & Pearl, for appellant.

Egbert J. Mapes, for plaintiffs.

LONG, J. On August 4, 1890, the defendant company entered into a contract with Wilson & Moore by which they were to erect for defendant an opera-house building for the sum of $45,000, to be completed by July 1, 1891. The contract provided that should the contractors at any

[1] See *Mitts v. McMorran,* 64 Mich. 664.

time refuse or neglect to supply sufficient material of the proper quality, or fail in any respect to prosecute their work with promptness and diligence, or fail in the performance of any of the agreements on their part, such failure being certified by the architect, the owners should be at liberty to supply the material, etc., and deduct the cost of the same from any moneys due or to become due to the contractors. The contract also contained the following provision:

"Before each payment, if required, the contractors shall give the architect good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractors; and, further, if at any time there shall be any lien or claim for which, if established, the owners or the said premises might be made liable, and which would be chargeable to the said contractors, the owners shall have the right to retain, out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify them against such lien or claim, until the same shall be effectually satisfied, discharged, or canceled."

Bice, Pendill & Co. were merchants doing business at Marquette, and the plaintiffs in this suit are the successors to that firm, and have succeeded to all their rights by assignment. On August 28, 1890, and after the contract above specified had been made between defendant and Wilson & Moore, that firm submitted to Wilson & Moore a proposition to furnish certain materials for the building for the sum of $3,456.45. Their proposition was accepted, and the firm of Bice, Pendill & Co. furnished materials up to March 1, 1891, when they refused to furnish any more material upon the credit of Wilson & Moore unless the estimates for the material should be made directly to them, and the defendant should pay them directly therefor. Mr. Pendill called upon the architect, Mr. Charlton, and stated to him that they declined to furnish more materials unless they could see their way to get their pay. Mr.

Charlton, who audited all the bills, advised Pendill that if he would get an order from Wilson & Moore he would have the estimates made directly to the firm of Bice, Pendill & Co. The order was given by Wilson & Moore upon the defendant. This order became lost, and was not produced upon the trial; but Mr. Pendill testified that it was an order for the architect to make the monthly estimates for materials furnished by Bice, Pendill & Co. directly to them each month, and to pay to them directly upon such estimates; that he gave this order to Mr. Charlton, the architect, who agreed to make the payments directly to Bice, Pendill & Co. The whole of the materials were thereafter furnished, and on August 1, 1891, the following certificate given:

"MARQUETTE, MICH., Aug. 1, 1891.

"BICE, PENDILL & Co.,

"In account with WILSON & MOORE, Contractors and Builders:

"Due Bice, Pendill & Co. for material furnished for opera house	$3,595 51
April 1. Less estimate	933 00
Balance	$2,662 51

"The above bill is correct.

"WILSON & MOORE.

"I certify that the above material has been delivered, and has been built in the Marquette Opera-House Block, and is satisfactory.

"D. FRED CHARLTON, Architect."

Mr. Charlton testified that he did not remember distinctly about the order, but had a faint recollection that he saw it, or was told the amount. He admits, however, that he certified the bill above set out.

This action is brought against the defendant company for the amount of the claim of Bice, Pendill & Co. for such materials. On the trial before a jury the plaintiffs had verdict and judgment for the amount of the claim.

The court directed the jury that it was not claimed on the part of the plaintiffs that the defendant company purchased the materials from them, or Bice, Pendill & Co., as the plaintiffs' firm was then known, "but that fact might not be controlling in this case. Did the defendant make the agreement that is claimed by the plaintiffs in their declaration? That is, did the defendant agree to pay direct to Bice, Pendill & Co.? * * * If you find that such agreement was made, the court advises you that it was not within the statute of frauds."

Substantially, the court advised the jury that if such an arrangement was made with the architect as plaintiffs claimed, and the architect had authority to buy materials, and pay for materials furnished by plaintiffs to Wilson & Moore, the plaintiffs might recover.

It is first contended by counsel for defendant that there is no proof to sustain the declaration. The declaration contains the common counts and a special count. The special count alleges, substantially, that Bice, Pendill & Co. refused to supply materials to Wilson & Moore unless the defendant would promise and agree to pay directly to Bice, Pendill & Co. the entire amount which might accrue and be owing for such materials as the said Bice, Pendill & Co. should thereafter furnish for the construction of said building, and to be paid to said Bice, Pendill & Co., according to estimates of the architect thereafter from time to time given; and that thereupon, at the request of said Wilson & Moore, and in consideration of the premises aforesaid, and that the construction of said building might not be delayed, the said defendant agreed with the said Bice, Pendill & Co. to pay to said Bice, Pendill & Co. directly all such sums of money as might be owing them for materials thereafter furnished by said Bice, Pendill & Co. in the aforesaid Marquette Opera-House building, from time to time, according to estimates made as aforesaid.

The count then sets out the furnishing of the materials according to such agreement, and that such materials were used in the construction of the building.

The court stated the plaintiffs' claim to the jury substantially as the claim is laid in the declaration, and directed them that the question in the case was whether the defendant made the agreement claimed in the declaration, and, if such agreement was made, plaintiffs could recover. The plaintiffs' proofs, we think, tended to sustain this theory of the case. It is shown that the architect promised plaintiffs to make the estimates directly to them thereafter, provided they obtained an order from Wilson & Moore. Some dispute arises over this order, but the proofs tend to show that the architect was satisfied with the arrangement, and did make the estimates as agreed, and paid the April estimate of $933, and certified to the delivery of the balance of the material used in the building, furnished by the plaintiffs. The plaintiffs' proofs tended to sustain the theory of the declaration, and the court was not in error in stating that the case was not within the statute of frauds. The defendant company had a right, under its contract with Wilson & Moore, at any time when the contractors failed to prosecute the work with diligence, to provide materials themselves, and deduct the cost from the moneys due on the contract. Before it made any payments on estimates to the contractors the defendant company had also the right to know of any liens or incumbrances which might be put upon the property, for which the company would be liable, and, if any such claims existed, to retain sufficient moneys out of any payment to meet such claims. Under these circumstances, when the defendant company found that plaintiffs would furnish no more material to Wilson & Moore, or upon their credit, it agreed to make the payments for such material directly to plaintiffs. The case, in principle, falls within the rule laid down in

Calkins v. Chandler, 36 Mich. 320, 324; *Bates v. Johnrowe*, 57 Id. 521. It was not a promise to pay the debt of Wilson & Moore, but a promise to pay, for the material put into the building, directly to Bice, Pendill & Co., and which Wilson & Moore agreed it might do. As was said by Chief Justice Shaw in *Nelson v. Boynton*, 3 Metc. 396, 402:

"The rule to be derived from the decisions seems to be this: That cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of a person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The object to be accomplished by the defendant company was the immediate acquisition of those materials to put into the building. The purpose was not to benefit Wilson & Moore, or to obtain any forbearance for them, but to benefit the defendant company.

Some other reasons are argued and urged in this Court why the judgment should not stand. It is contended that the court was in error in leaving to the jury the question whether Charlton, the architect, had authority to make the agreement relied upon. We think the evidence justified the charge and the verdict.

It was shown on the trial that the plaintiffs, before the trial of the present case, had commenced suit against Wilson & Moore, in which they had judgment, and garnished a third party, for the price of these materials, and had also, in another proceeding, sought to obtain a lien upon the opera-house building; and it is claimed that such proceedings conclusively negative the claim now made. The fact that the plaintiffs still made a claim against Wilson & Moore could not affect their rights in the present proceeding. It is not claimed that Wilson & Moore were released from their indebtedness, and a judgment

against them would not bar the plaintiffs' claim against the opera-house company, unless there was a satisfaction of the judgment. It was not the theory of the plaintiffs that the defendant purchased the material of them, but that the defendant agreed to pay to them directly for the material, if the plaintiffs would furnish it on the contract with Wilson & Moore; and under the rule in *Calkins v. Chandler, supra,* it would not matter whether Wilson & Moore remained liable or not.

We need not discuss the other errors assigned. We have examined them, and they are overruled.

The judgment must be affirmed, with costs.

HOOKER, C. J., MCGRATH and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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CHRISTINA FLAGG v. THE CHICAGO, DETROIT & CANADA GRAND TRUNK JUNCTION RAILWAY COMPANY.

Railroad companies—Frightening horses—Erection of fences in depot grounds—Contributory negligence.

1. A railroad company is not guilty of negligence in failing to place fences or screens along its tracks in its station grounds for the purpose of preventing the frightening of horses approaching its station.
2. The driver of a four-year-old colt who tries to hold him by the head after being backed up to the platform at a railway station, and after he has become restless and frightened at the noise of an approaching train, instead of driving away over a smooth driveway, and thus avoiding the threatened danger, is guilty of negligence;[1] citing *Geist v. Detroit City Railway,* 91 Mich. 448.

[1] See *Cornell v. Railway Co.,* 82 Mich. 495; *Mahan v. Clee,* 87 Id. 161; *Kalembach v. Railroad Co.,* Id. 509.

Error to St. Clair. (Canfield, J.) Argued April 28, 1893. Decided June 1, 1893.

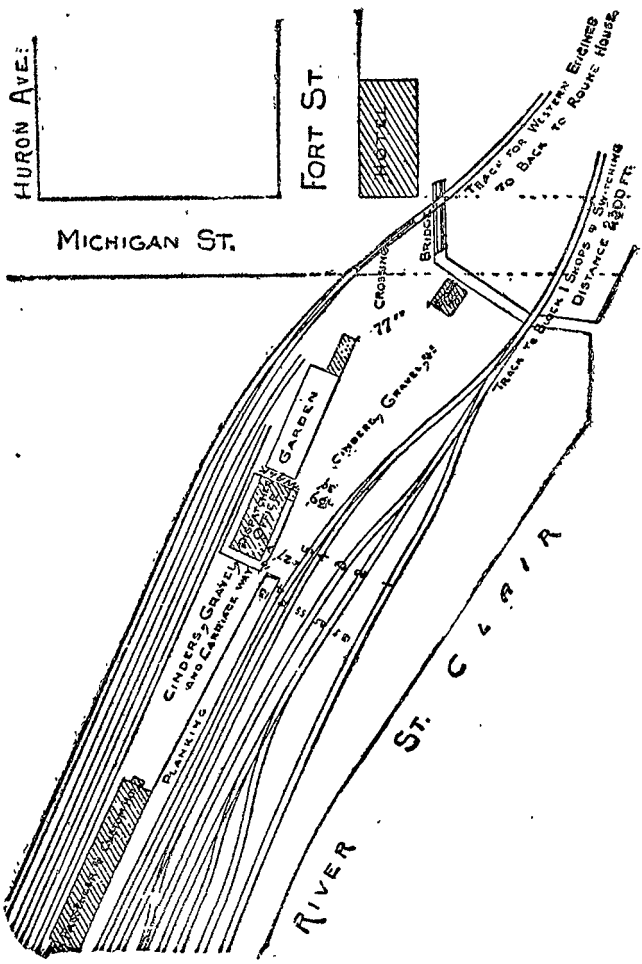
Negligence case. Defendant brings error. Reversed, and no new trial ordered. The facts are stated in the opinion.

E. W. Meddaugh (Atkinson & Wolcott, of counsel), for appellant.

J. B. McIlwain (A. E. Chadwick, of counsel), for plaintiff.

LONG, J. Plaintiff lives at Lakeport, about 10 miles from Port Huron. On the day of the accident she was returning from a visit at Port Huron to her home. She had solicited a ride with two young men by the name of Goodman, one about 19 and the other 14 years of age. They had a light wagon, drawn by one horse. On their way they drove to Ft. Gratiot, to get from the defendant company two trunks belonging to a party in Lakeport, and for which they had the checks. The horse they were driving was four years old, but well broken. None of these parties had ever been at the depot at Ft. Gratiot, and the horse had never been driven there. The situation of the streets, railroad tracks, and buildings of the defendant company is shown by the accompanying plat on page 32.

They drove down Michigan street to the tracks, and before turning into the depot grounds the older of the two boys got out of the wagon, went to the baggage room, and saw the baggage man, who took the checks, and delivered him the two trunks, telling him to drive up to the platform to get them. He put them on a truck, and wheeled them out to the end of the platform, near the train dispatchers' office, and then returned for his horse


HURON AVE.
FORT ST.
MICHIGAN ST.
TRACK FOR WESTERN ENGINES TO BACK TO ROUND HOUSE
BRIDGE
CROSSING
DISTANCE 1200 FT.
TRACK TO BACK 1 SHOPS & SWITCHING
77'
GARDEN
CINDERS, GRAVEL & CARWORK WAY
PLANKING
RIVER ST. CLAIR

and wagon. The horse was driven over the first line of tracks through the driveway, and turned round, backing the end of the wagon to the north end of the platform, and opposite the train dispatchers' office. The older boy got out of the wagon, leaving his brother and the plaintiff in the wagon. The horse became restless, and the younger boy got out and took him by the bits. He began to rear, when the older boy went to his head. The horse finally started and ran northward, and, swinging to the right across the tracks, overturned the wagon, throwing the plaintiff out, breaking her leg, and otherwise injuring her. The horse became frightened and unmanageable from the noise of an approaching train coming from the rear, and along the track on the east side of the depot. This action was brought to recover damages for the injury thus sustained by the plaintiff, and on the trial she had verdict and judgment for $2,000.

The duty alleged in the declaration is that, if the defendant had taken proper precaution to protect life and property against such apparent danger as the operating of engines and cars along said mentioned switching tracks, it would have constructed and maintained a high board fence along the westerly side of its main switching tracks from said passenger, freight, and baggage platform, at the southerly end of said building known as the "dispatchers' office," etc.; or, had said defendant kept an employé or servant at said platform to warn strangers coming there with horses to receive or deliver freight or baggage, or to assist in holding such teams, or maintained hitching posts or rings for hitching horses, the accident would not have happened. The breach of duty assigned is as follows:

"But, on the contrary, said yard, on the easterly side, and adjoining said main switching tracks, is wholly unfenced, and said tracks laid level with said yard for the

whole distance, and have so existed for more than a year past; while passengers desiring to take said railroad trains, or receive or deliver freight from or to said railroad, or to receive or deliver baggage transported over said railroad, are compelled to go by the route aforesaid through the yard aforesaid to said platform as the only means of access for such purposes."

There is another allegation of negligence in the declaration, but which seems to have been abandoned on the trial. It was claimed by the declaration that the train was propelled along the track with great speed, and without any warning to the plaintiff or those in charge of the horse. On the trial, when proof was offered of this fact, the court stated to counsel that he did not understand that in the operating of the train there was any negligence alleged; and counsel for plaintiff agreed with the court's views, so that we may consider that question settled and out of the case. The only questions, therefore, for our consideration are (1) whether it was negligence on the part of defendant, under the circumstances, not to have built and maintained a fence along the side of these switching tracks; and (2) whether the plaintiff was in the exercise of due care.

1. The court below, upon the first question, directed the jury that if they found that the want of such a barrier left the station grounds in a condition not reasonably safe, and plaintiff's injury would not have taken place except by reason of such insufficient condition, plaintiff and the Goodmans being in the exercise of due care, the plaintiff was entitled to recover. We think this charge was not warranted. Counsel for defendant had asked the court to instruct the jury substantially that the defendant was not bound to fence its depot grounds. This instruction should have been given. It was shown by the testimony of the station agent, and not disputed, that this ground east of the dispatchers' office and north to McNeil

creek is used for passengers to get off and on trains; also for conductors leaving trains to go to the dispatchers' office for orders. It is also used by conductors of switch engines to mark the string of cars to be disposed of. It is used by the general public in going to and from the ferry-boats plying every 15 minutes from that side of the river to Point Edward, on the opposite side. It appears that it is necessary to have that point open so that the dispatchers may have a view of the yard and of the arrival and departure of trains, and that a fence there would hinder and obstruct the making up and working of trains. On the east side of these tracks, and below the dispatchers' office, are two slip-docks where the trains are run onto the transfer boats to be carried across the river, and frequently from five hundred to a thousand cars a day are in the yard to be carried over, or have arrived in the yard from the other side of the river. The passageway for teams from Michigan street to the end of the platform opposite the dispatchers' office varies in width. Opposite the storehouse it is 77 feet wide, while opposite the dispatchers' office it is 27 feet to the tracks from the building. Across the tracks the ground is made level and smooth for people to pass over, hundreds of whom pass daily. So far as appears by this record, people have driven their teams in there with safety.

In a vast number of railway stations nearly the same state of things exists. Carriages and wagons come to these stations to meet arriving passengers. They draw up and await the arrival of the trains within a few feet of the track, and trains arrive and depart; and no one, so far as my examination has extended, has ever heretofore suggested that a railway company is guilty of negligence in not erecting a screen or fence so that horses standing there may not become frightened at approaching trains, except in the case of *Simkin v. Railway Co.*,

reported in 21 Q. B. Div. 453 (35 Amer. & Eng. R. R. Cas. 487). It appeared in that case that the plaintiffs were leaving a station belonging to the defendants, in a carriage, when the horse was frightened by the sight and sound of a locomotive engine at the station, which was blowing off steam. The horse upset the carriage, and the plaintiffs were injured. It did not appear that the engine was defective, or that it was used in an improper manner, or that the approach to the station was inconvenient; but the jury found that the defendants were guilty of negligence in not screening the railway from the roadway leading to the station, and that such negligence had caused the accident. It was said by the court:

"We cannot think that in this case there is any evidence that ought to have have been left to a jury of negligence by the defendants in not sufficiently and properly screening their railway from the road."

There is no statutory duty cast upon the defendant to place a fence alongside of its tracks, and it is quite apparent that it would not only be a great inconvenience to have such a fence there to the defendant company, but to the public generally. The duty which the defendant owed to the plaintiff was to provide a reasonably safe place of ingress to and egress from its station. Negligence would mean the omission by the defendant to do something which persons conducting a railway with reasonable care and caution should do. It cannot be said in this case that there is any such omission of duty. So far as our observation extends, no railroad company has heretofore found it necessary, in the careful management and conduct of its business, to place fences or screens along its tracks for the purpose of preventing the frightening of horses approaching its station. Where passengers are accustomed to be received upon a train, whether at the station house, at the water tank, or elsewhere, rail-

road companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train, and the latter have the right to assume that the grounds adjacent to the cars, within the limits in which persons necessarily and naturally go to and from them, admit of their getting safely out and in, even on a dark night; and passengers have a right to assume that no pitfalls are left near the traveled way. In such cases it might be necessary to erect barriers to prevent persons from wandering in the dark out of the traveled way, and falling into pits and getting into dangerous places. Such are the cases cited by plaintiff's counsel. *Hulbert v. Railroad Co.*, 40 N. Y. 145; *Cross v. Railway Co.*, 69 Mich. 363. But this case is not within the rule laid down in the cases cited.

2. The plaintiff's own testimony shows that not only were the Goodman boys guilty of negligence in attempting to keep the horse at the platform when it became restless at the noise of the train approaching from the rear, but the plaintiff saw and knew the danger herself, and could have avoided it by the least care on her part. She says she saw the railroad tracks there, and, after the horse had been backed up to the platform, she says she told the boys to hurry up, as she was afraid. She had not seen or heard any train at that time, but saw the tracks, and was afraid with the little boy in the wagon with her. She had plenty of time to alight from the wagon before any train was heard. After the train was heard, she says, if the boy had done as she told him, he would have driven out, as that was what she would have done. There was nothing unusual in the noise of the train. The horse became restless from the noise of the train before it was in sight, yet the boys, instead of driving out, attempted to hold him there; and the plaintiff, knowing the danger, kept her seat in the wagon. The boys knew the way out, and from the

point where they stood it was a smooth driveway from 30 to 100 feet in width, safe to drive over. It appears that the horse first became restless and frightened from the noise, and not from the sight, of the train; and yet with a four-year-old colt, which had never been driven there before, they determined to try to hold him by the head, rather than drive out. The case falls precisely within the ruling of this Court in *Geist v. Detroit City Railway*, 91 Mich. 448. In that case the driver thought he could get across the track in front of a car going 12 to 15 miles an hour, whipped up his horses to do so, and was struck by the car. This was held to be negligence. In the present case, the plaintiff and the Goodmans saw the danger, and knew that they had a young colt not accustomed to the place and that there was a safe way out. Instead of adopting a safe course, they took their chances that they could hold the colt, and let the train pass. They miscalculated the chances, and must suffer the consequences.

We see nothing in the case warranting a new trial. The verdict and judgment below must be reversed. No new trial will be ordered.

The other Justices concurred.

JUNE TERM, 1893.

THOMAS DOUBLE v. JAMES H. MCQUEEN, ANDREW DICKIE, AND WILLIAM W. MURPHY.

96	39
100	455
96	39
101	274
96	39
102	356
96	39
105	692

Removal of county-seat — Determination of result of election — Mandamus.

1. The action of the board of supervisors under How. Stat. § 491, in determining and entering upon their records the result of their canvass of the votes cast at an election regularly held upon the question of the removal of the county-seat of the county, is conclusive, and the removal cannot be defeated in the courts by a showing that the question was carried by an omission to return all of the votes cast against it.
2. Where, in answer to an order to show cause why a *mandamus* should not issue to compel the board of supervisors of a county to reconvene and canvass the votes cast upon the question of the removal of the county-seat, the respondents state that they have not refused to make such canvass, but propose to make it on the day to which the board has adjourned, there is no necessity for issuing the writ.
3. Where, in such a case, the answer shows that the majority of the votes actually cast was against the removal, and that the inspectors of election in certain townships fraudulently omitted to make true and correct returns of the votes cast, and the respondents ask that said inspectors be compelled to make a return to the facts thus set up, the answer will be treated as a petition, and an order to show cause why they have not made such true and correct returns will issue against said inspectors.

Mandamus. Argued May 31, 1893. Decided June 7, 1893.

Relator applied for *mandamus* to compel the board of supervisors of Montmorency county to reconvene, and canvass the votes cast upon the question of the removal of the county-seat, and determine the result; and an order was granted on the prayer of the respondents, requiring the inspectors of election of certain townships, who are charged in the answer with fraudulently omitting to make true and correct returns, to show cause why they should not be compelled to make such returns. The facts are stated in the opinion.

T. S. Joslin and *J. E. Kinnane*, for relator.

Joseph H. Cobb and *Frank Emerick*, for respondents.

LONG, J. The county of Montmorency is composed of the six townships of Albert, Briley, Hillman, Montmorency, Rust, and Wheatfield. James H. McQueen is the supervisor of the township of Rust, Andrew Dickie of the township of Montmorency, and William Murphy of the township of Hillman. February 24, 1893, a special meeting of the board of supervisors of the county was called for the purpose of considering the question of the removal of the county-seat from Hillman to another place nearer the center of the county. A resolution was passed by the board, directing that the question be submitted to the electors of the several townships at the annual election to be held on April 3 following. This notice was published, and it is alleged by the petition here that all the proceedings relative to submitting the question to the electors were regular and in compliance with the statute. The electors of the different townships voted by ballot upon the question, and the votes were certified by the inspectors of election to the county clerk within 10 days. On April 21 a meeting of the board of supervisors was called for the purpose of canvassing these votes. The clerk laid before the board the

statements of votes as returned by the inspectors. It is claimed by the petition that after the votes in the township of Hillman had been canvassed the respondents refused to proceed further with the canvass. The other three supervisors attempted to proceed with the canvass, and offered motions and resolutions for that purpose, but were unable to do so, and thereupon the board adjourned until July 5, 1893. A *mandamus* is asked to compel the board to reconvene, and canvass the votes as certified by the inspectors of election from the different townships, and determine and declare the result of the vote, and enter the result upon its records, and perform all things relative to the removal of the county-seat, as is required by section 491, How. Stat.

An order to show cause was issued, and the three respondents answer, admitting the calling of the board of supervisors upon the question of the removal of the county-seat, and the submitting of that question to the electors, but setting up some irregularities in the publication of the notice of election and proofs of publication, claiming that such proofs were never properly brought before the board as required by law. They admit that the board adjourned until July 5, but insist that such adjournment was for the purpose of canvassing the votes cast upon the question, and determining the result. The reason of the adjournment of the board is stated in the answer, substantially, that prior to the election the board of election commissioners caused to be prepared and printed official ballots to be used by the electors of the county in voting at such election for candidates for the offices of Justice of the Supreme Court, Regents of the University, circuit judge, and county school commissioner, and upon four proposed amendments to the Constitution, as also upon the question of raising by bond the sum of $5,000 for building purposes, and of the removal of the county-

seat in accordance with the terms of the resolution adopted by the board of supervisors; that such official ballots were properly distributed by the board of election commissioners, and placed in the hands of the inspectors of election of the different townships before the election, and were used and voted by the electors of each of said townships at such election; that in the township of Albert there were cast for such candidates 110 votes for Justice of the Supreme Court, 105 votes for Regents of the University, 110 votes for circuit judge, 117 votes for supervisors, and for the various other township officers from 103 to 110 votes. The respondents state upon information and belief that in the township of Albert there were cast at such election at least 80 votes against the removal of the county-seat; that such votes were cast by the electors properly marking such official ballots in the square opposite the words, "A proposition to remove the county-seat to the north-west quarter of the south-west quarter of section 12, township 30 north, of range 2 east,—No;" that most of such votes so cast against the removal of the county-seat were voted by residents of the village of Lewiston, in such township, and situate about nine miles from the polling place in such township; that the electors residing in said village came early to said polling place, substantially together, and voted almost to a man before noon of that day; that such electors were informed by the inspectors of election that they were to vote upon the question of the removal of the county-seat upon the official ballot provided and furnished them by the election inspectors, but were not informed that it was intended that they should vote upon such proposition in a separate ballot-box, or in any other way than upon such official ballots; that after the electors from the village of Lewiston had gone home, the election inspectors—of which the relator was one—produced a small ballot-box, and ballots which had printed thereon, "For the removal of the

county seat,—Yes;" that thereupon 23 electors residing in the northerly part of the township, who had purposely refrained from voting until that time, under an understanding with the election inspectors, came forward and voted the tickets handed them by the election inspectors, which were placed in the small box; that the election inspectors thereupon assumed to decide that the 80 votes and more cast against the removal of the county-seat upon the official ballots were illegal, and canvassed and returned to the board of supervisors only the 23 votes placed in the small box, and all of which were in favor of such removal; that these facts were made to appear to the board of supervisors by protests supported by affidavits against the canvassing of the votes returned by the inspectors of election.

It further appears by the answer that in the township of Briley, while many electors voted in a separate ballot-box, those electors also had an opportunity to vote twice upon the question; that is, once by the official ballot, and again by a separate ballot printed by the election inspectors. It is also claimed that the same state of facts existed in the township of Wheatfield.

By the answer it further appears that upon the convening of the board of supervisors they canvassed the votes from the township of Hillman, and found 6 votes cast for the removal and 117 against it. The board thereupon proceeded to canvass the votes of the township of Albert, and, upon reading the protest and affidavits against the canvass from that township as returned by the inspectors, they suspended their canvass, and adjourned until the following day, and thereafter adjourned until July 5. The respondents contend that the board of supervisors, convened for the purpose of canvassing votes upon the question of the removal of the county-seat, are possessed of greater powers than a board of canvassers to determine

the result of an election; that they have a right to determine the result of the ballots, and whether the question of such removal is carried by the vote of a majority of the electors; that such determination, when made by the board of supervisors, is final, and cannot thereafter be questioned in any court; that, being possessed of such powers, the adjournment was had for the purpose of ascertaining by a full investigation the manner of voting, whether upon official ballots or otherwise, in these several townships, and whether the official ballots in the township of Albert had been thrown out by the inspectors of election; that they intend to meet and determine the true result of all the votes cast; and to this end the respondents petition in their answer that an order may issue directed to the election inspectors of the township of Albert, compelling them to reconvene and recanvass the votes cast in that township upon that question, and make a further return thereof.

Under the return made by the respondents—that they had not refused to canvass the votes, but proposed to make a canvass on July 5, the day to which they have adjourned—there is no necessity for issuing the writ. Under a somewhat similar return in *Belknap v. Board of Canvassers*[1] the writ was denied. Counsel on the argument of the case in this Court, however, asked us to determine some of the other questions involved, as they are of great public importance, and their settlement now would save the county and respondents considerable expense.

The answer must be taken as true. It sets up facts which, if true, would change the result of the election. Upon the face of the returns made by the inspectors of election the majority of the votes cast was in favor of the

[1] Decided December 3, 1892, but no opinion filed.

removal. By the return made by the respondents it appears that the majority of the votes actually cast was against the removal. The inspectors of election in these several townships are charged with fraudulently omitting to make true and correct returns. This charge is made upon affidavits filed with the board of supervisors, who now ask that the inspectors of election be compelled to make a return to the facts set up in the answer. The respondents desire that their answer be taken as a petition for an order to show cause against the inspectors of election of the township of Albert why they have not returned a statement of the votes cast upon the "official ballot," so called. The true result of the ballots of those townships should be ascertained before the board of supervisors should be compelled to determine what the total vote of the county on that question is.

The decision of the board of supervisors under the statute (How. Stat. § 491) in determining and entering upon their records the result of their canvass of the votes cast at an election regularly held is conclusive for all purposes, and leaves no question open to contest afterwards, and the removal could not thereafter be defeated in the courts by a showing that it was carried by an omission to return all the votes cast against such removal. *Attorney General v. Board of Supervisors,* 33 Mich. 289; *Attorney General v. Board of Supervisors,* 34 Id. 211; *People v. County Treasurer,* 41 Id. 6; *Hipp v. Board of Supervisors,* 62 Id. 456; *Attorney General v. Board of Canvassers,* 64 Id. 612. In *Hipp v. Board of Supervisors, supra,* it was said by Chief Justice CAMPBELL:

"The Constitution has not empowered this Court to settle controversies not judicial, which are very wisely left to the proper local and representative agencies of the people."

The statute authorizing the board of supervisors to can-

vass the votes and declare the result provides that when the result is ascertained by the board and entered upon their records, if it is in favor of the removal, they shall provide for such removal within one year, and the place so designated shall continue the county-seat of said county for all purposes whatsoever. It is evident from the language of this statute that the supervisors alone are to determine the final result of the vote. For the purpose of this determination they have the right to know what the will of the people is as expressed at the polls. The votes cast upon the official ballot in the form thereon printed should not be excluded by the inspectors of election. The voters of that township cannot be thus disfranchised.

The answer herein will be treated as a petition, and an order to show cause will issue, according to the prayer in the answer, against the inspectors of election of the township of Albert, and also against the inspectors of election of the townships of Briley and Wheatfield.

The other Justices concurred.

ROBERT J. SEABURY AND WILLIAM F. STELLBERGER v. THE BOARD OF AUDITORS OF WAYNE COUNTY.

Justices' courts of Detroit—Appointment of deputy clerks.

3 How. Stat. § 7091*g*, as amended by Act No. 253, Local Acts of 1893, which gives the clerk of the justices' courts of Detroit power to appoint one or more deputies when the necessity therefor shall be certified by the justices to the board of auditors, to hold office during his pleasure, is construed as follows:

a—The act places the deputies under the absolute control of the clerk.

b—It was not contemplated that each certificate of appointment should be accompanied by a certificate of necessity.

c—If, after filing a certificate of necessity, a majority of the justices, in the ordinary course, file a certificate that the necessity for so great a number of deputies no longer exists, it is the duty of the clerk to reduce the number to that fixed by the new certificate of necessity, but in so doing he has the choice as to what deputies shall be retained in office.

d—In case of his refusal so to do, the remedy is by *mandamus* to compel such action, and not by refusing to pay certain of his deputies, who have been listed by the justices in their certificate for removal.

Mandamus. Argued April 25, 1893. Granted June 8, 1893.

Relators applied for *mandamus* to compel respondent to pay their salaries as deputy clerks of the justices' courts of Detroit. The facts are stated in the opinion.

George F. Robison, for relators.

Allan H. Frazer, for respondent.

McGRATH, J. Section 7091*g*, 3 How. Stat., as amended March 6, 1893, provides that the clerk of the justices' courts of Detroit shall have power to appoint one or more deputies when the necessity therefor shall be certified by the justices, and that said clerk may revoke such appointment at pleasure, which appointment and revocation shall be operative from the time of filing the certificate thereof with the county auditors.

In August, 1892, said justices had certified to the board of auditors that seven deputy clerks were necessary, and seven were duly appointed. On March 16, 1893, the clerk of the justices' courts, whose term of office under the law as it existed prior to March 6, 1893, did not expire until July 4, 1893, and, under the amendment of 1893, until February 1, 1894, revoked the appointment of two of said deputies, and appointed two others (relators)

in their stead. On March 17, 1893, a majority of said justices certified to the board of auditors that the clerk of the justices' courts had discharged A. and B., and offered to appoint relators, and that—

"At this time no necessity exists for the filling of the vacancies thus occasioned, as the business of these courts has fallen off to such an extent as to justify the undersigned to protest at this time at the placing upon the pay roll any names to succeed those removed. We further certify that no necessity exists for the appointment by said clerk of any deputy clerks for said courts."

The board of auditors refused to pay the salaries of relators, basing their refusal on said certificate of said justices, and this is an application for a *mandamus* to enforce such payment.

Under the act, all costs, fines, and dues, of every description, in all proceedings in said justices' courts, are received by the clerk, and he is required to give a bond to the county, conditioned to pay over all moneys received by him as clerk for the use of the county, and otherwise fully and faithfully discharge the duties of his office. The act authorizes the deputies to perform generally the duties of clerk, and empowers the clerk to require of each a bond, with such conditions as he may deem proper.

It is the evident intent of the act to place these deputies under the absolute control of the clerk. The act should receive a construction consistent with such purpose. It was certainly not contemplated that each certificate of appointment should be accompanied by a certificate of necessity. Such a construction of the act would put it in the power of the justices to dictate the appointment, and would prevent the clerk from revoking an appointment, and making another not approved of, except at the expense of assistance. When these appointments were made by the clerk, the certificate of a majority of the justices was on file with the board of auditors, declaring that seven depu-

ties were necessary. The appointments were valid under that certificate. If, however, a majority of the justices should, in the ordinary course, afterwards file a certificate declaring that the necessity no longer existed for so many deputies, it would be the duty of the clerk to reduce the number to that fixed by the certificate of the justices; but the certificate in the present case is aimed at the two new appointees, and the choice, in any event, as to who should remain, is with the clerk, and not with the justices or board of auditors; and the remedy is by a proceeding to set the clerk in motion, and not by a refusal to pay any two of the deputies whom the board of auditors, at the instance of the justices, may choose to select.

The *mandamus* must therefore issue as prayed.

The other Justices concurred.

RICHARD B. HUSTON, ADMINISTRATOR, ETC., v. JOSIAH A. WALDRON.

Vendor's lien—Evidence—Consideration.

Complainant filed a bill to establish and foreclose a vendor's lien upon land conveyed by his mother to her daughter's husband, with whom she thereafter lived until her death; which lien is held not to have been established, the evidence showing no intention on her part to retain it, and the amount paid her, and her after-support, constituting a full consideration for the deed.

Appeal from Berrien. (O'Hara, J.) Argued February 16 and 17, 1893. Decided June 16, 1893.

Bill to establish and foreclose a vendor's lien. Decree dismissing bill affirmed. The facts are stated in the opinion.

Edward Bacon, for complainant.

George S. Clapp, for defendant.

GRANT, J. Complainant, as administrator, filed this bill in equity to foreclose a vendor's lien upon certain real estate.

The bill alleges that Mary Witter, on March 19, 1866, was possessed in fee-simple of the real estate described; that defendant was her son-in-law, having married her daughter, by whom he had several children then living; that Mrs. Witter bargained and sold on that date to the defendant, for the consideration of at least $1,700, said land; that the deed therefor was duly executed and recorded; that to secure the payment of part of the purchase price defendant executed and delivered to Mrs. Witter two promissory notes for $300 each, dated April 16, 1866, with interest; that prior to the execution of said deed Mrs. Witter had long lived upon said land, and had had the entire control thereof; that about the time of such conveyance said defendant moved into the house where Mrs. Witter lived, and continued to live with her there until her death; that Mrs. Witter died intestate October 11, 1884; that nothing has been paid upon said notes; that said defendant, on March 19, 1869, conveyed to one Swem 20 acres of said land, the title and possession to the rest of the land being in him. The bill claims a lien for said purchase money, and prays for a sale of said real estate.

The answer denies that Mrs. Witter, at the time of the conveyance, had a good and indefeasible title in fee-simple to the land; admits the conveyance to defendant; avers that her husband, John Witter, before he died, made a

request to defendant that his wife should have a home with him while she lived; that shortly after her husband's death she removed to his house, and lived there till about March 19, 1866; that she then claimed an interest in the land described in the bill, desired him to buy it, and move into the house situated thereon, and agreed with him that if he would move there she would deed him her interest in the land, mainly, if not entirely, in consideration of her support by him while she lived; that as, however, it might occur that differences might arise, and she and he and his family could not live together agreeably, and she might desire to go elsewhere to live and be supported, they agreed that, if such contingency did arise, she should be secured by the two notes, but that otherwise, if she lived with him, and had her support while she lived, that was to be pay in full for all the interest conveyed by her to him, and for that reason said notes were made; that, aside from this, she was paid for her interest in said land when the deed was executed; that she lived with him from that time until her death, and was supported by him; that he built a new house on the land, in which she selected a room, which she thereafter occupied; that his wife died in 1877; that after her death he hired help to keep house for him, in order that he might more completely and satisfactorily keep and perform his agreement with her; that the heirs of her first husband claimed interests in the land; that her son William Huston, one of such heirs, claimed an interest, and defendant paid him $1,000, for which he received a deed bearing date the same day as the one from Mrs. Witter.

Decree was entered in the court below dismissing the bill.

At the time of the conveyance by Mrs. Witter to defendant she had three children living,—Richard B. Huston, the complainant, William Huston, and the wife of the

defendant. It was natural that she should choose to live with her daughter. She was possessed of some property, and loaned considerable in small sums, especially to her two sons and to Mr. Waldron, for which she took notes. Among her effects at the time of her death were 13 promissory notes. She had been married three times, and had had considerable experience in business affairs. While she may have claimed the entire title to the land conveyed,—about 90 acres,—she had not title of record to the entire land. Probably the defendant now has title by adverse possession. But it is immaterial whether she had a good title. No question is raised upon the validity of the deed, or her competency to make it, or that she was in any manner deceived. It is the fair presumption that she desired to secure a home with her daughter and her family during the remainder of her life. The evidence shows that her confidence in the defendant was not misplaced. A home was furnished her, and she was kindly and comfortably taken care of until her death, at the age of 81 years. Complainant claims that she did work enough in the defendant's family to compensate him fully for her support. It is undoubtedly true that she did more or less work in accordance with her age and strength. It would be indeed strange if she did not. But this has no tendency to show that the arrangement was not made. During her lifetime she asked for no payment either of principal or interest. She undoubtedly knew when her notes would become barred by the statute of limitations. Her conduct is very strong evidence that she was living there under some agreement. We think the evidence by a fair preponderance shows that these notes were given for the purpose stated in the answer.

This bill is not filed in the interest of creditors, but in the interest of complainant and his brother, to whom she had made advances. She left a will, which was drawn

by her brother, and left with him. After her death it was handed to William Huston, and was speedily lost while in his possession. Neither complainant nor his brother contributed anything towards the support of their mother. They have no equities, and, if they are entitled to a decree, it must be because they have clearly established the vendor's lien. But in this we think they have failed. The evidence shows no intention on her part of retaining a lien upon the land. At the time of the purchase defendant paid Mrs. Witter $1,000 upon the purchase. This amount, and the care of Mrs. Witter, constitute a full consideration for the deed.

Decree affirmed, with costs.

HOOKER, C. J., MCGRATH and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

HERMAN KANNENBERG v. THE CITY OF ALPENA.

Municipal corporations—Personal injuries—Ice upon sidewalk.

A city is not liable for an accident caused by the formation of ice upon a sidewalk from natural causes, and without fault upon its part, from snow which fell in the adjoining highway.

Error to Alpena. (Kelley, J.) Argued March 8, 1893. Decided June 16, 1893.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

W. E. Depew, for appellant, contended:

1. As the icy condition of the walk was not the result of neglect to remove naturally-accruing ice and snow, but was caused by

the action of the defendant in bringing a quantity of water to the catch-basin, and permitting the basin to be in such a condition that the water could not go through, thus forcing the water onto the sidewalk, where it froze, the case was a proper one for the jury; citing *Canfield v. Railway Co.*, 78 Mich. 356; *Corbett v. City of Troy*, 53 Hun, 228.

J. D. Turnbull, for defendant.

HOOKER, C. J. Plaintiff brought an action against defendant to recover damages for a personal injury, occasioned by slipping down upon the ice on a highway. It is contended by defendant's counsel that the evidence conclusively shows that the plaintiff was not upon the sidewalk when he slipped. No witness swears clearly that he slipped upon the sidewalk, but the plaintiff stated once in his testimony that he was on the sidewalk when he fell. We shall therefore treat the question as one for the jury.

The trial judge directed a verdict for defendant upon the ground that there was no evidence that the street was not in a reasonably safe condition for travel. The street had been recently paved, in the course of which the center of the highway was made higher than the existing sidewalks. It had previously been somewhat lower. The street was paved with cedar blocks, so laid as to make a gutter outside of the sidewalk. In this gutter was a catch-basin for the sewer, close to the place of the accident. This catch-basin had become filled up or stopped, so that the water did not run off, and, the weather being warm, the water accumulated at that point, and flowed upon the outer edge of the sidewalk, where it froze, and, it being covered with manure and dirt, plaintiff fell, and was injured.

It is claimed that defendant did not keep its walk in a reasonably safe condition for travel. Unless the municipalities of the State are to be made insurers against

accident, it is difficult to see how the plaintiff can be permitted to recover. Just what duty the city neglected is not stated. By the paving improvement, the water flowed upon the sidewalk and froze. Had it not been made, it would have flowed upon the road, where it would have frozen, and made it possible for an accident to happen there. No fault is found with the construction of the catch-basin, and upon the whole record it is plain that from natural causes, without fault upon the part of the city authorities, some ice formed from the snow which fell in the highway. No liability attaches under such circumstances.

Some cases have been cited in support of the plaintiff's claim, but they relate to instances where, by neglect of the hydrants or waterspouts, water was permitted to drop upon the walk, where it froze. These cases are clearly distinguishable from the case before us.

The judgment must be affirmed.

The other Justices concurred.

JOHN STEBBINS AND ELIZABETH STEBBINS v. JOHN TIMM AND SOPHIA TIMM.

Mortgage foreclosure—Appeal—Weight of testimony.

The conclusion of the circuit judge is held to have been warranted by the evidence, and the decree is affirmed.

Appeal from St. Joseph. (Loveridge, J.) Argued March 9, 1893. Decided June 16, 1893.

Bill to foreclose a mortgage. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

R. R. Pealer, for complainants.

O. F. Bean, for defendants.

HOOKER, C. J. The bill in this cause was filed to foreclose a mortgage. The premises were bought in 1868 by complainant John Stebbins and defendant John Timm, and held for a number of years by them in partnership, when complainant sold his interest in the land and personal property to defendant, who had resided upon the premises from the time of their purchase, taking a mortgage upon the land for $3,800. After making some payments upon this mortgage, and procuring an extension, defendant made default, and complainants filed this bill. The defendant now claims that he was defrauded by the complainant in their settlement which was the basis of the mortgage, and that he is not indebted to the complainants in any sum.

It is sufficient to say that a careful review of the testimony convinces us that the learned circuit judge before whom the case was tried, and who saw the witnesses, reached a just conclusion. We deem it unnecessary to discuss the facts.

The decree of the circuit court in chancery will be affirmed.

The other Justices concurred.

MARY McLEOD, EXECUTRIX, ETC., AND EMORY S. FRANK v. JOHN W. FREE, ADMINISTRATOR, ETC., ET AL.

Husband and wife—Joint mortgage—Survivorship—Reformation of securities.

1. The doctrine that where land is conveyed to a husband and wife jointly they take by entireties, and on the death of either the survivor takes the entire estate, does not apply to a purchase-money mortgage given to them jointly on the sale of land owned by the husband; citing *Wait v. Bovee*, 35 Mich. 425.
2. The decree below, reforming a mortgage given to a husband and wife jointly so as to make the income therefrom payable to the wife during her life-time, if she survives her husband, is affirmed; it appearing that such was the intent of the parties, and that by mistake the mortgage did not conform to such intent.

Appeal from Kalamazoo. (Buck, J.) Submitted on briefs March 10, 1893. Decided June 16, 1893.

Bill to reform certain securities. Defendants John W. Free and Henry C. Frank appeal. Decree affirmed. The facts are stated in the opinion.

Osborn & Mills, for complainants.

E. M. Irish, for appellants.

LONG, J. Stephen W. Frank and Abigail Frank, both deceased, were husband and wife. On December 28, 1889, Stephen sold all his real estate, with the exception of a village lot, to William Stuart and Edwin Roberts, his wife joining in the deeds. To secure a portion of the purchase money, a note and a mortgage were taken from Roberts, and an assignment of a mortgage and the notes accompanying from Stuart. The notes and mortgage and assignment

were all drawn payable to Stephen W. and Abigail Frank. By the bill filed in this case it is claimed—

1. That the notes, mortgage, and assignment were not prepared in accordance with the intention and understanding of the parties, but that all that Stephen W. Frank intended was to have them so drawn that the income should go to his wife during her life in case she survived him, and that a mistake was made by the scrivener in making them payable to the parties jointly.

2. That, if no mistake was made, then the transaction was intended as a testamentary disposition of the property, which was revoked by the last will and testament of Stephen, prepared and executed a few days after these conveyances.

The bill prays that the mortgage, notes, and assignment may be corrected in accordance with the intent of the parties, or that such instruments may be decreed to have been made as a testamentary disposition of the property; and that Mr. Free, as administrator of the estate of Abigail Frank, be enjoined from taking possession of such securities from the complainant McLeod, as executrix of the will of Stephen W. Frank.

On the hearing below the court found that it was not intended by Stephen or understood by Abigail that she should take by such instruments more than a life interest in these securities, and that all she did take was a life estate; and that such securities are now a part of the estate of Stephen, and in the possession of Mary McLeod, as such executrix. By this decree defendant Free was perpetually enjoined from taking any proceedings at law or otherwise to obtain possession of these securities, and the complainant McLeod was authorized and directed to collect the same as a part of the assets of Stephen's estate, and dispose of the proceeds in accordance with the terms of his will. The defendants John W. Free, as administrator, and Henry C. Frank, alone appeal. The bill was taken as confessed by all the defendants except those now appealing.

The contention on the part of the complainants is that the proofs abundantly sustain their position. It appears that on May 2, 1889, Stephen made a will. This was prior to the sale of the real estate. By the will he devised the use of substantially all the real estate to his wife during her natural life. Within a few days after he sold the real estate he directed a new will to be made. It revoked all former wills. At the time of its execution he had a small amount of personal property, a village lot, which he willed to his daughter, Mrs. McLeod, and the securities above described. He gave his wife a life interest in the village lot, all his furniture, etc., and bequeathed to his executors in trust the remainder of his estate, with power to sell and convey and convert into money, and the income of which was to be paid annually to his wife so long as she lived. His son Henry C., upon the death of his mother, was to be paid $100 in addition to the $2,000 or $3,000 he had already given him. Certain of his grandchildren living at his decease were each to receive $100, and his son Emory S. the sum of $2,000; and the residue, after paying the funeral expenses, for tombstones, etc., he gave to his daughter, Mrs. McLeod, and his son Emory S. He made his wife and his daughter, Mrs. McLeod, executrices of his will.

On February 12, 1890, Stephen W. Frank died. On the 27th of that month Mrs. Abigail Frank filed a petition in the probate court for probate of the will, and, she refusing to act as executrix, the trust was assumed by the daughter, Mrs. McLeod. The son Henry receipted for all that was his due under the will. On June 27 following Abigail receipted for all she claimed of the personal estate under the will, which amounted to $315.10. After this time the widow received the income from these securities, and, so far as appears by this record, never made any claim that they or any part of them belonged

to her. She died December 26, 1890. These securities were found among the papers of Stephen W., and passed into the hands of Mrs. McLeod, as executrix, and were treated as a part of the estate of Stephen until after the death of his widow. In 1891, Henry C. Frank filed a petition in the probate court for the appointment of an administrator of the estate of his mother, and Mr. Free was so appointed. Shortly thereafter it was claimed that these securities belonged to the estate of Abigail, upon the theory that she took the absolute title to them as survivor of herself and her husband, to whom they were jointly made, and this bill was thereupon filed. There is no controversy in the case except such as grows out of these securities, and, so far as appears, no rights of creditors are concerned. The naked question is, did the wife take these securities at the death of her husband?

The husband was the owner of the land out of which the securities grew. After they were taken, they were treated as his individual property during his life-time. He dealt with them as such, and at his death disposed of them by his will. His wife, as it appears, always regarded them as his property during his life-time, and after his death acquiesced in their being inventoried and treated as a part of his estate, taking and receipting for her share and interest in the estate as given her by the will, and was apparently satisfied to have the securities treated as a part of her husband's estate up to and at the time of her death. No one raised any question about it, until after her death, when the son Henry C., who was given only $100 by his father's will, made the claim that the securities belonged to his mother's estate.

Counsel for defendants cites cases in his brief where it has been held by this Court that a joint deed to husband and wife conveys the estate to them by entireties, and that the right of survivorship exists in such cases, so that

where one dies the other is vested with the whole estate.[1] But this doctrine has not been applied to mortgage securities with such strictness. In *Wait v. Bovee,* 35 Mich. 425, 429, it was said:

"The drift of policy and opinion, as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases; and it should not be applied except where the law in its favor is clear."

In the above case the husband and wife were each possessed of considerable means, and made investments jointly, each supplying half of the funds. On the death of the husband the wife claimed the whole of the securities by right of survivorship. This right was denied, and it was said:

"Our own decisions relative to the rights of husband and wife in case of united holdings of real estate afford no argument here."

It is evident from the testimony given by the complainants in the present case that the scrivener in drafting the mortgage, notes, and assignment did not make them in accordance with the understanding of the parties. It is also evident from the testimony of the witnesses that Abigail never understood that she had any more right in these securities than she had in the real estate out of which they grew. The will was made within four days after they were taken, and by the will she was given a life interest in them. Equitably they were a part of the estate of the husband, and, being so treated by the parties themselves, and so understood by them, they must now be so treated, and reformed accordingly. In any event, only one-half could go to the estate of the wife under the rule in *Wait v. Bovee, supra;* but, under the facts shown, the whole

[1] *Fisher v. Provin,* 25 Mich. 347; *Insurance Co. v. Resh,* 40 Id. 241; *Manwaring v. Powell,* Id. 371; *Jacobs v. Miller,* 50 Id. 119; *Vinton v. Beamer,* 55 Id. 559; *Dowling v. Salliotte,* 83 Id. 131.

securities must be treated as belonging to the estate of the husband.

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

HOOKER, C. J., MCGRATH and GRANT, JJ., concurred with LONG, J.

MONTGOMERY, J. (*dissenting*). I do not think that the evidence justifies the conclusion that there was any mistake in drafting the notes and mortgage.

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SAMUEL J. GRAY v. JOHN E. FINN ET AL.

Taxes—Fraudulent transfer—Replevin.

A vendee who claims under a pretended sale, made without consideration, and for the express purpose of defeating the collection of a tax from the vendor, cannot maintain replevin for the property, the possession of which has been retained by the vendor, against a tax collector who has seized it to satisfy the tax.[1]

Error to St. Clair. (Canfield, J.) Submitted on briefs March 10, 1893. Decided June 16, 1893.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Frank Whipple, for appellant.

[1] For cases involving the construction of How. Stat. § 8318, which prohibits replevin for property seized by virtue of a tax warrant, see *Hood v. Judkins*, 61 Mich. 576; *Hill v. Graham*, 72 Id. 660; *Lumber Co. v. Dean*, 73 Id. 460; *Boyce v. Peterson*, 84 Id. 490; *Boyce v. Stevens*, 86 Id. 549; *Tousey v. Post*, 91 Id. 631; *Lantis v. Reithmiller*, 95 Id. 45; and see *Mogg v. Hall*, 83 Mich. 576, holding that a township treasurer is not liable in trover for property seized under a tax roll and warrant fair upon their face.

P. H. Phillips, for defendants.

GRANT, J. Defendant Finn was collector of taxes for the Fourth ward of the city of Port Huron. By virtue of his tax warrant he levied upon certain personal property as belonging to one Lewis Potts, to satisfy a personal tax assessed against him. Plaintiff, claiming to own the property, brought this action of replevin to recover it. As evidence of title he introduced a bill of sale from Potts to him.

The court instructed the jury as follows:

"It is the claim of plaintiff that at the time when the property was taken he was the owner of it; that he had a bill of sale of the same from Lewis Potts, who had been previously the owner of most of the property; and that by virtue of that he was entitled to possession. The defendants, on the other hand, claim that at the time of the commencement of this suit the property in question was owned by Lewis Potts, and in his possession, and not the property of plaintiff, or in the possession of plaintiff. It appears that, at the time the property was taken by Mr. Finn and the other defendants, it was here, in the city of Port Huron, situate in a barn; and it is the claim of plaintiff that at that time it was in his possession; that he had it in his possession, and under his bill of sale. The defendants claim that as a matter of fact it was not in his possession, but was at the time the property of Mr. Potts, and was in the possession of Mr. Potts; that the plaintiff was Mr. Potts' hired man, and was taking charge of the horse, as usual, as he had before he claims to have bought it, and as usual for a man in his situation to be taking care of it. Now, in regard to the question of fact, as to the ownership and actual possession, and right of possession, of this property, it is for you to determine, from all the facts and circumstances of the case. The claim of defendants, you will understand, is that the transaction between Potts and Gray was simply a pretense; that it was a bill pretending sale, for the purpose of having it said that the property belonged to Mr. Gray, in order that Mr. Potts might avoid the payment of his taxes. On the contrary, Mr. Gray claims it was an actual transfer to him, in good faith. Now, as

to whether it was a mere pretense is a matter for you to determine from all the facts and circumstances in the case. You should consider all the testimony that has been given in view of the transaction, in the light of the circumstances, and satisfy yourself, as ordinary, unbiased men, what the truth is in that regard; and if the property is not the property of Mr. Gray, and was not in the possession of Mr. Gray, at the time it was taken, then the defendants would be entitled to a verdict in this case."

The court further instructed the jury that if they found that plaintiff was the owner of the property, and entitled to the possession, their verdict should be for the plaintiff; but if they found that he was not the owner, and not entitled to the possession, but that Mr. Potts was the owner and in possession at the time the property was seized by the defendants, then their verdict should be for the defendants.

Under the evidence and the charge of the court, the jury settled the following facts:

1. That the title and possession were in Mr. Potts.
2. That the pretended bill of sale was given with no intention to pass either title or possession to plaintiff, but that it was given for the express purpose of preventing a levy by the tax collector.

There was ample evidence to sustain the verdict.

Only judgment creditors can assail a transfer of property by a debtor as fraudulent, and a valid judgment is necessary to enable the creditor to make the attack. *Millar v. Babcock*, 29 Mich. 526. But we do not think this rule obtains where the person against whom a tax is assessed makes a pretended sale of the property for the express purpose of preventing a levy, retains possession of it, receives no consideration, and the pretended vendee participates in the fraud, and takes the bill of sale in order to assist in defeating the collection of the tax. Such party stands in no better position than his pretended vendor to contest the validity of the tax. Otherwise the statute

(How. Stat. § 8318) which prohibits replevin for property seized by virtue of a tax warrant could be very readily evaded. The question as to the validity of the tax warrant therefore becomes immaterial.

Judgment affirmed.

The other Justices concurred.

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THE ATTORNEY GENERAL v. THE DETROIT SUBURBAN RAILWAY COMPANY.

Quo warranto—When lies—Validity of franchise.

The fact that a street-railway company has constructed and is operating its road, *within the term of its corporate life*, upon a township highway, without objection from the township or any of its inhabitants, under and in full compliance with a *perpetual* grant of the right so to do, made by the township under How. Stat. § 3548, does not establish a case of such public interest as to justify the institution of a proceeding by *quo warranto* against the company to test the validity of such grant.

Application by the Attorney General for leave to file an information in the nature of a *quo warranto* against the respondent. Argued April 4, 1893. Denied June 16, 1893. The facts are stated in the opinion.

A. A. Ellis, Attorney General, *John J. Speed,* and *C. A. Kent,* for relator.

Russel & Campbell, for respondent.

GRANT, J. The Attorney General asks leave of this Court to file an information in the nature of a *quo warranto*

against the Detroit Suburban Railway Company. The petition was filed March 7, 1893. The reason assigned for the petition is that said railway company is exercising a franchise and privilege not conferred by law, in that the permit given by the township board is void upon its face, because it purports to grant an exclusive and perpetual right. The authority conferred by the township board of the township of Greenfield is attached to the petition, and reads as follows:

"FRANCHISE FOR WOODWARD-AVENUE STREET RAILWAY, OR HIGHLAND PARK ROAD.

"At a session of the township board of Greenfield, county of Wayne, and State of Michigan, held on the 17th day of October, A. D. 1885, at which a quorum of the board was present, the following preamble and resolution was submitted, and, after a careful consideration, was unanimously adopted:

"'*Whereas*, Frank E. Snow and William A. Jackson, of Detroit, Michigan, contemplate the construction of a railway on Woodward avenue, commencing at the railroad crossing, and running thence north-westerly along, upon, or adjacent to the Detroit & Birmingham Plank Road to the six-mile stake on said road; and

"'*Whereas*, the construction of said railway is deemed to be a valuable improvement to the property along said road, and to the township of Greenfield:

"'*Therefore, resolved*, that for and in consideration of the sum of one (1) dollar to the township board in hand paid by the said Frank E. Snow and William A. Jackson, the receipt whereof is hereby acknowledged, we, the township board, hereby grant, convey, and quitclaim unto the said Frank E. Snow and William A. Jackson, their successors and assigns, the exclusive and perpetual right and privilege of constructing, maintaining, and operating a railway for the transportation of passengers along and upon said road as aforesaid, and hereby authorize the execution of an instrument conveying the said right and privilege to the said Snow and Jackson for the perpetual use of said roadway for the purpose of said railway, together with the right to construct and operate all necessary switches and

appurtenances thereto belonging: *Provided,* that said railway shall be constructed at least 10 feet east of the west line of said highway, and also that said railway shall at all times maintain an open ditch or suitable drainage along said road, with all necessary sluiceways and other conveniences for the proper drainage of said road, and the property abutting thereon; and *provided,* that the rate of fare on said railway shall not exceed five (5) cents for each passenger per trip.'"

The authority conferred by statute upon the township board is found in How. Stat. § 3548, and is as follows:

"Any such company may extend, construct, use, and maintain their road in and along the streets or highways of any township adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of his township."

How. Stat. § 8646, authorizing the Attorney General to file informations of this character, reads as follows:

"An information in the nature of a *quo warranto* may also be filed by the Attorney General, upon his own relation, or upon the relation of any private party, on leave granted, against any corporate body, whenever such corporation shall—

"1. Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or

"2. Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or

"3. Whenever it shall have forfeited its privileges and franchises by nonuser; or

"4. Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges, and franchises; or

"5. Whenever it shall exercise any franchise or privilege not conferred upon it by law.

"And it shall be the duty of the Attorney General, whenever he shall have good reason to believe that the same can be established by proof, to file such information in every case of public interest, and also in every other case in which satisfactory security shall be given to

indemnify the people of this State against all costs and expenses to be incurred thereby."

Snow and Jackson and others organized a corporation known as the Highland Park Railway Company, May 11, 1886, and Snow and Jackson then transferred all their rights to said company. This company constructed the road, and operated it till February 1, 1893, when it transferred all its franchises, rights, and property to the respondent.

No claim is made that either the Highland Park Railway Company or the respondent was not duly organized, or that the road was not constructed in full compliance with the terms of the resolution of the township board, or that the respondent or its assignor has violated any of the conditions thereby imposed. No person living in the locality has made complaint. The municipality makes no objection. The sole contention of counsel for the relator is that the case falls within subdivision 5 of section 8646, above quoted, for the reason that the franchise, conferred upon a legal corporation, in terms extended beyond the life of that corporation. If the 30 years had expired, a different question might be presented. The sole question is whether the petitioner establishes a case of such public interest as to justify the interference of the State.

The statute confers the power upon the township board to grant the right, which may be exercised for a period of 30 years. The respondent is exercising that right within the period of its life, and after the construction of its plant and road at great expense, and the use thereof for nearly seven years. In *Maybury v. Gas-Light Co.*, 38 Mich. 154, it was sought to deprive the corporation of its franchise for violations of the conditions under which the franchise was granted. The Court said:

"But the permission to lay these pipes does not differ in any respect from that required for laying railways over

land, or ditches through it. It is not a State franchise, but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license, and in nothing else. A violation of the contract, or an unauthorized intrusion, must be redressed, as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. The injured party has a remedy for any grievance, but the State is no more interested than it would be in the question whether or not a railroad company has lawfully acquired its right of way."

This case was cited with approval in *People v. Railway Co.*, 92 Mich. 522, in which it was said:

"The right being such an one as the common council had a right to grant, and the common council having assumed to grant the right, the case presented is not such an one as calls for the exercise of the jurisdiction of this Court in a public proceeding instituted by *quo warranto*."

It is true that in the present case the question relates to the validity of the franchise or privilege as granted, while in the former cases the forfeiture of the franchises was involved. But we do not think that the petition presents a case of such public interest as to justify the granting of the application. It is a matter of local interest, in which the municipality and its people are interested. So long as they are content, we do not think the State is interested.

Application denied.

The other Justices concurred.

William O. Butler v. The Iron Cliffs Company.

Specific performance—Parol evidence—Contract by correspondence.

1. Where a contract is made by correspondence, the intent of the parties must be gathered from the whole thereof; citing *Francis v. Barry*, 69 Mich. 313.
2. Where, in a suit to enforce the specific performance of a contract for the sale of mineral lands, it appears that the contract was made by conversations between the parties, in which it was understood that the stone on the lands valuable for building purposes was to be reserved, and by after-correspondence in which said reservation was referred to, the correspondence must be interpreted in the light of the conversations, evidence of which is ad missible; citing *Loud v. Campbell*, 26 Mich. 239; *Richards v. Fuller*, 37 Id. 161; *Phelps v. Whitaker*, Id. 72; *Bailey v. Cornell*, 66 Id. 107.

Appeal from Marquette. (Stone, J.) Argued April 5 and 6, 1893. Decided June 16, 1893.

Bill for specific performance of land contract. Both parties appeal. Decree reversed, and bill dismissed. The facts are stated in the opinion.

Ball & Hanscom, for complainant, contended:

1. A written contract of bargain and sale was fully completed between the parties, as alleged in the bill.
2. When an agreement has been reduced to writing, everything before resting in parol becomes thereby extinguished or discharged; citing *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; and conversations controlling or changing the stipulations of the parties are, in the absence of fraud, no more received in a court of equity than in a court of law; citing *Willard v. Tayloe*, 8 Wall. 573; 2 Story, Eq. Jur. § 1531.

Sherman, Hoyt & Dustin and *Hayden & Young*, for defendant.

Long, J. It is alleged in the bill of complaint:

1. That the defendant was the owner of certain lands situate in Marquette county, and, being disposed to sell the same, addressed a written communication to complainant, September 19, 1891, containing a proposition to sell the same, specifying the price per acre.

2. That the complainant, on October 17 following, accepted such proposition by writing, and on October 19 he received a telegram from the president of defendant company, saying: "Will send deed to-morrow."

3. That the aggregate purchase price specified in the proposition was $28,200, which was paid to defendant.

Complainant therefore charges in the bill that by these means a contract of sale was made and concluded between the parties for the lands.

The answer admits the letter of September 19, the answer thereto, and telegram, but avers—

1. That this letter was but one of a series of letters passing between Mr. Butler and Mr. Mather, president of the defendant company, on the subject in question; that the letters themselves had been preceded by three conversations between the parties relating to the same subject; that the purpose of the letter of September 19 was only to fix a price, the fact that any deed, if given, would contain certain reservations, being fully understood between the parties; that all the letters and conversations must be taken together to ascertain the meaning of the transaction; that complainant, Butler, well knew this fact, and construed the letter of September 19 accordingly.

2. That it was expressly understood, both in these prior conversations and letters between Mr. Butler and Mr. Mather, that any deed, given by the defendant, of the lands in question must contain reservations saving and reserving to defendant forever all metals, ores, and minerals, and all slate, sandstone, limestone, granite, marble, and other rock or stone valuable for building purposes, with the right to dig, mine, and quarry the same, etc., and to use so much of the land for that purpose as was necessary, and also a reservation of a right of way for railroads across the premises; and that the letter of September 19, counted upon by the bill as a proposition of sale, was written by Mr. Mather with this distinct understanding.

3. That, in the conversation referred to in one of the letters, Mr. Mather carefully and fully explained to Mr.

Butler the nature of the reservations which would be included in any deed made by the company as above set forth, and that these reservations were the usual reservations contained in deeds given by the Iron Cliffs Company in the form used by it; that Butler expressly stated in such conversation that he understood that any conveyance made by the company would contain these reservations, and all of them, and he further stated that he would purchase the lands subject to such reservations; that the letter of September 19 was itself a reply to a letter written by Butler, dated September 3, regarding the same subject, and containing a request for an offer of the lands in question at some price for which the defendant company would be willing to sell the lands, and in which last-mentioned letter, also, the factor of price was the only one discussed; that this letter of September 3 written by Mr. Butler was of itself a reply to a letter written by Mather, of August 31, in which reference was again made by Mr. Mather to reservations, and that no exceptions were taken by Butler, in any of the correspondence previous to the payment of the money and the tender of the deed, to the reservations proposed by Mr. Mather, and mentioned in the letter of August 31; that, before Butler delivered his certified check for the purchase price, he was shown the form of deed which he would receive, which form was the usual form used by the Iron Cliffs Company, and contained all the reservations mentioned, and, after having examined this form of deed, Butler thereupon handed to the messenger the check for the purchase price.

4. The answer positively denies the making of any such contract as that alleged in the bill and the power of Mather to make the same, and denies the making, or the power to make, any other contract for sale than one containing the reservations mentioned.

The proofs were taken in open court, and a decree entered finding that the contract between the parties did not reserve the rock and stone or the railroad right of way, and directing that the defendant execute and deliver to complainant a deed containing the usual covenants of warranty, conveying to complainant the lands mentioned, excepting and reserving to the defendant forever all metals, ores, and minerals in or upon said lands, together with the continu-

ous right to enter upon said lands and explore for, mine, smelt, and refine all such ores and minerals, and to remove and dispose of the same. Complainant was awarded costs. From this decree both parties appeal.

The court below, while admitting the oral testimony on the hearing, refused to consider it in determining what the contract between the parties was. From the testimony of Mr. Mather, president of the defendant company, it appears that some time in August, 1891, complainant called upon him at his office in Cleveland, and wanted to buy these lands, and was advised that the company did not care to sell them; that Butler called again the next day, and renewed the conversation, when he was advised by Mather that he was not prepared to take the matter up, but would consult with his people about it; that soon after, and during the same month, he met the complainant at Marquette, when he again asked if the defendant would sell the lands, and wanted to know if the company would consider a proposition of $10 per acre, and was advised that, on returning home, Mr. Mather would consult his people, and write him. During some of these conversations Mr. Mather advised complainant that all the company's deeds of these lands contained mineral reservations, and that, if a deed was executed, "it would contain our usual mineral reservations, which included all stone."

Mr. Mather further testified that the form of their deeds for many years had contained the reservations contained in the deed to complainant, except rights of way to railroads, and that he told complainant that this was the usual form of their deeds, and that, in addition to this form, the company had recently decided also to insert a reservation giving defendant the privilege to grant rights of way to railroads, and that complainant then said he understood that; that he then advised complainant he had better look at the form of the deeds and examine it.

Mr. Mather further testified that he never had any authority from the company to make a deed of the lands except upon the form contained in the deed in question. This deed contains this reservation:

"Saving and reserving, however, unto the said party of the first part, and to its successors and assigns, forever, all metals, ores, and minerals, and all slate, sandstone, limestone, granite, marble, and other stone or rock valuable for building or other purposes on or beneath the surface of said lands, or any part or portion thereof, together with the right to enter upon said lands, and to explore therefor, and to mine, smelt, and refine such ores and minerals, and to quarry and dress such stone or rock, and to remove the same, and for that purpose to erect or construct or maintain all such buildings, machinery, roads, or railroads, sink such shafts, remove such soil, occupy as much of said land, and use and direct such streams or ponds of water thereon, as may be necessary or adequate to the successful prosecution of such business."

It appears that a subsequent clause in reference to the use of the lands for railroad purposes and the right of way over the lands for such purposes was contemplated to be inserted in those deeds, but was not in the form of deeds in use at that time. This latter reservation is not important, however, in this controversy, as it is agreed that that clause is not now insisted upon.

Complainant denied that in these conversations with Mr. Mather anything was said about some of these reservations in the deed. He states that—

"Nothing was said about the stone that I remember of. I don't think the word 'stone' ever passed between us. Mr. Mather's statement of the whole proceeding was correct, except as to that one thing in regard to stone and railroads."

He was asked what his understanding was in reference to the written proposition of Mr. Mather, and, if he accepted it, what reservations there were of the stone, and answered:

"My understanding of it was,—in fact, I had really two interpretations in my mind; I thought perhaps Mr. Mather had decided to sell me the land without any reservations, or I thought he proposed to sell the land with the mineral reservation, just as we had talked before. I thought it might be either way. I was willing to accept it upon the basis of the proposition."

It appears that complainant wrote Mr. Mather on September 3, 1891, asking prices of certain lands which he described. This was answered by Mr. Mather on the 19th, giving him prices on certain sections, as follows:

"In reference to our lands in Marquette county, our people are not willing to give an option on them to you, but they will place the following prices at which they are willing to sell them for cash. We will not change these prices during the next 30 days, and during that time will give you the first chance at them. We will sell our lands in sec. 32 at $10 an acre, in sec. 33 at $100 an acre, town 49, range 25; in sec. 10 at $40 an acre, in sec. 15 at $50 an acre, town 48, range 25.

"Yours truly,
"IRON CLIFFS COMPANY.
"By WM. G. MATHER,
"President."

This was answered on October 5 by complainant, and in which he expressed surprise at the prices, but asked that he might have time to secure other lands to combine with them to bring the average price lower. On the 17th he again wrote Mather, accepting the proposition of September 19, stating:

"I will take all the lands described in that letter, and at the prices named therein. Please make warranty deed or deeds conveying said lands to William O. Butler, Marquette, Mich., and forward same to J. M. Wilkinson's Bank, this city, together with draft on me for the amount of purchase price," etc.

He also wired acceptance of the proposition, to which Mr. Mather wired back: "Telegram received; will send deed to-morrow."

Prior to any of these written communications, and after the talk between the parties in reference to these lands, in compliance with Mr. Butler's request, Mr. Mather wrote him under date of August 31, 1891, that, after talking with his people, he found them quite indifferent to selling, especially at the price talked. In this letter Mr. Mather stated:

"You understand, of course, that in all our sales we always reserve the usual mineral rights."

It appears that after the telegram and letter of acceptance from Mr. Butler of the terms offered, and on October 20, Mr. Mather forwarded the deed of conveyance for collection, at the same time writing Mr. Butler that he had done so. In this letter he advised Mr. Butler about the reservations contained in the deed, as follows:

"The reservations contained in the deed are as I told you they would be,—the reservation of all stone and minerals, and the right to explore and mine; also the reservation of the right to grant rights of way to railroads."

A copy of the deed was sent Mr. Gibbs, agent of the defendant company, to show Mr. Butler. He met Mr. Butler, showed him the form of the deed, and Butler said that it was a little different from what he had talked with Mr. Mather, but he would write Mr. Mather about it. He then made out his check for the amount of the purchase, $28,200, and gave it to Mr. Gibbs for the company, and taking the deed. It appears that Mr. Butler then wrote Mr. Mather, claiming that the reservations in the deed as to the stone should be stricken out, and a new deed given, not including the reservations of the stone and right of way for railroads. The defendant company agreed upon striking out the reservation in reference to the right of way for railroad purposes, but refused to strike out the ones in reference to the stone, claiming and insisting that these reservations had been agreed upon.

We think the court below was in error in refusing to consider the oral testimony in the case. The contract, if any was made in reference to the sale of the lands, was made up of these conversations, and the letters and telegrams passing between the parties. It is evident that Mr. Mather, in these several conversations, meant to convey the idea to complainant that the company, if it made a sale, would reserve all minerals that it had been usual to reserve in its deeds. He called especial attention to the form of deeds which the company used, and advised complainant it would be well for him to look into these forms and examine them. Mr. Butler does not deny that this conversation was had, but says nothing was said about the reservation of stone. When examining the copy of the deed handed him by Mr. Gibbs, he saw that there was a reservation in reference to stone, and yet gave his check, certified by the bank, for the whole amount of the purchase. From these conversations, and the letters and telegrams passing between the parties, and the conduct of Mr. Butler in receiving the deed and paying for the lands before the alterations were made which he claims, it appears to us that the only construction which can be given to the contract is that the stone was a part of the intended reservation, and so understood by the parties to the transaction, and that the form of the deed given met all the requirements of the contract, except what is conceded in reference to the railroad right of way. The letter of August 31 apprised the complainant that there would be a reservation of the usual mineral rights. This had been explained by Mr. Mather in the conversations at Cleveland and Marquette, and he had called the attention of complainant to the form of deeds used. These deeds had always contained these reservations, and Mather advised complainant to examine their form.

It has been repeatedly held by this Court that, where

the contract is made by correspondence, the intent of the parties must be gathered from the whole of the correspondence. *Francis v. Barry,* 69 Mich. 313. The letters alone in this case did not contain the whole understanding of the parties, which must be interpreted with the aid of the oral testimony. The letter of August 31 is a part of the correspondence, and the expression of the "usual mineral rights," which were to be reserved, could only be explained by what had gone before in the oral conversations in reference to the form of deeds used. These rules have long been settled in this State. *Loud v. Campbell,* 26 Mich. 239; *Richards v. Fuller,* 37 Id. 161; *Phelps v. Whitaker,* Id. 72; *Bailey v. Cornell,* 66 Id. 107. This rule is stated by Jones on the Construction of Commercial and Trade Contracts (section 134) as follows:

"The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject-matter of the contract, and if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract. In every case, therefore, the writing must be critically examined in the light of its surrounding circumstances, with a view of determining whether it is a memorial of the transaction."

In this view of the case we need not discuss the question of the power of Mr. Mather to make a deed other than in the usual form used by the company of which he was president. It is admitted that he had power to make the usual form of deed, and it was so made. We are satisfied that, taking the whole transaction as shown by the oral testimony and the letters, it was clearly understood what the reservations were to be, and that they are properly set

out in the deed tendered by the defendant company. The bill is filed for specific performance of contract, and, it appearing that the deed tendered meets what the parties had agreed upon, the bill should be dismissed, with costs.

The decree of the court below must be reversed, and a decree entered here in accordance with these views.

The other Justices concurred.

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DUNCAN KENNEDY v. THOMAS H. DAWSON.

Chattel mortgage—Failure to file—Replevin—Assignment for benefit of creditors—Judgment—Priorities.

After mortgaging his stock of goods to secure a *bona fide* debt, a merchant made a general assignment for the benefit of his creditors. The assignee took possession of the goods, and they were replevied by the mortgagee. On the trial it appeared that the mortgage was withheld from record for 70 days, during which time the mortgagor purchased goods on credit from parties who were ignorant of its existence. And it is held that the rights of the several parties can be worked out in the replevin suit, and are as follows:

a—The assignee is entitled to the possession of the property as the representative of creditors who became such, or who extended an existing credit, after the making and before the filing of the mortgage, without knowledge of its existence, in the absence of a tender by the mortgagee of the amount of their claims.

b—On waiving a return, the assignee is entitled to a judgment for the value of the property, less the lien of the mortgagee, to be ascertained by deducting the amount of said claims, and of the claims of any others who have been prejudiced by the delay in filing the mortgage, from the amount found due on the mortgage.

Error to Marquette. (Stone, J.) Argued April 6, 1893. Decided June 16, 1893.

Replevin. Both parties bring error. Reversed. The facts are stated in the opinion.

Hayden & Young, for plaintiff.

E. E. Osborn, for defendant.

MONTGOMERY, J. On the 12th day of October, 1891, one Dennis McCarty, who was engaged in business at Ishpeming, gave a chattel mortgage to plaintiff, in the sum of $3,500, covering the stock then in his store, and all additions to the stock. The mortgage was withheld from record until December 22, 1891, when it was duly filed. January 25, 1892, McCarty made a general assignment to the defendant, who took possession, and advertised the stock for sale. February 18, 1892, Kennedy demanded possession, and, on the refusal of the assignee to deliver the goods into his possession, brought the present action of replevin, claiming the right to possession under the insecurity clause of his mortgage. It appears that McCarty continued to buy goods, and made purchases to the amount of $1,057.87, after the giving of the mortgage, and prior to its filing. On the trial the jury found that there was no fraud in fact in the making of this mortgage; that the value of the goods replevied was $3,936.53; that the amount of plaintiffs mortgage was $3,633.58; that creditors for goods sold the mortgagor after the making of the mortgage, and before its filing, held claims to the amount of $1,057.87; and thereupon the circuit judge ordered judgment to be entered for 6 cents damages and costs in favor of plaintiff, and for the defendant, for a special lien for the amount of $1,057.87. Both parties bring error.

The plaintiff contends that the lien of the creditors cannot be greater than is necessary for the protection of those who sold goods to McCarty after the making of the mortgage, and before it was filed, and whose debts remained

unpaid; and it is claimed that the evidence shows that a portion of these goods were paid for by plaintiff, or purchased by him, before the trial of this case. On the part of the defendant it is contended that the rights of the parties cannot be worked out in this proceeding; that under the general assignment law, there being no action permitted on the part of individual creditors to attain or assert their rights in preference to other creditors equally unsecured, the general assignee must hold the goods which have come into his possession until such rights have been determined in proceedings taken under the assignment law itself, and that otherwise such creditors would be without remedy. In part, this contention is correct. But we think there is no difficulty in holding that there is a party before the court who can amply protect the rights of all the creditors. The assignee is the representative of all the creditors, including those whose rights were injuriously affected by withholding the mortgage from record. As a representative of such creditors, he had the right to retain possession for their protection. We find, on examination of the record, that there was evidence tending to show that a portion of the indebtedness for which the defendant was given a lien had become the property of the plaintiff. This evidence was doubtless overlooked by the circuit judge, as it cannot be that the defendant can enforce against the plaintiff a lien on account of a debt due the plaintiff himself. We think, however, the defendant is right in his contention that when this suit was instituted he was entitled to possession, as against the plaintiff, as a representative of the creditors as to whose claims the mortgage was void, and that, therefore, the general verdict should not have been for the plaintiff, but for the defendant.

Can the rights of the parties be worked out in this replevin suit? And, if so, what should be the form of

the judgment? The deed of assignment transferred to the defendant the general title of the goods, subject to the plaintiff's lien, and, in addition to this, a lien on the property, as a representative of the special class of creditors, which lien was entitled to precedence over that of the plaintiff. Furthermore, this right of these creditors extends further than this. It is clear that they may elect to proceed against that part of the property which would be essential to satisfy the plaintiff's debt, and the result must be, therefore, the reduction of the plaintiff's lien by so much as their claims entitled to priority amount to. If this were not so, then the general creditors would find their funds reduced by the amount of the newly-established lien in favor of these special creditors. This would be manifestly unjust to the unsecured creditors, and should not be permitted. The mortgagee, being in fault, must bear the loss. In *Root & Co. v. Harl*, 62 Mich. 423, the rule of distribution was established. It was there held that the special class of creditors, standing in the relation occupied by the special creditors whose rights are involved in this case, were entitled to take the place of the mortgagee to the extent of the amount of their claims, and that the mortgage was therefore entitled to preference only to the amount of the balance due after deducting the claim allowed to the preferred creditors. This being so, the rights of the parties to this suit are these:

1. The plaintiff having failed to tender the amount of the special lien for the protection of which the assignee, as a representative of the special creditors, was entitled to hold possession of the property, the defendant is entitled to a general verdict, and to costs of the court below.

2. The defendant, having waived a return of the goods, is entitled to a verdict for the value of the property, less the plaintiff's lien, which is entitled to priority over the general creditors.

3. The amount of the plaintiff's lien which is entitled to priority over the general creditors will be ascertained by deducting the amount of the claims due the creditors who have either extended credit, or the term of credit, after the making of the mortgage, and before the filing, as well as the claims of any others who have been prejudiced by the delay, from the amount found due on his mortgage.

It may be added, while not necessary for a determination of this case, that, as to any indebtedness due to the plaintiff not realized by these proceedings, he would be entitled to seek, and may have, his remedy on the general distribution of the funds by the assignee.

The judgment will be reversed, and a new trial ordered. Neither party will recover costs in this Court.

The other Justices concurred.

George Prentiss v. The Estate of James Gibb Ross, Deceased.

Sale of standing timber—Limitation of time for removal.

Where a contract for the sale of standing timber, after reciting that the vendor owns the timber, and has the right to cut and remove it during the times thereinafter mentioned, provides for its sale to the vendee, and to his heirs and assigns, forever, and gives him such right as the vendor then has, during the term of one year as to a portion of the timber and five years as to the remainder, *and no longer*, to enter upon the land and cut and remove the timber, the vendee loses all interest in the timber which remains standing at the expiration of the times limited for its removal.

Error to Marquette. (Stone, J.) Argued February 14, 1893. Decided June 16, 1893.

Claim against the estate of decedent. Claimant brings error. Affirmed. The facts are stated in the opinion.

Ball & Hanscom, for appellant.

Moore & Moore and *T. E. Tarsney*, for appellant, contended:

1. License to take off timber may be extended by parol or by the conduct of the parties, and Mr. Ross waived the right to claim a forfeiture (if any) by giving the notice and seizing and converting the property (including the one-year timber) as the property of Prentiss; citing *Green v. Bennett*, 23 Mich. 464; *Williams v. Flood*, 63 Id. 487.

Clark & Pearl and *John D. Conely*, for defendant.

HOOKER, C. J. On September 28, 1882, the claimant contracted in writing with James Gibb Ross for the purchase of the pine timber on a large number of parcels of land, agreeing to pay therefor the sum of $65,000, $10,000 of which was paid down. He gave his two promissory notes, of $27,500 each, payable at the expiration of one and two years, respectively, with interest at the rate of 6 per cent., for the remainder. He subsequently paid $5,000 on one of these notes. The payment of the consideration was secured by a "lien on said pine timber for all moneys that might from time to time be due, owing, or accruing due or owing, from" the purchaser, "for or on account of said purchase money, and interest thereon." The writing further provided—

"That, if at any time the sum of $2,000 and over shall be due and payable as aforesaid, the party of the first part, his executors, administrators, or assigns, may, after 30 days' notice, in writing, given to said party of the second part, or left at his last or usual place of business or abode, sell the said pine timber, or any part thereof, by auction or otherwise, as said party of the first part may deem proper, and apply the proceeds thereof towards the payment of such sums as may be due and owing, or accruing due and owing, hereunder, and interest as afore-

said, and to the payment of the costs, charges, and expenses of the sale of the same, and to pay over the surplus," etc.

It further provided—

"That, in case of default in payment of said installments, and interest thereon, when the same shall fall due, the whole of said unpaid sum shall at once become due and payable, * * * and said party of the first part may, after 30 days' notice, in writing, given to said party of the second part, or left at his last or usual place of business or abode, in addition to his other remedies, have the right to enter in and upon and take possession of said timber, and every part thereof, upon said lands, and to sell the said timber, as he may deem proper, upon giving 30 days' notice in writing, in manner hereinbefore mentioned, and pay over the surplus money," etc.

The land was divided into two classes, from the first of which the timber was to be taken within one year, and from the second within five years, "and no longer."

The claimant let a contract to one Sullivan to take off this timber, and he went upon the land, with the necessary implements, and built the necessary buildings, roads, etc., and commenced the removal of the timber. He cut and removed about 6,000,000 feet, and skidded a large quantity more upon the premises. Claimant did not pay the amount that fell due on September 23, 1883, and two days later Ross gave him notice, in writing, that he should take possession of the pine timber, standing and down, and, at the expiration of 30 days from the date of service of the notice, would proceed to sell it, at auction or otherwise, as he might deem best, and, after applying the proceeds as provided by the contract, would pay the surplus, if there should be any, to the claimant. Ross accordingly sold the timber, both that which was on skids and that standing. He sold the skidded logs to Sullivan for $2.50 per 1,000, *i. e.* $10,000, the title not to pass until paid for. He subsequently sold the standing timber. The trial judge

held that this contract entitled claimant to two notices, of 30 days' each, and that, inasmuch as only one was given, the sale of the timber was a conversion, and the claimant had a verdict of upwards of $6,000, from which he has appealed.

Claimant's theory was that by taking possession of, and selling, the logs and standing timber, defendant converted it, and was liable for its value. Defendant claimed—

1. That there was no conversion at all, but, this being decided against him, then that there was no conversion as to the timber standing upon the lands from which the timber was to be cut within one year, by reason of the limitation of time.
2. That the sale of the logs on skids was with the consent of Prentiss, who was willing that Sullivan should have them at this price, that he might be able to realize enough from them to compensate him for getting them out, and, therefore, that there was no conversion.
3. That the value of the standing timber did not exceed his claim against Prentiss.

The first 15 assignments of error may be dismissed with the remark that the rulings related to the question of value of the property converted, and we think no error was committed in these rulings. They involve no legal question of interest, and a discussion of each is unnecessary.

Assignments 16 and 17 relate to the amount received by Ross, and by him credited to Prentiss, on account of the standing timber. This testimony bore upon the question of the good faith of Ross, and was properly admitted.

The next three assignments relate to requests to charge. The first and second requests were given, in substance. The third was as follows:

"Under the evidence in this case, you should find the value of all the property, both logs and trees, at the time they were converted, and add interest at 6 per cent. from the time of the conversion; and that amount, less what Mr. Prentiss owed Mr. Ross, with 6 per cent. interest, you will bring in as your verdict."

Inasmuch as there was some evidence of knowledge and consent on the part of claimant to the sale to Sullivan, it was a question for the jury to determine. This request was therefore properly refused.

The court properly instructed the jury that the claimant could not recover the value of the standing timber upon the "one-year" lands, as, by the terms of the contract, he had lost all interest in it before defendant took possession. This disposes of assignments 21 and 34.

A large number of assignments are based upon the charge of the court that if the jury found that the claimant had ratified the sale of the logs to Sullivan, or waived a claim to damages therefor, no damages should be given him for their conversion. Under the proofs this was a proper question for the jury, as above stated, and we think that it was properly submitted to them.

Upon a review of the whole record, we fail to find any error of which the claimant can complain, and the judgment will therefore be affirmed.

The other Justices concurred.

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DAVID TOUSIGNANT v. THE SHAFER IRON COMPANY.

Contract of employment—Change of masters—Notice—Principal and agent.

1. In a suit by miners for labor performed after a mining company had contracted with its former agent to take out the ore, proof of the employment of the plaintiffs by the agent for the company for an indefinite time, and at a given rate, prior to the letting of the contract, and of their continuous labor thereunder, and of the balance due them for the labor sued for, makes a *prima facie* case, and casts the burden upon the

company of showing its non-liability by bringing home to the plaintiffs notice or knowledge of the contract.

2. The same rule applies to boarding-house keepers who boarded the miners under an arrangement with the company by which they reported the amount of the board-bills, and the sum was charged up to the boarders in the time-slips given them, and credited to the boarding-house keepers, who relied upon this method, rather than upon the individual responsibility of the boarders.

3. The same rule does not apply in a suit by miners who left the service of the company before the contract for taking out the ore was made, and were re-employed by the agent after he entered upon the performance of his contract, and who only show the nature of such re-employment by the testimony of the agent, who says that he made no contract in the name of the company after such letting to him, but there should be some evidence to repel the natural inference that the agent made the new contract in his own name, and to show that the plaintiffs supposed, at least, that they were dealing with the company, or that they relied upon the apparent authority of the agent, and gave credit to the company.

Error to Iron. (Stone, J.) Argued April 6, 1893. Decided June 16, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

E. E. Osborn, for appellant.

Cook & Pelham, for plaintiff.

McGRATH, J. Plaintiff sues in behalf of himself and some 40 others to recover for labor performed in mining at the Shafer iron mine in June, July, and August, 1891, and for certain board furnished the men, as hereinafter explained.

Defendant began operating the mine in 1889, and continued the mining operations until January 1, 1891, when it let the contract to take out the ore to one Jennings, who had up to that time been its superintendent, and from that time forward Jennings carried on the business of get-

ting out the ore in his own behalf, and paid the men for the months of January to April, both inclusive. For the month of May defendant paid the men on Jenning's account. Prior to January, 1891, a time slip or check was given to each employé on or about the 1st of each month. These slips were made out on printed blanks having the following caption:

"MONTHLY PAY-ROLL ACCOUNT.

SHAFER MINE.

_____, No.____

"*In account with Shafer Iron Co.*

"For the month of_____, 189 ."

Each slip was filled out with the number of days worked, the *per diem*, and the aggregate earnings, from which was deducted the amount for rent, board, doctor, etc., and the balance due the employé was brought down. These checks were given to the men, who kept them until pay-day, which was about the 20th of the month. They were paid, sometimes by Chicago checks, signed by the Shafer Iron Company, at other times by local checks, signed by Jennings, and at other times in currency. No notice was given by the company to the men of any change. Defendant's general manager, one Himrod, and its agent, one Biggers, remained at the mine, and occupied the company's offices. There was in fact no change made in the manner of conducting the business, except that the men were afterwards paid in checks signed by Jennings, or in currency. There was no visible change about the mine, except that at one of the skips a red cardboard, 12 by 20 inches in size, upon which was printed in large black letters the following: "Employés are positively forbidden to ride in the skip. Use ladders. Shafer Iron Co.,"—had been tacked up, and some time after January 1, 1891, several lead-pen-

cil lines had been drawn across the words "Shafer Iron Co.," and the words "E. P. Jennings, Contractor," had been written in pencil underneath. Jennings testified that after January 1, 1891, he had carried on the business of mining the ore in his own name; had opened an account with a bank, and with one or two material-men, in his own name; that he had never pretended from that time forth to do business for the Shafer Iron Company; never made a contract, or tried to make a contract, in the name of the Shafer Iron Company; and that whatever he did he did in his own name. The plaintiff and his assignors had all worked for the company up to January 1, 1891, and most of them continually, until some time in August. A few had not been employed continuously after January 1. Time-checks were issued to the men as before, *upon the same blanks*, and it was upon these checks that defendant, in June, paid the men for May. Jennings was the only witness called for plaintiff.

The court instructed the jury as follows:

"I think the rule of law is, gentlemen, that a person employed by an authorized agent, and set to work, as it is conceded these men were by the undisputed evidence in this case, had a right to suppose that the same condition of things continued to exist after the employment as existed at the time of the employment, unless they had notice to the contrary, or unless there was something in the circumstances surrounding the matter that was equivalent to them of notice. In other words, it seems to the court that the defendant corporation here owed these men who were in its employ at the time it made this contract with Mr. Jennings,—which we will term the change in the way of doing business there,—that at that time the defendant owed its employés there in the mine a duty; that it was the duty of the defendant to have carried particular notice to them; to have brought notice home to them of this change. In other words, the rule, as I understand it, is this (and it is said to be in the books a familiar principle of law): That when one has constituted and accredited another as his agent to carry on business, the authority of

the agent to bind his principal continues even after actual revocation of such authority, until notice of the revocation is given, and, as to persons who have been accustomed to deal with such an agent, until notice of the revocation is brought home to them. And it is said that the case of such an agency is analogous to that of partnership, and the notice of revocation of the agency is governed by the same rules as notice of dissolution of partnership; that is, as to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditors, or at least that the credit should have been given under circumstances from which notice can be inferred. When notice is sought to be inferred as a fact from circumstances, it becomes a question for the jury.

"The court here thinks this is a question of fact, and submits it to you, and the question is submitted to you as a matter of fact, whether this labor for which this suit is brought was done and performed under such circumstances as would operate as notice, or under such circumstances that it can be said that notice can be inferred on the part of these claimants of this change. If these parties had notice of this change, they cannot recover here, for it is undisputed that a change took place; that the authority of Jennings was revoked, and he entered into an independent contract; and the question here is, did these claimants have notice, or, under the circumstances surrounding them, can you infer from this evidence legitimately that they received notice? So, I say the question is submitted to you as a matter of fact, whether the defendant gave such notice as a prudent man should have given.

"Something has been said here, and evidence has been given, with reference to some board bills. It is claimed on the part of the claimants here that it had been a custom or universal practice at that mine, and it is claimed that there is some evidence to support it, that certain boarding-house keepers had been in the habit of boarding the men, and that at the end of the month the amounts due to the boarding-house keeper from the several men he had boarded were reported to the superintendent or officers of the mine, and that these amounts were deducted from the amounts due the men, and were by the mine paid over to the boarding-house keeper. It is claimed that such was the practice; that it was generally acquiesced in by the men. It is claimed that this continued, after this

change, to be done in the same way it was done before. The court submits that matter to you. Was there a custom or general, universal practice as to the boarding of the men by which the boarding-house keeper had received from the defendant the board of the men,—that is, during the time that this defendant was operating the mine,—and was such course acquiesced in by the defendant and the miners, the men who owed for the board? And it is submitted to you whether the boarding-house keeper, this having been the practice,—had the boarding-house keeper, or any persons whose claims are represented in this suit, received any notice of the change in this business, such as would have led a prudent man to have acted differently? If there had been such custom or universal practice, and no notice had come to the knowledge of the boarding-house keepers, then I think they should recover for the boarding-house claims in this case; but if there had been such a universal practice, or if you shall find that there had been such practice, but that they had received notice of the change, or under the circumstances had notice of the change, then you should not allow these claims."

It was claimed that four men (named) had not worked at the mine during January, February, March, or April, 1891, and one (named) had not worked in January, 1891.

"As I understand it, there is uncontradicted evidence in the case that they were old employés under the prior management, had ceased to work for two or three months there during the time I have mentioned, or three or four months, as the case may be, and came back and resumed work at the mine under Mr. Jennings. Now, should the defendant in this case pay for these men's labor? Counsel for defendant insists that they should not, because they had broken their relations,—they had gone away,—and claims that they came back like new men. I have deemed it my duty, gentlemen, to submit that question to you as to these men, and ask you, as matter of fact, whether, under all the circumstances of the case, these men, having worked there before, having entered the employment again, whether, considering the lapse of time between the prior labor and entering into the work again, considering the time between which the former labor ceased and the change took place between Jennings and the defendant corporation,—I leave it to you to determine whether the prior dealing between

the parties, under the circumstances, were such as to warrant the laborers in believing in the continued existence of the authority of the agent or the superintendent to hire them; as to whether that authority was existing there at the time,—whether the same authority was existing as at the time of the former hiring. If you shall say that they were warranted, under all the circumstances surrounding the case, the lapse of time being taken into consideration, and everything there that the evidence shows that they saw and did there,—that they were warranted in supposing that Jennings continued with the same authority there as agent of the defendant,—then I think you should allow these claims; otherwise, not; they should be rejected."

As to the parties who had been employed by the company, and therefore continued at work at the mine without cessation, the learned judge was undoubtedly correct. These men had been employed by defendant for an indefinite time. No new or other contract of employment was shown to have been made with them. The question was not as to whether Jennings had apparent authority to employ them. As to them, a *prima facie* case was made when they showed an employment by defendant at a given rate; that they continued at work in the same employment; that they had been paid in part, and that a balance was yet unpaid. The burden was then upon defendant to show that it had been in some way released and discharged. The case does not differ from any other case of an executory contract not terminated at the time of the revocation of the agency.

The case is different respecting the operatives who did not continue under the same engagement. The general rule undoubtedly is, as stated by the trial judge, that a former general agent, within the scope of his original authority, notwithstanding its revocation, continues to bind the former principal as to those parties who have been, and are still, dealing with him in good faith, in reliance upon his former authority, until they have notice of its

revocation. Mechem, Ag. § 224. The case is said to be analogous to that of the dissolution of a partnership, and is governed by the same rules. To all persons who have had actual dealings with the agent, actual notice must be given, or such notice of the fact must be brought home to them as would be sufficient to put an ordinarily prudent man upon inquiry. Id. § 228. The reason for the rule in the case of a partnership is well stated by Butler, J., in *Lyon v. Johnson*, 28 Conn. 1, 4: A partnership "once existing, and publicly known to exist, the continuance of the connection will be presumed by the public till the contrary appears."

It is contended by plaintiff that the burden of proof is upon the partner seeking to escape liability to show knowledge or notice. But this rule does not relieve plaintiff of the necessity of any showing, on the part of the parties who were re-employed, as to the circumstances of their re-employment, the character of the new contract, and their good faith. The language of the books is: Persons "dealing in good faith;" "relying upon the agent's former authority;" "supposing that they were employed by defendant;" "who gave the credit to the agent for defendant;" "who believed that such agency continued;" "dealing with one partner in ignorance of the dissolution;" "supposing them still to be in partnership;" "giving credit to the partnership." As Lord Kenyon, in one of the cases, observes:

"It would be the hardest measure imaginable upon the creditor were the law otherwise,—if, while he *supposed he was giving credit* to a man having sufficient to satisfy the whole of his demands, he might be trusting a beggar."

Did these parties deal in good faith? Did they rely, assume, suppose, believe? To whom did they in fact extend credit? With whom did they contract? These are pertinent inquiries. Plaintiff must recover, if at all, upon the

theory that the employment was in fact continuous, or, if there was in fact a re-employment, that these parties were employed in the name of the defendant, or under such circumstances, and in such a manner, as to justify the assumption that they were employed for defendant, and that they in fact did so suppose, and extended the credit to the defendant. There must be sufficient evidence to bring these parties within one of these propositions. Until they are so brought there is nothing to start with; nothing to cast any burden upon the defendant. Defendant is not liable upon all contracts made by Jennings, but only upon such as have been made in reliance upon his apparent authority to act for it. It cannot be assumed or presumed that any new contracts were made in its name, or for it, or that credit was extended to it.

In the partnership cases the contracts were entered into on the faith of the partnership with one of the partners, in the name, and ostensibly for the benefit, of the partnership.

In *Hall v. Heck*, 92 Mich. 458, the notes were executed in the firm name.

In *Uhl v. Harvey*, 78 Ind. 26, the evidence tended to show that plaintiff acted upon the belief that defendant was still a member of the firm.

In *Uhl v. Bingaman*, Id. 365, 369, the court say:

"There can be no doubt that the general burden of the issue was, as the court instructed, on the plaintiff; but, in order to show his right of recovery against the appellant, it was only necessary to show that the appellant had been a member of the firm; that, knowing the appellant's connection, he had dealt with the bank; that the business had been carried on without change in the name of the firm, and was being so conducted at the time he made the deposit which the action was brought to recover. He was not bound to offer evidence of the negative fact that he had not received notice of the appellant's withdrawal."

In *Ketcham v. Clark*, 6 Johns. 144, the draft was accepted by one member of the firm in the firm name.

In the leading case of *Claflin v. Lenheim*, 66 N. Y. 301, defendant had been carrying on business in two different cities, and plaintiffs had been furnishing goods in both. Defendant's brother, as agent, managed the business in one of the places, and ordered the goods in the name of defendant, as he had been doing, and the credit was given to defendant.

In *Ulrich v. McCormick*, 66 Ind. 243, money had been paid upon the note to a former agent of the payee. Held that, if the payor paid the note in question to the agent in good faith, without notice of the revocation of his agency, the payment was a satisfaction of the note. But the court say: "The question still remains, was the payment *bona fide?*"

In *Newcomet v. Brotzman*, 69 Penn. St. 185, defendant had turned his business over to his son, who had formerly assisted in the management. Plaintiff testified that he had been misled; that he had supposed that he was dealing with the father.

In *Rolling-Mill Co. v. Hyland*, 94 Ind. 449, the court say:

"It is admitted by the appellant that $60.25 of the recovery was correct. But it is insisted that for the residue, being for work done after April 1, 1882, the appellant was not liable. The work prior to that time, about which there is no dispute, was performed by the appellee for the appellant, at its coke works. The works were operated by the appellant's agent, John J. Enders, who, as such agent, employed and paid the workmen, the appellee among the others. Enders, having leased the works of the appellant, operated them upon his own responsibility, *but in the appellant's name*, without its consent, during the period for which the appellant disclaims liability to the appellee. The evidence tends to show that up to May 16, 1882, the time to which the finding was in appel-

lee's favor, he had no notice of the change in the management of the coke works, but supposed that he was working for the appellant under the employment of Enders as its agent. We cannot say that the facts and circumstances did not justify this impression, and, this being the case, we are of the opinion that the appellant was liable."

In the present case there was testimony tending to show a re-employment of these men, but there was absolutely no testimony respecting the nature of that re-employment, except that of Jennings, who said that after January 1, 1891, he made no contract in the name of the company. In view of this testimony there should have been some evidence to repel the natural inference that Jennings made the new contract in his own name, and to show that these parties supposed, at least, that they were dealing with the defendant, or that they relied upon the apparent authority of Jennings, and gave credit to defendant. If the language of the employment did not suggest the person employing, then it should appear that these parties supposed, at least, that they were being employed for the defendant.

Respecting the claims for board, the men to whom these amounts were payable were operatives in the mine. Irrespective of any custom or arrangement, these men, as assignees, would have the same right of recovery as their assignors. But the arrangement was that the amounts of these bills should be furnished by the keepers, and, in the time-slips that were given, these amounts were charged up against the operative, and credited to the keeper, who relied upon this method, rather than upon the individual responsibility of the boarders. The keepers were dealers with the defendant company, and are within the rule. No notice appears to have been given to them, and there was no error in the court's instruction to the jury.

It was competent to show the method of paying the

men prior to January 1, 1891, as well as that followed after that date.

The November and December, 1890, pay-rolls were competent for the purpose of showing that the operatives were in the defendant's employ during those months.

Judgment is therefore reversed, and a new trial ordered.

The other Justices concurred.

WILLIAM JONES v. THE SHAFER IRON COMPANY.

Notice.

1. Actual knowledge, however acquired, dispenses with the necessity for notice.
2. Such facts must be made to appear in order to dispense with the necessity for notice as will warrant a jury in believing that the party had actual knowledge.
3. This case is ruled in the main by *Tousignant v. Iron Co.*, *ante*, 87.

Error to Iron. (Stone, J.) Argued April 6, 1893. Decided June 16, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion, and in *Tousignant v. Iron Co.*, *ante*, 87.

E. E. Osborn, for appellant.

Moriarty & Abbott (Ball & Hanscom, of counsel), for plaintiff.

MCGRATH, J. This case is in most respects similar to

the case of *Tousignant v. Shafer Iron Co., ante,* 87, and is ruled thereby.

There was some testimony tending to show that plaintiff and one of the other persons in whose behalf suit was brought had actual knowledge of the change in employers.

The question of notice or knowledge is one of fact for the jury. Actual knowledge, however acquired, dispenses with the necessity for notice. 17 Amer. & Eng. Enc. Law, 1121; *Davis v. Keyes,* 38 N. Y. 94; *Dickinson v. Dickinson,* 25 Grat. 321; *Ennis v. Williams,* 30 Ga. 691. Such facts must be made to appear as will warrant a jury in believing that the party had actual knowledge. 17 Amer. & Eng. Enc. Law, 1122. The court instructed the jury that, if any of the men received notice or knowledge in any way that Jennings was the man they were working for, and not the Shafer Iron Company, they could not recover. We think that that question was fairly submitted.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

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112 692

96 99
135 159

JACOB ROSENSTIEL, COUNTY DRAIN COMMISSIONER OF LENAWEE COUNTY, v. CHARLES R. MILLER ET AL.

Drains—Proceedings by county commissioner—Liability of petitioners for costs.

Where a county drain commissioner follows the description contained in an application for the deepening and straightening of a drain, and the jury determine that no public necessity exists for the improvement, the petitioners cannot avoid the liability imposed by 3 How. Stat. § 1740*b* 5, for the costs and expenses incurred, on the ground of the alleged insufficiency of the description of the line of the drain in the application.

Error to Lenawee. (Lane, J.) Argued April 11, 1893. Decided June 16, 1893.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Salsbury & O'Mealey, for appellants.

Fellows & Chandler, for plaintiff.

MONTGOMERY, J. The plaintiff, as drain commissioner of the county of Lenawee, sues the defendants, who filed with him a petition reciting that a certain drain existed in the townships of Rollin and Hudson, in Lenawee county, known as the "Posey Lake Outlet Drain," and stating that—

"Said drain needs deepening and straightening from the point where said outlet crosses the south line of the N. ½ of the N. W. ¼ of section 5, township 7 S., range 1 E., Michigan, owned by Artemus Cooper, and running thence north-east along the channel of said drain into the lower end of Posey lake, as follows: To be straightened as much as the lay of the land along the said outlet will permit, from the south line of said N. ½ of N. W. ¼ of section 5 to the highway between lands owned by A. Gowan, being part of N. E. ¼ of N. E. ¼ of said section 5, and land owned by Artemus Cooper, being west part of N. W. ¼ of N. E. ¼ section 5; thence along the present channel of said Posey Lake outlet to the lower end of Posey Lake."

The petition concludes as follows:

"And your petitioners do hereby make application and respectfully request that said Posey Lake drain be deepened four feet, and straightened in the best possible way, in accordance with the provisions of Act No. 227 of the Public Acts of 1885, as amended."

The declaration avers—

That plaintiff proceeded to examine the route, and determined that it was necessary and conducive to the public health and welfare that said drain should be deepened and straightened in accordance with the application;

that, for the purpose of determining the practicability of said proposed deepening and straightening of said drain, he caused a survey and measurement of the line of the proposed drain to be made by a competent surveyor, and that upon such survey he found that the proposed deepening and straightening was practicable, and he made his order of determination in writing in accordance with his finding, and did establish the commencement, route, and terminus of said drain; that afterwards he applied to the owners of land through which the drain passes for releases of right of way and damages, which were refused; that he then made application to the probate court for the county for the appointment of special commissioners as provided by law; that one of the parties interested demanded a jury of 12 freeholders, and such jury was impaneled, and disagreed; that a second jury was impaneled, which determined that the deepening and straightening of the drain was not necessary or conducive to the public health, welfare, and convenience, which finding of the jury was confirmed by the probate court, and that thereupon the commissioner dismissed the proceedings at the cost of the petitioners; that demand was made upon petitioners for payment of the costs incurred, which was refused, and this action brought.

Defendants demurred generally to the declaration, and insisted that they were not liable for the reason that the proceedings were without jurisdiction.

The statute (section 1, chap. 3, Act No. 227, Laws of 1885) provides that before the commissioner shall take action towards establishing a drain there shall be filed with him an application, signed by not less than five freeholders of the township; and further provides that such petitioners shall be jointly and severally liable for all costs and expenses, in case the commissioner, upon examination, or upon examination and survey, shall determine that the same is unnecessary or impracticable, or in case the proceedings shall be dismissed for other cause; and provides, further, that, if the persons signing such application shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction, and collect such costs and expenses, with costs of suit.

It is said that no determination has been made in this case that the drain is unnecessary, and hence the applicants are not liable for costs that accrued down to and including the survey, unless the proceedings were dismissed afterwards for some legal cause; that there is and has been no cause for such-dismissal, because all the proceedings subsequent to the survey were absolutely without jurisdiction and void. It is contended that the line of the proposed drain was not sufficiently described, and that, therefore, it was impossible for the jury to find whether it was necessary to the public health and welfare that the drain should be constructed as described in the determination of the commissioner; for, it is said, the very ground upon which the jury may have proceeded is that the line was not sufficiently described.

We cannot accept this view of the liability of the petitioners. They are actors in the proceedings, and the statute contemplates that they are the parties in the suit. It appears that the commissioner has in the proceedings followed the description contained in the petition. Indeed, he would be bound to do so if he proceeded at all. Having done so, and the jury having determined that there was no public necessity for the improvement, it is manifestly unjust that these petitioners should now attempt to shield themselves behind the alleged defects in their own petition, and assert a want of jurisdiction. We think they are within the spirit and letter of the statute, and are responsible for the costs incurred.

Judgment will be affirmed, with costs.

The other Justices concurred.

ALEXANDER McGREGOR v. THE ESTATE OF JAMES G. ROSS, DECEASED.

96	103
101	575
96	103
103	610
96	103
105	296
96	103
125	166
96	103
147	529

Contract—Construction—Breach—Damages.

1. A provision in a logging contract by which the contractor agrees to cut, under the direction of a scaler to be furnished by the log-owner, and haul and bank on a certain river, all of the timber on certain lands by April 1 of the following year, and deliver the logs into the main jam at the mouth of the river during the driving season of that year, does not give the log-owner the right to order the contractor to stop cutting logs when, in the opinion of the scaler, he has as many cut as he can get out and deliver during said driving season.
2. A mere *request* by the log-owner to the contractor to quit cutting logs, if acquiesced in by the contractor, does not amount to a breach of the contract on the part of the log-owner; but a *direction* by the log-owner to stop cutting, which the contractor obeys under protest, amounts to a breach, entitling the contractor to the consequent damages.

   If, after such direction, the contractor continues cutting timber, but is prevented from completing the same by reason of such breach, the log-owner, in a suit brought by the contractor upon the contract, can recoup the damages sustained by reason of the failure of the contractor to deliver the logs so cut, such failure not being occasioned by the prior breach by the log-owner.

Error to Marquette. (Stone, J.) Argued April 12, 1893. Decided June 16, 1893.

Claim against the estate of decedent. Defendant brings error. Reversed. The facts are stated in the opinion.

Clark & Pearl, for appellant.

E. J. Mapes, for plaintiff.

MONTGOMERY, J. The plaintiff recovered below upon a claim originally presented before commissioners on claims

appointed in the matter of the estate of Ross. The claim filed was for the price of cutting, putting in, and running a quantity of pine saw-logs during the logging season of 1887–88, under a written contract.

The contract provided for the putting in of the logs standing upon certain described lands, estimated to amount to about 5,000,000 feet. The agreement on the part of the plaintiff was to cut, skid, haul, and bank said timber upon a branch of the Escanaba river, and below the forks, on section 25, or above the forks, on section 24, township 44 N., range 28 W. The timber was to be banked on or before the 1st of April, 1888, and was to be delivered by the plaintiff into the main jam at the mouth of said river during the driving season of that year, and with all diligence and dispatch. For the services to be performed by the plaintiff, Ross agreed to pay the sum of $5.50 per 1,000 feet,—$1.50 per 1,000 as the logs should be skidded in the woods, $2.75 per 1,000 when the logs were banked at one of the places mentioned, and $1.25 per 1,000 when the logs should be driven into the main jam at the mouth of the river. The contract contained this provision:

"Said party of the second part, in consideration of the sum of $5.50 per thousand feet, board measure, agrees to cut, log, skid, and haul to bank of branch of said Escanaba river, at the place before described, all the pine timber on said above-described lands, *to be cut under the direction of a scaler furnished by said first party*, being about 5,000,000 feet."

The contract also designated the length and manner of cutting the timber, and provided that the scaler was to scale the logs either in the woods or on the bank of the river, at the option of Ross, by a scaler furnished by him.

The plaintiff offered testimony tending to show that after the execution of this contract he entered upon the performance of the same,—got in supplies, built his camp, and started to cut and skid, and make his logging roads;

that he then cut the main roads leading from the banking ground into the timber, and completed the same between the middle and the last of January; that in building the roads it was necessary first to cut out and grade them, ready to put on a snow plow when the snow came. Plaintiff commenced hauling on the 16th or 17th of January, and at this time had from 60 to 90 men at work, with 9 teams. A portion of this timber was standing upon lands detached from the main body, and this detached portion was the first cut and skidded, and was also the first timber hauled to the banking ground. On the 30th of January, plaintiff purchased 6 additional teams, which were at once placed by him upon the work. On the 14th of February he had banked, according to the report of the scaler, 1,879,477 feet. The plaintiff also introduced evidence tending to show that prior to this time Ross' agent, Mr. Connolly, had told the plaintiff to stop cutting and skidding; that plaintiff refused to do so; that, while he was absent for a few days, Connolly peremptorily directed the work to cease. The testimony tended to show that Connolly told the plaintiff's foreman, the latter part of January, to quit skidding, and that Cameron, the scaler, also forbade him soon after, stating that such were his instructions from Mr. Connolly. Cameron testified:

"I was satisfied that they could get in all the logs there was, but this particular time he [referring to Connolly] made them stop, so I stopped them."

Plaintiff further introduced testimony tending to show that when he was stopped he let all his sawyers and swampers go. At the time the plaintiff was stopped from cutting, there remained upon the land from 800,000 to 1,100,000 feet, which was not cut subsequently by him.

1. The counsel for the estate contend that under the contract, giving the right to Ross, through the scaler, to

direct the manner of cutting the timber, under the provision of the contract that the cutting of the timber should be under the direction of the scaler furnished by the first party (Ross), he had the right to stop the cutting when the scaler should be of the opinion that the plaintiff would not be able to get out any more timber than was already cut. The learned circuit judge instructed the jury, in substance, that this provision did not confer this right upon Ross, but that the authority of the scaler only related to the manner of cutting; that under the contract the plaintiff had the right to proceed in his own time to cut the timber, he being bound by the provision of the contract to get the timber out so as to run it during the season. We think this the correct interpretation, and that there is no error here.

2. It is further contended by the counsel for the estate that there was in fact no breach of the contract by Ross, and that plaintiff could have proceeded to cut the timber had he seen fit to do so; that the direction to stop cutting did not amount to a prevention. The circuit judge instructed the jury, in substance, that if the statement made by the agent of the deceased to the plaintiff was in the nature of a request, and that the plaintiff acquiesced in such request, and stopped cutting, this would not amount to a breach of the contract; but that, on the other hand, if the plaintiff was directed to stop work under his contract, and did stop work under protest, or objected to it, this would amount to a breach of the contract, entitling the plaintiff to recover damages for such breach. In this there was no error. See 3 Amer. & Eng. Enc. Law, p. 904, and cases cited.

3. The plaintiff, after the alleged breach of the contract, proceeded to cut a further quantity of logs, but, as the jury found, was unable to complete the entire cutting, because of the breach. He did, however, cut, haul, skid,

and put in the stream some 4,000,000 feet. Some 500,000 feet of these logs were not run during the season, and the estate sought to recoup damages for the failure to run out these logs. The jury were instructed by the circuit judge that—

"If Ross first broke this contract, so that there was a breach of it on his part, the plaintiff had a right to go on, and perform so much as he saw fit, and no more, and recover what it was worth for what he did. He would not be bound even by the contract price there. So it all depends on who broke the contract in the first regard. It does not lie in the mouth of a defaulter in performing a contract to say that the contract is evidence of the true value of the labor performed."

We think the court was in error in giving this instruction. When the deceased committed a breach, the plaintiff was privileged to adopt either one of two courses: He could abandon further work under the contract altogether, and sue to recover the price of work already performed, and whatever damages he had already sustained because of being prevented from completing the contract; or he could continue, under the contract, to do so much of the work as he was permitted to do, and recover damages for the interruption. But in case he did so there is no reason why he should not be bound by the terms of the contract, so far as he did attempt its performance, and responsible for any breach of condition not dependent upon the neglected performance of the other. In other words, the law does not outlaw a party who has broken a contract in any particular, or deprive him of having the benefit of provisions inserted in such contract for his protection, in any case where the other party proceeds under the contract, and where the breach may be compensated in damages, and where the neglect of performance by the plaintiff is not induced by the act of the one guilty of the first default. This does not militate against the rule that,

where covenants or agreements are dependent, the one who has committed the first breach is ordinarily without remedy under the contract. In the present case the running of the logs already cut and hauled, and those which the plaintiff was, subsequent to the breach, permitted to cut and haul, was not dependent upon the putting in of that portion of the timber which the plaintiff was prevented from cutting by the wrongful act of Ross.

In *Milldam Foundery v. Hovey*, 21 Pick. 417, there was an agreement, on the one hand, to furnish water power, and, upon the other hand, to manufacture certain articles. There was an interruption of the mill power, which was construed to be the breach of a condition precedent which would authorize the defendant to break off from his contract. Chief Justice Shaw, at page 444, lays down the following rules, which we think applicable to the present case:

"Such breach of the condition could only excuse the defendant from such part of the contract requiring the use of mill power as remained to be performed when the breach of condition happened." Further: "Although such suspension or interruption of the mill power might be construed to be the breach of a condition precedent which would warrant the other party to break off, and excuse the further performance of the contract, yet it is at his option to do so, or to waive the breach and proceed with the contract; and, if he continues in the performance of the contract until the impediment is removed and the power re-established, this amounts to a waiver of the forfeiture, and the party will no longer be excused thereby from the further performance of the contract."

In 2 Pars. Cont. 678, it is said:

"Generally, where one fails to perform his part of the contract, or disables himself from performing it, the other party may treat the contract as rescinded; but not if he has been guilty of a default in his engagement, for he cannot take advantage of his own wrong to defeat the contract; nor if the failure of the other party be but par-

tial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed."

In *Franklin v. Miller*, 4 Adol. & E. 599, it is said:

"It is a clearly-recognized principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to."

See, also, *Boone v. Eyre*, 1 H. Bl. 273, note *a*.

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

The other Justices concurred.

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144 249

THE MICHIGAN DAIRY COMPANY v. ALLICK G. RUNNELS.

Domestic corporations—Attachment.

1. A writ of attachment may issue against a domestic corporation, in the county where its home office is located, in favor of a creditor who resides in that county, in the like cases as in suits between individuals.
2. Prior to the passage of Act No. 242, Laws of 1887, no substituted service of process could be made upon a domestic corporation in any county other than that in which its home office was located; citing *Insurance Co. v. Circuit Judge*, 23 Mich. 492.
3. How. Stat. § 8137, as amended by Act No. 242, Laws of 1887, gives a remedy by attachment against domestic corporations, other than railroad and navigation companies, in all cases where the plaintiff resides in a county other than that in which the home office is located, in case property can be found liable to attachment therein.
4. The true construction of How. Stat. § 7987, which provides, as one of the grounds for an attachment, that the defendant is a foreign corporation, is that while, as against foreign corporations, that fact alone is sufficient to authorize the issuance of

the writ, some other of the statutory grounds must be set out in the affidavit in the case of a domestic corporation.

Error to Newaygo. (Palmer, J.) Argued April 14, 1893. Decided June 16, 1893.

Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

E. L. Gray, for appellant.

M. W. Underwood, for plaintiff.

MONTGOMERY, J. The plaintiff sued defendant in trover for the conversion of certain personal property. The defendant sought to justify the taking under a writ of attachment issued out of the circuit court for the county of Newaygo at the suit of Albert Keith, a resident of Newaygo county, and against the present plaintiff, a corporation having its home office in Newaygo county. This proof was excluded by the circuit judge, and judgment passed for the plaintiff. The sole question presented by the record is, therefore, whether a writ of attachment may issue against a domestic corporation, in the county of its location, in favor of one also a resident of the county, in like cases as in suits between individuals.

The plaintiff relies upon section 8137, 3 How. Stat., which reads:

"Suits against corporations may be commenced by writs of summons or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, shall be served on the presiding officer, cashier, secretary, or treasurer, or any other officer or agent of such corporation, or by leaving the same at the banking house or office of such corporation, and may be served in any county in the State where the plaintiff resides: *Provided*, that in any county of the State where said plaintiff may reside, other than the one wherein the principal office of such corporation may be located, a writ

of attachment may be the first process against such corporation, which shall be served in the same manner as other writs of attachment issuing out of the court wherein suit is commenced; and, upon the return of such service being made, such corporation shall be deemed to be in court, and the like proceedings, as near as may be, shall be thereupon had as in cases of suits against individuals. All acts or parts of acts inconsistent herewith are hereby repealed: *Provided, further,* that the attachment proceedings, as herein provided for, shall not apply to railroad companies or corporations whose right of way, or any part of the same, is within the boundaries of the State of Michigan, nor to navigation companies or corporations."

The contention is that this section prescribes the kind of process which may issue against corporations, and excludes attachment, except in the cases specified. The circuit judge so ruled.

We do not deem this the correct construction of this statute. In construing a statute it is important to consider the law as it existed prior to the enactment, and particularly the mischief sought to be remedied by legislation. Under the law as it existed prior to this enactment, no substituted service could be made upon Michigan corporations in any county other than that in which the home office was situated. *Detroit Fire & Marine Ins. Co. v. Circuit Judge,* 23 Mich. 492. By the amendment to section 8137, adopted in 1887, a remedy by attachment was given against domestic corporations, other than railroad and navigation companies, in all cases in which the plaintiff resided in a county other than the home county of the corporation, and in case attachment of property could be had. It cannot be doubted, we think, that this was intended to extend, rather than to restrict, remedies against such corporations. Prior to the amendment of 1887, section 8137 contained the same provisions as to the commencement of suits against corporations, excepting the

proviso relating to attachments. Section 7986 provided as follows:

"Any creditor shall be entitled to proceed by attachment against his debtor in the circuit court of the county in which the creditor or the debtor (or, in case of joint debtors, either of them) shall reside, if the debtor have property subject to attachment in said county," etc.

Section 7987 provides for an affidavit, which shall set out the cause for issuing the attachment, and, among others, provides that one sufficient cause shall be that the defendant is a foreign corporation. This reference to foreign corporations does not exclude the remedy against domestic corporations. The true construction, we think, is that while, as against foreign corporations, that fact alone is sufficient to authorize the writ, in a suit against a domestic corporation some other ground in the statute specified shall be set out. Certainly, a domestic corporation may be a *debtor*, and such corporations may, acting in the only manner that corporations may act,—by its agents,—fraudulently transfer its property. The terms of the general statute are broad enough, therefore, to include domestic corporations; and such, we are convinced, has been the interpretation placed upon this statute at the circuit for many years. The provision of section 8137 for attachment in counties other than the home office of the corporation is an enlargement of the remedy, and does not operate to repeal, by implication, section 7986.

It follows that the judgment must be reversed, and a new trial had.

HOOKER, C. J., MCGRATH and LONG, JJ., concurrred. GRANT, J., did not sit.

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116 254
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120 65
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152 112

JOHN W. HUGHES AND JOHN S. ECK v. CHARLES H. TANNER.

Logs and logging—Lien—Waiver.

1. In the absence of a reservation in a sawing contract of the right to ship the lumber before payment of the saw bill, the shipment of a portion of the lumber without protest will not prevent the contractor from claiming a lien upon the remainder for the whole saw bill.
2. The acceptance of time drafts on account of the amount due on a sawing contract will not operate to discharge the lien of the contractor unless received as payment, and then only *pro tanto;* citing *Craddock v. Dwight*, 85 Mich. 587, 591.
3. Where the purchasers of a portion of the lumber covered by a sawing contract know that the lumber is in the possession of the contractor, and is being sawed by him, and the only knowledge he has of the sale is the fact that the initials of their names are placed upon certain piles of the lumber, and that he sees one of the purchasers at the mill while the sale is being negotiated, no such sale, delivery, transfer of title, or payment in the contractor's presence is shown as to make it his duty to assert his lien.

Error to Iosco. (Simpson, J.) Argued April 20, 1893. Decided June 16, 1893.

Replevin. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

M. J. Connine, for appellants, contended:

1. If the contract and course of dealing are inconsistent with a lien, none arises (*Randel v. Brown*, 2 How. 406), as by giving credit beyond the time when the property is to pass out of the possession of the claimant, or by a particular mode of payment; citing 1 Jones, Liens. §§ 322, 1002; *Trust v. Pirsson*, 1 Hilt. 292; *Fieldings v. Mills*, 2 Bosw. 489.
2. The contract, and the course of dealing under it, were radically inconsistent with a lien, and defendant has waived his lien by

his conduct with plaintiffs. The contract itself is inconsistent with a lien, because, according to its terms, payment for the sawing was to be made at stated times, meantime permitting the Potts Lumber Company to remove all the lumber prior to the time of payment if it chose, and still further providing that defendant should wait until fall for about half of his pay, at which time all the lumber might be gone. He was bound to deliver as fast as the Potts Lumber Company saw fit to take it, and an unconditional agreement to deliver is antagonistic to continual possession, which is the foundation of a common-law lien; citing *Chadwick v. Broadwell*, 27 Mich. 6; *McMaster v. Merrick*, 41 Id. 505; *DeWitt v. Prescott*, 51 Id. 304; *Smith v. Greenop*, 60 Id. 68; *Tyler v. Lumber Co.*, 78 Id. 81.

3. Applying the payments to the lumber cut from month to month, defendant has received more than enough to pay him for all the lumber cut up to August 1, 1890, which was the date when the last of plaintiffs' lumber was cut and piled, and, as between defendant and plaintiffs, who are third parties, and who have purchased and paid full value, the law ought to apply these payments to the lumber first cut; citing *McMaster v. Merrick*, 41 Mich. 512; *Youmans v. Heartt*, 34 Id. 397.

O. E. M'Cutcheon (*Forrest & M'Cutcheon*, of counsel), for defendant.

McGRATH, J. Plaintiffs bring replevin for a quantity of lumber, upon which defendant claims a lien for the saw bill.

In the spring of 1890, defendant, who was the owner of a saw-mill and the docks at Oscoda from which the lumber was replevied, entered into a verbal contract with the Potts Lumber Company to saw logs for the company for that season, at $2.50 per thousand. The agent of the Potts Lumber Company testified that—

"The contract was that he was to have $2.50 for sawing and piling it on the docks, where the boats could get it, and, if he was compelled to put any on the shore, he had to forward it at his own expense when we needed it. There was no particular quantity mentioned that he was to cut. He was to cut all we had, and we were to give him all he could cut. He was to get in cash whatever

the amount of his pay-roll would be every two weeks. He said he did not think it would amount to much more than half what the bill called for, and, with the balance, he did not need the money; that we could settle any time in the fall with 60-day paper. He was to have enough every two weeks to pay his expenses, and the balance was to be settled for in the fall with 60-day paper. It was proposed to reach the amount in the fall that he had cut, by estimate."

The defendant insisted that the fall settlement was to be in cash, and that, as the lumber was shipped, he was to be paid in full for the saw bill. As these payments were made, they were credited to the Potts Lumber Company, and the saw bill was charged up as the lumber was shipped.

Under this contract, defendant cut and piled about 9,000,000 feet of lumber during the season of 1890. About half of this lumber was shipped away. The lumber company failed in November, 1890. No settlement had been had between the parties. The total amount of the saw bill was upwards of $22,000. Defendant had received $7,247.05, and the further amount of $4,000 in drafts which had not been paid, leaving a balance unpaid at the close of the year of $14,774.77. This amount was reduced by payments by parties claiming interests in the lumber to $6,661. As the lumber was cut, it was sorted and piled, as directed by the lumber company, and each pile, as completed, was marked by the lumber company with the date, and the initials "J. E. P." The payments made during the season were by 30 or 60 day drafts.

In the latter part of July, 1890, plaintiffs claim to have purchased certain piles of this lumber, which were at the time estimated at between 1,200,000 and 1,300,000 feet. It was agreed that the mill culls were to be $6 per thousand; the double X, including the 12-inch, was to be $10 per thousand; and the wide was to be $12 per thousand. It was to be inspected and delivered afterwards, and the

price was agreed upon, subject to inspection as it was loaded. Three hundred thousand feet of this lumber was taken away. Plaintiffs gave their paper for the full amount that was claimed upon the estimate. One of the plaintiffs testified that—

"They [the lumber company] wanted that amount of paper, and I advanced it. I did not intend to advance them any more than I believed there was in my judgment. If there had been any difference, I assumed that the difference was to be adjusted on inspection. They [the lumber company, before inspection] utterly abandoned the lumber."

These piles of lumber, so claimed to have been sold to plaintiffs, were marked by the lumber company with the initials "J. W. H." One or more witnesses testified that the word "sold" was added, but others testified that it was not.

The question as to what the contract between defendant and the lumber company really was, was for the jury. The final balance was to be made upon estimates. This contract did not necessarily contemplate the shipment of all of the lumber before final settlement. If, as defendant claimed, the basis of the saw bill, prior to the final settlement at the close of the season, was to be the lumber scale upon shipment, it is immaterial whether all or any part of the lumber was to be shipped during the season; for, in any event, the saw bill as to the lumber shipped was to be paid as it was shipped. The contract stated by the company's agent makes no reference to the payment of the saw bill upon the lumber actually scaled and shipped. The defendant denies that any time was to be given at the close of the season. That question was for the jury. Upon defendant's theory, all of the lumber was to remain on his docks, in his possession, until the saw bill was paid. Such a contract was not inconsistent with the right to claim a lien.

In the absence of a right expressly reserved to ship before payment of the saw bill, the fact that lumber was shipped away without protest would not take away the right to assert a lien upon what remained. The right to assert a lien upon what remained was not affected by the release of what was shipped. The contract was entire and continuing. It covered the whole season's cut. What lumber remained was subject to lien for the whole saw bill. As was said by Lord Ellenborough in *Blake v. Nicholson*, 3 Maule & S. 167:

"I think the defendant had a lien for the whole balance, the work being an entire work, in the course of prosecution, upon the same principle that a tailor who is employed to make a suit of clothes has a lien for the whole price upon any part of them."

The fact that, as the lumber was piled, it was marked with the initials "J. E. P.," did not take it out of defendant's possession. The title to this lumber was in the lumber company. Defendant was sawing other lumber. Considerable of this very lumber was piled on the bank or on the docks at shallow water, and, under the contract, defendant had a duty yet to be performed respecting it. The lumber company gave directions how it was to be piled, but defendant directed where it was to be piled. Neither party regarded the marking as having any significance as a delivery or transfer of possession.

The receipt of the dishonored paper would not operate to discharge the lien unless received as payment (*Craddock v. Dwight*, 85 Mich. 587, 591), and then only *pro tanto*. Defendant claimed only $2.50 per thousand upon plaintiff's lumber, and, after deducting the amount of these unpaid drafts, the amount remaining due defendant exceeded the judgment.

Whether, as between the lumber company and plaintiffs, there was a transfer of the title even, may well be doubted,

but there was clearly no such participation or knowledge on the part of defendant as would operate to estop him from asserting his lien. Plaintiffs were doing business at Toledo, Ohio. One of them visited the mill, looked over the lumber, returned to Toledo, and afterwards communicated their acceptance of the proposition made to the lumber company. No knowledge of their acceptance, of the terms of the contract, of the time or place of delivery, was brought home to defendant. The only undisputed testimony tending to bring the knowledge of the sale to defendant was the fact that the initials were placed upon these piles of lumber, and the further fact that defendant had seen one of the plaintiffs at the mill while the sale was being negotiated. There was no such sale, delivery, transfer of title, or payment in defendant's presence as made it his duty to assert his lien. Plaintiffs knew that the lumber was in defendant's possession, and was being sawed by him. Plaintiffs cannot be said to have been ignorant of defendant's rights. He had not misled them even by silence.

It is insisted that, inasmuch as the total amount paid by the lumber company, including the $4,000 in paper which had not been paid, was sufficient to pay the saw bill for all lumber cut prior to August 1, such payments should have been applied to liquidate that part of the saw bill first earned. The contract being entire, any part was subject to lien for work done on any other part. *Craddock v. Dwight, supra.*

We find no prejudicial error in the record, and the judgment is affirmed.

The other Justices concurred.

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THE PEOPLE v. WARREN MILLER.

Criminal law—Rape—Age of consent—Evidence.

1. An assault with intent to commit the crime of rape is necessarily included in the greater offense.
2. A respondent who is informed against for the crime of rape may be convicted of an assault with intent to commit that offense, upon testimony showing its actual commission.
3. It is no defense to a prosecution under 3 How. Stat. § 9094, for unlawfully and carnally knowing and abusing a female child under the age of 14 years, that she had reached the age of puberty when the offense was committed.

Error to Clare. (Hart, J.) Submitted on briefs April 21, 1893. Decided June 16, 1893.

Respondent was convicted of an assault with intent to commit the crime of rape, and sentenced to imprisonment in the State prison for five years. Judgment affirmed. The facts are stated in the opinion.

Geo. J. Cummins (*W. W. Green,* of counsel), for respondent.

A. A. Ellis, Attorney General, and *W. A. Burritt,* Prosecuting Attorney, for the people.

HOOKER, C. J. The defendant was convicted of assault with intent to commit the crime of rape upon a girl of less than 14 years of age.

The proof consisted of testimony from the girl, who unequivocally testified to the completed act of sexual intercourse, testimony from a physician, showing an examination and rupture of the membrane, testimony of one or two witnesses to admissions on the part of defendant to the effect that he had intercourse with the girl on the occasion

charged, and testimony that she was at the time below the age of 14 years, and that she had been subject to menstrual periods for a year. The defendant was sworn, and denied seeing the girl upon the occasion charged.

The errors relied on are as follows:

1. That the court charged the jury that the defendant might be convicted of rape, of assault with intent to commit rape, or of simple assault.
2. That, defendant having denied the transaction, the jury should have been charged that there must be some testimony corroborating that of the girl, or the verdict must be not guilty.
3. That the jury should have been charged that if the girl had reached the age of puberty, although under 14 years of age, she was no longer a "child," within the meaning of the statute.
4. That the jury should have been directed to return a verdict for the defendant because the girl had reached the age of puberty.

It is true that upon this record the proof upon one side shows the completed act of sexual intercourse with a girl under the age of 14 years, while upon the other a denial of any offense is made. Under such proof it cannot be denied that a verdict of assault with intent to rape is illogical. But an assault with intent to commit rape is necessarily included in every rape. The defendant's counsel are alleging, not an injurious error, but one which, if it could be called an error, has resulted to defendant's advantage. In the case of *Hall v. People,* 47 Mich. 636, this question was passed upon, and the omission to charge the jury that the defendant might be found guilty of the lesser offense was held to be error, in just such a case as this. See, also, *State v. Shepard,* 7 Conn. 56; *Com. v. Cooper,* 15 Mass. 187. The case of *People v. Partridge,* 86 Mich. 243, cited by counsel, differs from this case in this: That the offense of assault "without intending to commit the crime of rape" could not be said to be

included in the offense of rape, but, on the contrary, was at variance with such offense.

The charge of the court is not given, and we have no means of determining what, if anything, was said to the jury upon the subject of corroboration, and, while the request of defendant's counsel was refused, we cannot assume that the subject was not properly treated in the charge. We do not intend to imply that the court should have given the request in substance, for we are not prepared to say that conviction in rape cases cannot be based upon the uncorroborated testimony of the woman assaulted. We see no reason for holding that the rule of the common law is changed by permitting the defendant to testify, and believe that the question of credibility can be safely left to the jury. As a matter of fact there were corroborating circumstances in the case.

The remaining question is without merit. The statute (3 How. Stat. § 9094) provides that,—

"If any person shall * * * unlawfully and carnally know and abuse any female child under the age of fourteen years, he shall be punished," etc.

It is contended that the victim must not only be under the age of 14 years, but must be a child, *i. e.* must not have reached the age of puberty. We cannot assent to such a doctrine. The legislators who voted for this law must have known that puberty in females is common before the age of 14. There is nothing to indicate that the age of puberty was intended to have any bearing upon the subject.

We find no error in the record, and the judgment will be affirmed.

The other Justices concurred.

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WILLIAM L. JENKS, ADMINISTRATOR OF THE ESTATE OF HARRIET J. COMSTOCK, DECEASED, v. JOHN L. BLACK, JUDGE OF PROBATE OF ST. CLAIR COUNTY.

[See 95 Mich. 48.]

Estates of deceased persons—Allowance of claims—Appeal—Estoppel.

1. An appeal from an order for the hearing of claims generally, made after the appointment of a special and before the appointment of a general administrator, is the appropriate remedy by which to test the validity of such order, and of the allowance of claims thereunder.
2. Where heirs are estopped from questioning the validity of an order of the probate court, and of the proceedings had thereunder, the administrator is also estopped in a proceeding in which he represents only their interests.
3. The position taken by the relators in *Comstock v. Circuit Judge*, 95 Mich. 48, is held to have been so inconsistent with the application in this case as to work an estoppel against their right to contest the action brought in question in this proceeding.

Mandamus. Argued April 25, 1893. Denied June 16, 1893.

Relator applied for *mandamus* to compel respondent to appoint commissioners on claims in the matter of the estate of Harriet J. Comstock, deceased. The facts are stated in the opinion.

P. H. Phillips, for relator.

Cyrus A. Hovey, for respondent.

MONTGOMERY, J. Relator asks for a writ of *mandamus* to compel the respondent to proceed to appoint com-

missioners on claims in the estate of Harriet J. Comstock, deceased.

It appears that an order for the hearing of claims before the judge of probate was made on the 29th of August, 1890, and that, proceeding under such order, the creditors filed claims against said estate; that a hearing was had, and various claims allowed. This was after the appointment of a special administrator, and before the general administrator was appointed. The relator was subsequently appointed general administrator of the estate, and made application to have commissioners appointed to hear claims against the estate, which was denied.

The relator contends that the judge had no power to make the order which has been proceeded under until a general administrator was appointed, and that such order was void. It may perhaps be doubted whether the statute (How. Stat. § 5853) is broad enough to authorize the proceedings taken in this case; but, if it be conceded that the application was not sufficient to justify the court in proceeding to the allowance of all the claims which were considered, it is very evident that the more appropriate remedy to test the validity of the action would have been by appeal.

But a more conclusive answer to the present application, we think, is that it appears that all parties to these proceedings have waived any objection to the proceedings, and are estopped now from invoking the remedy sought. It is very evident that the present proceeding is directed against the action of the probate court in allowing the claim of William B. Comstock. After the allowance of this claim, one of the three other heirs interested appealed to the circuit court from the order, and afterwards, having parted with her interest in the estate, dismissed her appeal. Subsequently the two remaining heirs sought to reinstate the appeal, and in that proceeding set out "that such

claim of appeal from the probate court was taken by the appellant, Helen E. Coombs, after consulting the relators," who were the other heirs interested. See *Comstock v. Circuit Judge*, 95 Mich. 48. The position taken in that proceeding by the parties in interest was so inconsistent with the present application as to work an estoppel against their right to contest the action here brought in question. We think it very clear that, if they were the parties directly asking the aid of the Court, they would be concluded by the judgment in that case. As the administrator represents only their interests in this proceeding, he should also be estopped. Wells, Res. Adj. § 54.

The writ should be denied, with costs payable out of the estate.

The other Justices concurred.

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THOMAS M. PEIRCE ET AL. v. JOHN W. CLOSTERHOUSE.

Contract—Assignment—Pleading—Principal and agent.

1. An assignee of an open account cannot recover thereon under a common-count declaration in which the assignment is not averred; citing *Blackwood v. Brown*, 32 Mich. 104; *Rose v. Jackson*, 40 Id. 29; *Cilley v. Van Patten*, 58 Id. 404.[1]
2. A broker who contracts in his own name to furnish a bill of lumber at an agreed price, and places the order with lumber dealers for whom he has no right to make such a contract, and from whom he is only entitled to receive a commission on such orders as they accept, cannot be said to have made the contract in their behalf or as their agent.

[1] See *Altman v. Fowler*, 70 Mich. 57; also *Webster v. Williams*, 69 Id. 135, holding that a judgment in favor of an assignee, if not appealed from, is valid, although proof of the assignment is admitted without an averment of that fact in the declaration.

Error to Kent. (Adsit, J.) Submitted on briefs April 25, 1893. Decided June 16, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

C. O. Smedley, for appellant.

J. M. Jamison, for plaintiffs, contended:

1. Where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either may sue upon it; citing *Sims v. Brittain,* 4 Barn. & Adol. 375; *Sims v. Bond,* 5 Id. 393; Bish. Cont. §§ 1079, 1080.

McGRATH, J. Plaintiffs bring *assumpsit* on the common counts for a bill of lumber used in the construction of a house owned by defendant.

The house was built under a contract with one Cultice, who agreed to furnish all the materials. Some time prior to the letting of the contract, one Quackenbush, who had been in the lumber business on his own account, met defendant on the street, and asked him if he intended to build any houses during that summer. Defendant replied that he did, whereupon Quackenbush asked if he could not furnish him the lumber. The conversation was then interrupted. At another interview, Quackenbush called upon defendant, and asked if he was ready to place that lumber order, and defendant replied that he had not yet let the contract. Quackenbush testifies that—

"He said he would let the contracts for the buildings, and I would have to figure with the contractor, and if I could figure low enough, which he hoped I could, he would be glad to have me get it. He said—well, in the beginning, he said he let the contracts, and, as the lumber was being delivered, where the contractor O. K.'d the bills, he paid them."

Afterwards, Quackenbush called again, and defendant told him that Harry Cultice had the contract, and he said:

"I would figure it reasonable, because he was a good fellow,—a hard worker; and I told him, if I could not figure it as low or lower than anybody else, I did not propose to have any preference over any one else. If I could figure it as cheap, I would like to have him use his influence to let me have the job."

Quackenbush then found Cultice, got from him a bill of the lumber, gave to Cultice a figure for it, and Cultice awarded the contract to Quackenbush.

"*Q.* (to Quackenbush). What did Mr. Closterhouse say about the payment of this lumber?

"*A.* He said, as fast as the lumber was being delivered there, and the contractor O. K.'d the bills he would pay them.

"*Q.* When was that?

"*A.* That was when I first saw him; that is, not when I first saw him, but before that,—this talk."

Quackenbush further testifies that he went over to plaintiffs, handed the bill to one of the firm, and asked him what he would furnish that bill for, and—

"He told me he would figure it or furnish it for so many dollars and cents, and I told him that is just what I had agreed to."

"*Q.* Who were you working for at the time you came in the office, and talked with Mr. Closterhouse?

"*A.* Well, I was working for different lumber firms, and I was also working for myself. * * * * * * * *

"*Q.* And then you figured on it, and handed in your bid?

"*A.* Yes, sir.

"*Q.* Who did you hand your bid in to?

"*A.* Mr. Cultice.

"*Q.* Did you tell him where you were going to get the lumber at that time?

"*A.* No, I did not.

"*Q.* Didn't you state to him that you were going to get the lumber from Muskegon?

"*A.* I said I could get it in Muskegon, I could get it in Cadillac, and get it from the lumber firms here in the city. * * * * * * * * * * * * * *

"*Q.* Who were you working for at that time? Were you working for Peirce & Co. at that time?

"*A.* I placed the order—

"*Q.* Just answer my question. Were you working for Peirce & Co. at that time?

"*A.* Why, certainly, I supposed I was.

"*Q.* Weren't you doing a commission business,—taking orders, and placing them with different people,—either in Cadillac or Muskegon or Grand Rapids, wherever you could do the best, and make the most money? Is not that a fact? Weren't you working for yourself?

"*A.* I suppose I was working for myself. That same time I had an understanding with Peirce & Co. * *

"*Q.* Was it not your intention to get it from Muskegon, and he was in such a hurry that you had not time?

"*A.* Yes.

"*Q.* You told Mr. Cultice you were going to send to Muskegon and get this, didn't you?

"*A.* When I first talked with him,—Muskegon or Cadillac. I would not say that I said Muskegon, particularly. I might have mentioned Muskegon, and I might have said Muskegon alone."

Neither Quackenbush nor plaintiffs had any further conversation with defendant until after the lumber was furnished, and a bill therefor was sent to defendant in May following, when defendant at once repudiated it.

1. Plaintiffs could not recover as assignees of Quackenbush, under the declaration. *Blackwood v. Brown,* 32 Mich. 104; *Rose v. Jackson,* 40 Id. 29; *Cilley v. Van Patten,* 58 Id. 404.

2. Quackenbush cannot be said to have made the contract in behalf of, or as the agent of, plaintiffs. He made the proposition to Cultice in his own name, and not for plaintiffs. He had no authority to make a contract which would bind plaintiffs. He fixed the rates, and after he had made the contract with Cultice he went to plaintiffs, and inquired what they would furnish the bill for. In any view, he was only to receive commissions on such orders as plaintiffs accepted. They were not bound by his rates. When he closed the contract with Cultice he intended, as he says, to get the lumber at Muskegon or

Cadillac. He had the option to place the order or get the lumber wherever he chose. He was under no obligation to get it from plaintiffs. If he had afterwards refused to perform, neither Cultice nor defendant could have looked beyond him.

The judgment is reversed, and a new trial granted.

HOOKER, C. J., LONG and GRANT, JJ., concurred. MONTGOMERY, J., took no part in the decision.

WILLIAM N. CARLISLE v. ELLA CARLISLE.

Divorce—Setting aside decree—Rights of second wife of complainant.

1. A second wife, who becomes such in reliance upon a decree of divorce granted her husband, is entitled to notice of a petition by the first wife to vacate the decree.
2. The court granting a decree of divorce has the power to set it aside for fraud in its procurement, or want of jurisdiction, on the application of the party against whom it was obtained, even though the other party may have remarried and children may have been begotten; citing *Edson v. Edson*, 108 Mass. 590; *True v. True*, 6 Minn. 458; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Adams v. Adams*, 51 N. H. 388; *Everett v. Everett*, 60 Wis. 200; *Caswell v. Casivell*, 24 Ill. App. 548; *Allen v. Maclellan*, 12 Penn. St. 328; *Stephens v. Stephens*, 62 Tex. 337; but the decree cannot be avoided by the party guilty of the fraud; citing *Simons v. Simons*, 47 Mich. 253; nor can the party obtaining the decree, and accepting its benefits, afterwards question the jurisdiction of the court granting it; citing *Ellis v. White*, 61 Iowa, 644; *Kile v. Town of Yellowhead*, 80 Ill. 208; *Morriss v. Garland*, 78 Va. 215; *Embry v. Palmer*, 107 U. S. 8.

Appeal from Wayne. (Hosmer, J.) Submitted on briefs April 25, 1893. Decided June 16, 1893.

Complainant filed a bill for divorce, which was granted, and subsequently set aside on petition of defendant. Anna E. Carlisle, the second wife, intervened, and on her petition the order vacating the decree was set aside, from which defendant appeals. Affirmed. The facts are stated in the opinion.

Ervin Palmer, for appellant.

E. H. Sellers and *Alfred Lucking*, for the Estate of Anna E. Carlisle.

McGRATH, J. A divorce was granted in the Wayne circuit court in chancery between the parties, February 26, 1887. In May, 1891, defendant filed her petition to set aside the decree, alleging as the sole ground that the proceedings were commenced, and the order for appearance published, and the decree entered, against Ellen Carlisle, whereas defendant's name is Ella Carlisle. No opposition was made to the application, and, in June following, an order was entered vacating the decree. In August following, by stipulation the proceedings were discontinued.

In January, 1892, Anna E. Carlisle appeared before the court, and set forth that in March, 1887, she had married the complainant, and had lived with him as his wife until November, 1890; that at that time they separated; that in December, 1890, William N. Carlisle had filed a bill for divorce in the Wayne circuit court in chancery against her, and that the proceeding for divorce was still pending. The court then made an order requiring complainant and defendant to appear on a day named, and show cause why the order vacating the decree should not be set aside, and the stipulation stricken from the files. After a full hearing the court made an order restoring the decree, and striking the stipulation from the files, but ordered, also,

that said defendant have leave, if she so elect, to bring her petition for leave to answer to a hearing upon first giving 20 days' notice to Anna E. Carlisle to come in and answer said petition, and show cause why the prayer thereof should not be granted. From this order defendant appeals.

It appears from the record that for four years defendant had known of the granting of the divorce, and of complainant's intermarriage with Anna E. Carlisle. Complainant and defendant had separated in 1886. She had gone west, taking with her a son, the issue of the marriage. In August, 1888, she was in Detroit, and an order to show cause why she should not deliver the boy over to the custody of complainant, in accordance with the decree, was served upon her, and she made an agreement with complainant with reference to the boy. The order served upon her ran against her as Ellen Carlisle.

It is also apparent from the record that the proceeding to vacate the decree was instituted at the instigation of complainant. In the divorce proceeding instituted by William N. Carlisle against Anna E. Carlisle, an adjustment of the question of alimony had been made. William N. had conveyed to Anna E. the homestead and certain personal property. Defendant resided in Wisconsin. Her petition to set aside the decree and her answer to the order to show cause are sworn to in that state. She did not appear in person at either hearing, nor does it appear that, since the vacation of the decree, complainant and defendant have lived together. The solicitor who appeared for complainant when the decree was vacated appeared for defendant in the subsequent proceeding, and appears here for appellant. Although for four years defendant had known of the remarriage of complainant, she omitted all reference to it in her petition, and to that petition no

answer was filed. Within two months after the decree was set aside, although grave charges were made against her in the testimony upon which the divorce was granted, a stipulation was filed, discontinuing the divorce case.

There is no longer any doubt of the power of a court of equity to set aside its own decree of divorce for fraud in its procurement, or for want of jurisdiction, on the application of the party against whom the decree was obtained; and this, although the other party may have remarried, and children may have been begotten. *Edson v. Edson*, 108 Mass. 590; *True v. True*, 6 Minn. 458; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Adams v. Adams*, 51 N. H. 388; *Everett v. Everett*, 60 Wis. 200 (18 N. W. Rep. 637); *Caswell v. Caswell*, 24 Ill. App. 548; *Allen v. Maclellan*, 12 Penn. St. 328; *Stephens v. Stephens*, 62 Tex. 337. But the decree cannot be avoided by the party guilty of the fraud (*Simons v. Simons*, 47 Mich. 253); nor at the instance of third parties (*Baugh v. Baugh*, 37 Mich. 59); nor can a party who obtains the divorce, and accepts its benefits, afterwards question the jurisdiction of the court granting it (*Ellis v. White*, 61 Iowa, 644; *Kile v. Town of Yellowhead*, 80 Ill. 208; *Morriss v. Garland*, 78 Va. 215; *Embry v. Palmer*, 107 U. S. 8). This is not, however, an application by a third party to set aside a decree of divorce. The order appealed from was an order setting aside an order obtained upon a petition filed evidently by collusion with complainant, and which concealed from the court a fact of which the court should have been advised; an order which made Anna E. Carlisle an adulteress, and affected, and was probably calculated to cut off, rights of property. Ordinarily the rights of the second wife are fully protected by the husband, who appears and makes known the remarriage. Here the husband made no defense. To hold that in such a case the second wife, who had in good faith relied upon the decree

sought to be set aside, was not entitled to notice, and had no right to intervene, would be rank injustice.

In *Bomsta v. Johnson*, 38 Minn. 230, plaintiff brought an action to annul a decree of divorce rendered in 1879, between herself and husband, who died in 1885, and it was held that Pauline Ganner, who married the deceased immediately after the decree of divorce, was a proper party defendant. The case of *Zoellner v. Zoellner*, 46 Mich. 511, was a proceeding of like character, where the petition was filed after the death of the husband, and eight years after the decree was made. Mr. Justice GRAVES, speaking for the Court in that case, says:

"Nothing is now involved except property. The sole motive of the petitioner in assailing the judicial proceeding which purported to sever her connection with the deceased complainant is to get, through a kind of *post mortem* adjudication, a share of the property he left. * * * The defects in the proceedings which are now set up were open to detection by the least attention to facts which must have been obvious to her, and the notice from her husband, and the surrounding circumstances with which she was intimate, were urgent calls upon her to look into the proceedings. In short, if her present explanations are correct, the facts of which she had full knowledge implied conclusively that the decree was a fraud, and there is no reason to suppose that she was not then as eligibly situated to take action as she is now. * * * The proceeding is consequently subject to the proposition that the public peace and good order are concerned in withholding the assistance of equity from those who grossly neglect to take care of their own rights."

This is not an attempt to compel a husband and wife to live together, but it is the right of a party who, relying upon the decree of a court of equity, has in good faith entered the marriage relation, and has acquired rights of property, to be heard in a proceeding instituted in the name of the party who had for four years known of the divorce and of the remarriage, and made no sign, who does not excuse the delay, and whose skirts are tainted with a strong

suspicion of collusion with the party procuring the divorce, who cannot be heard to question the proceeding. The right of a court of equity to purge its own records of an order obtained by a fraud upon it is involved here. This order was entered upon an *ex parte* affidavit to a petition, the only ground being the use of the name "Ellen," instead of "Ella," in proceedings instituted by the husband, who had lived with her for 16 years, and must be supposed to have known by what Christian name she was known. A hearing should have been had upon that question before a subsequent marriage should have been invalidated.

It is urged here, however, that the order for appearance fixed the time at five months, whereas proof of publication was filed, and the order *pro confesso* entered, after four months, and twenty-four days before the expiration of the time named. This point was not made in the court below. Here, again, are we confronted with peculiar circumstances. Although this is the second petition filed by defendant, in neither was the question raised. The statute provides that in such case the order shall require the defendant to appear and answer "in not less than four months." The order was published for the required time, and proof of publication duly made. The order *pro confesso* was upon a three-months printed blank. The printed word "three" was twice stricken out, and the word "four" written in in each instance. The order as published, a printed copy of which appears attached to the affidavit of publication, fixes the time at five months, but, by reference to the original order for appearance signed by the circuit judge, it appears that the order was originally written "four months," but at some time the word "four" has been converted into the word "five," evidently with a different pen and ink, if not by a different hand. Whether this was done before the publication, or after the discovery of an error in the pub-

lication, does not appear. The situation suggests the most careful examination before an order is made vacating the decree.

In any case where a petition is filed after such a lapse of time, it should affirmatively appear what change, if any, has taken place in the *status* of the parties, and, when a decree has been followed by the marriage of one of the parties, the court should see to it that interests of the innocent third party are fully protected, and, when no opposition is made by the party to the record, the court should give to such third party an opportunity to be heard.

The order of the court below was right, and is therefore affirmed.

HOOKER, C. J., LONG and GRANT, JJ., concurred. MONTGOMERY, J., concurred in the result.

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CHARLES REED v. CLARA A. BOND AND THE GOGEBIC COPPER & IRON MINING COMPANY.

Mortgage—Assignment—Legality of consideration—Foreclosure—Conditional sale.

1. It is no defense to a suit by an assignee to foreclose a mortgage that the assignment was made in payment of a gaming debt due him from the mortgagee; citing *Bagg v. Jerome*, 7 Mich. 145.
2. A deed given by a debtor to a creditor in satisfaction of the debt, in which provision is made for the repurchase of the land, at the option of the grantor, within a specified time, and its conveyance to him by the grantee on payment of the pur-

chase price and interest, will be treated as an absolute conveyance, with an option to repurchase.[1]

Appeal from Ontonagon. (Stone, J., presiding.) Argued April 28, 1893. Decided June 16, 1893.

Bill to foreclose a mortgage. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

T. L. Chadbourne (*Chadbourne & Rees*, of counsel), for complainant.

J. R. Rauch, for defendants.

MONTGOMERY, J. The bill in this case was filed to foreclose a mortgage on the undivided one-fourth of certain lands in the county of Ontonagon, given on the 1st day of November, 1872, by George W. Knowlton to one James O'Brien, which mortgage was assigned to complainant in December, 1873. The defense is:

1. That the assignment from O'Brien to complainant was made in payment of a gaming debt.

2. That, at the time of the execution of the mortgage by Knowlton, his interest in the property was that of a mortgagee only, and that, therefore, the mortgage by Knowlton was, in effect, a mortgage of a mortgage. This determined, it is claimed that the statute of limitations has run against the Knowlton deed considered as a mortgage, and hence that the complainant is not entitled to relief.

The defendants ask for affirmative relief, and that the cloud upon their title be removed.

1. The gaming contract is fully executed, and where this is so the court will usually leave the parties where it finds them. Whatever remedy the assignor may have does not

[1] For cases involving the question whether a conveyance, absolute upon its face, shall be treated as a deed or a mortgage, see *Weed v. Mirick*, 62 Mich. 414; *McMillan v. Bissell*, 63 Id. 66; *Crawford v. Osmun*, 70 Id. 651; *Stahl v. Dehn*, 72 Id. 645; *Seligman v. Ten Eyck Estate*, 74 Id. 525; *Etheridge v. Wisner*, 86 Id. 166; *Gamble v. Ross*, 88 Id. 315; *Clark v. Landon*, 90 Id. 83; *Knight v. Hartman*, 93 Id. 69; *Loth v. Friederick*, 95 Id. 598.

concern the defendants. They are fully protected by the assignment to the complainant. *Bagg v. Jerome*, 7 Mich. 145.

2. A question of greater difficulty is that of whether the instrument under which Knowlton derived his title is to be treated as an absolute conveyance with an option to repurchase, or, in legal effect, a mortgage. The instrument, in its material parts, is as follows:

"This indenture, made the 7th day of June, in the year 1859, between William A. Pratt, of the city, county, and state of New York, party of the first part, and George W. Knowlton, of the same place, party of the second part:

"*Witnesseth*, that the said party of the first part, for and in consideration of the sum of $2,738, lawful money of the United States of America, to him in hand paid by the said party of the second part at or before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all his right, title, and interest in and to all the undivided one-fourth part of those certain lands and premises situate in the State of Michigan."

Here follows a full description, and the *habendum* clause, as follows:

"To have and to hold, all and singular, the above mentioned and described premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever."

This is followed with the covenants of warranty, concluding:

"And that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably hold, use, and possess and enjoy the same without any let, suit, trouble, or disturbance of said party of the first part, his heirs or assigns, or any other person lawfully claiming or

to claim the same, except under and in pursuance of the agreement for the repurchase of the same, hereinafter contained."

The agreement contains this further provision:

"*Whereas,* this conveyance is made by the said Pratt to said Knowlton on account of the said Pratt's indebtedness to said Knowlton, and no searches against the property above described have yet been made by said Knowlton as to the title or the incumbrances thereon:

"It is therefore further hereby agreed that said Knowlton have six weeks from the date hereof to make such searches, and that, if no deed, mortgage, attachment, or execution against said Pratt, or incumbrance of any kind, exists or is to be found thereon, the above conveyance shall be in full of all claims, demands, and causes of action of every kind whatever between the parties hereto, except the agreement for the said Pratt's right to repurchase said property within fourteen months from May 9, 1859, hereinafter mentioned. * * * * * * *

"On the payment of the price of $2,738, and interest from May 9, 1859, to the time of reconveyance, at seven per cent. per annum, and all taxes and necessary charges on said property incurred and paid for by said Knowlton, said Knowlton agrees to sell and convey to said Pratt, his heirs, executors, administrators, and assigns, at any time within fourteen months from May 9, 1859, all his equitable or legal claim and interest in said property, with the same title as he obtained by this deed, and with all the title which he may be entitled to obtain by virtue of this agreement, free from incumbrances on said property by him made or suffered, and to give a deed thereof with covenants against the acts of said Knowlton; and said Pratt or his said representatives have the right to repurchase said property on those terms within that time, but not otherwise."

There are no extraneous or attendant facts which throw light on the intention of the parties. It appears that the grantor and Knowlton had been in litigation before the making of this deed, and had agreed upon a settlement at the sum stated in the deed as the consideration. Neither party was at the time in possession, so that there is no

inference to be drawn from a change in possession, or, on the other hand, from a continuance in possession.

As to whether an instrument in the form of a conveyance, with an agreement back to resell, is to be deemed a mortgage, is often a question difficult of solution, and is frequently made to depend upon the peculiar circumstances of the case. It is usual that in the instrument itself, or in the attendant circumstances, facts which clearly indicate the intention of the parties appear, and when this is so the court will carry such intention into effect. Where this is done by declaring a deed and agreement to reconvey a mortgage, it has most usually been in recognition of the right of the parties to contract as they saw fit, unless there is some additional principle of equity to control the decision,—as, for instance, the principle, "once a mortgage, always a mortgage;" but where the question is to be determined upon the naked agreement, the question, as in all cases involving a construction of an agreement in writing, is, what is the engagement on either hand? what did the parties intend by their agreement? In the present case the deed was given for a present consideration, and, as the grantee had not then examined the title, it was declared that, if the title was found satisfactory, "the above conveyance shall be in full of all claims, demands, and causes of action of every kind whatever between the parties," except the agreement to repurchase. By a subsequent clause Pratt is given the right to repurchase within 14 months, and Knowlton agrees to sell within that time at the consideration price and interest.

Two things are apparent:

(1) That the intention was that the debt from Pratt to Knowlton should be extinguished by the conveyance; (2) that it was optional with Pratt whether he purchased or not, and hence that no new debt was created from Pratt to Knowlton.

In 1 Jones, Mortg., at section 264, it is said:

"The rights of the parties to the conveyance must be reciprocal. If the transaction be in the nature of a mortgage, so that the grantor may insist upon a reconveyance, the grantee at the same time may insist upon repayment; but if it be a conditional sale, so that the grantor need not repurchase, except at his option, the grantee cannot insist upon repayment."

And at section 265 it is said:

"If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage, but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms of the agreement. A debt, either pre-existing or created at the time, or contracted to be created, is an essential requisite of a mortgage. * * * * 'Where there is no debt and no loan it is impossible to say that an agreement to resell will change an absolute deed into a mortgage.' The debt may not be evidenced by any bond or note, or covenant to pay it; so that the facts and circumstances of the transaction must be inquired into in order to ascertain whether the consideration of the deed was really a debt or loan. If not one or the other, the deed can hardly be a mortgage."

This text is supported by abundant authority, and is in line with the decisions of our own State. See *Swetland v. Swetland*, 3 Mich. 482; *Cornell v. Hall*, 22 Id. 377. It was said in *Jeffery v. Hursh*, 58 Mich. 257:

"It is now settled, as well as any principle of law can be, that an absolute deed, with a bond or separate defeasance or agreement, executed at the same time, to reconvey the estate upon payment of a certain sum of money, constitute a mortgage, if the instruments are of the same date, or are executed and delivered at the same time, and as one transaction; and when this is the case it is a conclusion of law that they constitute a legal mortgage."

This case is cited with approval in *Clark v. Landon*, 90

Mich. 83. In each of the cases cited, however, there was extraneous evidence making the intent of the parties that the transaction should amount to a mortgage apparent.

If it be assumed that the *prima facie* intent is that a deed with a defeasance back amounts, in effect, to a mortgage, and that the engagement on the part of the grantor to pay the debt will be implied, it still does not follow that in the present case this instrument should be held to be a mortgage; for the question of whether there should be an indebtedness is not left to inference, but is determined by the instrument itself, which provides in plain language that the indebtedness should be discharged upon acceptance of the deed, and that the repurchase should be optional with the grantor.

In *Swetland v. Swetland, supra,* the Court say, in discussing this question:

"If the debt which formed the consideration of the deed was extinguished at the time by the express agreement of the parties, * * * it must be deemed purchase money, and the transaction will be a sale upon condition."

In *Cornell v. Hall* it was said:

"Courts do not presume to change the contracts which the parties have made. * * * While these principles will not permit a transaction which, in substance, is a mortgage, to have the effect of a sale, there is no principle or maxim of policy which forbids the making of a conditional sale, or which will allow the court to interpose and convert one into a mortgage."

In Martind. Conv. § 417, it is said:

"If the debt is extinguished at the time by the express agreement of the parties, * * * then it must be regarded as purchase money, and the transaction will be a conditional sale."

See, also, *Conway's Ex'rs v. Alexander,* 7 Cranch, 218; 1 Jones, Mortg. §§ 260, 267, and cases cited; *Henley v.*

Hotaling, 41 Cal. 22. Such, we think, is the effect of the agreement in this case.

The decree will be affirmed, with costs.

The other Justices concurred.

EPHRAIM WHITTAKER v. ELTON B. FULLER.

Replevin—Taxes.

The lessee of personal property, if entitled to its possession, can maintain replevin against a township treasurer who seizes it in satisfaction of a tax assessed against the lessor.[1]

Error to St. Clair. (Mitchell, J.) Argued April 27 and 28, 1893. Decided June 16, 1893.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

A. E. Chadwick, for appellant.

Henry P. Jenney, for defendant.

MONTGOMERY, J. This is an action of replevin to recover possession of 43 sheep. One Zebina McColman owned and leased to the plaintiff the south-east quarter of section 35, township of Mussey, county of St. Clair. He also leased to the plaintiff and gave him possession of 43 sheep, to be kept by the plaintiff on the farm for one-half of the wool and increase. March 5, 1891, defendant, who was township treasurer of the township of Mussey,

[1] See note to *Gray v. Finn,* 96 Mich. 62, for cases involving the construction of How. Stat. § 8318, which prohibits replevin for property seized by virtue of a tax warrant.

took the 43 sheep from the plaintiff's possession, drove them to Capac, 3 or 4 miles from the residence of plaintiff, and offered them for sale, to satisfy a special tax for a drain, called the "Doty Drain," against the land occupied by Whittaker. After forbidding Fuller to sell the sheep, and after demanding them, plaintiff brought replevin.

It was conceded by counsel for the defendant on the settlement of the bill of exceptions that if the plaintiff, under the proofs and his theory of the case, had a right to attack the validity of the Doty drain proceedings, the case should be reversed, and sent back for a new trial.

The learned circuit judge instructed the jury that, if the plaintiff was the true owner of the property, inasmuch as there was no tax or assessment against him, he might maintain replevin. But he further charged that,—

"If the officer finds the property claimed by some person as lessee, for instance, for the purpose of increase, as is claimed in this case, while the true owner is behind, and he himself could not have taken the property away, yet the law steps in, and makes this property liable to seizure by a public officer for taxes against the owner, and does not let it be avoided by such a contract; otherwise it might be put out of the law's reach, and in that way he (the owner) would avoid taxation and avoid the payment of taxes by simply leasing or disposing of his property in that way."

He further charged the jury that—

"Mr. Whittaker in this suit asserts absolute property and ownership and right of possession by his writ, and now the question comes before you to determine whether he in any way, being the owner, and being entitled to the possession, has waived the right of possession, so that he is now estopped by the law from asserting his claim of ownership, if he had one; and that is the main question I shall submit to you."

It is claimed by the defendant that when he went to make the levy to satisfy the tax Mr. Whittaker pointed out the property in question as the property of Mr. McCol-

man, and that plaintiff is therefore estopped from now bringing this action of replevin while the officer is proceeding to satisfy this tax. After giving an appropriate instruction upon this subject, the learned circuit judge further said to the jury:

"Now, in this case, if you find for the plaintiff that Whittaker's theory is correct, and that he gave no right or permission to seize them, and that he owned the sheep, and was entitled to their possession, and did not give a right or permission in any way to Mr. Fuller to take them, then you will find a verdict for the plaintiff, and assess his damages in that case at such sum as you find to have been proved before you. But if, on the other hand, you shall find that Mr. Fuller went there in good faith, and sought to find out the true condition of the property, and was misled, if the property was Whittaker's, or, if not Whittaker's, that he was told by Whittaker it was McColman's, and he, in pursuance of that, made the levy, then Mr. Whittaker himself cannot maintain this suit."

He further instructed the jury as follows:

"Now, remember that in this case it depends upon who was the owner of the property. It is not claimed that Mr. Whittaker was the absolute owner; only that he was the conditional owner. You heard what I said in reference to that, in the first place, that no man can put his property beyond the reach of taxes; but, if he can, then, did Mr. Fuller levy on this property in good faith, having reason from what was said by Mr. Whittaker to believe it was the property of Mr. McColman, and took it away? and in that case he is entitled to levy, or, if you find that the property was not Mr. Whittaker's; in either of those cases you will find for the defendant, and assess his damages to the value of the property, as I say."

We think that the jury must have understood from these instructions that, in order to entitle the plaintiff to recover, it must appear that he was the absolute owner of the property. This is not the law. See Cobbey, Rep. § 137, and *Hunt v. Strew*, 33 Mich. 85, in which case it was held that the lessee of personal property is the proper plaintiff in replevin. The plaintiff having the right, then,

to bring replevin, and it being conceded that if he had the right to attack the validity of the tax he is entitled to recover, it follows that the case must be reversed; for it must be held that one entitled to the possession of personal property sought to be taken to satisfy a tax against a third person may defend his possession against the officer. *Tousey v. Post*, 91 Mich. 631, 634, and cases cited.

The question of estoppel was in the case, and, apart from the erroneous instruction which placed a burden upon the plaintiff to show a full title in himself, was properly submitted to the jury. Nor is the question presented here as to whether the officer had the right to levy upon an interest of McColman in the property, and to sell such interest as he had, as it not only does not appear that such an attempt was made, but the concession of defendant would preclude him from raising this question on this hearing.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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LEVI TILLOTSON v. WILLIAM L. WEBBER.

Public lands—Grant to railroad—Selection—Evidence—Certification of copy of public record—Deed—Identity of party—Practice in Supreme Court—Ejectment—Taxes—Sale—Validity of deed.

1. The effect of the act of Congress of June 3, 1856, granting certain lands to the State of Michigan to aid in the construction of a railroad from Amboy, *via* Hillsdale and Lansing, to some point on or near Traverse Bay, and of the acceptance of the grant by the State, and of Act No. 126, Laws of 1857, granting said lands to the Amboy, Lansing & Traverse Bay Rail-

road Company, has been settled by this Court, so far, at least, as to determine that the title of the United States to the lands was divested, and that, when earned, the railroad company might select any land within the prescribed limit of 6 miles, if not 15 miles; citing *Johnson v. Ballou*, 28 Mich. 379.

2. The appointment by the Governor of the agent nominated by the railroad company to select its lands, the filing of the list of lands so selected with the Commissioner of the State Land Office, the certification of the same by the commissioner to the Secretary of the Interior, and the approval by that officer of such selection, are, in the absence of any proof to the contrary, *prima facie* evidence of the compliance by the railroad company with the statutory requirements to the satisfaction of the Federal and State governments.

3. The act did not expressly require the preservation or filing with the State or Federal departments of any selection or report of the agent appointed to select lands for the company, and the lands described in the list filed by the company with the State Land Commissioner, certified by him to be a true and correct list of the lands selected by the agent, and approved by the Secretary of the Interior, may be assumed to have been properly selected.

4. The certificate of the Commissioner of the General Land Office that an annexed paper is a copy of a list of lands on file in his office, so far as the same applies to certain descriptions contained therein, makes the paper admissible in an action of ejectment involving the particular descriptions certified to, although not authenticated according to our statutes; citing *Lacey v. Davis*, 4 Mich. 150; *Gilman v. Riopelle*, 18 Id. 158.

5. By asserting title in himself under a tax deed, the grantee asserts that the United States has parted with its title to the land.

6. The fact of the identity of the name of the grantor in a deed under which a plaintiff in ejectment claims title with that of the grantee in a prior deed of the same land, no intervening conveyance being shown, raises a presumption of the identity of the grantor and grantee; citing *Goodell v. Hibbard*, 32 Mich. 47; *Eames v. McGregor*, 43 Id. 313.

7. An agreement between three persons, reciting the purchase by one of them of certain lands for the joint benefit of all, for a specified sum paid by the one, and providing that all money advanced by each shall bear interest, and that each shall receive pay for all services rendered and expenses incurred in the matter of the purchase and sale of the lands, and that the one

shall advance all moneys needed to pay all existing and future taxes thereon, and that whenever enough money shall have been received on sales made to repay the amounts advanced by the parties, with interest, the remaining lands shall be equally divided between them, creates only an equitable interest in the two, and, in the absence of proof of other right of possession in them, they are not proper co-plaintiffs with the one in an action of ejectment for the unsold land, which is wild and unoccupied.

8. Ejectment lies against one who pays for, procures, and causes to be recorded a tax deed, under which he claims title on the trial; citing *Anderson v. Courtright*, 47 Mich. 161; *Hoyt v. Southard*, 58 Id. 432; *Heinmiller v. Hatheway*, 60 Id. 391; *Murray v. Hudson*, 65 Id. 674.

9. The holding in *Demill v. Moffat*, 45 Mich. 410, and in other cases,[1] that the trial judge should clearly state the question of law upon which he directs a verdict, must be restricted to reasonable limits, and will not prevent the Court from examining the facts in the record in an ejectment suit in which the defendant claims title under a tax deed, issued on a sale of the land for the taxes of several years, and on the trial of which the circuit judge held the tax proceedings for each year void, but failed to specify his reasons for so holding as to one of said years.

10. If any portion of the taxes is void, a sale based thereon is void.

11. The power of the township board to raise money for the contingent and poor funds of the township depends upon the neglect or refusal of the electors to vote to raise the same at the annual township meeting, who cannot be held to have refused or neglected so to do if the proposition to raise the money was not submitted to them.

12. Where the amount charged against a parcel of land in the column headed "township tax" can be accounted for only by assuming that the general highway tax is included therein, contrary to law, a tax deed issued on the sale of the land to satisfy the taxes thus blended is void.

Error to Saginaw. (Edget, J.) Argued January 18, 1893. Decided June 16, 1893.

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[1] See *Rayl v. Estate of Hammond*, 95 Mich. 22.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

L. T. Durand, for appellant.

G. W. Davis, for plaintiff.

HOOKER, C. J. The plaintiff brought an action of ejectment to try his title to certain wild and unoccupied lands. He bases his claim to them upon a conveyance from the Amboy, Lansing & Traverse Bay Railroad Company to one Henry Day, while defendant claims title under an Auditor General's deed for delinquent taxes for the years 1874 to 1880, inclusive, excepting those for the year 1875. A large number of assignments of error appear in the record, which can be conveniently considered upon the following questions:

1. Does plaintiff's record evidence show a valid conveyance from the federal government to Ashbel Green?
2. Is the identity of Ashbel Green aforesaid, as the grantor of plaintiff, established by competent evidence?
3. Had Rose and Stevens an interest which affected plaintiff's right of recovery?
4. Was defendant's connection with the land such as to subject him to an action of ejectment?
5. Questions involving the validity of defendant's tax deed.

Plaintiff's title: By act of June 3, 1856 (11 U. S. Stat. at Large, 21), Congress granted certain lands to the State of Michigan, to aid in the construction of the Amboy, Lansing & Traverse Bay Railroad. The State accepted this grant, and in turn granted the lands to the railroad company, by Act No. 126, Laws of 1857. The effect of this legislation has been settled by this Court, so far, at least, as to determine that the title of the United States was divested, and that, when earned, the railroad company might select any land within the prescribed limit of 6 miles, if not 15 miles. *Johnson v. Ballou,* 28 Mich. 379, 388. The documentary proof in this case shows:

1. The acceptance required by section 5 of the act of 1857.

2. The filing of the maps required by section 6 of said act.

3. The certificates of the Governor that two sections, of 20 consecutive miles, of the road, were completed, whereby the company became entitled to select and sell 240 sections of land.

4. The appointment by the Governor of Amos Gould as agent to select lands for the company.

5. The selection of the lands in question by the company, on file in the Land Commissioner's office, at Lansing, over the signature of its president, with the confirmation of the board of control.

6. The filing of a list containing the lands in question, as selected, in the office of the Secretary of the Interior, with the approval of said secretary.

7. The conveyance by the railroad company of the lands in question to Henry Day.

It would seem that the appointment of the agent, and the certificates of the completion of the road, made by the Governor; the selection of the lands, and filing of the list, by the company, with the Commissioner of the State Land Office; the certification of the same by the State Land Commissioner to the Secretary of the Interior, and his approval,—ought to be sufficient proof that the railroad company had complied with the requirements of the law to the satisfaction of the State and Federal governments, if, indeed, it did not preclude their questioning the same.

It is true that objection was made to the introduction of the several documents by which plaintiff sought to prove these things, but we think them all admissible.

Objection is made that the selection of the land is not shown to have been made by the agent appointed by the Governor, as required by both the Federal and State acts. The latter provided for the nomination of the agent by the railroad company. No express provision required the preservation or filing with the State or Federal departments of any selection or report of the agent, and the list filed

with the Land Commissioner by the company, and approved by the Secretary of the Interior, may be assumed to have been properly selected, especially as it appears to have been acted upon; the Land Commissioner having certified to the list as a true and correct list of the lands selected by the agent of the State of Michigan, and the Secretary of the Interior having approved it as such.

Perhaps the most serious point raised relates to the authentication of the certified copy of the list of lands selected by the agent, and filed in the office of the Secretary of the Interior. The point to the objection seems to be that the certificate warrants the inference that the list of lands is not complete. It seems to be the practice of such department to certify a document so far as it applies to the particular property involved, and in this case the list included only the land in question here. To have certified the whole list would have made unnecessary expense, and incumbered the record with voluminous papers of no value. The same practice prevails in certifying field notes of surveys. See *Gilman v. Riopelle*, 18 Mich. 158; *Lacey v. Davis*, 4 Id. 150,—where it is held that authentication according to the practice of the department makes papers admissible, though not certified in accordance with our statutes.

Without deciding that these proceedings are necessarily conclusive against the Federal or State governments upon the question of the title of the railroad company, it is not too much to say that, in the absence of any proof to the contrary, they are *prima facie* evidence; and whether this title could be controverted by any one may be doubted (see *Jackson, Lansing & Saginaw R. R. Co. v. Davison*, 65 Mich. 438),—especially by persons not claiming title under some other grant from the government. Furthermore, when the defendant asserts title in himself, under his tax deed, he asserts that the government has parted with the land;

otherwise, it would not have been subject to taxation, and his tax deed would fall. If we accord to the tax deed all the weight as evidence that can be claimed for it, viz., that it is *prima facie* evidence that the lands were taxable, and, therefore, that the government had parted with its ownership, it does not militate against plaintiff's claim, while, if the proceedings showed that the lands were assessed in the name of the plaintiff, the plaintiff and defendant would be in the attitude of parties claiming under a common grantor, and under the well established rule it would be unnecessary to go behind plaintiff's title. *Eames v. McGregor*, 43 Mich. 313. And in the absence of such evidence of assessment to the plaintiff or his grantors, we are not called upon to assume that the taxes upon which defendant bases his claim arose upon an imaginary title emanating from the government, when a *prima facie* one is shown, which is consistent with defendant's alleged title. *Eaton v. North*, 20 Wis. 449. This view disposes of the many assignments of error which pertain to this branch of the case, for while there were other documents than those mentioned, offered to prove this title, and admitted against objection, they were unnecessary, and may be disregarded, inasmuch as the court might properly have said to the jury that Ashbel Green had title to the property.

The identity of Ashbel Green: In January, 1864, Henry Day conveyed the premises to "Ashbel Green, of New York." In 1884, "Ashbel Green, of the township of Palisades, in the county of Bergen, and state of New Jersey," conveyed the premises to the plaintiff. Plaintiff showed by one Rose that he knew Ashbel Green, who made this deed, and at one time he told him he lived in New Jersey. This evidence was clearly hearsay, and not admissible. But, in the absence of any testimony to the contrary, there was ample evidence to warrant the conclusion of the identity of the Ashbel Green who was the

grantee of Day, and him who was the grantor of the plaintiff. The proximity of the township of Palisades to the city of New York, and the well-known custom of residents of neighboring hamlets to do business in said city, together with the testimony upon the subject, were quite sufficient. See *Goodell v. Hibbard*, 32 Mich. 47; *Eames v. McGregor*, 43 Id. 313,—cited by counsel for plaintiff. The defendant was not injured by the testimony. This appears to have been the view entertained by the circuit judge.

What was the interest of Rose and Stevens? Defendant sought, on cross-examination, to draw out some evidence tending to show that two men, named, respectively, Rose and Stevens, had an interest in the land, upon the claim that this would affect plaintiff's right to recover. This appears to have been upon the theory that they should have been made parties plaintiff, or that it would limit plaintiff's recovery to an undivided interest, or possibly defeat it altogether, if Rose and Stevens were entitled to exclusive possession. He claimed to expect to show that one of them had charge of the land, or paid some taxes, under a contract which was produced, and which reads as follows:

"This agreement, made this twenty-ninth day of April, A. D. eighteen hundred and eighty-four, between Levi Tillotson, Jerome K. Stevens, and Julius K. Rose, all of the city and county of Saginaw, State of Michigan, witnesseth as follows:

"*Whereas*, the said Tillotson has this day purchased from Ashbel Green, of New York city, state of New York, for the joint benefit of said Tillotson, Stevens, and Rose, the following lands, viz. [here follow descriptions of various parcels in different counties], for the sum of four thousand dollars ($4,000), said money having been paid by said Tillotson:

"It is agreed between the parties hereto that all money advanced by each of them shall bear interest at the rate of seven (7) per cent. per annum, and also that each and every one of them shall be entitled to and receive pay for

all services and expenses in the matter of purchase and sale of said lands. Said Tillotson agrees that he will advance all moneys which may be needed to clear up and pay all taxes and assessments now or hereafter on said lands. Whenever enough of said land has been sold, and money enough received on the same, to repay the several parties hereto the amounts advanced by them, in money or otherwise, together with the interest on the same, then and at such time all the lands remaining unsold shall be divided equally between the parties hereto, share and share alike. This agreement is binding on the heirs of the parties hereto. All losses, if any, on said investment, are to be borne equally by the parties hereto.

"Signed and delivered this twenty-ninth day of April, eighteen hundred and eighty-four.

"In presence of—

"JEROME K. STEVENS.
"JULIUS K. ROSE.
"LEVI TILLOTSON."

We think that this contract did no more than to create an equitable interest in Rose and Stevens, and there was no offer to show any other right to possession, while it seemed to be conceded that the lands were wild and unoccupied. Under these circumstances the exclusion of the contract and testimony was proper.

Was defendant's claim such as properly to subject him to an action? In view of the zeal of defendant in defending his tax title, we think little hesitation should be shown in holding that it was. Repeated decisions have, however, set the question at rest. He admitted that he paid for, procured, and caused to be recorded, the tax deed under which he is here claiming title. *Anderson v. Courtright,* 47 Mich. 161; *Hoyt v. Southard,* 58 Id. 432; *Heinmiller v. Hatheway,* 60 Id. 391; *Murray v. Hudson,* 65 Id. 674.

This, in our opinion, disposes of all the questions involved, except those arising upon the tax deed.

The plaintiff claims that, if the record shows facts sufficient to invalidate the tax proceedings for each and every of these years, the deed must be held void, while the

defendant contends that this Court will only so hold upon grounds pointed out by the circuit judge. He asserts that no defect in the tax of 1876 was pointed out by the judge.

It is a convenience to this Court to have the questions of law upon which it must pass specifically pointed out by the trial court, as has been said in *Demill v. Moffat,* 45 Mich. 410, and other cases. But we understand that these cases go no further than to hold that the trial judge should clearly show the question of law that takes the case from the jury. This must be understood to be restricted to reasonable limits. In *Demill v. Moffat,* Mr. Justice COOLEY said:

"Was he [the trial judge] of opinion that the plaintiffs had given no evidence tending to the proof of their heirship? * * * Did he think adverse possession was satisfactorily made out? * * * Did he think the defendants had proved title out of Thorn through the alleged deed to Hamilton? * * * But we need not proceed from point to point in the case, and endeavor to surmise on what ground the plaintiffs were turned out of court. * * * In other words, we are invited to review this case upon all the facts."

In this case the court held that the tax proceedings for each year were void, and the judge was particular to give his reasons for so holding in regard to the tax for each year except 1876. This raises the legal question whether the facts in the record show the tax proceedings for the several years void; and it has frequently been held that the result of the case here cannot depend upon right reasons for his ruling having been given by the trial judge.

It is settled law that if any portion of the tax is void the sale based thereon is void. *Rogers v. White,* 68 Mich. 10; *Sinclair v. Learned,* 51 Id. 335; *Hall v. Kellogg,* 16 Id. 135. Tax titles for the years 1874, 1876, 1877, 1878, 1879, and 1880 are involved.

Included in the township tax for the year 1874 were the sums of $300 for contingent fund, and $200 for poor fund. The record shows that the voters voted a number of items at the annual township meeting, but these items do not appear to have been submitted to them, or in any way mentioned. Subsequently the township board voted them. This was unauthorized. The power of the board to raise money for these purposes depended upon the neglect or refusal of the voters to do so, and unless the proposition was submitted to them they cannot be said to have done either. *Harding v. Bader,* 75 Mich. 316; *Newaygo Co. Manfg. Co. v. Echtinaw,* 81 Id. 416.

The roll for the year 1876 shows excessive taxes to have been levied against one parcel of the land, amounting to nearly seven cents, and against the other amounting to nearly eight cents. Under repeated adjudications this is sufficient to render the deed invalid, so far as it is based upon the tax for that year.

The rolls for several years show large amounts charged against the land in the column headed "Township Tax." It can be accounted for only by assuming that the general highway tax is included. The law in force at that time provided that the annual township meeting might, upon the estimate of the highway commissioner, vote to raise a sum not exceeding one-half of 1 per cent. upon the aggregate valuation of the township, according to the assessment roll of the preceding year, for roads and bridges, the same to be levied and collected in the same manner as other township expenses. Comp. Laws 1871, § 1269. Again, section 477, subd. 15, provides that the board of supervisors may authorize a township, by a vote of the electors, to raise by tax a sum not exceeding $1,000 in any one year, to build or repair any roads or bridges in the township, or in the use of which the township may be

interested, to be "assessed and collected in the same manner as other township taxes are now assessed and collected by law."

Section 1002 provides for the delivery of the copy of the roll, with taxes carried out, with the school, library, two-mill, and schoolhouse taxes in one column, the highway taxes in another, the township taxes in another, etc., "and if other taxes are at any time required by law they shall be placed each in another column." This section applies to all taxes raised, and is sufficiently broad to cover all that may be raised. Its requirements are intended to afford tax-payers the means of ascertaining the purposes to which the taxes paid are to be applied, and such statutes are mandatory. *Case v. Dean,* 16 Mich. 12. This statute distinguishes highway taxes from township taxes. Money raised under the first of these provisions has been held to be rightly included in the highway column (*Silsbee v. Stockle,* 44 Mich. 561), and that raised under the second would seem to be on the same footing. The blending of the township and highway taxes, even were it proved beyond the realm of conjecture, would be a violation of the law. To hold otherwise would, in view of the case of *Silsbee v. Stockle,* leave it optional with the supervisor to put these taxes in the highway or township column. This disposes of the tax titles for the years 1877, 1878, 1879, and 1880, and the deed must therefore be held to have conveyed no title to the defendant. It follows that the trial judge committed no error in directing a verdict for the plaintiff.

Judgment affirmed.

The other Justices concurred.

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JOHN K. MCCAHILL, ADMINISTRATOR, ETC., v. THE DETROIT CITY RAILWAY COMPANY.

Street-railways—Negligence—Injury to child.

1. Where a street-car driver permits a seven-year-old boy, who was upon the front platform with him when the car started, to remain there and ride for some distance, he has no right to order the boy to get off without giving him an opportunity to obey the order with safety.
2. It is a question for the jury in such a case whether the driver was negligent if he ordered the boy to get off while the car was in motion, or whether he should have first stopped the car, and then given the order.

Error to Wayne. (Reilly, J.) Argued January 11, 1893. Decided June 23, 1893.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

William Look and *H. F. Chipman*, for appellant.

Sidney T. Miller (*John C. Donnelly*, of counsel), for defendant.

MCGRATH, J. Plaintiff's intestate, a boy 6 years, 11 months, and 10 days old, was run over and killed by one of defendant's cars. Defendant operated a street railway on Trumbull avenue, Howard, Seventh, and Congress streets, in the city of Detroit. A one-horse car was being driven east on Howard street, between Eighth and Seventh streets. The Seventh street track is used in common by the Baker street line. The driver stopped his car before reaching Seventh, and ran forward to see if there was a Baker street car coming north, and, finding none, returned to his car, and found the boy on the front platform of the

car. The driver started his car, turned south on Seventh, and the boy was run over just south of Lafayette avenue, a little over one block from Howard street.

The driver, upon his direct examination, stated that when he returned to his car, on Howard street, he told the boy to get off; that the boy said he would get off when he got around the curve, meaning the curve at the corner of Howard and Seventh; that the boy did not get off when the car had passed the curve; that when the car reached the south crossing he slackened the car very near a stop, and told the boy to get off, but the boy made no move, and,—

"When I got over the crossing a little ways, I stopped the car to a dead, and told him he must get off. At that he stepped off. I started the car off, letting the brake off, and it didn't go more than four feet before I felt a jar, or the car going over something. I stopped immediately, and the boy was under it. I don't think I was over a car-length, or a car and a half, over the Lafayette crossing, when I stopped the car."

On cross-examination the attention of the witness was called to his testimony taken at the coroner's inquest, in which he stated that—

"He didn't get off that time, and waited until I got over the crossing, and I slackened down again, going very slow; and I told him he would have to get off, or get me into trouble. So I stopped the car, but he got off before I could stop it. The car was then going very slow, nearly at a stop, when he got off, and got on his feet backwards, and let go."

Other testimony tended to show that Fort street is considerably lower than Lafayette; that the accident occurred near the alley south of Lafayette, or about 60 feet south of Lafayette. A passenger upon the car testified that the car did not stop after leaving Howard street, until after the accident; that he saw the boy get off the car; that just after the boy stepped off the car he noticed the car going

over something; that he heard "them speaking" just as the boy got off, but could not tell what was said. Another witness stated that she saw the accident; that she heard the driver tell the boy to get off; that the car was going at the time he told the boy to get off, and when the boy got off.

The boy did not fall off because allowed to remain on the platform. There was no evidence tending to show that he was merely permitted to get off the car, or that the driver was guilty of only a careless disregard of the boy's presence on the car. Even if it were true that the driver was applying the brake to stop the car so as to allow the boy to get off, and the boy, without being ordered so to do, and without waiting for the car to stop, jumped off, the driver having no reason to expect that he would do so, it does not follow that the driver was guilty of negligence. The same result might have followed if he had been riding in the car box.

This boy was less than seven years of age. He had not jumped upon the car while it was in motion. He was on the front platform of the car, beside the driver, to the driver's knowledge, when the car started. He had been permitted to ride for some distance. Having permitted him to remain upon the car, the driver had no right to expect him to get off, or to compel him to get off, or to order him to get off, without giving him an opportunity so to do with safety. Even the refusal of an adult to pay his fare would not authorize the conductor to eject him from a moving car. Here, the permission extended to a mere child must be held equivalent to an invitation, so far as the degree of care which defendant was bound to exercise was concerned. As is said in *Powers v. Harlow*, 53 Mich. 507, 515:

"Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are

chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly."

Even upon the driver's own testimony, he had ordered the boy from the car three times: First, before the car started, when the boy told him he would "jump off" after the car passed the curve; second, at the south side of Lafayette, while the car was moving; and, third, at the time that the boy did jump off. There was testimony tending to show that when he was ordered off the third time the car was at a standstill; but a passenger upon the car, and a witness who was upon the sidewalk, and who saw the boy, and heard the driver order him off, say that the car was moving. The question of merely permitting the boy to get off was not the negligence which plaintiff's proofs tended to disclose. The second count of the declaration alleged that the boy had been put off, or ordered off, while the car was in motion, and there was proof tending to establish that allegation. The jury should have been directed to that question.

The charge of the court that, "if the boy knew what his father meant when he warned him not to go on the car, then he was not entitled to the same degree of care as an innocent child, who gets onto a car without any warning," was clearly erroneous. The father of the boy testified that he had "warned the boy not to be jumping on the cars; to keep off the cars, and away from them; and that he punished him when he found that he did go there." There was no testimony tending to show that he explained the danger and risk to the boy. He simply threatened to punish him if he did it, and he probably meant what he said.

It was a question for the jury whether the driver was negligent if he ordered the boy to get off while the car was in motion, or whether he should have first stopped the car, and then ordered the boy to get off.

While plaintiff was upon the stand the court said:

"I don't see what damages the parents would suffer for the death of a child six years of age. You are entitled to their services until they are 21, but it costs a great deal more to raise them than they can suffer."

The questions of plaintiff's damage, and the value of decedent's services less the expenses of care and support, were questions for the jury, and not for the court.

It was suggested upon the hearing that judgment had not been entered when the writ of error was sued out. The writ issued February 24, 1892, returnable March 29, 1892. The bill of exceptions was settled in March. Judgment was entered April 8, 1892. The time for the return to the writ of error was extended to May 5, 1892, and the return was filed here April 21, 1892. Two full terms had intervened before the hearing, and no motion to dismiss was made. The objection comes too late. The judgment affected is that appearing in the return.

The judgment is reversed, and a new trial awarded.

The other Justices concurred.

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GEORGE W. DUTCHER v. ELI S. BUCK.

Partnership—Profit sharing—Liability to third parties.

1. All of the authorities agree that profit sharing is evidence tending to show a partnership.
2. To constitute one a partner as to third persons, it is not necessary that he should agree to share in the losses of the business; citing *Sager v. Tupper*, 38 Mich. 258, 265.
3. Community of property, interest, and profits in a venture launched for the benefit of two persons makes them both principals, and whatever is done for their mutual benefit must

be deemed to have been done by authority of both; citing *Corey v. Cadwell*, 86 Mich. 570; *Purvis v. Butler*, 87 Id. 248.

Error to Kent. (Grove, J.) Submitted on briefs January 12, 1893. Decided June 23, 1893.

Assumpsit. Plaintiff brings error. Reversed, and judgment entered for appellant. The facts are stated in the opinion.

Earle & Hyde, for appellant.

Birney Hoyt, for defendant.

McGRATH, J. This is *assumpsit*, originally brought in justice's court, for work and labor.

The court below made the following findings:

"In the spring of 1889 the defendant was the owner of 840 acres of land in Charlevoix county, in this State. About the 6th of March, 1889, he made the following agreement with one Arthur Leclear: The said Leclear was to go on the defendant's land, and cut logs and bolts, and market and sell and receive payment for the same. He was to pay the expenses of the job, pay the defendant $1.00 a thousand stumpage for logs, and 25 cts. a cord for bolts. He was to furnish the use of a team, and defendant was to furnish the use of a team. Leclear was to have $20 a month for his services, and his wife was to have $3 a week for her services in boarding the men, and what was left was to be divided equally between defendant and Leclear as profits. The stumpage was to be paid first, and then the expenses of the job, including the pay of the men, were to be paid by Leclear; after that, he and his wife to receive above amounts, and balance, if any, divided as above. It was agreed that at any time when Leclear could not, from the proceeds of the logs and bolts, pay expenses, he should cease further work under the contract.

"In the month of December, 1889, the defendant, who lives in the township of Paris, Kent county, Michigan, went to Charlevoix county, and, by a subsequent agreement then made between himself and Leclear, he sold the logs and bolts thereafter for that winter, and collected the pay

for the same, and paid all the expenses of the job, including the men, out of such money (the subsequent agreement modified the original agreement only as stated); and on the 6th of March, 1890, gave orders to the men upon the railroad station agent for the balance of their wages then due for the winter's work, signing the orders with his own name.

"In May, 1889, the plaintiff, who lives in Byron, Kent county, Michigan, and whose sister was the wife of said Arthur Leclear, went to Charlevoix county, and was employed by Leclear to work on the job. The plaintiff is a deaf-mute of the age of 26 years. He was told by Leclear that he was to pay him, and that the money to pay his wages was to come from Buck. He worked from that time on until the next March. He was paid by defendant, under the said subsequent agreement, for his work from the time that defendant went to Charlevoix in December, 1889, but his work for the previous summer and fall was not paid for. Defendant did not know that plaintiff was not paid for his summer's work until after his final settlement with Leclear. Leclear received, for logs and bolts sold prior to December, 1889, about $2,000, none of which was paid to defendant, except about $16 in money, $20 in road work, and a house, for which Buck allowed Leclear $300, and a barn, $25. Buck paid $104 for supplies for the job at Leclear's request, and this sum, together with the stumpage for the logs and bolts, exceeded the amount received by Buck, as above stated. Said defendant did not, on the 8th of March, A. D. 1890, or at any other time, promise or agree to pay plaintiff for said labor, or any part thereof.

"I find that there was no partnership in fact between Arthur Leclear and defendant. Said plaintiff was not employed to do said work and labor by the said defendant or for him, but said plaintiff was employed by one Arthur Leclear, and said work and labor was done for said Arthur Leclear. Said Leclear had no authority to hire or employ any person for defendant. Said Arthur Leclear and defendant were not partners in any business, and they did not hold themselves out to the plaintiff, or to the public, or to any one, as partners.

"I find, as a conclusion of law, that defendant is not liable in this action to pay plaintiff's claim herein, or any part thereof."

Much controversy has arisen over the conclusiveness of profit sharing as to the liability to third persons of such profit sharer. The authorities upon that question are not harmonious, even in our own State. All, however, agree that profit sharing is evidence tending to show partnership. It was held in *Beecher v. Bush*, 45 Mich. 188, and in *Colwell v. Britton*, 59 Id. 350, that merely sharing in profits, where third persons have not been legitimately led to believe there was a partnership, does not create one as to them, unless there was one in fact. In both of those cases, however, the party sought to be charged as a partner received a percentage of the proceeds as a measure of compensation,—the one as rental, and the other as commission. Both come within the generally recognized exception to the rule laid down by a large number of authorities, that, as to third persons, profit sharing is conclusive as to liability. *Smith v. Bodine*, 74 N. Y. 30; *Leggett v. Hyde*, 58 Id. 278; *Haas v. Roat*, 16 Hun, 527; *Greenwood v. Brink*, 1 Id. 227; *Beudel v. Hettrick*, 45 How. Pr. 198; *Vanderburgh v. Hull*, 20 Wend. 70; *Heimstreet v. Howland*, 5 Denio, 68; *Everett v. Coe*, Id. 180; *Burnett v. Snyder*, 81 N. Y. 550; *Richardson v. Hughitt*, 76 Id. 55; *Eager v. Crawford*, Id. 97; *Ford v. Smith*, 27 Wis. 261; *Nicholaus v. Thielges*, 50 Id. 491; *Smith v. Knight*, 71 Ill. 148; *Niehoff v. Dudley*, 40 Id. 406; *Meserve v. Andrews*, 104 Mass. 360; *Haskins v. Burr*, 106 Id. 48; *Mollwo v. Court of Wards*, 4 Moak Eng. R. 121; *Ross v. Parkyns*, 13 Id. 834, 839 (note); *Ex parte Tennant*, 22 Id. 831; Colly. Partn. (6th ed.), 70–72; Story, Partn. § 27; *Smith v. Watson*, 2 Barn. & C. 401; *Heran v. Hall*, 1 B. Mon. 159; *Bartlett v. Jones*, 2 Strob. 471; *Whitcomb v. Converse*, 119 Mass. 43; *Harvey v. Childs*, 28 Ohio St. 319.

It is not necessary to rest the present case upon this naked rule. The court below, undoubtedly recognizing the rule laid down in *Beecher v. Bush*, that the test of part-

nership as between the parties is their intent, found there was no partnership in fact between Leclear and defendant; but in *Cleveland Paper Co. v. Courier Co.*, 67 Mich. 152, 158, it is held that—

"As to third persons the liability of a partner is frequently imposed, though it was not the intention of the party sought to be charged to become one, and even though a partnership could not have been made."

Numerous authorities might be cited in favor of this proposition.

It is held in *Eastman v. Clark*, 53 N. H. 276, that sharing profits in any other sense than sharing them in the capacity of a principal is not an absolute test of one's liability; that his liability depends upon whether he is a principal, bound by a contract made by himself, or his agent acting by his authority. Chief Justice Bellows died pending consideration of the case, and extracts from his notes are printed with the opinions filed in the case. He said that the recognized test had been announced in various forms as "a community of interest in the profits;" "a participation in the net profits;" "a participation in the profits as profits;" "a specific interest in the profits, with the right to an account;" that, "to constitute a community of interest in the profits, there must be a common interest in them as a principal trader, and as distinguished from a right as a creditor to receive a sum of money out of the profits, or a sum proportioned to the *quantum* of profits, or even a share of the profits as a compensation."

In *Loomis v. Marshall*, 12 Conn. 69, 77, Huntington, J., says:

"This community of profits is the test to determine whether the contract be one of partnership; and, to constitute it, a partner must not only share in the profits, but share in them as a principal."

In *Cox v. Hickman*, 8 H. L. Cas. 268, 306, Lord Cranworth says:

"It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test, for a right to participate in profits affords cogent—often conclusive—evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable on the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

The doctrine of these cases is the groundwork of the opinion of Mr. Justice COOLEY in *Beecher v. Bush*, where it is said that the elements of partnership are—

"Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, to the extent, even, of making one the sole agent of the others and of the business."

In the present case the agreement was that both parties should be compensated, the one for the timber, and the other for services; each supplied a team of horses; help was to be employed, and the wife was to be paid a certain amount for the board of such help; the timber was to be converted into logs and bolts; Leclear was to market and sell the logs and bolts, and pay the expenses, not only the stumpage and his own wages, and the board of the men, but all the expenses, including the wages of the men.

The manner in which the business was to be conducted was regulated by the agreement. Leclear was left no option except such as might be exercised by a mere foreman. In December the only modification made in the agreement was that defendant, instead of Leclear, should market and sell the products, collect the proceeds, pay the expenses, and account for the balance. The character of the venture was not changed. Leclear was none the less agent of both when he was paying out their moneys for labor expended upon their logs and bolts, than was defendant after December. Although the agreement provided that Leclear should pay the expenses, it is evident that such expenses were to be paid out of the proceeds, and the contract provided that, at any time when Leclear could not from such proceeds pay the expenses, he should cease to work.

The only provision lacking in this arrangement is one with reference to joint participation in losses. As between themselves the inference is, if any losses were sustained by an excess of expenses over proceeds, that Leclear should pay such loss. But to constitute one a partner as to third persons, it is not at all necessary that he should agree to share in the losses of the business. *Sager v. Tupper,* 38 Mich. 258, 265.

It is clear that these operations were carried on in behalf and for the benefit of both Leclear and defendant. When the timber was converted into logs and bolts, such products became the property of both. The labor was expended, reducing the timber to that condition, for the benefit of both, in order that profit might be realized. Upon the sale of the products the proceeds belonged to both. In *Beecher v. Bush* it is said: "If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting;" but, in the present case, defendant would certainly have been compelled to resort to the latter remedy. Here were all

the *indicia* of partnership relations, except, perhaps, that defendant was not to share in losses. The business was in no sense Leclear's independent business, carried on by him in his own way. The conduct of the business was restricted and regulated by the agreement. There was community of property, community of interest, and community of profits. The venture was one launched for the benefit of both parties. Both were principals, and what was done for their mutual benefit must be deemed to have been done by authority of both. *Corey v. Cadwell*, 86 Mich. 570; *Purvis v. Butler*, 87 Id. 248.

The judgment below is therefore reversed, and judgment entered here for the amount of the judgment in the justice's court, with interest from the date of said judgment, and costs of both courts.

LONG and GRANT, JJ., concurred with MCGRATH, J.

MONTGOMERY, J. *(dissenting).* The sole question in this case is whether the defendant was, as to the transactions out of which the claim of plaintiff arose, a partner of one Leclear.

Among the findings of fact by the circuit judge are the following:

"I find that there was no partnership in fact between Arthur Leclear and defendant. Said plaintiff was not employed to do said work and labor by the said defendant or for him, but said plaintiff was employed by one Arthur Leclear, and said work and labor was done for said Arthur Leclear. Said Leclear had no authority to hire or employ any person for defendant. Said Arthur Leclear and defendant were not partners in any business, and they did not hold themselves out to the plaintiff or to the public, or to any one, as partners."

The evidence is not returned, and no attempt has been made to present the question of whether the evidence supports the findings. It is insisted, however, that the Court may look into the other findings of the facts and

circumstances, with a view to ascertaining whether the facts specifically found are conclusively inconsistent with the finding that there was no partnership in fact. The facts so found are the following:

The defendant was the owner of 840 acres of land in Charlevoix county, both the defendant and Leclear being residents of Kent county. An agreement was made in March, 1889, between Leclear and defendant, by the terms of which it was agreed that "Leclear was to go on the defendant's land, and cut logs and bolts, and market and sell and receive payment for the same. He was to pay the expenses of the job, pay the defendant $1.00 a thousand stumpage for logs, and 25 cents a cord for bolts. He was to furnish the use of a team, and defendant was to furnish the use of a team. Leclear was to have $20 a month for his services, and his wife was to have $3 a week for her services in boarding the men, and what was left was to be divided equally between defendant and Leclear as profits. The stumpage was to be paid first, and then the expenses of the job, including the pay of the men, were to be paid by Leclear; after that, he and his wife were to receive the above amounts, and balance, if any, divided as above. It was agreed that at any time when Leclear could not, from the proceeds of the logs and bolts, pay the expenses, he should cease further work under the contract."

This was found to be the agreement under which the operations were proceeding at the time the liability to plaintiff arose. I do not think that this finding is conclusively inconsistent with the finding that there was no partnership in fact between Leclear and defendant. If the terms of the agreement between the parties are to control the transaction, under no circumstances could Leclear, without violating the agreement, incur expenses which should become chargeable to the parties to the contract as partners. It was specifically agreed that, when Leclear could not pay the expenses, he should cease further work under the contract. The expenses of the job were to be paid by Leclear individually, and by the order of

payment the stumpage was to be first paid, and his own and his wife's wages were to be paid only in case there was a surplus after paying the workmen. The general finding imports that the parties did not intend a partnership, and it must be assumed that there was evidence to support this finding.

It is stated in Lindl. Partn. p. 10: "Whether an agreement creates a partnership or not depends on the real intention of the parties to it." See *Pollard v. Stanton*, 7 Ala. 761; *Gray v. Gibson*, 6 Mich. 300; *Beecher v. Bush*, 45 Id. 188. It is said, however, that, if parties have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement; but a specific agreement negativing a partnership may throw light on other clauses, and rebut inferences which might be drawn from them alone. Lindl. Partn. p. 11. Generally, profit sharing is *prima facie* evidence of an agreement of a partnership, and, in cases where the contrary intention does not appear, undoubtedly evidence of profit sharing is sufficient to constitute the parties copartners. The same author further says:

"Indeed, it has often been said that community of profit is the test of partnership. This, however, is not accurate. Whether persons are really partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses in it."

In the well-considered case of *Beecher v. Bush*, 45 Mich. 193, it was said:

"If parties intend no partnership, the courts should give effect to their intent, unless somebody has been deceived by their acting, or assuming to act, as partners; and any such case must stand upon its peculiar facts, and upon special equities. It is nevertheless possible for parties to intend no partnership, and yet to form one. If

they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise, we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'"

And again, at page 200, it is said:

"In so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner, unless by contract and with intent he has formed a relation in which the elements of partnership are to be found."

Partnership is a species of agency, and, where the parties to a contract do not themselves intend a partnership, it would seem, on principle, that the one who is unknown to those who deal with the others should be held only on the same ground that an undisclosed principal would be bound. This would preclude recovery in the present case, or in any case where the right of an ostensible principal to contract on behalf of the other is negatived by the very terms of the contract; and cases are numerous in which this test has been applied. *Cox v. Hickman,* 8 H. L. Cas. 268; *Eastman v. Clark,* 53 N. H. 276; *Dwinel v. Stone,* 30 Me. 384; *Clifton v. Howard,* 89 Mo. 192 (1 S. W. Rep. 26); *Newberger v. Friede,* 23 Mo. App. 631. See, also, *Morrison v. Cole,* 30 Mich. 102; *Runnels v. Moffat,* 73 Id. 202; *Murphy v. Craig,* 76 Id. 155; *St. Denis v. Saunders,* 36 Id. 370.

In the present case the profits, over and above the stumpage and expenses of putting in the timber, were to be

divided between defendant and Leclear; but it is distinctly found as a fact by the circuit judge that Leclear did not represent the defendant in doing this work, and the special facts found are not necessarily in conflict with this finding. The whole control of the work was with Leclear. He was to collect all the proceeds of the sales, he was to pay all expenses, must cease work when he was unable to do this, and the facts are entirely consistent with an intent on the part of the parties that the division of the excess was as a measure of compensation for the stumpage value of the timber.

I think the finding below should be sustained, and the judgment affirmed.

HOOKER, C. J., concurred with MONTGOMERY, J.

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MYRON W. CLARK ET AL. v. HENRY KELLOGG.

Guaranty of collection—Evidence—Pleading.

1. An agreement by which the assignor of a quantity of notes and accounts does guarantee, represent, and warrant that a specified sum shall be realized thereon, and which provides that the assignees shall use due diligence in their collection, amounts to a guaranty of collection.[1]
2. In order to recover upon such guaranty, the assignees must show that each note and account has been put into judgment, and that an execution has been returned thereon unsatisfied; citing *Bosman v. Akeley*, 39 Mich. 710; *Schermerhorn v. Conner*, 41 Id. 374.
3. Evidence of a waiver of the exercise of "due diligence" is inadmissible in a suit upon a guaranty of collection, unless specially counted upon in the declaration; citing *Aldrich v. Chubb*, 35 Mich. 350.

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[1] See *Totten v. Burhans*, 91 Mich. 495.

Error to Jackson. (Person, J., presiding.) Submitted on briefs March 9, 1893. Decided June 23, 1893.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Thomas A. Wilson, for appellants.

Blair & Wilson and *Parkinson & Day,* for defendant.

MONTGOMERY, J. The plaintiffs sued the defendant, counting upon a breach of an agreement given on the occasion, and in consideration, of the purchase by the plaintiffs from the defendant of a stock of goods and a quantity of notes and accounts. That portion of the agreement material to be considered in determining the questions involved reads as follows:

"The said party of the first part * * * does covenant and agree * * * that the annexed invoice is a true statement of the amount and value of stock, merchandise, and property, and also guarantee, represent, and warrant that there is in said stock goods to the value of $14,709.68; also that the amount of $29,702.54 net shall be realized, without charging for the personal services of the parties of the second part, nor other charges of second parties, except incurred in suits, by the parties of the second part upon the accounts and notes herein conveyed. The parties of the second part shall use due diligence in their collection."

The declaration counted upon this agreement, and set out no subsequent modification or waiver of its terms. On the trial the plaintiffs sought to recover by showing that they had dealt with the accounts as men of ordinary business judgment would, and also sought to show that the defendant had, as to a large portion of the accounts, directed the plaintiffs as to what he would require as evidence of due diligence, and that plaintiffs had complied with the demands of the defendant in this regard.

1. The circuit judge construed the original contract as

amounting to a guaranty of collection, and held that no showing of diligence was sufficient which did not include proof that the accounts had each been put in judgment, and execution had been taken out, and returned unsatisfied. This ruling was unquestionably right, if the proper construction was placed on the contract. *Bosman v. Akeley*, 39 Mich. 710; *Schermerhorn v. Conner*, 41 Id. 374.

It is contended, however, that the contract in question should not be construed as a guaranty of collection of each individual account, requiring resort to legal process in the collection of each, but amounted to a warranty and representation that there should be realized $29,702.54 from the total of the accounts; and that the fact that the amount guaranteed to be realized was much less than the face of the accounts negatives the idea that resort should be had to suit upon each account.[1] The infirmity of this construction is that it ignores the subsequent language, "The parties of the second part shall use due diligence in their collection," or accords to this language a meaning at variance with the settled significance of the terms employed. What constitutes due diligence is settled by the cases of *Bosman v. Akeley* and *Schermerhorn v. Conner, supra.*

In the case of *Ralph v. Eldredge*, 58 Hun, 203, a similar question was presented. Plaintiff and defendant were copartners. Defendant conveyed his interest to the plaintiff in the notes, accounts, and demands owing to the firm. The defendant at the same time executed to the plaintiff a bond with the condition that defendant should pay to the plaintiff one-half of the amount of the notes, accounts, and claims of the late firm assigned by defendant to plaintiff that should prove to be uncollectible, if any such there should be. The court say:

"It seems to be settled in this state that a guaranty of

[1] Counsel cited *Taylor v. Soper*, 53 Mich. 96; *Koch v. Melhorn*, 25 Penn. St. 89; *Struthers v. Clark*, 30 Id. 210.

collection is an undertaking to pay the sum of money guaranteed, provided the principal debtor is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him. * * * The plaintiff urges that the bond does not guarantee the collection of these claims, but is only a contract to pay plaintiff one-half of the amount of those which should turn out bad. But the bond uses the word 'uncollectible,' and the question must be, what is the legal meaning of that word? That word has a definite meaning, as decided in the cases above cited; and that meaning should be here enforced."

The legal signification of the term "due diligence," as applied to a guaranteed note or account, is well understood, and the parties must be assumed to have contracted with reference to that meaning.

2. The court rightly held that the alleged subsequent waiver could not be shown under the pleadings in this cause. The contract itself having fixed upon the plaintiffs a specific duty, the averment in the declaration that the plaintiffs did use due diligence amounted, in effect, to an averment that they had pursued the course which the law imposes upon them in order to charge the guarantor. If they relied on any excuse for failing to use due diligence, this should have been counted upon in the declaration. *Aldrich v. Chubb*, 35 Mich. 350.

Judgment affirmed, with costs.

The other Justices concurred.

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MATTHEW LAMONT v. FRANK LEFEVRE AND ALMINA LEFEVRE, IMPLEADED WITH MICHAEL DAILY.

Contract of sale—Payment—Mechanic's lien—Notice—Homestead.

1. A contract for the purchase of building material, which specifies no time for the payment of the purchase price, will be construed as contemplating payment on delivery.
2. Notice of the filing of a statement of lien, under the mechanic's lien law of 1885, need not be served upon the owner of the premises, where the contract out of which the claim arises was made with him; citing *Kirkwood v. Hoxie*, 95 Mich. 62.
3. A homestead exemption may be claimed in land purchased for a homestead, and upon which a building is afterwards erected, and occupied by the owner for hotel purposes, and in which his family reside, they having no other residence or home; citing *Mills v. Hobbs*, 76 Mich. 122; *King v. Welborn*, 83 Id. 195.
4. A lien attaches under the mechanic's lien law of 1885 to a homestead exceeding in value $1,500, subject to the statutory exemption; and, if the premises are incapable of division, they may be sold, as the only means of reaching the excess.

Appeal from Bay. (Cobb, J.) Argued April 7, 1893. Decided June 23, 1893.

Bill to enforce a mechanic's lien. Defendants appeal. Affirmed. The facts are stated in the opinion.

Hatch & Cooley, for complainant.

McDonell & Hall, for defendants.

HOOKER, C. J. Complainant, a material-man, filed the bill in this cause against Frank Le Fevre and Almina Le Fevre, husband and wife, and Michael Daily, to enforce a mechanic's lien for materials furnished for a hotel erected upon premises owned by Frank Le Fevre.

A contract to furnish material, erect and complete said

hotel, was let by Le Fevre to a firm of builders named Willis & Grant, who in turn sublet a portion to one Thompson. Thompson failed to perform, and negotiations were had whereby complainant furnished material which Thompson should have furnished. The principal dispute, so far as the facts are concerned, is over the question of defendant Frank Le Fevre's liability to complainant for this material, the complainant asserting that it was furnished upon the request of Le Fevre, accompanied by a promise to pay for the same the amount of complainant's bid. The defendants deny that Le Fevre promised to pay for the material, and allege further that, if he did, the promise, being oral, would come within the statute of frauds as a promise to pay the debt of Willis & Grant, who were under contract obligations with Frank Le Fevre to furnish the material.

Upon the question of fact it is sufficient to say that we agree with the circuit judge that the complainant established the contract alleged, and that it was an original promise, and valid. It was not within the statute, for complainant did not sell to Willis & Grant, nor did they purchase the material from him.

A number of legal questions arise. It is contended that there was no meeting of minds, because no time appears to have been specified when the amount agreed upon for the material should be paid; but the rule of construction in such cases is that payment upon delivery is contemplated.

The statement filed with the register of deeds was to the effect that the materials were furnished "in pursuance of *a certain contract* with Frank Le Fevre," and that there was $220 due; and a copy of this statement, with notice of filing, was served on Frank Le Fevre only. The bill alleges two contracts,—one made on or about July 26, 1890, for $400; and another, that complainant should furnish for the building such materials as Le Fevre might

order from time to time, for which he (Le Fevre) would pay, and under which arrangement complainant furnished materials to the amount of $20. This sum of $20 was rejected by the circuit judge, and, as complainant did not appeal, cannot be allowed here. It is mentioned because the defendants assert that it is the occasion of a variance between the statement, which mentions one contract, and the bill and proofs, which mention two; and it is contended, further, that the statement is excessive by this amount, and that the lien is therefore lost. It appears that the only reason for denying complainant any portion of his claim was the fact that in his statement of lien he did not say two certain contracts instead of one. By a mere technicality he is deprived of his security for $20, although an honest claim. The case differs from those cited by counsel for defendants, where persons wrongfully clouding debtors' titles with excessive liens are denied the benefit of the statute. The case of *Gibbs v. Hanchette*, 90 Mich. 657, carefully distinguishes between such cases and those where, through an honest mistake, too much has been claimed in the statement of lien, or by reason of a failure of proof the claimant was denied the entire amount claimed. We think this case is of the latter description. Under his pleading the court below declined to consider the $20 item, and for reasons given we cannot allow him the amount here, if we should find the statement filed would permit it, about which we deem it unnecessary to express an opinion.

A point is made over the matter of notice, defendant Almina Le Fevre not having been served with notice. The object of a notice is to prevent the owner from paying the principal contractor (Act No. 216, Laws of 1885, p. 295, § 3), and in this case, as the contract was made with the owner, there was no necessity for a notice. The

validity of a lien does not depend upon the notice. *Kirkwood v. Hoxie,* 95 Mich. 62.

The building for which this material was furnished was a hotel, with a wing; the latter, used for a barber shop, being entirely on the west half of lot 11, while the former was on the west half of lot 12, of block 19, in Bay City. The proof shows that the timber was used in both, which were being erected together, and it is not an unreasonable assumption that both were contemplated when the contract was made. We think they should be treated as one parcel, as defendants evidently treated them, and that the lien attached to both.

The remaining question pertains to the homestead rights of Mrs. Le Fevre. The defendants purchased the premises for a homestead before contracting, and moved upon them before the statement of lien was filed, with the design of making the same their home. They thereby made it a homestead, and the fact that the building erected and in which they reside is a hotel made no difference. *Mills v. Hobbs,* 76 Mich. 122; *King v. Welborn,* 83 Id. 195. To the amount of $1,500 it was exempt from this lien. Beyond that sum the lien attaches, and, as the premises cannot be divided, a sale affords the only means of reaching the excess. To hold that it could not be reached because indivisible would be to do violence to the plain intent of the statute, which, while it aims to afford every one a shelter, was not designed to enable one to defeat his creditors by so constructing valuable property as to make it difficult to divide it.

The decree of the circuit court will be affirmed, with costs.

The other Justices concurred.

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JONATHAN PENFOLD v. DWIGHT G. F. WARNER AND MARY WARNER.

Power of attorney—Construction—Husband and wife.

1. A power of attorney to sell and convey land will be strictly construed, and cannot be enlarged by construction.
2. The power granted in a power of attorney to sell any and all real estate, belonging to the parties executing it, in a designated county, only covers lands *then* owned by them in that county.
3. Land conveyed to a wife by her husband after the execution by them of a power of attorney to their son to sell any and all real estate belonging to them, or either of them, in a designated county, cannot be said to have *belonged* to the wife when the power of attorney was executed, in such a sense as to authorize the son to sell the land after its conveyance to his mother.

Error to Benzie. (Aldrich, J.) Submitted on briefs April 13, 1893. Decided June 23, 1893.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Manly C. Dodge (Smurthwaite & Higgins, of counsel), for appellant.

D. G. F. Warner (Pratt & Davis, of counsel), for defendants.

HOOKER, C. J. John W. Zimmerman, being the owner of a parcel of land in Frankfort, Benzie county, Mich., joined with his wife, Barbara E. Zimmerman, in a power of attorney to their son, Morris M. Zimmerman. This was duly acknowledged and recorded. In 1888, John W. Zimmerman quitclaimed the premises to his wife, Barbara,

and, shortly after, died. In 1890, Morris M. Zimmerman, as attorney for Barbara E. Zimmerman, conveyed the premises, except the north 100 feet, to the plaintiff, for a valuable consideration, by warranty deed. In September, 1891, Barbara E. Zimmerman quitclaimed the premises, except the north 50 feet, to the defendant Dwight G. F. Warner. Plaintiff brought ejectment. Judgment being rendered in favor of the defendants the plaintiff appealed.

This power of attorney was given by husband and wife at the time when the title to the real estate in question vested in him, and his wife had no title to any lands, aside from her inchoate right of dower in this parcel. Counsel argue from these facts that the language of the power should be construed to cover lands subsequently acquired, while on the other hand it is contended that this power of attorney conferred no greater authority than to convey her right of dower in a deed whereby her husband's title should be conveyed.

We are impressed by the importance of certainty in instruments authorizing the conveyance of lands, and by the serious consequences likely to arise if it be determined that a power of attorney may mean one thing or another, as the tints of surrounding circumstances, resting on parol testimony, may vary. When placed upon record, as under our recording laws it may be, there should be no uncertainty in its meaning, and strangers should not be required to look beyond the language used. We are aware that there are authorities which appear to attach importance to surrounding circumstances, but, beyond such as may be deemed to create an estoppel, we cannot approve them; and, inasmuch as titles to land cannot in Michigan be maintained upon an estoppel, we cannot recognize the authority of such cases. Eliminating extrinsic circumstances from the question, its solution is comparatively

easy. No doctrine is better settled than that these "powers of attorney are strictly construed, and cannot be enlarged by construction." *Wood v. Goodridge,* 6 Cush. 117; *Morrell v. Frith,* 3 Mees. & W. 402; *Neilson v. Harford,* 8 Id. 806; *Withington v. Herring,* 5 Bing. 442; *Rossiter v. Rossiter,* 8 Wend. 494; *Jeffrey v. Hursh,* 49 Mich. 31, 58 Id. 246. The Legislature has signified its approbation of this doctrine by restricting powers by statute. See How. Stat. chap. 215; Id. §§ 5623, 5629. Recurring to the instrument in question, we find the language to be as follows:

"John W. Zimmerman and Barbara E., his wife, * * * do make, constitute, and appoint Morris M. Zimmerman our true and lawful attorney for us, and in our name, place, and stead, and in the name, place, and stead of either of us, to bargain, sell, or mortgage any and all real estate belonging to us, or either of us, in any real estate in the county of Benzie," etc.

The plain import of this language limits the power to lands then owned by the parties. *Weare v. Williams,* (Iowa), 52 N. W. Rep. 328. As the title then stood, Barbara E. Zimmerman had no title in the premises. She had an inchoate right of dower, which she might release by joining with her husband in a deed of the premises, or by her conveyance to the holder of the title. *Rhoades v. Davis,* 51 Mich. 306. It was not an interest that could be conveyed by her so long as the husband held the title to the fee. But when she received a deed from her husband, and became owner of the fee, the inchoate right of dower was extinguished by the merger, and there was nothing left for it to operate upon, so far as that parcel of land was concerned, unless we are to extend the power by construction, which, as we have seen, the courts do not favor. This land did not belong to her when the power of attorney was executed.

Some other questions are raised upon the record, but,

as the case must hinge upon the power of attorney, we think it unnecessary to pass upon them.

The judgment will be affirmed.

The other Justices concurred.

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JERUSHA NAYLOR v. JOHN MINOCK.

Mortgage—Husband and wife—Estates in entirety—Statutory foreclosure—After-acquired title.

1. A mortgage executed by a wife upon land owned by herself and husband as tenants in the entirety, to secure the repayment to their son of money expended in the defense of his father on a criminal charge, and to be expended in his maintenance at an asylum to which he was about to be sent on his acquittal on the ground of insanity, is invalid in its inception to convey any estate, and is ineffectual to convey the title acquired by the wife on the death of the husband.

2. The following propositions are summarized from the opinion of Mr. Justice MONTGOMERY:

a—Neither a husband nor wife can convey the estate vested in them as tenants in the entirety by his or her sole deed, and any instrument by which either attempts to make such conveyance is void; citing *Fisher v. Provin*, 25 Mich. 347; *Insurance Co. v. Resh*, 40 Id. 241; *Manwaring v. Powell*, Id. 371; *Allen v. Allen*, 47 Id. 74; *Vinton v. Beamer*, 55 Id. 559; *In re Appeal of Lewis*, 85 Id. 340; 2 Bl. Comm. 182.

b—How. Stat. § 8506, which provides that a deed executed on the statutory foreclosure of a mortgage shall, in case of a failure to redeem, vest in the grantee all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, is to be read into mortgages executed since its enactment as a part of the contract;[1] citing *Brayton v. Merithew*, 56 Mich. 166.

c—The married woman's act of 1855 confers upon the wife power only to contract and bind herself in relation to her prop-

[1] See *Brennan v. Eggeman*, 73 Mich. 658, where the foreclosure was in equity.

erty and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it; citing *Johnson v. Sutherland*, 39 Mich. 579; *Insurance Co. v. McClellan*, 43 Id. 564; *Reed v. Buys*, 44 Id. 82.

Appeal from Wayne. (Hosmer, J.) Argued April 13, 1893. Decided June 23, 1893.

Bill to restrain the statutory foreclosure of a mortgage. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

John D. Conely, for complainant.

F. A. Baker, for defendant.

MONTGOMERY, J. A bill was filed in the Wayne circuit to restrain the statutory foreclosure of a mortgage. The relief prayed for was granted, and the defendant appeals.

James Minock and Bridget Minock were husband and wife. The land in question was conveyed to them on the 8th of June, 1846, by a deed in which they are named as grantees, as "James Minock and Bridget Minock, his wife." On the 15th of March, 1882, James Minock had been adjudged insane, and the defendant, his son, had become liable to pay the expenses incurred in his defense on a criminal charge, and to be incurred in maintaining him at the asylum.[1] With the expressed purpose of securing to defendant the repayment of these advances, Bridget Minock, on the 15th of March, 1882, executed the mortgage in question, which recites a consideration of $1,000 to the party of the first part, and provides:

"The party of the first part * * * has granted, bargained, sold, remised, released, enfeoffed, and confirmed, and by these presents does grant, bargain, sell, remise,

[1] James Minock was acquitted on his trial for murder on the ground of his insanity, and his son became responsible for his support at the asylum.

release, enfeoff, and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all those certain pieces or parcels of land [a description of which follows], together with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

"To have and to hold the above bargained premises unto the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever."

This grant is followed by the usual defeasance and power of sale, containing the further provision:

"And on such sale to make and execute to the purchaser or purchasers, his, her, or their heirs and assigns, forever, good, ample, and sufficient deed or deeds of conveyance in law, pursuant to the statute in such case made and provided."

1. It will be seen that the mortgage does not purport to be given for the debt of the wife, but is given to secure obligations primarily those of her husband; nor was the mortgage given upon what was, at the time of its execution, her separate estate. She and her husband were tenants in the entirety, and neither could convey without the other joining in the conveyance. *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Id. 241; *Manwaring v. Powell*, Id. 371; *Allen v. Allen*, 47 Id. 74; *Vinton v. Beamer*, 55 Id. 559; *In re Appeal of Lewis*, 85 Id. 340.

2. It is contended, however, that the mortgage debt was wholly for necessaries furnished to James Minock, an insane person, for which his estate, or his right of survivorship in the farm, was clearly liable, and the giving of the mortgage by Bridget Minock bound her interest or right of survivorship, so that the mortgage was, from the beginning, a perfectly valid security. We do not think this contention can be allowed. The validity of the instrument as a conveyance of an interest in land cannot depend upon the question of whether the moral obligation of the husband to pay or secure the payment is greater or less.

3. It is next contended that, the mortgage evidencing an intent to convey the title to the property described subject to the defeasance, Mrs. Minock and her heirs are estopped from asserting an after-acquired title, and hence that, when, on her husband's death, the full title vested in her, the mortgage from that moment bound the estate. This contention is based both on the claim that such is the common-law doctrine of estopped by deed, and also that the statute (section 8506, How. Stat.) is effectual to estop Mrs. Minock and her heirs. This section, so far as is material to the question here, is as follows:

"Unless the premises described in such deed [referring to deed on foreclosure] shall be redeemed within the time limited for such redemption, as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled as hereinafter provided."

In *Brayton v. Merithew*, 56 Mich. 166, this statute was construed, and it was held that, as to one not under disability, the execution of a mortgage with this statute in force operated to pass, not only the estate actually owned by the mortgagor at the time, but an after-acquired title; or, in effect, that the statute is to be read into the mortgage, as a part of the contract. It is unnecessary, therefore, to determine what the rule would be in the absence of this statute. If this mortgage was, at its inception, such a contract as a married woman is entitled to enter into in this State, it must be held effectual to pass the title which vested in her at her husband's death. But herein lies the difficulty. As already stated, neither the husband nor the wife could convey the estate vested in them in the entirety, unless both joined, and any instrument by which either attempted to make such conveyance

would be void. See 2 Bl. Comm. 182, and cases above cited. The wife's power to make contracts is not general, but is statutory, and cannot be extended beyond the statutory limits. In the present case, as we have already pointed out, the attempt to convey the title which she held at the time in this property was ineffectual. Had she, in terms, contracted to bind an after-acquired estate, there is no authority, either at the common law or by the statute, by which she could have done so, for a consideration passing to another person. It has been repeatedly held that the statute of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. See *Johnson v. Sutherland*, 39 Mich. 579; *Kenton Ins. Co. v. McClellan*, 43 Id. 564; *Reed v. Buys*, 44 Id. 82. See, also, as bearing indirectly upon the subject, *Hovey v. Smith*, 22 Mich. 170; *Kitchell v. Mudgett*, 37 Id. 81; *Carley v. Fox*, 38 Id. 389.

It follows, from the views expressed—First, that the mortgage was not valid, in its inception, to convey any estate; second, that it could not be effectual to pass an after-acquired title, because of the incapacity of the mortgagor.

The decree below was right, and will be affirmed, with costs.

The other Justices concurred.

JAMES H. DARLING AND CHARLES H. COOK v. JOSEPH B. JEWELL.

Cancellation of deed—Mistake—Fraud.

No questions of law are involved in this case, and the decree below is affirmed.

Appeal from Newaygo. (Palmer, J.) Argued April 18, 1893. Decided June 23, 1893.

Bill to set aside certain deeds. Decree dismissing bill affirmed. The facts are stated in the opinion.

W. D. Leonardson (*L. N. Keating* and *George Luton*, of counsel), for complainants.

A. G. Day, for defendant.

LONG, J. Complainants filed their bill in the Newaygo circuit court in chancery to set aside two deeds made by them to the defendant of certain premises in that county, on the ground of mistake in the description.

The controversy arises over the question as to what was understood to be the true boundary line at the time the deeds were executed. Complainants were tenants in common of the property, but conveyed by separate deeds. It is claimed that the lands agreed to be conveyed by complainants were bounded on the south by lands of Sarah E. Whitman and H. N. Smith, but that by an error in drafting the deeds, or by the fraud of defendant, Jewell, certain lands now claimed by Sarah E. Whitman and H. N. Smith were included in the deeds so executed by the complainants to the defendant. The court below, after a full hearing upon pleadings and proofs in open court, dismissed the bill, with costs.

We think the court below very properly dismissed the bill. The evidence is not convincing that any mutual mistake was made in describing the lands. Jewell evidently believed that he was purchasing all the lands described in the deeds, and paid the full consideration therefor. Defendant, Jewell, wrote the deeds for the complainants to execute. He claims to have put in such lands as were agreed upon. After the deeds were executed, ejectment was brought against him by certain parties who claimed to own some portions of the land. This bill was filed to avoid the effect of the warranty in the deeds as to those portions, and on the hearing the complainants sought to show that Jewell fraudulently put in more land than he purchased from them. We think the evidence fails to substantiate this claim. It is unnecessary to insert the evidence here. The court below, after a full hearing in open court, was of the opinion that complainants failed to make a case, and we concur in that opinion.

Decree is affirmed.

The other Justices concurred.

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JOHN H. CLEGG AND WILLIAM H. BROOK v. THE BOARD OF AUDITORS OF WAYNE COUNTY.

Board of supervisors—Examination of books and accounts—Wayne county auditors.

The board of supervisors of Wayne county have no power to examine the books and accounts of the treasurer and board of auditors of said county.

Mandamus. Argued April 25, 1893. Decided June 23, 1893.

Relators applied for *mandamus* to compel respondents to allow a certain account. The facts are stated in the opinion.

John J. Speed and *Henry M. Duffield,* for relators.

F. A. Baker, for respondents.

GRANT, J. October 14, 1892, the board of supervisors of Wayne county adopted a resolution appointing a committee to consider the necessity of an examination by an expert accountant of the books and records of the board of county auditors and county treasurer, and to make such recommendation thereon as they deemed advisable. October 18, 1892, the committee reported, recommending a biennial examination by an expert accountant, who should report to the board of supervisors each year. October 26, 1892, a special committee of the supervisors were appointed by the board for that purpose, and directed to employ an expert accountant to assist them, and such committee were directed to make such examination for a period of years as they should find expedient and necessary. February 6, 1893, the relators were employed by said committee as experts, in accordance with the above resolution, and a compensation of $25 per day was agreed upon, with 8 hours to constitute a day's work; the term of such employment to be at the pleasure of the committee. Relators entered upon such employment, and continued therein till February 28, 1893, when they presented to the respondents a bill for services rendered of $343.75, which was certified by the committee to be correct. The respondents refused to allow the account, and in their answer to the petition in this case alleged three reasons for such refusal, viz.:

1. Said account is not a legal claim against the county of Wayne.

2. The services rendered were not reasonably worth the sum charged.

3. No moneys had been raised for the payment of any such expense.

The Constitution (article 10, § 10) reads as follows:

"The board of supervisors, or, in the county of Wayne, the board of county auditors, shall have the exclusive power to prescribe and fix the compensation for all services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed or defined shall be subject to no appeal."

Section 6, art. 10, provides:

"A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law."

In 1889 the Legislature enacted a law relative to the powers, duties, and compensation of the board of auditors of Wayne county. 3 How. Stat. § 518b *et seq.* Section 8 of said act provides:

"Said board shall have power, and they are hereby authorized—

"*First,* at any time to examine the books and accounts of the county treasurer and other county officers, and they shall, on demand, be exhibited to them by said officers. And, as often as they may require, the accounts and vouchers of the county treasurer shall be audited and allowed by them; and after the same shall have been audited by said board it shall not be requisite that such accounts and vouchers be again audited by the board of supervisors."

In *Attorney General v. Board of Auditors,* 73 Mich. 53, this Court entered into a full and careful review of the above clause of the Constitution, examining the debates of the constitutional convention, the history of the legislation prior to the adoption of the present Constitution and subsequent thereto. The conclusion there reached was that—

"Neither legislation nor acquiescence can take away from the supervisors any of the jurisdiction given them by

the Constitution, and not given by that instrument to the county auditors of Wayne."

It was there also said:

"There can be no doubt that the convention meant to exclude any board but the supervisors from managing the business given into their charge by the Constitution in express terms, except in the single subject of services and claims, in Wayne county."

But, it must be remembered, in that case the board of auditors were assuming power over a subject which was expressly conferred by the Constitution (section 9, art. 10) upon the board of supervisors. In the present case the power sought to be exercised is not among those expressly enumerated in the Constitution as belonging either to the board of auditors or to the board of supervisors.

The power conferred by the act of 1889 upon the board of auditors is very broad, and the only conclusion from its terms is that the Legislature designed to place the accounts and books of the county treasurer under the exclusive control of that board. The last section of the act provides that "the board of supervisors of said county shall not have or exercise the power herein conferred upon said board of auditors." The previous law contained a like provision. 1 How. Stat. § 513. The Legislature, under the Constitution, enacted a general law defining the powers and duties of the boards of supervisors of the several counties, and conferring upon them certain local administrative and legislative powers. Among the powers so conferred was the examination of the accounts of the county treasurer.

Under the constitutional provision in regard to Wayne county, the board of supervisors cannot fix the compensation to be paid for any services rendered the county. They may hire the services, but the board of auditors must fix the compensation, and from their decision there is no appeal. It follows that, even if the board of supervisors had the

right to employ the relators, they had no right to fix their compensation.

The important question, however, still remains, whether such board possess the power to examine the books and accounts of the county treasurer, and the books and accounts kept by the board of auditors. Except as to the powers enumerated in the Constitution, the board of supervisors are not vested with any other powers or duties than those conferred upon them by statute. There is no statute giving them any control over, or any right to examine, the books kept by the board of auditors. As to them, therefore, the resolution of the board of supervisors is clearly void.

Under the general statute above cited, defining the powers of the boards of supervisors, these boards have the right to examine the books and accounts of the county treasurer. 1 How. Stat. § 478. The Constitution is silent upon this subject, and therefore such boards possess only such power in this regard as is conferred upon them by statute. This act makes no exception to the county of Wayne, but it must be construed in connection with the act prescribing the duties and powers of the board of auditors of Wayne county. Referring to that act, we find, as already shown, that the power is in express terms taken away from the board of supervisors, and limited to the board of auditors. The intent of the Legislature is clear, and its power to enact the law undoubted.

It follows that the action of the board of supervisors is void, and the writ must be denied.

The other Justices concurred.

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JAMES SHERLOCK v. WILLIAM J. STUART, MAYOR, AND WILLIAM A. SHINKMAN, CLERK, OF THE CITY OF GRAND RAPIDS.

Liquor traffic—Police power—Municipal corporations—Ordinances —License—Discretion of council.

1. No one possesses a natural, inalienable, or constitutional right to keep a saloon for the sale of intoxicating liquors; citing Black, Intox. Liq. §§ 46, 48.
2. The principel upon which is based the regulation of the liquor traffic is found in the police power of the State.
3. The restrictions and conditions which may be imposed upon the liquor traffic are entirely within the discretion of the people, acting through the Legislature; and they have the right to prohibit the low, the vicious, and the criminal from engaging in it.
4. The fee required to be paid as a condition precedent to engaging in the business of selling intoxicating liquors is called a "tax," but there are other conditions precedent which are inconsistent with a purely tax system, and partake of the character of a license; citing Black, Intox. Liq. § 108; *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Id. 223; *Robison v. Miner*, 68 Mich. 552.
5. The Legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application; and may enact that only reputable persons shall be allowed in the business, and may authorize the municipal authorities to determine the question of fitness.
6. Other considerations than the mere locality must often enter into the determination of the suitableness of the place for a saloon; and if the building be so arranged as to render violations of the law easy, or if the saloon is to be kept in connection with a house of prostitution, or if it be not situated upon a street or alley, or if it be in one of the upper stories of a building, or in a part of the city occupied for residence purposes only, or near a school, such conditions would certainly afford good reasons for the rejection of an application for a license.

7. Under the charter of the city of Grand Rapids, which confers upon the common council power to enact such ordinances as it may deem desirable to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof, the council may enact an ordinance requiring that all applications for license shall be made to the council, and prescribing the conditions precedent to their consideration.

8. An ordinance requiring all applications to be in writing, and to state the number or location of the proposed saloon, and that they be accompanied with a recommendation, signed by 12 reputable and respectable citizens of the city, certifying that the applicant is well known to them, and is of means, and qualified to keep a saloon, and is of good reputation, fame, and moral character, and is an orderly person; and requiring him to pay a specified sum for such license, and a fee for issuing the same, and to give a bond, to be approved by the council, conditioned that the applicant shall keep and maintain an orderly and well-regulated saloon during the continuance of his license, and pay all fines imposed according to law for a violation of any of the provisions of the ordinance; and providing that the license, when issued, shall state the number or location of the saloon, as designated in the application, and shall not be transferred to any other part of the city without the consent of the council,—is clearly authorized by the charter, and its plain intent is to confer upon the common council power to determine each individual application, so far as the location and suitableness of the place are concerned.

9. When the mayor and common council have in good faith exercised the discretion conferred upon them by law, the courts cannot review such discretion; and the action of the mayor in vetoing a resolution of the council granting a license, on the ground of the unsuitableness of the place where the saloon is proposed to be located, can only be reviewed by the council.

10. The question in *People v. Furman*, 85 Mich. 110, was whether the general liquor law of 1887 repealed all prior acts of the Legislature inconsistent therewith, general as well as local; and the power of the Legislature to confer, by subsequent legislation, upon municipal corporations, the right to deal with the liquor traffic in a manner not provided for in the general law, is to clear for argument.

Mandamus. Argued January 17, 1893. Denied June 23, 1893.

Relator applied for *mandamus* to compel the issuance of a liquor license. The facts are stated in the opinion.

Morse, McGarry & McKnight, for relator.

William Wisner Taylor, for respondents.

GRANT, J. The charter of the city of Grand Rapids confers upon the common council the power—

"To enact * * * such ordinances, by-laws, and regulations as they deem desirable * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof."

It further provides that—

"No person shall engage in or exercise the business or occupation of * * * saloon keeper, within the limits of said city, until he is first licensed as such by the common council, under such penalty as the common council may by ordinance prescribe."

In conformity with its charter the common council enacted an ordinance, the first section of which reads as follows:

"No person shall engage in the business of saloon keeping, in any house or place within the limits of this city, without first having obtained a license for that purpose from the common council."

Section 2 of the ordinance reads as follows:

"Every person desiring to keep a saloon in the city shall, before a license is obtained for that purpose, make an application in writing to the common council for such license, stating the number or location of the saloon where the business for which the license is asked is to be carried on, which application must be accompanied with a recommendation, signed by at least twelve reputable and respectable citizens of this city, certifying that the applicant is well known to them, and is of means, and qualified to keep a saloon, and is of good reputation, fame, moral character, and an orderly person. Such applicant shall also, before receiving his or her license, pay into the city treasury such sum for said license as the common council shall annually fix for that

purpose, and take the treasurer's receipt therefor, and also a fee of fifty cents for issuing such license. Such applicant shall also, before receiving said license, execute a bond to the city of Grand Rapids, in such sum and with such sureties as shall be approved by the common council, conditioned that such applicant shall keep and maintain an orderly and well-regulated saloon during the continuance of his or her license, and shall pay all fines imposed and costs therewith assessed upon him or her, according to law, for a violation of any provision of this ordinance. Said license, when issued, shall state the number or location of the saloon, as designated in the application, and shall not be transferred to any other part of the city without the consent of the common council; and no license issued as aforesaid shall extend beyond the first Monday in May next after the issue of the same."

The relator presented his petition to the council under this ordinance, and the council, by a majority vote, granted the license. The mayor, under the power conferred on him, vetoed this action of the council, and no further action thereon has been taken. The relator now asks this Court to compel the respondents to issue the license. The reason given by the mayor for his veto is that the place specified in the petition is unsuitable for a saloon. He presented this reason at length in his message, from which it appears that he has acted in entire good faith, and not from mere caprice, or arbitrarily.

It is contended that the power conferred upon the common council should be exercised by a general ordinance fixing districts or limits within which saloons may be kept, and that the council does not possess the power to hear and determine each individual case.

The principle upon which is based the regulation of the liquor traffic is found in the police power of the State. No one possesses a natural, inalienable, or constitutional right to keep a saloon for the sale of intoxicating liquors. "To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling." Black, Intox. Liq. §§ 46,

48. By the Constitution of 1850 such sales were absolutely prohibited. By the amendment of 1876 the prohibitory clause was removed from the Constitution, and the power vested in the Legislature to deal with the traffic as it deemed expedient and wise. In some counties of the State the traffic is now prohibited, while in the others it is regulated by the general law of 1887, and by the charters of municipal corporations. The Legislature may now determine who may carry on the business, and the time when, and the place where, it may be carried on. It is manifest that the welfare of society requires that this business should be in the hands of reputable, law-abiding persons. It is notorious that the low, the vicious, and the criminal are often engaged in it. The people, under our Constitution, have the right to prohibit such persons from engaging in it. The restrictions and conditions upon it are entirely within the discretion of the people, through the Legislature.

"It is not for the courts to determine its expediency, or, as said by Mr. Cooley in his work on Constitutional Limitations, 'to run a race of right, reason, and expediency with the legislative branch of the state government.'" *Robison v. Haug*, 71 Mich. 42; Cooley, Const. Lim. 597.

"If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." *Ex parte Christensen*, 85 Cal. 208; *Crowley v. Christensen*, 137 U. S. 86 (11 Sup. Ct. Rep. 13).

The system, in this State, is not purely a tax system. The fee to be paid as a condition precedent to entering upon the business is called a "tax," but there are other conditions precedent which are inconsistent with a purely tax system. These provisions partake of the character of a license. It is said by Black:

"Any law which requires certain acts, other than the mere payment of the tax, to be done by the party, as a prerequisite to his right to enter upon the pursuit of the

trade in question, and makes it a penal offense to engage in the business without such formalities, is in reality a license law, no matter whether it be called a 'tax,' or by any other name." Black, Intox. Liq. § 108.

In Ohio a law nearly parallel in its provisions with the act of 1887 was held to be a license and not a tax law, and therefore void under the constitution of Ohio. *State v. Hipp*, 38 Ohio St. 199; *Butzman v. Whitbeck*, 42 Id. 223. Mr. Justice CAMPBELL, in commenting on the law of 1887, calls this provision "the tax or license for doing business." *Robison v. Miner*, 68 Mich. 552.

Under this comprehensive police power of the State it is, in my judgment, too clear for argument that the Legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application. The Legislature may also enact that only reputable persons shall be allowed in the business, and may authorize the municipalities to determine the question of fitness. If the State possesses this right, the power to determine these questions must, in the first instance, be lodged in the municipality, or some board representing it, or in some other body or court. There is no presumption that the persons charged with this duty will not perform it, or that they will abuse the discretion given them. Other considerations than the mere locality must often enter into the determination of the suitableness of the place for a saloon. If the building be so arranged as to render violations of the law easy, or if it is to be kept in connection with a house of prostitution, or if it be not situated upon a street or alley, or if it be in one of the upper stories of a building, or in a part of the city occupied for residence only, or near a school, these would certainly afford good reasons for rejecting the application. Mr. Cooley says:

"The state has also a right to determine what employ-

ments shall be permitted, and to forbid those which are deemed prejudicial to the public good. * * * The general rule, undoubtedly, is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class, while leaving them open to others. Some employments, for example, may be admissible for males, and improper for females; and regulations recognizing the impropriety, and forbidding women engaging in them, would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable." Cooley, Const. Lim. (6th ed.) 742.

In the unreported case of *Van Dann v. Uhl, Mayor of the City of Grand Rapids*, decided October 29, 1891 (no opinion being filed), the precise question in the present case was involved, and the writ was denied.

It is said in Black on Intoxicating Liquors (section 170):

"The rule obtains in a few of the states that if a person who desires a liquor license brings himself within the terms of the law, by complying with all the statutory preliminaries, and possessing the requisite moral and other qualifications, he is entitled, as a matter of law, to be licensed, and the license cannot be withheld from him. But in far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case, as to granting or refusing the license applied for." See, also, the authorities there cited: *In re Hoover*, 30 Fed. Rep. 51; *Sparrow's Petition*, 138 Penn. St. 116; *U. S. v. Ronan*, 33 Fed. Rep. 117; *Perkins v.*

Ledbetter, 68 Miss. 327; *Batters v. Dunning*, 49 Conn. 479; *Ailstock v. Page*, 77 Va. 386.

In this case the common council enacted an ordinance requiring application to keep a saloon to be made to it, and prescribing the conditions precedent to its consideration by the council. This places no limitation upon its discretion, but only prescribes a mode of procedure. I think the ordinance is clearly authorized by the charter, and that its plain intent is to confer upon the council the power to determine each individual application, so far as the location and suitableness of the place are concerned. The veto of the mayor was based entirely upon the unsuitableness of the place. Relator has been treated in the same way, and for the same reason, as was another who applied for a license in this same building. The place was in the rear part of the building, fronting upon Monroe street. A thin board partition separates the room where the saloon is to be kept from the front room. Application was made to keep a saloon in this building, designating it as "No. 48 Monroe Street," but was unanimously rejected by the council. The return alleges that this application is made in the interest of the former applicant. The mayor and the council are more familiar with the place and its surroundings, with its interior arrangements, with the purposes for which the entire building is to be used, and with all the circumstances of the case, than we can possibly be. When the mayor and council have in good faith exercised the discretion conferred upon them by the law, courts cannot review it. There is nothing in this case showing any abuse of discretion, or the arbitrary exercise of power. The action of the mayor, therefore, can only be reviewed by the common council.

The question in *People v. Furman*, 85 Mich. 110, was whether the general liquor law of 1887 repealed all prior acts of the Legislature inconsistent therewith, general as

well as local. The power of the Legislature to confer, by subsequent legislation, upon municipal corporations, the right to deal with the liquor traffic in a manner not provided for in the general law, is too clear to require argument. This right was conferred upon the city by a subsequent act.

Writ denied.

HOOKER, C. J., and MONTGOMERY, J., concurred with GRANT, J.

McGRATH, J. *(dissenting).* This is an application to compel the mayor and city clerk of Grand Rapids to issue a license to carry on a saloon at No. 80 Waterloo street, in a block located on the corner of Waterloo and Monroe streets. Relator presented his bond to the common council, and that body approved it, and recommended that the license be granted. The mayor vetoed the action of the common council, giving as his reason that an application had been before made, by one Johnson, for a license to keep a saloon at 48 Monroe street (the Monroe street front of the same building), which called forth a remonstrance, and the application was rejected; that—

"It seems to be the almost universal opinion that this is an unsuitable place for a saloon, and, aside from that, there are reasons which seem to justify its refusal. We are chosen to enforce the laws, and to see that no advantage is taken of us, where the laws can be evaded. In this case there is only a temporary board partition separating the room on Monroe street from the room where the saloon is to be kept, and immediately upon the license being received this partition can be taken down, and the saloon opened up on Monroe street; and there is no power possessed by the city, or its officers, to prevent running it at the place where they have refused, unanimously, to have it located. We should make it sure this would not happen.

"Again, I am convinced that this application in the interest, if not for the use, entirely, of Mr. Johnson, and Mr. Johnson himself states to me that he expects to open a

restaurant on the second floor, in case the billiard tables are moved out, as they may be, and to fit up sleeping rooms on the third floor, with an inside stairway from the saloon to this restaurant. We would be putting it beyond the power of the officers to compel compliance with the laws."

Section 10, title 3, of the charter of Grand Rapids provides that the common council—

"Shall have power, within said city, to enact, make, continue, establish, modify, amend, and repeal such ordinances, by-laws, and regulations as they deem desirable, within said city, for the following purposes: * * * To license and regulate the keepers of hotels, taverns, and other public houses, grocers, and keepers of ordinaries, and victualing and other houses or places for furnishing meals or food; to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof."

The ordinance provides that—

"No person shall engage in the business of saloon keeping, in any house or place within the limits of this city, without first having obtained a license for that purpose from the common council."

Every person desiring to keep a saloon is required by this ordinance to make an application in writing to the common council, stating the number or location of the saloon, accompanied with a recommendation, signed by at least 12 reputable and respectable citizens of the city, certifying that the applicant is of good reputation, fame, moral character, and an orderly person. No ordinance has been enacted fixing any districts, prescribing the location of saloons, or how they shall be separated from other apartments, or how the building shall be otherwise occupied.

It will not be contended that the charter power to license includes the power to prohibit either hotels, taverns, public houses, groceries, or saloons. The right to sell liquor, under certain restrictions and conditions, is made lawful by statute, and the statute expressly provides by what

method counties may exercise the prohibitory power. The power to license is conferred as a mere incident of the power to regulate. When the liquor business is carried on within the restrictions established by the Legislature, and such additional restrictions as may be lawfully imposed by local authority, its rights should be respected and protected by courts as carefully, and to the same extent, as those of any other business. *People v. Scranton,* 61 Mich. 244; *Amperse v. City of Kalamazoo,* 59 Id. 78. The power to regulate assumes the existence of the traffic. Suppression is not regulation, but prohibition. The words "regulate" and "prohibit" are not synonymous. *People v. Gadway,* 61 Mich. 285; *In re Hauck,* 70 Id. 396.

In *Potter v. Village of Homer,* 59 Mich. 8, 13, Chief Justice CAMPBELL says:

"The Legislature, and not the common council, has the right, and has exercised the duty, of determining on what terms liquors may be sold. * * * It was not designed by the law that the lawfulness or unlawfulness of the traffic should be determined by a common council, or that the power to do business should depend on their pleasure. The statute itself has fixed the conditions, and nothing is left to the council, except to pass upon the sufficiency of the sureties. * * * In this they have the same discretion, and no more, that is possessed by other persons called on to approve sureties. * * * It is tyrannical, as well as unlawful, to hinder any one who is ready to furnish security from conducting his lawful business."

In *Re Frazee,* 63 Mich. 396, 406, it was held that whatever regulations are made by a municipality must operate uniformly under the same conditions.

"All by-laws," says Chief Justice CAMPBELL, "made to regulate them, must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. * * * When men in authority have arbitrary power there can be no liberty."

The ordinance in that case was held to be unreasonable—

"Because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions, and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions, operating generally and impartially."

The act of 1887 undertook to authorize the rejection of the bond if the principal was known to the board, to which the bond was presented for approval, to be a person whose character and habits would render him an unfit person to conduct the business. In *Robison v. Miner*, 68 Mich. 549, 555, this provision was held void. Mr. Justice CAMPBELL, referring to the power sought to be vested in the board, says:

"If no standard is laid down, there may be as many scales of fitness and unfitness as there are boards. We have already had occasion, under the old law, to discover that boards desirous of preventing liquor selling are ingenious in finding fault with bondsmen. There are very many excellent people who regard every seller of liquor as a bad man, unfit for social privileges, and others who hold peculiar views on other topics, which would render them harsh censors. If the statute had fixed the rule, there would be means of protecting parties against caprice and condemnation unheard. But when the same persons are to be judges of the proper causes of rejection, as well as of the fitness of persons under such causes, the law subjects every one to the mere will of his neighbors, and gives him no rights whatever. No man's rights can be submitted, under a constitutional government, to the discretion of anybody."

See, also, *Kuhn v. Common Council*, 70 Mich. 534, 538.

In *Baltimore v. Radecke*, 49 Md. 217, 230, referring to an ordinance respecting the use of steam engines in the city of Baltimore, the court say:

"It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories, and other similar establishments, within

certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. * * * When we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism, and other improper influences and motives, easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

In *Yick Wo v. Hopkins*, 118 U. S. 356, an ordinance of the county and city of San Francisco made it unlawful for any person to carry on a laundry business within the corporate limits without first obtaining the consent of the board of supervisors, unless the laundry was located in a brick or stone building. It appeared that there were about 320 laundries in San Francisco; that 310 of them were in wooden buildings; that 240 of them were owned and conducted by Chinamen; that 200 of said Chinamen had applied to the board of supervisors for permission to do business; and that all of said applications were denied, while all the applications of those of other nationalities were granted, except one. The court held that the ordinance was invalid because it undertook to confer

arbitary power on the supervisors to deprive a person of the right to carry on his business. Mr. Justice Matthews, speaking for the court, says:

"If an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent without reason, and without responsibility. The power given to them is not confined to their discretion, in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

In *Tugman v. Chicago,* 78 Ill. 405, it was held that an ordinance which prevents one citizen from engaging in a particular business in a certain locality, under a penalty, while another is permitted to engage in the same business in the same locality, is unreasonable and void, and that it makes no difference that the persons who are allowed to continue were already engaged in the business when the ordinance was adopted, for, if the ordinance prohibits one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced.

The reasons given by the mayor for his veto in the present case illustrate the necessity for some uniform regulations fixing the rights of applicants, and the conditions under which licenses may be granted. The mayor *is convinced* that the application is in the interest, if not for the use, of Johnson. This is a mere supposition, unwarranted by any fact that appears either in relator's application to the council, or in the return here made. It is a mere notion of his own. The fact that a restaurant

"may be" opened on the second floor "if the billiard tables are removed, as they may be," or that sleeping rooms are to be located on the third floor, or that the board partition divides the lower floor into two apartments, or that stairs lead from this floor to the next, are not unusual conditions. In a number of the cases which have come before this Court, saloons are carried on in connection with restaurants, cigar stores, billiard rooms, and lodging apartments, and no law exists prohibiting such connection. In other cases, saloons are connected with living apartments. In others, side doors connect with hallways, and back doors with alleys. These are matters which are susceptible of definite rules, if the power exists to impose conditions respecting them. In the absence of rules applicable to all, there is no protection against individual persecution, and the exercise of arbitrary power or caprice, and the success of any application may depend upon the measure of the applicant's influence, or upon the influence exercised by the proprietor of the establishment next door, which has already been licensed.

The power to license or regulate the business, or to prescribe the locality in which it shall be carried on, is conferred with the intention that it shall be exercised by the body to whom that power is delegated, and in the mode prescribed. Black, Intox. Liq. § 228; Cooley, Const. Lim. (6th ed.) pp. 248, 249. The very grant of power, in the present case, describes the mode of its exercise. It contemplates definite, impartial, and permanent rules, operating uniformly, and negatives the idea of an arbitrary exercise of the power in each case, as it may arise. If the position taken by respondents is correct, the council may refuse a license to A., and grant one to B., or it may refuse to grant one to A., at No. 80 Waterloo street, and grant one to B., at No. 82 Waterloo street. Indeed, the petition in the present case sets up, and it is not denied, that within

less than 11 feet of the place named there is a saloon in operation, and within the same block there are three saloons. The power conferred by the charter can only be exercised by the adoption of a general ordinance, prescribing a general rule by which licenses may be granted, and all persons coming within the requirements of such ordinance, and complying with its terms, are entitled to receive a license. Black, Intox. Liq. § 228. The matter must not be left to the caprice of any one, but, if regulated at all, must be by permanent legal provisions, operating generally and impartially, and reasons given for the refusal of a license must have their basis in, and be supported by, such provisions. See *State v. Mahner*, 43 La. Ann. 496; *State v. Dubarry*, 11 South. Rep. 718; *City of Jacksonville v. Ledwith*, 26 Fla. 163; *Ex parte Theisen*, 11 South. Rep. 901.

In *Sparrow's Petition*, 138 Penn. St. 116, and in *Raudenbusch's Petition*, 120 Id. 328 the general law provided that the court of quarter sessions should hear petitions, in addition to that of the applicant, in favor of, and remonstrances against, the application for such license, and in all cases should refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license was not necessary for the accommodation of the public, and entertainment of strangers or travelers, or that the applicant was not a fit person to whom such license should be granted. In *U. S. v. Ronan*, 33 Fed. Rep. 117, and in *Re Hoover*, 30 Fed. Rep. 51, the code of Georgia expressly empowered the commissioners "to grant or refuse such application" for a license. In *Ailstock v. Page*, 77 Va. 386, by express statutory provisions, the county courts were vested with discretionary powers, and the applicant was allowed an appeal. In *Batters v. Dunning*, 49 Conn. 479, the act authorized the

county commissioners to license suitable persons to sell liquors in suitable places, and the court held that the statute had characterized, by a general qualifying word, the persons to be licensed, and the places of business; that the word was not defined by law, so that its application could be determined, except by the judgment of the commissioners. There is no doubt as to the power conferred in any of these cases.

The case of *Van Dann v. Uhl, Mayor of the city of Grand Rapids,* is cited by the majority, but that case is not reported, and we have been unable to agree as to just why the order to show cause was refused in that case, and there is no *data* at hand from which to settle the question. *Karreman v. Mayor of Grand Rapids,* determined July 9, 1889, but not reported (no opinion being filed), involved the same question here presented, and after a full hearing a *mandamus* was granted.

The section of the charter of Grand Rapids, referred to by Mr. Justice GRANT, prohibiting persons from engaging in the business without having first obtained a license, is as follows:

"SEC. 21. No person shall engage in or exercise the business or occupation of hotel or tavern keeper, innholder, common victuler, or saloon keeper, within the limits of said city, until he is first licensed as such by the common council, under such penalty as the common council may by ordinance prescribe; and all persons who shall keep a bar, or who shall sell beverages by the cup or glass, shall be deemed saloon keepers, within the meaning of this act, and be required to take license as such: *Provided,* that nothing in this act shall be construed as licensing the sale of intoxicating liquors as a beverage."

The power of the council in the premises is derived from section 10, and not from section 21. The question here is not so much what power the Legislature has over the liquor traffic, or what power may be delegated to

municipalities, but rather what is the nature of the power granted in this particular instance? Does the grant prescribe the manner of its exercise? Is the power granted power to legislate on the subject, or is it a discretionary power, in the absence of ordinance, regulation, rule, or order? Does the grant of power to license under fixed rules, orders, regulations, or ordinances convey the right to refuse arbitrarily a license in a case where all the conditions of existing ordinances have been complied with? I think not, and the writ should issue.

LONG, J. *(dissenting).* I am unable to agree fully with my brethren in this case. There can be no doubt that under our Constitution the Legislature has power to confer authority upon the common council of a city to regulate the business of selling liquors, or to prohibit the business altogether. The power over the liquor traffic is vested by the Constitution in the Legislature, to deal with it as it deems expedient, since the constitutional amendment of 1876; and the Legislature may now delegate the power of control to the legislative body of the municipality under the provisions of section 38, article 4, of the Constitution, which provides that "the Legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper." *Friesner v. Common Council,* 91 Mich. 504, 508.

The Legislature, by the charter of Grand Rapids, conferred upon the common council the power "to enact * * * such ordinances, by-laws, and regulations as they deem desirable * * * to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof." Under this provision of the charter the common council passed the ordinance in question, which reads:

"No person shall engage in the business of saloon keeping, in any house or place within the limits of this city, without first having obtained a license for that purpose from the common council." The ordinance also provides that every person desiring to keep a saloon shall make an application in writing to the common council, stating the number or location of the saloon, accompanied with a recommendation, signed by at least 12 reputable and respectable citizens of the city, certifying that the applicant is of good reputation, fame, moral character, and an orderly person.

There can be no question, it seems to me, that the ordinance is within the power conferred by the charter. Acting under this ordinance, the relator presented his application in writing to the common council. The application was accompanied with a recommendation, signed by 12 or more citizens of the city, certifying that the applicant was a person of good reputation, fame, and moral character, and an orderly person. The common council acted upon this petition, and by a majority vote decided that the license should issue. The mayor, claiming the right to exercise the veto power under the provisions of the charter, sent to the council his reasons why the license should not be granted. No further action has been taken, and the writ of *mandamus* is asked to compel the mayor and clerk to issue the license granted by the council. The reasons given by the mayor for his veto of the action taken by the council are not that the application is not accompanied with a recommendation, signed by 12 reputable and respectable citizens of the city of Grand Rapids, certifying that the applicant is of good reputation, fame, moral character, and an orderly person; neither is it based upon the fact that the 12 persons making certificate are not reputable and respectable, or that the applicant is not a person of good reputation, fame, moral character,

and an orderly person; but his objections were based entirely upon the unsuitableness of the place where the saloon was proposed to be kept. The place was in the rear part of a building fronting on Monroe street, and a thin board partition separated the room from the front room, which faced the street.

It is evident that the mayor's veto was the exercise of arbitrary power, and not warranted by the ordinance. Under the ordinance no person could keep a saloon without obtaining a license from the council, but the ordinance also provided what showing should be made to the council to obtain it. This showing was made, and the council granted the license. The mayor then stepped in, and, in no manner claiming but that the requirements of the ordinance had been fully complied with, sought to prevent the issue of the license upon some other ground, which the ordinance had not provided. This ordinance was a law of the city, and every person complying with its provisions had a right to have a license to keep a saloon. It could not be issued to one person, and denied to another. If the council desired to have other restrictions placed upon the business of keeping saloons, it should have provided such restrictions, or left out all mention of them.

The Legislature undoubtedly has the right to prohibit altogether, and may confer this power upon municipalities, and, if it may prohibit, it may impose such conditions upon the traffic as it may deem wise. It is not for the courts to determine the expediency of such legislation, or, as said by Mr. Cooley in his work on Constitutional Limitations, "to run a race of right, reason, and expediency with the legislative branch of the state government." Cooley, Const. Lim. 597. See, also, *Robison v. Haug*, 71 Mich. 42. It is said in *Ex parte Christensen*, 85 Cal. 208: "If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it

pleases." But the ordinance under consideration does not prohibit. It purports that the council shall grant licenses upon certain conditions, which are specifically set forth in the ordinance. The council has acted upon the application, and found that the conditions prescribed have been complied with. The mayor, by his veto, now sets up other conditions, not required by the ordinance. It may be true that the council would have had the right, under the charter, to impose the conditions by the ordinance which the mayor now prescribes; but it has not been done, and the mayor has no right now to prescribe them, or to insist upon conditions not so prescribed.

The writ of *mandamus* should issue as prayed.

THE BIRDSELL MANUFACTURING COMPANY v. FRANK E. BROWN AND JOHN SEHLER.

Principal and agent—Contract—Breach—Damages—Promise to indorse.

1. The relation of principal and agent is not changed as between the parties, nor as between the principal and a third person, by the failure of the agent to observe secret instructions given him by the principal.
2. An agent cannot be held as an indorser upon a mere promise to indorse, but, if the promise is made upon a sufficient consideration, an action may be maintained for its breach.
3. Where an agent sells and delivers a machine without having a full settlement with the purchaser, and taking his notes for the purchase price, as required by the contract of agency and the instructions of the principal, the measure of damages, as against the purchaser, is the price of the machine, and, as against the agent, compensation for the injury sustained by his failure to perform his agreement and follow the instructions given.

4. The defendants, who were agents of the plaintiff for the sale of clover hullers, are held not to have made themselves liable for the value of a huller sold and delivered without securing the notes of the purchaser, and returned by the purchaser to the defendants, and, after being stored for a time, reshipped by them to the plaintiff, under the facts stated in the opinion, a reference to which is necessary to a correct understanding of the questions decided.

Error to Kent. (Grove, J.) Argued March 8, 1893. Decided June 23, 1893.

Assumpsit. Defendants bring error. Reversed. The facts are stated in the opinion.

Ward & Ward, for appellants.

Stuart & Knappen, for plaintiff.

McGRATH, J. Defendants were acting as plaintiff's agents for the sale of clover hullers at Grand Rapids, under a written agreement dated December 29, 1888, by the terms of which defendants agreed—

To receive, and take good care, by storing under shelter, of all machines sent to them as such agents; and, should any machine sent to them remain unsold at the end of the season, to store the same under cover until the next season, or return the same to plaintiff.

"To take all orders on blanks furnished by the party of the first part, and to have the same properly filled and signed, showing property statement of purchaser, and to use all due diligence in ascertaining the correctness of such property statements, and to forward orders without delay for acceptance or rejection.

"To receive the purchase price of all machines sold as aforesaid, whether in money or notes, and to forward the same to the said party of the first part promptly, and at the time of settlement of each sale.

"That all moneys and notes and other securities taken for said clover separators (or parts thereof) are to be received by said parties of the second part in a fiduciary capacity, and not otherwise, and so accounted for; and said moneys, notes, and securities are in no case to be

used or appropriated by said parties of the second part, but are to belong (as soon as received by said parties of the second part) exclusively to said party of the first part, and to be promptly remitted to it as each settlement is made. * * * * * * * * * *

"To invariably have full settlement with the purchaser before the delivery of each machine, or any part thereof.

"To be personally responsible for any neglect of the faithful performance of any of the requirements embraced in this agreement.

"To sell only at such prices and on such terms as said party of the first part shall direct, and hereby guarantee payment for machines sold, unless said parties of the second part shall, before sale, send an order to the said party of the first part, with property statement of the purchasers thereon, and such order shall be accepted by it. Such order shall be in the form of a proposal, and may be accepted or rejected by said party of the first part."

On October 3, 1889, defendants sent a telegram to plaintiff at South Bend, Ind., as follows:

"Will you ship one huller, two January's time, good paper, our indorsement? Answer quick when can ship."

On the same day plaintiff replied:

"Will ship huller on that time, and can ship next Monday. Instruct us."

Defendants on the same date gave the following instructions:

"Ship the huller Monday next, as stated."

The huller was shipped on October 7, and on that date plaintiff sent to defendants the following bill:

"CLOVER-HULLER DEPARTMENT.
"SOUTH BEND, IND., Oct. 7, 1889.

"BROWN & SEHLER, Grand Rapids, Mich.,

"In commission account with Birdsell Manufacturing Co.

"Order No. 2,969. Machine No. 13,999.

"One No. 1 clover huller, trucks, and stacker, 9½ pulley, $470.

"Commission 20 per cent., payable at time and in same proportion as we receive our money, per contract.

"For terms ———.

"If sold on time, sale to be made subject to our approval, per contract.

"Transferred from ———."

The huller was delivered to the person for whom it was obtained, one Van Amburg. The notes were not obtained from the purchaser. On November 14, 1889, defendants wrote plaintiff as follows:

"*Gentlemen:*

"The last huller shipped us does not seem to work right, and we are unable to get settlement for it. We are no experts on huller business, but the party we sold to had worn out one of your hullers before, and said that he had no trouble whatever in cleaning the seed; but with this he cannot get the seed through the sieve; keeps a man at the sieve all the time, and then it will run over so that they have to stop and clean it out. If the man is not there all the time, it will load up and run over. Think will have to send a man who understands his business, to see what can be done with it, before we can get settlement. Any time about the 20th of the month will be all right for him to come, as the man is sick now, and would rather not start under a week. Let us hear from you by return mail what day a man can come, so that we can write him to be ready."

On November 19, 1889, plaintiff replied as follows:

"*Gentlemen:*

"You wrote us the other day that you needed an expert to look after one of your hullers. You also spoke about the party being sick who wanted help, and that he will not likely be able to work before the 20th. The weather being so bad, and the party sick, it will be best for you to telegraph us when everything is ready for starting the machine.

"You say he has trouble about getting the seed through the sieve. Do you mean the recleaner or the wire shoe? It is quite likely that if he would lower the tail board as low as possible behind, and put on plenty of wind, he will have no trouble whatever about the shoe clogging up. Tell him he need not be uneasy about blowing over seed. If the trouble is with the recleaner, perhaps the screens need washing off. Sometimes they get dirty or gummy, and the holes thereby become too small for letting the seed through properly. If the cylinder concaves are properly adjusted, and the tail board kept down behind, and plenty of wind let on, we have no doubt but that everything

will run all right. It is quite likely that some of his belts are too loose. We inclose cut with one of the belts marked in red ink. If he will keep this belt good and tight, and the fan belt also tight, we are quite sure he will need no expert."

On November 22, 1889, defendants wrote again to plaintiff as follows:

"*Gentlemen:*

"Answering yours of Nov. 19, would say that it will be necessary to send a man to see to this huller, as the customer has got balky. You can send a man at any time within a week if it stops raining, and we will see then what can be done."

After this letter was written, and on Nov. 30, one Altland, a representative from the home office, visited Grand Rapids, saw defendants, and also Van Amburg. At that conversation Van Amburg told Altland that he would not settle for the machine until it was made to give satisfaction. Altland says:

"I proposed to Van Amburg that we could try the machine, and he agreed to it, and set the 27th day of December for us to be here, to have an expert to show how the machine would work."

On December 7, 1889, plaintiff wrote defendants as follows:

"*Gentlemen:*

"Our Mr. E. W. Altland reports that Mr. Van Amburg does not expect to start up his huller again until between Christmas and New Year's. If convenient, we wish you would notify us either by letter or wire about three days before he desires to start the machine, giving the exact day, if possible, and we will have some one there to see that it operates properly. From what Mr. Altland says we are satisfied that the trouble lies exactly where we wrote you in our last letter. All that will be necessary in this case will be to lower the concave, or take out all of the teeth except one row, if the clover is dry enough, and then lower the tail board at the rear end of the machine, and turn on plenty of wind. If that is done, the shoe

will be kept clean, and the huller will work to everybody's entire satisfaction."

To this letter defendants replied, December 8, as follows:

"*Gentlemen:* The arrangement your Mr. Altland made with Mr. Van Amburg is that they were to start the huller on Friday between Christmas and New Year's, and that you were to have a man there at that date."

On December 14, 1889, defendants again wrote to plaintiff as follows:

"*Gentlemen:*

"Mr. Van Amburg, who has the huller that is unsettled for, called yesterday, to let us know that since he had been away from home there had another huller come in, and done all of the work in his neighborhood, including the job that the machine was to have been tried on. He says that there is no use in talking, if he should keep the huller, he could never get work to do with it in that country again. He makes a proposition to deliver the huller back here, lose his freight, and pay $50 for what he has damaged it. This, he says, is all that he will or can do. He is perfectly responsible for a dozen hullers, and we have had a great amount of deal with him, and always found him perfectly straight; but he is very headstrong and set in his way, and when he gets an idea that a thing is not right it is impossible to change it. If you wish to accept his proposition, you may have the $50, and carry the huller in stock here until another year. He will clean the huller up; and, as it has never hulled but a few days, thinks it is not damaged. We should judge that this would be the best way out of the trouble, but, if you have any other idea in the matter, perhaps you had better send Mr. Altland back here to talk to him, as we have done all we possibly can to get the settlement. Please let us hear from you by return mail, so that we can close the matter up one way or the other."

On December 16, 1889, plaintiff replied, refusing to accept the proposition, and stating that—

"The facts of the case are that the machine was shipped to you, for we did not know whom, on October 7

last, which we did on a telegraph order from you, in which you stated that you would indorse the paper. We heard nothing further in regard to this machine until November 14, under which date you wrote us that the machine did not seem to work as it should, and that you were unable to get settlement for same. You also stated that the trouble seemed to be in the mill. When Mr. Altland called upon you recently he reported fully in regard to this matter, and said that there was not the least doubt in the world but what the machine was all right. He also further stated that Mr. Van Amburg now expects to quit the threshing business on account of his eyes, and says, were it not for this, he is of the opinion that Mr. Van Amburg would not take the position he has in the matter. * * * To sum up this matter as above stated: The machine was sent without any order, and on your guaranty, and we shall look to you for the payment for the huller, on your guaranty on the paper taken for it. We regret very much that this matter has taken the shape that it has, and are inclined to the opinion that, had you taken Mr. Van Amburg's order for the machine, or settled for it when he took it, this action on his part would have been avoided."

To this letter defendants replied as follows:

"*Gentlemen:*

"Yours of the 16th is at hand, and contents noted, and in answer to same will say that ours of the 14th was not a request, as you seem to take it, but was merely a statement of what Mr. Van Amburg's proposition was, and what our idea of the matter was. * * * As for Mr. Van Amburg's quitting the threshing business, will say that he hasn't the least idea of doing so. As we wrote you before, Mr. Van Amburg intended to have the machine tried on the Friday between Christmas and New Years. He was here in the city on jury at the time this agreement was made, and, when he went home at the end of the week, found that another machine had got in and done the work, so that there is no job left to try it on.

"As regards our ordering the machine, will say that we don't go back on ordering the machine, nor on making good our order, but, until you make the machine work satisfactorily or to fulfill your guaranty, you will not be able to get pay for it. * * * If you wish to have

anything done with Mr. Van Amburg you can send one of your representatives to interview him."

In March, 1890, Van Amburg, between two days, took the huller back to Grand Rapids, and left it in front of defendants' place of business. After it had remained there for some time, defendants, to protect it, placed it under cover. After this, and in April, plaintiff's agent, Altland, again visited Grand Rapids, and, with the knowledge of the disposition made of the huller, called upon Van Amburg in person and alone, and demanded a settlement for the huller, but Van Amburg refused to pay. On November 13, 1890, defendants wrote to plaintiff as follows:

"*Gentlemen:*

"There still remains in stock here, belonging to you, the No. 1 huller formerly ordered for Mr. Van Amburg. We notified your Mr. Altland when here last winter that Mr. Van Amburg had returned the huller, and asked to have an order for shipment of the huller. We have, according to contract, stored the machine under cover up to the present time, and have never received an order from you for the return of the machine. We now consider that we have stored the machine longer than our contract requires, and we now need the store room. The machine is here, subject to your order, and, according to terms of the contract, we trust you will give us shipping orders for this at once, as we do not think that we should be called upon to store it longer."

No reply was made to this letter, and in August, 1891, defendants shipped the huller back to plaintiff, but plaintiff refused to receive it, and what became of it does not appear. This suit was then brought.

The court instructed the jury as follows:

1. "The evidence in the case does not show that there was a sale from the plaintiff to the defendants of this clover huller; but it does show, under the construction which I feel bound to place on the agreement, namely, the telegrams in connection with the contract of agency, that these defendants, in sending forward the telegram that was first read, acted as the agents of the plaintiff in this suit. * * * * * * * * * * *

2. "In this contract of agency there is a provision that the party of the first part—that is, the plaintiff in this suit—agreed to furnish to the said parties of the second part—that is, the defendants in this suit—such number of clover separators manufactured by the said party of the first part as the said parties of the second part may be able to sell as its agents prior to January 1, 1890; the said party of the first part reserving unto itself the right, in case it shall not be able to fill all orders sent it by the parties of the second part, to restrict said parties of the second part to such number of machines as it may be able to supply, even though the terms and conditions of orders received at the office may be accepted, and acknowledged, and shipment promised. This provision in the contract, as well as the fact that resort is had to the mode of business between the parties to construe that phrase of the first telegram to which I have called your attention, among other things, has led me to the conclusion to interpret and construe these telegrams together with this original contract, and to hold that whatever contract was made in reference to this huller was by the defendants, as agents, with the plaintiff, as their principal; in other words, that it was on their part done, and on the part of the plaintiff understood as done, with reference to their duties as agents, and under this contract of agency.

3. "If there is any recovery by or on the part of the plaintiff in this suit, it must be under the fourth count of the declaration; and the fourth count charges these defendants, as agents, under the agreement that was put in evidence of the contract of agency. It sets forth the agreement; it sets forth that contract of agency; it sets forth as a part of the agreement that the plaintiff at the special instance and request of the defendants—It sets forth that on, to wit, the 3d day of October, 1889,—

"'In consideration that the said plaintiff at the special instance and request of said defendants would deliver to them, the said defendants, on, to wit, the 7th day of October, 1889, at Grand Rapids, in the State of Michigan, aforesaid, one of plaintiff's number one clover hullers, on the terms that defendants should accept said huller at a certain price, to wit, at the price of $470, and would have full settlement with the purchaser thereof for the same before the delivery thereof to him, and take in payment therefor the two promissory notes of the purchaser thereof, each for one-half of said amount, and one of said notes to become due on January 1, 1890, and the other of said notes to become due on January 1, 1891, and both to be indorsed by defendants and delivered to plaintiff, to wit, within 60 day from October 3, 1889; and the said defendants then and there, on the day and year last aforesaid, undertook and promised the plaintiff to take, sell, settle, and pay for said clover huller accordingly.'

"That is the agreement set forth in this count of the declaration substantially; and then it is averred that, in reliance upon that agreement and undertaking on the part of the defendants, the

plaintiff did, on the 7th day of October, deliver to the defendants said clover huller, on the terms and conditions aforesaid, and that the defendants sold and delivered it to William Van Amburg. Now follows the allegation in the declaration as to the breach by the defendants of the agreement set forth in the declaration. And the allegation of breaches of that agreement is as follows:

"'That the said defendants, not regarding their said promise and undertaking, but contriving and intending to deceive said plaintiff, did not have full settlement, or any settlement, with said purchaser, to wit, said William Van Amburg, for said huller, before the delivery thereof to him, but, on the contrary, delivered the same to him, said Van Amburg, without any settlement whatever; and said defendants did not, although often requested so to do, take from said purchaser, to wit, said Van Amburg, and deliver to plaintiff, the promissory notes above mentioned, or any notes whatever, for said clover huller, although more than 60 days have elapsed since the delivery of said huller to said defendants, and the sale by them to said Van Amburg; but without authority, and contrary to the express direction of said plaintiff, said defendants received back said huller from said Van Amburg, and attempted to relieve him, said Van Amburg, of all liability therefor.'

"Substantially the averments of the breaches of the agreement relied upon by the plaintiff are the neglect to have a settlement before the delivery of the machine; the neglect to take notes for the payment from the purchaser, and indorse them and deliver them to the plaintiff within 60 days; and the averment that without authority, and contrary to the express directions of the plaintiff, the defendants received the huller back, and attempted to relieve Van Amburg of all liability therefor. Now, it is under this count of the declaration that the plaintiff must recover, if it recovers at all; and the claim on the part of the defendants is that this machine, being a clover huller manufactured by the plaintiff, and sold by the plaintiff, through its agents, the defendants, to Van Amburg, and delivered to Van Amburg, carried with it an implied warranty that it was reasonably fit for the purpose for which it was designed, and that it was not reasonably fit for that purpose; in other words, that it would not do the work that a clover huller is intended to do,—would not do it properly. And it is further claimed on the part of the defendants that they, as agents, did all that was required of them under this contract; and that, as soon as they ascertained that the machine had been tested, and that it was claimed by the purchaser, Van Amburg, that it would not perform the work, they notified the plaintiff, and gave the plaintiff an opportunity to send a man forward here and put the machine in working order, and make it work if it would. Undoubtedly the plaintiff had a right to such a notice, and had a right to have the opportunity, when informed that the machine would not do the work, to attempt to put it in working order, to

make it work. And there is a question for you to consider in this case whether or not it was afforded sufficient opportunity—reasonable opportunity—so to do; and upon the part of the defendants, that Mr. Van Amburg gave timely notice to them, and that they gave the notice to the plaintiff. It is claimed on the part of the plaintiff that it was not afforded a reasonable opportunity; that, in fact, it was prevented.

4. "Now, it is a rule of law that, in the case of a sale of machinery, such as a clover huller, an implied warranty accompanies it that the machine is reasonably fit—suitable—to do the work for which it is designed and sold. The questions in this case, then, are whether or not this machine was reasonably fit to do the work for which it was intended; and the burden is upon the defendants, so far as that is material to the issue, to show that this huller was so imperfect that it could not reasonably be made to do the work for which it was intended.

5. "The averments in the declaration in regard to the neglect of the defendants to make settlement, and to take these notes, are, under the testimony, fully established. There was no settlement made. It is a conceded and undisputed fact in the case that there was no settlement, and also an undisputed fact in the case that no notes were taken. The huller came here, and it was delivered to Van Amburg on his oral order that he gave in the first instance. He tested it, and he claimed that it did not do the work. The plaintiff claims that it would do the work if it had an opportunity to give it a fair trial. Now, these averments, that I say are undisputed, do not render the defendants liable, unless their breach of them caused the damage that the plaintiff has sustained; unless the injury which the plaintiff claims resulted or flows from the breach of those averments, it would not follow that the defendants are liable. It would not make very much difference whether the settlements were had and notes taken or not if the purchaser were perfectly solvent, and payment could be enforced against him; and, if there was a sale in this case to Van Amburg that would bind Van Amburg, then the plaintiff in this case could enforce it against Van Amburg, and the mere omission to take the notes, or to have settlement at the time, would not be the cause of any damage.

6. "But it is claimed in this case on the part of the plaintiff that, if Van Amburg was liable at all, these defendants released him from the liability by receiving back (they being agents of the plaintiff) and by accepting this huller on Van Amburg's claim that it did not fulfill the implied warranty which I have mentioned, and therefore on that it seeks to recover against these defendants for a breach of their duty on this contract as agents. Now, if you find from the testimony that this machine could be reasonably

made to do the work for which it was intended, then Van Amburg would have no right to return it. That alone would not be sufficient to entitle the plaintiff to recover in this action,—merely finding that Van Amburg had no just reason to return it. Merely finding as a fact that the machine was capable of doing the work for which it was intended would not be sufficient to entitle the plaintiff to recover in this action, in my judgment; because, if he had not any right to return it, it could easily enforce the sale against him, and he would be the proper man to sue and recover from, in my judgment. But if, in addition to finding, if you should find it to be a fact, that the machine could be reasonably made to do the work for which it was intended,—if, in addition to that these defendants, without authority from the plaintiff, or contrary to its express directions, received the huller back from Van Amburg, and attempted to relieve Van Amburg of all liability therefor, and did relieve him by accepting it back,—then the defendants are liable. And I think as a matter of law, if Van Amburg set up the claim that the machine did not fulfill the implied warranty, that it was not capable of doing what it was intended to do; if on that claim he sought to return it, and did return it, to the defendants, and they accepted it,—then Van Amburg would be released. The plaintiff would be bound by that act of its agents. Van Amburg would be released; and, if these defendants did not have just cause for releasing him, they would render themselves liable. In other words, if the machine could be reasonably made to do its work by the plaintiff, and it had not omitted opportunity, when it was afforded it, to do it, then there would be no right to return it.

"The defendants claim, however, that they did everything that they could; that they tried to get a settlement; that they acted as agents for their principal, and kept in mind the interest of their principal as well as their own; and they claim that the testimony shows that the huller would not do the work. If you find, then, these two propositions in favor of the plaintiff: If you find that the machine could be reasonably made to do the work, and that these defendants accepted it back when they ought not to have done it, had not any right to do it, and relieved Van Amburg from liability, then your verdict will be for the plaintiff; otherwise not. * * * * * * * * * * * *

7. "*A Juror:* I would like to ask a question, if not improper. Would it be considered, in law, any acceptance of it back in the manner in which it was returned according to the evidence?

"*The Court:* Well, in that regard, if you find from the evidence that the machine was returned by Van Amburg, and left in front of or near the premises of the defendants without their consent, without their knowledge; that they notified the plaintiff of its

return; that they took it under cover merely for the purpose of protecting it and sheltering it, under the provision in the contract which required them to shelter machines kept over,—it would not be an acceptance, that of itself; but, in determining whether or not there was an acceptance, you should consider all the testimony in the case, consider all the efforts that were made on the part of the defendants to make a collection for the machine. You may consider whether any communication or interview was had between them and Van Amburg, or any understanding whatever between them, in that regard, and what they did in regard to notifying the plaintiff, and in regard to sending the machine back, and the time it was sent back,—all these facts and circumstances."

The learned circuit judge was right in holding that whatever contract was made in reference to the huller was made by defendants as agents for plaintiff. That relation was at no time changed, nor was the relation between plaintiff and Van Amburg altered by the failure on the part of defendants to observe secret instructions. Van Amburg seems to have been financially responsible. This record contains no evidence of collusion between defendants and Van Amburg; nothing that is not consistent with entire good faith on the part of the defendants. If plaintiff has suffered any damage, it would seem to be because it has not pursued Van Amburg. Defendants could not be held as indorsers upon a mere promise to indorse. If, however, the promise to indorse is made upon a sufficient consideration, an action may be maintained for the breach. 2 Pars. Notes & B. 15; 1 Daniel, Neg. Inst. § 689*a*; Tied. Com. Paper, § 264; *Fenn v. Harrison,* 3 Term R. 757; *Moxon v. Pulling,* 4 Camp. 50; *Bank v. Houston,* 1 Har. (Del.) 225; *French v. Turner,* 15 Ind. 59. If defendants were liable under the agreement fixing the terms of the agency, they were liable as guarantors.

The claim against Van Amburg belonged to plaintiff, and not to defendants. Even the authority to sue must have proceeded from plaintiff, and any suit brought against Van Amburg must have been brought in the name of

plaintiff. Plaintiff's remedy against defendants was for a breach of agreement. The measure of plaintiff's damage, as against Van Amburg, was the price of the machine, while, as against defendants, it was confined to the injury sustained by failure to follow instructions. The difficulty here grows out of the attempt to make the agents primarily liable, and to cast upon them the purchaser's burden, in addition to that arising out of the agreement of agency. Defendants' guaranty was not against litigation, nor against claims that the machines were not up to the implied warranty. The same defense could be made to an action on the notes. Defendants, on November 14, 1889, notified plaintiff that they had been unable to get a settlement with Van Amburg. Plaintiff made no objection on that ground until a month afterwards, but in the mean time sent on its adjusting agent, who made a distinct arrangement with the purchaser to be present on December 27, and make a trial of the machine. If Van Amburg had no defense, or did not furnish an opportunity for the trial, or if he desired to avoid the contract, plaintiff was fully advised of all the facts. Defendants were not insurers against that situation. The remedy against Van Amburg was simple. Plaintiff alone could pursue it. Instead of pursuing Van Amburg, plaintiff, on December 16, 1889, notified defendants that it would look to them for the value of the machine. Why? Not because defendants had not collected in advance the contract price, but simply because Van Amburg had not given, and defendants had not required, the notes in advance. The huller was at this time in Van Amburg's possession, and remained in his possession some three months thereafter.

The matter rested until some time in March, 1890, when Van Amburg, between two days, brought the machine to Grand Rapids, and left it exposed in front of defend-

ants' premises. After some time, defendants, to protect the machine, put it under cover. It cannot be contended that this act on the part of defendants was a release of Van Amburg. Plaintiff was notified of this move, and its representative afterwards saw Van Amburg, and demanded a settlement for the huller. Nothing further was done until November 13, 1890, when the letter of that date was written to plaintiff. No reply was made, and in August, 1891,—one year and ten months after the sale, and nine months after the letter of November 13, 1890, was written,—defendants shipped the huller back to plaintiff. Plaintiff had made no move against Van Amburg, nor against any one. Indeed, it had written to defendants, one year and nine months before this time, that it did not intend to look to Van Amburg, but to them, for the value of the machine. Defendants had written to plaintiff for instructions, and had waited nine months for a reply. Defendants were entitled to instructions, if plaintiff desired to save its rights as against Van Amburg, after having announced that it did not intend to pursue him, and plaintiff cannot now be heard to say that this act of defendants made them liable to it for the value of the machine.

The judgment is reversed, and a new trial granted.

The other Justices concurred.

96 228
103 181
96 228
109 485
96 228
127 558
96 228
140 254

CORNELIUS HEALY v. WILSON NEWTON ET AL.

Bond — Recitals — Estoppel — Stay of proceedings — Supersedeas — Death of party—Revivor.

1. A recital in a *supersedeas* bond given by a log-owner on the rendition of judgment against the principal debtor, which is made a lien on the logs, that a personal judgment has been rendered against the log-owner, concludes him and his sureties in a suit on the bond as an admission of that fact; citing 2 Amer. & Eng. Enc. Law, 464.
2. Where, on the rendition of a judgment, a stay of proceedings is granted on condition that the defendant file a bond for the payment of the judgment, if not set aside or reversed, as provided in 3 How. Stat. § 7621c, and the defendant files with the clerk the usual *supersedeas* bond, conditioned for the prosecution of a writ of error to effect, and the payment of any judgment rendered by the Supreme Court, after which a bill of exceptions is settled, but no writ of error is ever sued out, the bond is valid as a common-law bond, independent of the statute.
3. The plaintiff in such a case may move to have the order staying proceedings set aside, or he may rely upon the bond filed; and in a suit thereon, in which the breach alleged is the failure to take out and prosecute the writ of error to effect, the measure of damages is the amount of the judgment recited in the bond, with interest thereon.
4. Where, after the trial of a suit against the principal and sureties in a bond, the principal dies, the case should proceed against the surviving defendants; citing How. Stat. § 7401.
5. Where in such a case an order is entered, without objection, reviving the suit against the administrator of the deceased defendant, and judgment is rendered in favor of the surviving defendants and the administrator, on its reversal in the Supreme Court the writ of error will be dismissed as to the administrator, and the judgment entered will run against the surviving defendants.

Error to Mackinac. (Pailthorp, J.) Argued April 14, 1893. Decided June 23, 1893.

Assumpsit. Plaintiff brings error. Reversed, and judgment entered here for plaintiff for $449.98. The facts are stated in the opinion.

James McNamara, for appellant.

P. N. Packard and *Oscar Adams,* for defendants.

McGRATH, J. Plaintiff commenced proceedings under Act No. 229, Laws of 1887, known as the "Log Lien Law," and on June 17, 1889, recovered judgment against the principal defendant for $325 and costs, and was given a lien on the products. The judgment entry is entitled "*Cornelius Healy v. James Healy, Defendant, and Archibald P. Newton, Special Defendant,*" and recites that, the default of the principal defendant in said cause "having been duly entered, and the same having become absolute, and Archibald P. Newton having claimed to be the owner and interested in the products seized, * * * and having filed his application in said cause, and served the same upon the plaintiff's attorney, * * * and said plaintiff and Archibald P. Newton being in court, by their respective attorneys, ready for trial without a jury, and the court having heard the proofs and allegations of the parties," etc. On the rendition of the judgment the owner of the logs obtained an order extending the time for the preparation and presentation for settlement of a bill of exceptions for the period of 60 days, and staying all proceedings except the taxation of costs, upon condition that said owner file a bond within 20 days, pursuant to the provisions of the statute in such case made and provided. On June 26 said owner filed a bond in the sum of $650, which was approved by the clerk, containing the following recitation and condition:

"*Whereas,* judgment has been rendered in the circuit court for the county of Mackinac in favor of said Corne-

lius Healy and against said Archibald P. Newton for the sum of $325 damages and the costs of suit, in which judgment and proceeding the said Archibald P. Newton complains that there is error in substance, and to be relieved therefrom has obtained a stay of proceedings in said court to settle a bill of exceptions and remove the same to the Supreme Court by writ of error, to the end that the error made therein may be corrected:

"Now, therefore, the condition of this obligation is such that, if said Archibald P. Newton shall prosecute his said writ of error to effect, and shall pay and satisfy such judgment as shall be rendered against him upon said writ of error in said Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue."

Afterwards the attorney for plaintiff applied to the clerk for an execution, but the clerk refused to issue the same, giving as a reason that a bond had been filed and a stay of proceedings had been entered. The time for preparing a bill of exceptions was extended from time to time until December 16, 1889, when the same was duly settled. The principal in said bond "took no further proceedings to take said cause to the Supreme Court on writ of error than the settlement of said bill of exceptions, and never sued out a writ of error in said cause, and did not prosecute said writ of error to effect." Plaintiff sues upon the bond, and the court finds the facts, and as a conclusion of law "that the plaintiff has not made out such a case as entitles him to judgment," and rendered judgment for defendants. No other reasons are assigned, except as they may be inferred from the motion for judgment made by counsel for defendants, who asked the court to find as a matter of law that the bond declared upon, being a bond given in a legal proceeding, and not by the acquiescence of the plaintiff in the case, is void, and not binding on the defendants, for the reason that it is not authorized by any law of this State; that it does not comply with the statute in reference to bonds given upon a stay of proceedings ordered by the circuit court; that it is void as a bond for a

stay of proceedings upon a writ of error; that no writ of error was ever issued in this case; that the bond is without consideration; and that, no damages growing out of the breach alleged having been set forth in the declaration, and no proof, the plaintiff is entitled to nominal damages only.

The bond is in the form prescribed by How. Stat. § 8679. An order staying proceedings for 60 days had been entered at the instance of the principal obligor, conditioned upon the execution within 20 days of a bond. The bond was filed and acquiesced in by plaintiff, who relied upon Newton's expressed intention to take out a writ of error. For six months thereafter Newton pursued a course indicating an intention to take the case to this Court. In *Howard v. Hess,* 63 Mich. 725, there was no finding that the bond was ever delivered by defendants to the clerk, or meant to operate as a stay of proceedings, and it did not become effective by operation of the statute. Here the bond was delivered and filed, evidently in pursuance of the order staying proceedings, and was acquiesced in as such. The bond must be held valid as a common-law bond, independent of the statute. *Hester v. Keith,* 1 Ala. 316; *Lane v. Kasey,* 1 Metc. (Ky.), 410; *State v. Thompson,* 49 Mo. 188; *Williams v. Shelby,* 2 Or. 144; *Burroughs v. Lowder,* 8 Mass. 373; *Winthrop v. Dockendorff,* 3 Greenl. 156; *Kimm v. Steketee,* 44 Mich. 527. In *Hester v. Keith* it was held that, though the condition of a bond for the prosecution of a *supersedeas* does not conform to the statute, yet, as the bond was effectual to delay the collection of the execution, upon discharging the *supersedeas* it becomes absolute, and may be prosecuted as an obligation at common law. A bond for money, to be void upon the doing of a certain thing, is held to be, in legal effect, a contract to do that thing. *Waynick v. Richmond,* 11 Kan. 488. A bond under seal imports a consideration.

Page v. Trufant, 2 Mass. 159; *Harrell v. Watson,* 63 N. C. 454; *Harris v. Harris,* 23 Grat. 737; *Collins v. Blantern,* 1 Smith, Lead. Cas. 636.

It is urged that there was no judgment in fact against the principal obligor in the bond. The judgment was a lien upon his property. It is a sufficient answer, however, that the bond recited a judgment against him. A recital in a bond concludes the parties as an admission of the facts recited. 2 Amer. & Eng. Enc. Law, 464. The declaration properly follows the bond.

Plaintiff, after the execution and delivery of the bond, had one of two courses open to him, to wit, move to have the order staying the proceedings set aside, or acquiesce and rely upon the bond. Under the facts found in the present case, he will be presumed to have elected to take the latter course. The breach complained of is the failure to take out and prosecute the writ to effect. The court has found such breach, and the measure of plaintiff's damages is the amount of the judgment recited in the bond, with costs and interest.

Pending the consideration of the case by the court below, the principal obligor died, and an order was entered reviving the case as to decedent in the name of the administrator.[1] The statute (How. Stat. § 7401) provides that upon the death of one of several defendants the action shall proceed against the survivors. No objection seems to have been made to this order by counsel for either defendant, and it affirmatively appears by the judgment entry that the "attorney for the administrator of the estate," etc., joined in the motion for judgment.

The writ of error will be dismissed as to said adminis-

[1] The case was tried June 28, 1892. Archibald P. Newton died in August of that year, and his death was suggested, and the order of revivor entered, October 25, 1892, on which day judgment was rendered in favor of the administrator and the surviving defendants, who were the sureties in the bond.

trator, and the judgment below reversed, and judgment entered here for plaintiff and against the surviving defendants for $449.98, with costs of both courts to plaintiff.

HOOKER, C. J., LONG and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

SARAH A. ROBARDS v. LEWIS WATERMAN.

96	233
115	525

Partnership—Mortgage—Exemptions.

96	233
s55NW	662
131	320

96	233
150	681

1. One partner has the right to execute a chattel mortgage upon the partnership property in the firm name for the purpose of securing or paying partnership debts.
2. Such a mortgage is valid as against the exemptions provided for by How. Stat. § 7686, although some of the partners may not be aware of its execution; citing *Harvey v. Ford*, 83 Mich. 506.

Error to Calhoun. (Hooker, J.) Argued April 19, 1893. Decided June 23, 1893.

Replevin. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

L. B. Tompkins (*R. S. Lockton*, of counsel), for appellant.

A. M. & A. Culver, for defendant.

GRANT, J. This case was tried before the court without a jury. The findings of fact are as follows:

1. Plaintiff and one David B. Swart were partners in trade, and owners, as such, of a stock of groceries, including the property mentioned in the writ of replevin issued in this cause; the plaintiff being a married woman, and

her husband acting as her authorized agent in relation to the business.

2. On the 17th day of August, 1885, the said firm was indebted, for goods purchased, to two firms, and to secure said indebtedness the plaintiff, in the name of the firm, had delivered to said creditors two chattel mortgages upon the goods of the firm, including the articles in controversy, which mortgages were due and outstanding on said 17th day of August; foreclosure of one or both of them having been begun.

3. The partners were mutually distrustful, and David B. Swart, to protect his interest, and to prevent the sale upon the mortgages mentioned, borrowed the sum of $400 from his brother, Tunis W. Swart, of Mt. Pleasant, giving him the firm's mortgage upon the goods for that sum, payable on demand. This loan was made upon the representation that the money was to be used for the payment of the debts of the firm, including the two mortgages, which mortgages were supposed to amount to the sum of $360. The money, when received, was applied in payment of the mortgages, to the amount of $361.64, and the balance, of $38.36, was retained by David B. Swart.

4. The value of the property of the firm at this time was in the neighborhood of $500, and was all covered by each of the mortgages mentioned.

5. On the 18th day of August, Tunis W. Swart commenced proceedings to foreclose his mortgage, by placing it in the hands of the defendant for that purpose, in furtherance of which the defendant at once took possession of the property, and advertised it for sale, in accordance with its terms.

6. November 16, 1885, the plaintiff sued out a writ of replevin, under which the property covered by said mortgage was taken from the possession of the defendant, and delivered to the plaintiff.

7. At the time of the replevin the property was worth the sum of $450, having deteriorated in value $50 while in the possession of the defendant.

8. Demand of payment of the amount secured by mortgage was duly made before steps were taken to foreclose the mortgage.

9. At no time during the time that the partners carried on business did the stock greatly, if any, exceed the amount of property exempt to the two partners under the eighth subdivision of the exemption law.

10. Defendant had a special interest in the property by reason of his mortgage of $400, amounting at this date to $530.

11. Plaintiff on August 20 filed a bill in chancery to wind up the affairs of the partnership, making defendant and Tunis W. Swart defendants, and enjoining the sale under the mortgage, which she alleged to be fraudulent. That suit is yet pending. A receiver was appointed, who never qualified, and on November 8 the preliminary injunction was dissolved.

No exceptions were taken to the findings either of fact or of law. Assignments of error based thereon will not now be considered. The only question for determination, therefore, is, do the findings of fact support the judgment? This has been so often held by this Court that a citation of the cases is unnecessary.

The judgment is correct, for the following reasons:

1. One partner possesses the right to execute a chattel mortgage in the firm name for the purpose of securing or paying partnership debts. *Harrison v. Sterry,* 5 Cranch, 289; *Bohler v. Tappan,* 1 Fed. Rep. 469; *Gates v. Bennett,* 33 Ark. 475; *Nelson v. Wheelock,* 46 Ill. 25; *Patch v. Wheatland,* 8 Allen, 102; *Walker v. White,* 60 Mich. 427; Jones, Chat. Mortg. § 46.

2. It is settled in this State that such mortgage is valid as against the exemptions provided for by How. Stat. § 7686, though some of the partners may not be aware of its execution. *Harvey v. Ford,* 83 Mich. 506.

Judgment affirmed.

LONG, MCGRATH, and MONTGOMERY, JJ., concurred. HOOKER, C. J., did not sit.

96 236
103 178

MARGARET TEN HOPEN v. THOMAS WALKER.

Killing trespassing dog—Damages—Justification.

1. Dogs have a value, and are the property of the owner, as much as any other animal which one may have or keep; citing *Heisrodt v. Hackett*, 34 Mich. 283.
2. The fact that a dog is committing a trespass at the time it is killed, and is, in the opinion of the person who kills it, about to destroy some of his property, will not justify the killing, nor in any way mitigate the actual damages which the owner of the dog is entitled to recover.[1]
3. Where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable,—not as a punishment to the wrong-doer, but to compensate the injured party; citing *Wetherbee v. Green*, 22 Mich. 311.

Error to Kent. (Grove, J.) Submitted on briefs April 20, 1893. Decided June 23, 1893.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Dunham & Preston, for appellant.

Francis A. Stace, for plaintiff.

LONG, J. Plaintiff recovered judgment against the defendant for $225, as damages in an action on the case for the malicious killing of her dog.

It was shown on the trial that plaintiff's sons were

[1] See *Burnham v. Strother*, 66 Mich. 519, defining who is a "keeper" of a dog; *Newton v. Gordon*, 72 Id. 642, holding that, in an action under How. Stat. § 2119, it is not necessary to aver that the owner or keeper knew that the dog was accustomed to do damage; *Longyear v. Buck*, 83 Id. 236, holding the dog-tax law constitutional; *Hubbard v. Preston*, 90 Id. 221, holding that, under the facts of that case, the killing of a dog in the night-time, while trespassing on the premises of the defendant, was justifiable; and *Bowers v. Horen*, 93 Id. 420, holding that such killing was not justifiable under the facts of that case. See, also, *Knowles v. Mulder*, 74 Mich. 202.

walking along the highway. They were accompanied by the plaintiff's dog and two other dogs. When in front of defendant's premises, the dog of plaintiff turned into the defendant's grounds, just out of the highway, and approached a pond which was kept for lilies, apparently with intent to slake its thirst. Defendant, seeing it from the upper window of his house, went down into the lower hall, got his gun, and, returning above, shot the dog from the upper window. It is not claimed that this dog had done any damage there at that or at any other time. On the trial the court permitted the defendant to show that upon several previous occasions other dogs had wallowed in this pond, destroying some of the plants there growing, and upon one occasion the owner of the dog, when remonstrated with by defendant, had called him vile names, and otherwise insulted and abused him. There was no fence in front of the premises, and this pond lay open to the highway.

At the close of the testimony, counsel for defendant asked the court to instruct the jury:

"3. If the court shall hold that this action can be maintained upon the facts disclosed in the plaintiff's declaration, then we ask the court to charge the jury that, in order to recover in this action, the plaintiff must show to the satisfaction of the jury that the defendant was moved to kill the dog through malice, either towards the dog or towards the plaintiff herself; that this must be shown by declarations of the defendant made before or at the time, showing a wicked and malicious purpose, or such facts and circumstances as naturally and logically lead to the conclusion that the defendant was actuated by malice, by ill will, hatred, or a desire for revenge.

"4. If the jury find from the evidence that the dog was committing a trespass upon the property of the defendant, and in shooting the dog the defendant was only seeking to prevent injury to his property, then there was no malice on his part, and plaintiff cannot recover.

"5. If the jury find that the plaintiff is entitled to

recover, then, in estimating the damages, they can only find the fair market value of the dog.

"6. In examining and weighing the testimony of the witnesses as to the value of the dog, they should scrutinize it closely, and see upon what knowledge they base their opinions. Mere opinions, not based upon a knowledge of the character and qualities of the dog, are not evidence of his value. Statements of witnesses of the market value of the dog in question, or of such dogs, who have never dealt in such dogs, nor ever known personally of dealings by others, ought not to be received, except with great caution."

These instructions were refused, and the court directed the jury substantially that the plaintiff was entitled to recover actual damages, which would consist of the value of the dog at the time it was killed; and that, even if the dog was committing a trespass at the time it was killed, and, in the opinion of the defendant, was about to destroy some of his plants, it would not be a justification for the killing, or in any way mitigate actual damages, because the law affords a remedy for the destruction of property caused by the beasts of another. The court further instructed the jury that there were but two questions for them to consider: (1) The value of the dog; and (2) was there malice? Upon the last proposition the court directed the jury:

"If you find from the evidence that there was malice, and that these annoyances that I have mentioned did take place, you will consider those annoyances and those previous trespasses with a view of determining, in the first place, whether they fully rebut the claim of malice,—whether or not they afforded an excuse or cause for killing the dog, to the extent that it would take away the malice; and, if you find in the negative upon that question, you are at liberty to consider them, and ought to consider them, as mitigating damages which you would otherwise allow on account of the malice, if you find that the malice existed."

It was claimed on the part of the plaintiff that, if the jury found that the killing of the dog was willful and

malicious, the plaintiff, in addition to actual damages, was entitled to recover exemplary damages. Upon this portion of the case the court directed the jury substantially that, while actual damages could not be mitigated by the fact that defendant had theretofore been annoyed by other dogs, yet, if they found that he had been so annoyed, or that he believed at the time that the plaintiff's dog was about to destroy some of his property, they might consider whether these facts would entirely rebut malice; and if, notwithstanding those facts might be found to exist, they believed that defendant was actuated by malice, they might even then award exemplary damages, for, if the defendant willfully and maliciously did the killing, exemplary damages would be recoverable.

We see no error in the charge. The testimony tended to show that the dog was valuable. It was a "Gordon setter," eligible to registration, and some of the witnesses placed its value as high as $250. It had never, so far as this record shows, trespassed upon the defendant's premises, nor had he in any manner been annoyed by it. On the day it was shot, it ran a few feet out of the highway to the edge of this lily pond, between which and the highway there was no fence, and, immediately as it reached the pond, defendant, without any warning to the boys who had it in charge, shot and killed it. The jury, under the charge as given, may or may not have found that the dog was killed willfully and maliciously, as the amount of the verdict is less than several of the witnesses placed its value; but there certainly was evidence which would have justified the jury in finding the act willful and malicious. The dog was not running at large, contrary to law, but was in the immediate charge of its keeper. It is settled in this State that dogs have value, and are the property of the owner, as much as any other animal which one may have or keep. *Heisrodt v. Hackett*, 34 Mich. 283.

Usually, where an act is done with design, and from willful and malicious motives, the law compels full compensation, and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blamable act; but, where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable. These damages are not awarded as a punishment to the wrong-doer, but to compensate the injured party. *Wetherbee v. Green*, 22 Mich. 311.

All redress in damages partakes to some extent of a punitory character, and the line between "actual" and what are called "exemplary" damages cannot be drawn with much nicety. They are properly based upon all the circumstances of the aggravation attending it. The real purpose is to compensate the plaintiff for the injuries he has suffered. *Stilson v. Gibbs*, 53 Mich. 280; *Wilson v. Bowen*, 64 Id. 133. It was said by Chief Justice COOLEY, in *Stilson v. Gibbs, supra:*

"In other cases there may be a partial estimate of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous."

In the present case, the court below submitted to the jury the question whether the defendant was actuated by malice and was guilty of willful conduct in shooting the

dog. The rights of the defendant were fully protected, as all the circumstances prior to the commission of the act were permitted to be put in by the defendant, showing the annoyances he had had from other dogs, and the provoking and insolent conduct of the owners of the other dogs when remonstrated with by him. The jury found that these facts did not constitute an excuse for killing the plaintiff's dog, and, we think, very properly.

In cases of malicious injury, it is not necessary that there should be actual enmity towards the person injured. *Brown v. State,* 26 Ohio St. 176. In *Wright v. Clark,* 50 Vt. 130, it appeared that plaintiff's dog drove a fox upon the land of defendant's father. Defendant came up and shot the dog. On the trial he claimed that he was shooting at the fox, and accidentally shot the dog. No enmity appeared to have existed between the parties. The court charged that, if the defendant intentionally and wantonly shot the dog, they might give exemplary damages. It was held that such intentional and wanton shooting implied malice, and that the instruction given was correct.

Some other errors are claimed. We have examined them, and do not deem them of sufficient importance to notice, and they are overruled.

Judgment affirmed, with costs.

The other Justices concurred.

RUSSELL WHEELER AND FRANK E. WHEELER v. LOUISA MEYER AND JOHN F. GUILLOZ.

[See 95 Mich. 36.]

Costs—Judgment against sureties.

Where a judgment in favor of a non-resident plaintiff, who has given security for costs, is reversed, and the case remanded for a new trial, costs cannot be awarded under How. Stat. § 7663, against the surety;[1] citing *Ortmann v. Bank*, 42 Mich. 464.

Motion by defendants to amend judgment so as to make it include and run against the sureties for costs. Argued June 20, 1893. Denied June 28, 1893.

Albert J. Chapman, for motion.

Corliss, Andrus & Leete, contra.

PER CURIAM. On March 28, 1893, the defendants' costs were taxed at $236 by the clerk of this Court, upon a judgment of this Court theretofore rendered against the plaintiffs, reversing the judgment of the circuit court for the county of Wayne, and ordering a new trial.[2] Plaintiffs, being non-residents, were required to give security for costs, which, on May 15, 1893, they did, in compliance with an order of the Wayne circuit court. An execution issued for the collection of said judgment, and was returned unsatisfied on the 6th day of June, 1893, and the next

[1] How. Stat. § 7663, provides that whenever any person shall become security for costs for another in any court in this State, in case the defendant shall recover a final judgment or decree for costs against the plaintiff or complainant, judgment or decree shall be immediately and in such suit entered as well against such surety as against such plaintiff or complainant, and execution may issue against such surety, in the same manner as if he had been himself a party to such suit.

[2] See *Wheeler v. Meyer*, 95 Mich. 36.

day defendants' counsel filed a certified copy of the undertaking, and moved this Court for an amendment of the judgment, so that it should include and run against the sureties for costs.

The case is governed by *Ortmann v. Bank,* 42 Mich. 464.

The motion will be denied, with costs.

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JOHN M. ARBUCKLE ET AL. v. ALBERT D. REAUME, SIMON DONNELLY, AND PETER DONNELLY.

Conflict of laws—Note given on Sunday.

Notes made and delivered in Michigan on Sunday are void under How. Stat. § 2015, although payable in another state.

Error to Monroe. (Kinne, J.) Submitted on briefs February 8, 1893. Decided June 30, 1893.

Assumpsit. Defendant Peter Donnelly brings error. Reversed. The facts are stated in the opinion.

Ira G. Humphrey, for appellant.

Landon & Lockwood, for plaintiffs.

LONG, J. This action was brought to recover upon two promissory notes, dated February 4, 1889, and executed and delivered to the plaintiffs' agent in this State, but payable at plaintiffs' office, at Toledo, Ohio. The defendant Peter Donnelly pleaded the general issue, and denied the execution of the notes. The other defendants did not appear, and were defaulted.

It was admitted that, while the notes bore date as of

Monday, they were in fact executed and delivered to the agent of the payees in this State on Sunday. The court below ruled that, though the notes were executed and delivered in this State on Sunday, yet, the testimony showing that the office of the plaintiffs was in Ohio, and the contract to be performed there, that they were not void, under section 2015, How. Stat., as the laws of Ohio, and and not of Michigan, governed the transaction; and judgment was given in favor of the plaintiffs.

It was not shown upon the trial what the statute laws of the state of Ohio were. The only contention upon this record is whether the question is to be determined by the law of the place where the notes were executed and delivered or by the law of the state where made payable. The notes were given for machinery. The contract of sale was made in this State, and the property delivered here. The notes were taken by the plaintiffs' agent on the delivery of the machinery; the whole transaction being closed on Sunday. How. Stat. § 2015, provides:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense."

In *Adams v. Hamell*, 2 Doug. 73, it was held by this Court that a note made on Sunday was void, under the provisions of the statute of 1838, which are similar to the provisions of How. Stat., above quoted.

In *Tucker v. Mowrey*, 12 Mich. 378, this Court, approving *Adams v. Hamell*, said:

"The statute not only makes it a penal offense, but

takes away the legal capacity of the parties to make a contract on that day. And, whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner as if no such contract had ever been made."

The court below was in error in holding that the notes could be enforced here by reason of being made payable in Ohio. Parties cannot be allowed to defy our laws, and recover upon a contract void from its inception under our statute, by making the place of payment out of the State.

It is an elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction. 7 Wait, Act. & Def. p. 114; *Myers v. Meinrath*, 3 Amer. Rep. 371.

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

The other Justices concurred.

EZRA CRAFT v. PARKER, WEBB & CO. (A CORPORATION).

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Negligence—Sale of spoiled meats—Evidence—Question for jury.

1. A keeper of a meat-market is bound to use due care to see that the meats sold are fit for human consumption; citing *Hoover v. Peters*, 18 Mich. 51.

2. A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold;[1] and, if he sells food that is dangerous to those who eat it, he is liable for the consequences, if he knew it to be dangerous, or, by proper care on his part, could have known of its condition; citing *Bishop v. Weber*, 139 Mass. 411.

3. Where, in a suit to recover damages for selling spoiled meat,

[1] See *Sinclair v. Hathaway*, 57 Mich. 60; *Copas v. Provision Co.*, 73 Id. 541.

the plaintiff testifies that he noticed a peculiar odor and taste while eating it, it is a question for the jury whether he exercised due care in partaking of the meat.

4. The plaintiff, in a suit to recover damages for negligence in the sale of a piece of spoiled bacon, after fixing the time of the sale, and showing the keeping for sale by the defendant of spoiled meats at about that time, may show that the defendant kept other spoiled meats for sale prior to the time of the sale complained of.

Error to Wayne. (Hosmer, J.) Submitted on briefs March 9, 1893. Decided June 30, 1893.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Sloman, Moore & Duffie, for appellant.

Willard M. Lillibridge, for defendant.

LONG, J. Plaintiff brought suit in an action on the case for negligence in selling a piece of rolled spiced bacon, which he alleges was spoiled, and unfit for food, and from the effects of which he became sick. The court below directed a verdict in favor of defendant, on the ground that there was no negligence shown on its part, and also that the plaintiff was guilty of contributory negligence.

We think the case should have gone to the jury. Defendant carries on a wholesale and retail business of selling meats in the city of Detroit. On July 8, 1891, plaintiff's brother bought from it, at the retail counter, a roll of spiced bacon. It was taken to the plaintiff's house, where he boarded, and part of it cooked for breakfast. Plaintiff's brother had the first slice, which seemed to be all right. Later in the morning, plaintiff's wife cut off some more from the roll, and cooked it for plaintiff. The wife noticed a peculiar odor from it, but claims she thought it was the spices. Plaintiff also noticed the odor, and a

peculiar taste, and claims that he also thought it was the spices. Soon after eating it he became quite sick. He sent for a physician, who pronounced that he was suffering from some kind of poison. Plaintiff then examined the rest of the meat, opened it, and says that it was very rank, and the smell of it was like that of a carcass.

A witness for plaintiff also testified that a short time previous to that she purchased some spiced bacon of defendant, cooked it, and her husband became sick. She opened that roll, and found it spoiled. She returned it to one of the clerks at the retail counter, and told him of its condition. He took it back, and gave her other meat in its place.

John Stabler, a witness for plaintiff, testified that he had worked for defendant, but left its employ just before this meat was sold. He testified that he had seen old pickle dripping from the upper floor upon bacon piled upon a lower floor, and that defendant's foreman had the bacon removed; that some rolls of bacon were badly molded and the foreman directed that they should be taken to the smokehouse, and smoked over again.

Robert Craft, a brother of the plaintiff, had worked for defendant, and was in its employ at the time the bacon in question was sold. He was asked:

"Do you know of any spoiled meats that were sold there, over the counter, during the month of July, about the time you procured this piece of spiced bacon, that was put on the counter there for sale for private consumption, in the regular course of their business, and that was unfit for food, being spoiled and discolored?"

Under defendant's objection, the witness was not permitted to answer. John Stabler was also asked:

"What can you say as to whether or not you have seen meat that was spoiled, and unfit for use, prepared in this place to be sold on the market, about last summer, or the early part of last winter?"

This was also ruled out.

The answers to these questions should have been permitted. The question to Mr. Craft fixed the time the sale was made of which plaintiff complains, and, with some testimony fixing the keeping for sale of spoiled meats at about that time, the plaintiff should have been permitted to show the condition of other meat kept for sale prior to that time. The defendant was the keeper of a retail meat-market, engaged in the business of selling meats for food, and was bound to use due care to see that the meats were fit for human consumption. *Hoover v. Peters*, 18 Mich. 51. It was proposed to be shown, however, that it was not only careless in preparing these meats, but its servants had actual knowledge of the unfitness of the meat for food, and yet sold it.

It was a question for the jury whether the defendant was so careless that it should be held responsible for the consequences of its own acts, or the acts of its servants. A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold. If, in addition to this implied warranty, it is found that he was negligent in selling meat that was dangerous to those who ate it, he will be liable for the consequences of his act, if he knew it to be dangerous, or, by proper care on his part, could have known its condition. *Bishop v. Weber*, 139 Mass. 411 (1 N. E. Rep. 154.) These were questions for the jury, and not for the court.

The question was also for the jury to determine whether the plaintiff exercised due care on his part in partaking of the meat when he observed the odors arising from it after it was cooked.

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

The other Justices concurred.

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d129	670
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149	190

SILAS WHITE v. JOHN McQUEEN.

False imprisonment—Arrest without a warrant—Probable cause—Pleading—Evidence.

1. When the facts are conceded, probable cause is a question of law, which the court must determine; citing *Perry v. Sulier*, 92 Mich. 72; *Huntington v. Gault*, 81 Id. 155.
2. When an officer in arresting fugitives from justice, and those who he honestly believes have been guilty of a felony, has acted in good faith, and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and relieved from the consequences of a false imprisonment.
3. The defense that the defendant in a suit for false imprisonment, who arrested the plaintiff without a warrant, had probable cause to believe that he had been guilty of a felony, is inadmissible under the plea of the general issue, without notice of such special matter of defense.
4. A newspaper article which states that the plaintiff in a suit for false imprisonment, and his companions, were very drunk when they boarded a street car, refused to pay their fare, used vile language, which annoyed the passengers, refused to get off when requested, and showed fight when the conductor proceeded to put them off; that the motorman came to the conductor's rescue, and knocked one of the men from the car, and the conductor ejected another; that one of them jumped on again, and was bleeding profusely, and using vile and filthy language; that when he refused to get off the conductor knocked him from the car with a rock; that the passengers then commenced to jump from the car, one of whom, a lady, fortunately fell away from the car, and escaped death; and that the names of the men were not known to the police, but that they had a good description of them, and, unless they left the city, they would probably be identified,—does not show that the plaintiff and his companions had been guilty of a violation of How. Stat. §§ 9274, 9275 (which make it a crime for any person willfully and maliciously, by any act, or by means of intimidation, to impede or obstruct the regular operation and conduct of the business of any railroad company, etc., or for two or more persons willfully and maliciously to combine or conspire together for a like pur-

pose), or of any felony whatever, and does not justify the arrest of the plaintiff without a warrant.

Error to Kent. (Adsit, J.) Submitted on briefs April 18, 1893. Decided June 30, 1893.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Myron H. Walker, for appellant, contended for the doctrine of the opinion.

L. G. Rutherford, for defendant, contended:

1. Any facts which would induce any fair-minded man of average intelligence and judgment to believe that a felony had been committed would be probable cause and reasonable grounds for such belief; citing *People v. Wilson*, 55 Mich. 515, 516; *Ross v. Leggett*, 61 Id. 449.
2. The plaintiff admits that he boarded a street car in company with some drunken men, who refused to obey the reasonable rules adopted by the company, who used boisterous and obscene language, threw stones, and threatened to kill and murder. This information coming to the sheriff, or to any other person, would authorize him to make the arrest whenever and wherever the party could be found; and on this state of facts the court should have taken the case from the jury, and for that reason the plaintiff cannot be prejudiced by any ruling made by the court.
3. In actions of tort, everything which may be considered by the jury in mitigation of damages may be given in evidence under the general issue, for such matters cannot be pleaded, and a notice of them would be of no avail; citing *Delevan v. Bates*, 1 Mich. 97; and it has never been considered necessary in this State, where the defendant did not seek to justify under process, to give notice under the general issue; citing *Josselyn v. McAllister*, 22 Mich. 300.
4. The burden of proving want of probable cause is on the plaintiff; citing *Hamilton v. Smith*, 39 Mich. 222.

GRANT, J. Defendant was the sheriff of Kent county. He caused the arrest of plaintiff August 2, 1891, which was Sunday, and imprisoned him in the county jail until the following day, when he was brought before the police

judge, and charged with being disorderly, under an ordinance of the city of Grand Rapids. He was tried upon August 4, and acquitted. Defendant had no warrant for his arrest. Plaintiff then instituted this suit to recover damages for false imprisonment. The declaration is in the usual form. The plea was "not guilty." Defendant claimed to have arrested plaintiff upon suspicion that he was guilty of a felony.

It appears from the evidence that on the Saturday evening previous an altercation had occurred upon a street car between those in charge and some passengers; that during the fight a lady had jumped from the car, and was reported to be seriously injured; and that no arrests were made that night of any of the persons engaged in the fight. The defendant testified that between 8 and 9 o'clock Sunday morning the turnkey of the jail reported to him that there was a riot on East Fulton street by a lot of colored people, and that a lady was killed or nearly killed; that some one had telephoned that there had been a row and a fight on a street car, and that this woman had received serious injuries in consequence of the fight, and thought the authorities ought to take these people in charge. Defendant then went to the office of the street-railway company, and saw Mr. Chapman, who had telephoned to the jail for him. Chapman gave him the names of six persons, including the plaintiff, who, he said, had been engaged in the fight, and wanted him to arrest them. Mr. Chapman told him that these persons had undertaken to run the car, and had used profane language; that the conductor undertook to eject some of them from the car; that they all pitched on the conductor, or two conductors, got one of them down, and hammered him; that this lady had gotten off of the car, or jumped off the car, in some way; that she was in a critical condition, and presumed she would die; that he (Chapman) wanted these people taken that day,

for if she died they would skip out, and there would be trouble in getting them. On the strength of this information defendant sent two deputies to arrest the plaintiff and the others who were reported to have been engaged in the affair. Defendant thought, but was not positive, that he saw an account of the affair in one of the Sunday morning papers. Plaintiff was a coachman for Dr. Barth. He was found by the officers at his customary work at the barn about 1 o'clock P. M., and promptly told them his name, whereupon he was immediately taken to jail.

The case was submitted to the jury upon the theory that if the defendant had probable cause to believe, from the information which he received, that a felony had been committed by the plaintiff, he was justified in making the arrest without a warrant. The court instructed the jury that assault with intent, to do great bodily harm, and manslaughter, were felonies. But the crime to which he specifically called their attention was obstructing the operations and business of the street-railway company, under How. Stat. §§ 9274, 9275. Under the first section it is made a crime for any person willfully and maliciously, by any act, or by means of intimidation, to impede or obstruct the regular operation and conduct of the business of any railroad company, etc. The second section makes it a crime for two or more persons willfully and maliciously to combine or conspire together for the like purpose. The punishment provided by the first section may be imprisonment in the State prison for a period not exceeding one year; and, under the second section, a like imprisonment not exceeding two years. The court instructed the jury that if the facts conveyed to the defendant justified him in believing that an offense under this statute had been committed, and that the plaintiff was guilty thereof, then he was justified in making the arrest.

The judgment must be reversed for two reasons:

1. The defense that the defendant had probable cause to believe that plaintiff had been guilty of a felony was inadmissible under the pleadings. Notice of this defense should have been given. Mr. Chitty says:

"Whoever assaults or imprisons another must justify himself by showing specially to the court that the act was lawful. And a plea justifying an arrest of the plaintiff upon the ground that a felony had been committed, and that there was reasonable ground to suspect and accuse the plaintiff, must distinctly state the specific reasons for suspecting the plaintiff. These are positive rules of law in order to prevent surprise on the plaintiff at the trial by the defendant then assigning various reasons and causes of imprisoning the plaintiff of which he had no notice, and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts." 1 Chit. Pl. 501; *Wade v. Chaffee*, 8 R. I. 224; *Boynton v. Tidwell*, 19 Tex. 118.

It is manifestly of more importance to the plaintiff that he should be informed by the plea of the facts relied upon for his arrest without a warrant than when he is arrested upon a warrant, which he has the right to see and read when he is arrested. No case than the present better illustrates the necessity of this rule. When brought into court after his imprisonment he was charged only with a misdemeanor, viz., the violation of a city ordinance. For this offense he could not legally be arrested without a warrant. He had a right to presume that this was the offense for which he was arrested the day before.

2. When an officer in arresting fugitives from justice, and those who he honestly believes have been guilty of a felony, has acted in good faith, and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and will be relieved from the consequences of a false imprisonment. This is required

for the protection of society, and to prevent the escape of criminals. So far as appears upon this record, the defendant acted mainly upon the information conveyed to him by Chapman. If he read the newspaper article (and the judge in his charge assumed that he did), there was nothing in that to indicate that plaintiff and his companions had been guilty of a felony. The article stated that plaintiff and his companions were very drunk when they boarded the car; that they refused to pay their fare; that they used vile language, which annoyed the passengers; that they refused to get off when asked; that they showed fight when the conductor proceeded to put them off; that the motorman came to his rescue, and with his crank knocked one of the colored men from the car; that the conductor ejected another; that one of the colored men jumped on again; that he was bleeding profusely, and using vile and filthy language; that when he refused to get off the conductor knocked him from the car with a rock; that the passengers then commenced to jump from the car; and that among those who jumped was a lady, but that she fortunately fell away from the car, and escaped death; and that the names of the colored men were not known to the police, but that they had a good description of them, and, unless they left the city, they would probably be identified. There was nothing in this statement to show that the plaintiff and his companions had been guilty of a violation of the statutes above quoted, or of any felony whatever. There was therefore nothing in it to justify the arrest without a warrant. When the facts are conceded, probable cause is a question of law, which the court must determine. Pol. Torts, 192, 193; *Perry v. Sulier*, 92 Mich. 72; *Huntington v. Gault*, 81 Id. 155. Under this record the court should have directed the jury that there was no probable cause for the belief on the

part of the defendant that plaintiff had been guilty of a felony.

For these reasons the judgment must be set aside, and a new trial ordered.

The other Justices concurred.

JAMES B. JUDSON AND WASHINGTON G. WILEY v. JOHN DUFFY.

Adverse possession—Evidence.

1. The divestiture of title to land upon no better claim than occupancy can be justified only by clear and cogent proof upon each of the essential elements of adverse possession; citing *Yelverton v. Steele*, 40 Mich. 538; *Pendill v. Agricultural Society*, 95 Id. 491.
2. It is the duty of courts to protect the rights of land-owners from the danger of capricious verdicts by refusing to allow a jury to consider the question of adverse possession until evidence sufficient to make a *prima facie* case under the rule laid down in *Yelverton v. Steele*, 40 Mich. 538, has been introduced.
3. Evidence that a defendant in ejectment entered into actual possession of the land in 1882, under a deed from the holder of void tax titles, and that his grantor, in 1861, arranged with a neighboring farmer to look after the land, and thereafter paid the taxes assessed thereon, and that the farmer drove his cattle to the land sometimes to pasture, and authorized others to cut grass thereon, it being wild and unfenced, and used by the cattle of the neighborhood as a common, and the grass being cut by any one who chose, without molestation, which supervision, such as it was, ended in 1876 or 1878, falls short of that "clear and cogent proof" necessary to divest the title to land by adverse possession.

Error to Ingham. (Person, J.) Argued April 20, 1893. Decided June 30, 1893.

Ejectment. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Cahill & Ostrander, for appellants.

Thomas E. Barkworth, for defendant, contended:

1. There was evidence to indicate adverse possession for 20 years previous to the time defendant bought the land, and its sufficiency was for the jury; citing Busw. Lim. § 233, and cases cited; *Gayetty v. Bethune,* 14 Mass. 49; *Jones v. Porter,* 3 Pen. & W. 134.
2. It has been held that, where the continuity of possession is in question, the jury have the right to pass upon the testimony, although none is presented to dispute continuous possession; citing *Thompson v. Kauffelt,* 110 Penn. St. 209; *Thompson v. Coal & Iron Co.,* 133 Id. 46; *Hacker v. Horlemus,* 74 Wis. 21; *Holbrook v. Bowman,* 62 N. H. 313.
3. It is not necessary that the land be cultivated or fenced, or that a stranger passing by would necessarily know that some one was asserting dominion over it. If the claim of right is so open and notorious that the neighborhood understands and recognizes it, nothing more is required; citing *Curtis v. Campbell,* 54 Mich. 340; *Murray v. Hudson,* 65 Id. 670; *Clark v. Campau,* 92 Id. 573; and the payment of taxes is very significant; citing *Rayner v. Lee,* 20 Mich. 387.

HOOKER, C. J. Plaintiffs, being owners of the government title to the premises in controversy, bring ejectment against defendant, who entered into possession in November, 1882, under a deed from one Baldwin, who was a grantee under void tax titles. The only defense made is that of adverse possession. The case was tried by jury, and a verdict for defendant was rendered, upon which judgment was duly entered, and plaintiffs appeal.

Where title to land is sought to be divested upon no better claim than occupancy, it can be justified only by clear and cogent proof upon each of the essential elements of adverse possession. *Yelverton v. Steele,* 40 Mich. 538; *Pendill v. Agricultural Society,* 95 Id. 491. And until each of these is supported by something more than an

inference, the question should not be submitted to the jury. When there is evidence upon each of them which, if believed, can be said to establish adverse possession, the case should go to the jury.

The evidence shows that in 1861 Baldwin employed one Poxson, a neighboring farmer, to look after the land, to protect his timber; giving him five dollars, and telling him that he could have the marsh grass. Beyond paying the taxes, this was all that Baldwin did. Under this arrangement, Poxson did, substantially, nothing more than to drive his cattle there sometimes to pasture, and to authorize two men to cut grass. The significance of these acts is materially lessened by the facts that the land was a wild swamp lot, unfenced, used by the cattle of the neighborhood as a common, and that grass was cut by any one who chose, without molestation by Poxson. Poxson testifies that—

"I went around the land with Baldwin, and showed him the line,"—and continues: "I didn't do much of anything about it. No one stole off the timber then, but I looked after it for Mr. Baldwin."

His looking after it was not sufficient to prevent wood roads being cut by persons taking hay. This supervision by Poxson, such as it was, came to an end in 1876 or 1878, after which he paid no attention to the land, and there is no evidence that any one did. There is evidence that one or both of the men whom Poxson authorized to cut grass continued to do so, and that Baldwin's son paid taxes. But it is equally clear that the land remained unoccupied for several years, until in 1882 the defendant entered upon it.

This testimony was all admissible, but falls short of that "clear and cogent proof" which permits the divestiture of title to land. Some of the cases seem to have given rise to the assumption that adverse possession becomes a ques-

tion for the jury when there is any admissible evidence tending to establish it, but we understand the rule to be that until the evidence reaches the required degree of clearness and cogency (which is manifestly a question for the court) there is nothing to go to the jury; and it is a clear duty of courts to protect the rights of landholders from the danger of capricious verdicts by refusing to allow consideration of the question of adverse possession by a jury until evidence sufficient to make a *prima facie* case, under the rule laid down in the case of *Yelverton v. Steele,* has been introduced.

The jury should have been directed to render a verdict for the plaintiffs.

Judgment reversed.

LONG and GRANT, JJ., concurred with HOOKER, C. J.

MCGRATH and MONTGOMERY, JJ., concurred on the ground that the possession was interrupted for several years.

JUDITH D. THOMPSON v. ISRAEL C. SMITH.

Mortgage—Description—Evidence—Estoppel—Foreclosure— Parties.

1. Where, on the trial of an action of trespass, the question of fact in issue is whether the land claimed to have been trespassed upon is actually included in a parcel of land described in a mortgage executed by the plaintiff's grantor to the defendant, it is not competent for the plaintiff to show by parol testimony that the mortgagor pointed out to the mortgagee the boundary lines of the lands to be included in the mortgage, and informed him that the land in controversy was not to be included therein.

2. A grantee is estopped from disputing his deed, in which, as also in all prior conveyances, the land is described as a part of "Block B" in a certain village, by showing that it is not a part of that block.
3. The right of possession of a subsequent grantee of mortgaged premises, whose deed is not recorded until after the filing of *lis pendens* in a suit brought to foreclose the mortgage, but who is in possession when the suit is commenced, will not be cut off by the foreclosure proceedings, nor by the entry of the mortgagee thereunder.
4. The foreclosure proceedings will not be given that effect by a stipulation of the grantee that they are regular, made in an action of trespass brought against the mortgagee for making such entry.

Error to Newaygo. (Palmer, J.) Argued April 19 and 20, 1893. Decided June 30, 1893.

Trespass. Plaintiff brings error. Reversed. The facts are stated in the opinion.

More & Wilson, for appellant, contended:

1. Parol evidence is admissible to identify the subject-matter of a deed, to determine locations, and define boundaries; citing Whart. Ev. §§ 942–944; 1 Greenl. Ev. § 287; *Purkiss v. Benson,* 28 Mich. 538; *Twogood v. Hoyt,* 42 Id. 609, 613.

Fletcher & Wanty, for defendant.

LONG, J. This is an action of trespass. The lands in controversy are described in the declaration as—

"Commencing at a point on the south bank of the Muskegon river, where the east line of River street, produced, intersects the river; thence westerly, along the bank of the said river, to the old channel of Brooks creek; thence southerly, along the easterly bank of said creek, to the right of way owned by the Chicago & West Michigan Railroad Company; thence easterly, on the north line of said railroad company's right of way, and to the west line of block four; thence north, along the west line of block four, to a point which would intersect the south line of Wood street, if produced; thence east on the south line

of Wood street, produced, to the west line of River street; thence north-westerly, along the west line of River street, to the north line of Water street; thence east, on the north line of Water street, to the east line of River street; thence north-westerly along the east line of River street, produced, to the place of beginning."

The cause was commenced in the Newaygo circuit court. Defendant appeared, and with his plea of the general issue gave notice that the title to the premises described in the declaration at the time of the acts complained of was vested in one James W. Converse, and that any acts that were done by the defendant were done as the agent of said Converse. The cause was tried before a jury, who returned a verdict in favor of the defendant.

The principal question on the trial was whether the land in controversy is a part of block B. The plaintiff, on the argument here, presents a plat which it is claimed shows that the western boundary of block B is at a line extended northerly from the line between lots 6 and 7 of block C; while the defendant presents a plat which it is claimed shows that block B is not thus bounded, but that it extends westward, and includes the lands in controversy. Reference to the two plats, which were used on the argument in this Court, does not settle the controversy. One is a copy of the plat of the village. This village plat was offered in evidence by the defendant on the trial, and excluded. It was offered, as defendant's counsel claim, for the purpose of showing that no particular piece of land was platted as block B, but that block B was the designation of a parcel of land in the village of Newaygo whose boundaries and limits were as well known and as well defined as those of any block in the village plat, and that the parcel described in the declaration is a part of that block. It is conceded that the village plat was never properly authenticated, but the one offered in evidence was the only one made or recorded, as shown by the record in this case. The pro-

prietors were John A. Brooks, John A. Brooks, Jr., and Sarell Wood. By reference to this plat it is seen that block B has no definite boundaries, though there appears to be a line extended northerly from Pine or River street to the Muskegon river. If this line is to be taken as the westerly boundary of block B, then that block has a definite boundary, as it would extend from the range line on the east to this line extended; but nowhere upon the plat or in the proceedings is it shown that that line is extended as the westerly boundary of block B. Neither is it insisted by either of the parties to be so. Defendant claims that block B extends to Brooks creek on the west, and includes the land in controversy. Plaintiff's counsel, on the other hand, contend that the westerly boundary of that block is as shown on a plat presented by them by an extended line between lots 6 and 7, block C, to the Muskegon river, and that all the lands lying westerly of that line and extending to Brooks creek never were platted. In other words, plaintiff's counsel contend that the lands upon the plat of the village of Newaygo between block A and Brooks creek are divided into three parcels; that the parcel between block A and the extended line between lots 6 and 7 of block C to the Muskegon river is properly block B; that the second parcel lies between the westerly boundary of block B and Pine or River street extended to the Muskegon river; and that westerly of that parcel is the third parcel, which includes all the lands between Pine or River street extended and Brooks creek, except what is shown on plaintiff's exhibit as block 4. This third parcel, as plaintiff describes it, is the piece in controversy. It is conceded that what is called on the plats "Pine Street" is in many conveyances called "River Street."

The plaintiff, to maintain her case, on the trial called David P. Clay as a witness, and he testified substantially that he knew the land in controversy, and at one time he

claimed to own it; that such claim of ownership commenced in the spring or summer of 1871, and that he cultivated and cropped it. Counsel then offered in evidence a deed bearing date May 20, 1887, and recorded September 20, 1887, from David P Clay to the plaintiff. This deed describes certain lands in the village of Newaygo, and, among other descriptions, the land in controversy as "so much of block B as lies west of River street," as well as all of blocks 4 and 127, except certain parcels theretofore deeded. Plaintiff claims that she went into possession of this land the 1st of May, 1887, and continued in possession until April or May, 1889, and cut the grass for two years, but never lived upon the land. On May 21, 1889, she claims to have gone to the land, and found defendant, Smith, in possession. He rebuilt the fences, cut the grass, and cropped part of it. There are in all some 15 or 16 acres. It is undisputed that defendant went into possession in the spring of 1889, and is still in possession.

Defendant, on his part, not only claimed possession, but title to the premises. To prove his title he put in evidence a mortgage made by David P. Clay and wife to James W. Converse, dated December 15, 1877, and duly recorded two days afterwards, to secure the sum of $25,000. The land is described in the mortgage as "block B, village of Newaygo." The mortgage also covers other lands. It appears that this mortgage was foreclosed in the circuit court of the United States for the western district of Michigan, the *lis pendens* being recorded in the register's office of Newaygo county, May 30, 1887. The sale was made October 8, 1888, James W. Converse being the purchaser at the sale. Defendant, Smith, claims to be in possession as the agent of Converse, and sets up title in Converse under his notice. The deed on this foreclosure sale was offered in evidence by defendant. It contains the same description as found in the mortgage.

The land described in the declaration, it is claimed by the defendant, is the same as that covered by the Clay mortgage, and the same as in the deed on foreclosure to Converse. The deed was objected to on the ground that the plaintiff was not made a party to the foreclosure proceedings, and was never served with process in that case, and at the time of the sale notice of that fact was given. It was also claimed by plaintiff's counsel that the land sold under the foreclosure is not the same description as the land in controversy. The lands are described in the deed from Mr. Clay to the plaintiff as "so much of block B as lies west of River street, in the village of Newaygo," while the mortgage from Clay and wife to James W. Converse describes the property as all of block B, village of Newaygo, and other lands, and the deed on foreclosure describes the property the same as in the mortgage.

To show how the lands had theretofore been described, and how Mr. Clay derived his title, the defendant offered in evidence a deed from Wilder D. Foster, assignee in bankruptcy of Alexander Blake, to Mr. Clay, dated June 28, 1871, describing the lands as—

"That part of block B lying north of block 4 and west of said block and the Newaygo Company's land, and extending to Muskegon river; meaning all the meadow land extending from said block 4 and the line of River street north to Muskegon river and Brooks creek, * * * all in the village of Newaygo."

Several other deeds were also offered in evidence, tracing the title back through these mesne conveyances to John A. Brooks and Sarell Wood, showing title in them prior to the year 1857, and all of said deeds describing the lands in controversy as a part of block B of the village of Newaygo. The tax rolls were also offered in evidence for the various years from 1858 down to the time of the trial, showing that these lands were assessed for taxes during all that time as a part of block B, village of Newaygo.

Witnesses were also called who had known these lands for many years, and who were familiar with the village plat, and testified that they had never known that any of these lands remained unplatted on the south side of the Muskegon river and westward to Brooks creek. The plat itself does not define the boundaries of block B, but all the conveyances above referred to recognize the land in controversy as a part of it, and the deed under which the plaintiff claims describes it as such.

Plaintiff's counsel offered in evidence certain deeds and mortgages executed prior to 1857, in which these lands are described by metes and bounds. Some evidence was offered by the plaintiff, and excluded by the court, which, it is claimed, would tend to show that Clay, at the time of giving the Converse mortgage, pointed out to Converse the boundaries of the land the mortgage would cover, and the boundaries of block B. It was claimed from this that the parties to the mortgage never understood that the mortgage covered the land described in the declaration.

The court directed the jury that the fact was established that the plaintiff was not made a party to the foreclosure proceedings, and hence whatever proceedings were taken to foreclose could not deprive her of her title; that both parties derived their title through Mr. Clay, and that the title to the property described in the declaration was in Mr. Clay at the time of the execution of the mortgage, December 15, 1877; and that the evidence beyond dispute showed that the deed of May 20, 1887, was made by Mr. Clay, who had the legal title, and was delivered to the plaintiff, and she went into possession under it. "But," the court said, "the vital question is this: Do the premises described in the declaration include any portion of block B? and that is the question for you to determine from the evidence." The court further said: "There was a stipulation between the parties filed in this cause, to the effect

that all the proceedings to foreclose the mortgage were regular, and no claim can be made now of any irregularity." The court further charged the jury as follows:

"David P. Clay was the owner of the premises in question and other lands included in the mortgage under date of December 15, 1877. That was prior to the conveyance made by him to plaintiff in this action. She was a subsequent purchaser of the premises, and necessarily took them subject to the mortgage and the legal effect of the foreclosure proceedings, providing all the proceedings were regular, as stipulated by the respective parties to this mortgage; and the title obtained under and by virtue of the foreclosure proceedings would refer back to the execution of the mortgage, and give the purchaser such title to the premises covered by the mortgage as the mortgagor had at the time the mortgage was executed and delivered to the mortgagee. Now, the plaintiff, in order to make out her case under the declaration in this cause, introduces in evidence a deed, the date of which I have called your attention to, under date of May 20, 1887 (Mr. Clay at that time was the owner of the premises in question), to Mrs. Thompson, the plaintiff in this suit. Mrs. Thompson, the plaintiff in this suit, I will say to you, as I said before, went into possession of the premises under and by virtue of that deed; and there is no dispute in the testimony, and it is a conceded fact, that on or about the 8th day of April, 1889, the defendant in this action took possession of the premises, and has continued in possession of the premises ever since, and claims to hold and occupy the premises on account of his having had a superior title to that of the plaintiff in this action; and his title would be superior to that of the plaintiff in this action provided you find from the evidence in this case, as a matter of fact, that the premises mentioned in this declaration are included in block B, covered by the mortgage in question in this suit. So the question of fact for you to determine, and the vital question of fact in this case, is, do you find from the evidence, as a matter of fact, that the premises described in this declaration are the same as the premises described in the mortgage as block B?"

The court further charged:

"Then the first question for you to determine is, taking it as a conceded fact that at the time of the execution of

the mortgage Mr. Clay was the owner of the premises in question (and that is your basis), ascertain, then, gentlemen of the jury, from the evidence in this case, whether this block B, as described in this mortgage, covers the premises which the plaintiff in this action claims to have been trespassed upon; and if you find that it does, that is a defense to this action, and this plaintiff is not entitled to your verdict. If, in considering that question, gentlemen, you find the issue in favor of the plaintiff,—you find that the premises described in the declaration in this suit are not within the premises described in the mortgage as block B,—then the plaintiff would be entitled to your verdict; and in determining that question of fact you will take into consideration all the evidence in the case before you. Now, certain deeds have been introduced in evidence here on the part of the plaintiff, and also on the part of the defendant, dating as far back as November, 1853; certain mortgages have been introduced, certain tax rolls have been introduced in evidence, and a certain map has been introduced in evidence here; and these records and this map are all circumstances competent for you, gentlemen, to consider in determining this question of fact to which I have called your attention, either one way or the other. In the absence of direct proof as to where the boundary lines are, and as to whether or not the land described in this declaration is included in the description of land mortgaged, it would be competent for you, and your duty, to take into consideration these deeds of conveyance. How did the parties to the instruments understand it,—the grantors and grantees therein named? How did the parties who executed, and to whom the mortgages were executed, understand it? What was their understanding of block B? What land was included? You may take into consideration, and it is your duty so to do, also, the tax rolls which have been introduced in evidence. How did the parties—the assessor, the party who made the assessment, and the parties against whom the land was assessed—understand it? What was their understanding with reference to this matter, as to whether or not the lands described in the declaration were the same as the lands described in the mortgage as block B? Neither the tax rolls nor the deeds offered in evidence nor the mortgages are conclusive upon this question, but they are all matters proper for you to consider; they are circumstances in the case proper to be considered."

Reference need not be made to the several assignments.

of error. It is evident from the whole record that the only question of fact in the case was submitted to the jury, and they have found that the lands in controversy are a part of block B.

It is contended that the court below was in error in excluding the testimony offered to show that Clay pointed out to Converse the boundary lines of the lands to be included in the mortgage, and that Converse was told that the lands in controversy were not to be included. This was properly excluded. The question under consideration on the trial was whether the lands in controversy were *actually* included in the Converse mortgage, and this question could be determined only by showing what were the boundaries of block B. The parol testimony of what the understanding was as to what was to be included could not aid this question, and could not be used for the purpose of contradicting or changing the description in the mortgage. The mortgage covered all of block B, and if this land was a part of block B it was included in the mortgage, whatever the understanding of the parties may have been about it; and parol evidence would not be admissible to change or vary the terms of the mortgage. The only question of fact arising in the case was whether the lands in controversy were a part of block B. The jury found that issue in favor of defendant.

It appears without contradiction that the plaintiff's deed describes the land as a part of block B, and the Converse mortgage covers all of block B, and the deed on foreclosure describes it in the same way. The plaintiff, then, by this record, is put in the attitude of making claim to this land, and attempting to prove her title by showing that it is not a part of block B, while the deed under which she herself claims describes it as a part of block B, and all other conveyances dating back to 1857 so describe it, and it has been so assessed during all that time. Whatever

title she had was derived from David P. Clay under this deed. She cannot now be heard to dispute the deed, and show in this action that, though the deed describes the land as a part of block B, it is not in fact part of that block. *Payne v. Atterbury*, Har. Ch. 414; *May v. Tillman*, 1 Mich. 262; *White v. Smith*, 37 Id. (Ann. ed.) 290, 296, and note; *Shotwell v. Harrison*, 22 Id. 410; *Case v. Green*, 53 Id. 615.

Plaintiff's deed, however, was given prior to the filing of the *lis pendens* in the foreclosure proceedings, and there is some evidence that she went into possession of the property under the deed prior to that time. The court below assumed that, inasmuch as the stipulation between the parties to this cause recited that the foreclosure proceedings were regular, therefore whatever rights the plaintiff had in the premises under her deed were cut off and foreclosed by that proceeding. The plaintiff was not made a party to the foreclosure, and consequently it was a matter of no concern to her whether the foreclosure proceedings were regular or not. The right to possession was not foreclosed, and could not be cut off, by that proceeding, or the entry of the defendant claiming under the foreclosure of the Converse mortgage. 2 Jones, Mortg. §§ 1412, 1413. The court below was therefore in error in that part of the charge. Under these facts, the court should have directed the verdict in favor of the plaintiff.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

THE PEOPLE v. GEORGE C. JACKMAN.

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Criminal libel—Pleading—Duplicity—Evidence.

1. A complaint for criminal libel in publishing three newspaper articles, which charges that the first article was intended to charge that the complainant had had an arm broken under dishonorable and disgraceful circumstances; that the second article was intended to charge that the complainant bore upon his person the marks of adventures at institutions of a disreputable character; and that the third article meant that the statement made by a certain doctor at a public meeting, that complainant's arm was broken while he was being ejected from a house of prostitution, was true,—is bad for duplicity.
2. The following propositions are summarized from the opinion of Mr. Justice GRANT, and are concurred in by the remaining Justices:

   a—The extrinsic matter introduced into the complaint was for the purpose of explaining the character and nature of the charge made in the publications complained of, and it was not only proper, but essential, that the pleader should state this, where the meaning would otherwise be doubtful.

   b—The statement that the respondent meant by the language used in the third article to say that Dr. Goerrs had told and explained to the people of Marquette correctly and truthfully that complainant's arm was broken while he was being ejected from a house of ill repute in Oshkosh, Wisconsin, was sufficiently definite, it not being necessary to set forth the exact language claimed to have been used.

   c—The law does not permit persons to publish that one has been guilty of criminal, infamous, or degrading acts, based upon public rumors or current belief.

Exceptions before judgment from Marquette. (Stone, J.) Argued April 21, 1893. Decided June 30, 1893.

Respondent was convicted of criminal libel under Act No. 210, Laws of 1885. Conviction set aside, and new trial ordered. The facts are stated in the opinion.

Peters & Shaull, for respondent.

A. A. Ellis, Attorney General, and *H. O. Young,* Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of criminal libel under Act No. 210, Laws of 1885. Section 1 reads as follows:

"That any person who shall falsely and maliciously, by word, writing, sign, or otherwise, accuse, attribute, or impute to another the commission of any crime, felony, or misdemeanor, or any infamous or degrading act, or impute or attribute to any female a want of chastity, shall be deemed guilty of a misdemeanor, and, upon conviction thereof for the first offense before any court of competent jurisdiction, shall be punished by a fine not exceeding one hundred dollars and costs of prosecution, or imprisonment in the county jail of the county in which such conviction shall be had, not exceeding ninety days, or both such fine and imprisonment, in the discretion of the court."

Section 2 provides that no justice of the peace shall have jurisdiction to try any person for a second or subsequent violation, but that when one is charged with a second violation the justice must hold an examination, and bind the accused over for trial in the circuit court if he finds probable cause. 3 How. Stat. §§ 9315, 9315*a*.

The portions of the three articles published in the Times, the newspaper edited by respondent, under the dates of October 20, 21, and 22, and set forth in the complaint, are as follows:

October 20: "The would-be humorous article in yesterday morning's Mining Journal concerning the gasoline explosion in 'Berney, Black & Co.'s sweat box' establishment on Saturday evening accused the editor of the Times of being sore, and endeavoring to do 'some roasting' himself. In that (as in thousands of other things) the 'monopoly sheet' was mistaken, and once more jumped at conclusions. 'Tis true the editor of the Times was the unlucky victim who was seated in the 'infernal machine,' and received a terrible roasting, but when the editorial item referred to was written he was unable to write or think of

anything but his physical injuries. The author of that item is not classed as the editor of the Times, and does not desire to 'roast' anybody, but while misfortune reigns he will endeavor to do business at the old stand. It is well understood that accidents will at times occur, but the one of Saturday night was far more honorable than being 'rotten-egged,' or having an 'arm broken,' of which the victims of both desire but little said."

October 21: "The Times is not the only paper printed in Marquette at the present time that has been so unfortunate as to be represented by persons who do tricky things on the sly. But it intends to retain on its staff only such as can show a clean record for the past as well as present life, and no man upon it can rise to the dignity of managing editor whose history is identified with institutions of a disreputable character, even if he does not bear upon his person the marks of adventure at such places."

October 22: "In '1873,' while driving along a beautiful thoroughfare in Wisconsin, two vehicles collided, and, strange as it may seem, one person, an innocent, (?) peaceable, law-abiding citizen, was hurled to the ground, and received an injury, the marks of which he will carry to his grave. Again, strange as it may seem, the facts have just been explained. There was no 'ice in the wheels,' and why the collision should occur is a mystery. It is fortunate that in this age of the world excuses are numberless, and even at the eleventh hour a sinner may try and seek redemption in various forms. About three years ago Dr. Goerrs (whom the victim of the above-claimed accident ridiculed as being a fakir) explained to the people of Marquette how the accident did happen, and produced $1,000 as a proof of his assertions, but the 'Wisconsin unfortunate' had neither money nor disposition to dispute the charge until after the doctor had left the city. Our 'Wisconsin granger,' who brought nothing to this city aside from a brazen face, a vile tongue, contempt for his fellow men, and a hue and cry for monopoly, cannot expect, after eighteen years have elapsed, to try and pawn off such an unfortunate tale on an innocent public."

The complaining witness, Mr. Russell, editor of the Mining Journal, met with an accident some years before these publications, in which his arm was broken. After

the article of October 21 in the Times, Mr. Russell published an article in the Journal, stating how the accident occurred. The article of October 22 in the Times was written in reply to this. The complaint contained appropriate *innuendoes*, explaining the meaning of the article, but did not set forth the exact language claimed to have been used by Dr. Goerrs in his speech to the people of Marquette. Respondent was convicted in both the justice's and circuit courts. In the circuit court his counsel moved to quash the complaint for the following reasons:

1. Extrinsic matter should not have been introduced in the complaint.
2. The complaint is bad for duplicity.
3. The articles published are not libelous in themselves.
4. While the complaint recites the statements of Dr. Goerrs, it does not allege that the libel was published of and concerning that matter.

This motion was overruled.

1. The extrinsic matter introduced into the complaint was for the purpose of explaining the character and nature of the charge made in the publication complained of. It was not only proper, but essential, that the pleader should state this, where the meeting would otherwise be doubtful. The article of October 22 referred to an explanation made by Dr. Goerrs. The pleader stated that the respondent meant by this language to say that—

"Dr. Goerrs had told and explained to the people of Marquette correctly and truthfully * * * that the arm of said Russell had been broken while the said Russell was being ejected from a house of ill repute in Oshkosh, Wisconsin."

This was sufficiently definite, and it was not necessary to set forth the exact language claimed to have been used by Dr. Goerrs. The respondent fully understood the charge referred to, for one of his defenses was that he believed it to be true.

2. The complaint is not bad for duplicity. The three articles may fairly be construed together as making one charge and forming one offense. Not until the publication of the third article is any direct reference made to the specific charge that Mr. Russell's arm was broken in a house of ill fame, or to the specific charge made by Dr. Goerrs. The third article made clear what was meant by the first two, and thereby rendered the offense complete.

3. It requires no argument to show that the complaint charges an offense within the meaning of the statute. The act charged was degrading, and the complaint alleges that it was made falsely and maliciously.

4. We think the complaint not open to the objection that it does not allege that the libel was published of and concerning the charge made by Dr. Goerrs. The reference in the third article to the statement made by Dr. Goerrs rendered clear the meaning which before had been doubtful. It showed that the degrading act charged in the articles was that Mr. Russell was in a house of ill repute, and was ejected therefrom. By the publication respondent gave credit to the charge, and stated that it was true, and intended to do so. All that remained for the pleader to do was by the proper explanatory words to put the meaning beyond doubt, so that the respondent should know what he was required to meet.

5. Respondent offered to show by a witness that the facts alleged in the complaint as libelous had for a long time been currently reported and believed in the community, and that these facts had been so reported to him. This testimony was correctly rejected. The law does not permit persons to publish that one has been guilty of criminal, infamous, or degrading acts, based upon public rumors or current belief. The respondent made no effort to determine the truth of the charge, nor upon the trial

did he offer to prove its truth. In the heat of a newspaper controversy of no concern or interest to the public he published an article defaming the character of a citizen. Such conduct has no excuse, either in law or morals. There were no justifiable ends to be accomplished by such publication.

I think there is no error upon the record, and the court below should be directed to proceed to judgment.

HOOKER, C. J. Jackman was prosecuted for libel. The complaint and warrant (which take the place of an information) allege the publication of three articles in the issues of defendant's newspaper, upon three consecutive days. The theory of the prosecution is that these articles, taken together, charge the complainant with a degrading act, viz., of being at a house of prostitution in Wisconsin. The defendant's counsel claim that each publication constitutes a separate and distinct charge.

The first says, in speaking of complainant and his business partner:

"It is well understood that accidents will at times occur, but the one of Saturday night was far more honorable than being 'rotten-egged,' or having an 'arm broken,' of which the victims of both desire but little said."

The second says: "The Times [defendant's newspaper] intends to retain on its staff only such as can show a clean record for the past as well as present life, and no man upon it can rise to the dignity of managing editor whose history is identified with institutions of a disreputable character, even if he does not bear upon his person the marks of adventure at such places."

The third says, in substance: "In 1873, while driving * * * in Wisconsin, two vehicles collided, and, strange as it may seem, one person, an innocent, (?) peaceable, law-abiding citizen, * * * received an injury, the marks of which he will carry to his grave. Again, strange as it may seem, the facts have just been explained. * * * About three years ago Dr. Goerrs (whom the victim of the above-claimed accident ridiculed as being a fakir) explained to the people of Marquette how the acci-

dent did happen, and produced $1,000 as a proof of his assertions, but the 'Wisconsin unfortunate' had neither money nor disposition to dispute the charge until after the doctor had left the city. Our 'Wisconsin granger,' who brought nothing to this city aside from a brazen face, a vile tongue, contempt for his fellow men, and a hue and cry for monopoly, cannot expect, after eighteen years have elapsed, to try and pawn off such an unfortunate tale on an innocent public."

The complaint alleges that some years before the publication complained of the complainant was injured, and his arm broken, by being thrown from a carriage in Fond du Lac, Wis., and that three years before making the complaint, at a public gathering of a large number of the citizens of Marquette, said injury was referred to in a public speech by a Dr. Goerrs, who then and there falsely gave the citizens of Marquette to understand, and charged indirectly, that said injury was occasioned by the forcible ejection of complainant from a house of prostitution in Oshkosh. The information charges that the first of the articles was intended to charge that complainant had had an arm broken under dishonorable and disgraceful circumstances; that the second publication was intended to charge and give it out to be understood by the readers that the complainant did bear upon his person the marks of adventures at institutions of a disreputable character; and that the third publication meant that the statement of said Dr. Goerrs, that complainant's arm had been broken while he was being ejected from a house of prostitution, was true. Each publication, as interpreted by the pleader, charges a degrading act, within the meaning of the statute. The information is therefore open to the objection of duplicity. 1 Bish. Crim. Proc. §§ 432–442; Tiff. Crim. Law (3d ed.) 375. Under this information and general verdict of guilty, it is possible that the jurors did not agree upon the commission of one and the same offense.

Upon other points we concur in the opinion of Mr. Justice GRANT.

The conviction should be set aside, and a new trial ordered.

MCGRATH, LONG, and MONTGOMERY, JJ., concurred with HOOKER, C. J.

THE PEOPLE v. WILBUR FLYNN.

96 276
118 301
96 276
154 574
154 581

Criminal law—Rape—Evidence—Instructions.

1. One who aids and assists another in committing the crime of rape is guilty of the main offense.
2. The definition of a reasonable doubt, in language substantially like that used in *People v. Finley*, 38 Mich. 482, is approved.
3. It is competent for the prosecution to ask the complaining witness in a rape case whether she believed that the respondent intended to kill her from threats which she has testified they, or one of them in the presence of the other, made; also, whether the intercourse, which is admitted, but is claimed to have been voluntary on her part, caused her pain; also, why she did not struggle against one of the respondents when he subjected her to such intercourse.
4. The charge as set forth in the opinion is held to state the law applicable to the case correctly.

Error to Kalamazoo. (Buck, J.) Argued April 21, 1893. Decided June 30, 1893.

Respondent was convicted of the crime of rape, and sentenced to imprisonment in the State prison for seven years. Judgment affirmed. The facts are stated in the opinion.

Volney H. Lockwood, for respondent.

A. A. Ellis, Attorney General, and *George P. Hopkins,* Assistant Prosecuting Attorney, for the people.

HOOKER, C. J. The respondent was convicted of the crime of rape. The alleged victim, Lizzie Schroder, together with one Minnie Ebans, attended a dance together, where they met the respondent and one Lemuel Allen, who is impleaded with him. The theory of the prosecution is that the young men induced these girls to permit them to take them to the girls' homes in a buggy, but that, instead of doing so, they went in another direction. The Ebans girl jumped out of the buggy, and escaped, but the Schroder girl was forcibly taken to a secluded place, and subjected to sexual intercourse by both of the young men, under threats of personal violence. The defense assert that the intercourse was voluntary.

Upon the trial, Minnie Ebans was sworn as a witness for the people. She testified that she got out of the buggy, and went to a house, and that the last she knew of Lizzie she was "hollering" for help when she (Minnie) was getting out of the buggy. "*Q. by Prosecuting Attorney*: That was after you got out of the buggy? *A.* Yes, sir. (Objected to by Mr. Lockwood as irrelevant and immaterial)." The court committed no error in overruling this objection. The fact was a part of the *res gestæ.* The same may be said of the testimony in answer to the question, "Which way did the buggy go after you left?" This witness testified that she saw no more of the boys or the buggy that evening, but that when she reached home Lizzie was at the witness' house. She was asked where she went before going home, and she stated that she was at police headquarters for about half an hour. She was asked nothing about what she did there, nor did she attempt to state. We see no error in permitting this testimony. The conduct of both girls immediately after

the transaction might reasonably be the subject of scrutiny.

The respondent was subsequently confined in the jail, where the girls were taken by the sheriff, to whom Lizzie had stated that Flynn did not have intercourse with her. A conversation occurred there between the sheriff and the girls in the presence of Flynn. At this time Flynn stated to the sheriff that he had intercourse with the Schroder girl. The sheriff, who had been told by her that Flynn had not had intercourse with her, turned to her, and asked her if it was true, and she said it was. The sheriff then said, "Why didn't you tell me this yesterday?" to which she responded that she was ashamed to confess it to him. The sheriff then asked her if she consented, and she said she did, whereupon he replied, "Well, then you were perfectly willing that Mr. Flynn should have intercourse with you?" She said, "No, I wasn't." The Ebans girl then said, "Lizzie don't understand what you mean by consent." This last remark was objected to and stricken out. The sheriff then explained to her that if she consented she would be as guilty as Mr. Flynn, so far as the act was concerned, and then she said she did not consent; that she was not willing; it was against her will that they had intercourse with her. "*Q.* Did she say anything on that occasion, Mr. Dix, about the reason she permitted it?" Under objection the witness stated: "She then showed me the marks on her neck, where Mr. Allen had choked her, and thrown her down. She said she was afraid to refuse Mr. Flynn, for fear she would receive the same treatment, as he had threatened her previous to this. Flynn made no further remarks on it." Similar testimony was given by the Ebans girl. This testimony was objected to, for the reason that it was hearsay, and immaterial, and that the admission of Flynn that he had intercourse with the Schroder girl was not voluntary. The sheriff stated that the statement was voluntary, and there is nothing to

show that it was not. Flynn did not testify about the interview. It was therefore for the jury to say whether his statement was voluntary. It had no special significance, for Flynn admitted the intercourse upon the stand. The statements of Lizzie in the presence of Flynn were admissible, in connection with Flynn's failure to deny them. She stated the fact of the intercourse, which he had already admitted. She gave as a reason that she feared him because of his threats, which he did not deny. This failure to deny the charge of threats was a matter for the jury.

The court committed no error in permitting the witness Lizzie Schroder to testify, against the objection that she had disobeyed the order of the court. The record shows that she did not disobey the order. The remarks of the prosecutor to the court in opposition to the objection did not prejudice the respondent, for there is nothing upon which to base the presumption that the witness had been doing anything improper while in company with the other witnesses.

The witness Lizzie Schroder was asked, "Whether you believed that they intended to kill you." And again, "Will you state whether or not it [the intercourse] caused you pain?" And again, "I will ask you whether or not, prior to this occurrence, you had experienced what is known as 'monthly periods.'" And again, "State why you did not struggle against Mr. Flynn." It is plain that all of these questions were admissible. The one in relation to menstruation was in connection with her statement that she found blood upon her garments after the act.

This covers the objections to the rulings of the court upon the introduction of evidence.

Some questions are raised upon the charge. The court instructed the jury, in substance, that, if Flynn aided and

assisted Allen to commit rape upon this girl, he was guilty of the offense. That is undoubtedly the law.

The court gave the eighth request to charge offered by the prosecution, as follows:

"I further instruct you, gentlemen, as requested in the people's eighth request as modified: The jury are instructed that it was not necessary for the complaining witness to tell her mother at once of the alleged rape upon her; and if the jury believe from the evidence that the defendant is guilty of the crime charged in the information, and that she by reason of the threats made to her by her ravishers and the treatment that she had received was induced thereby to refrain from informing her mother of what had taken place, then the complaining witness would be excused from not communicating the knowledge of the injury to others.

"That is true, gentlemen. At the same time it is true that you may take into account, in determining the truth of Lizzie Schroder's story, the circumstance whether she did or did not make complaint of it afterwards, and how recently. You may take that into account in connection with all of the facts and circumstances of the case. If you find that she did not complain of it because nothing of the kind happened, why, then, of course you would so consider it. If you find that she made no complaint because of the feelings of terror and mortification induced by what had happened to her, then, of course, she would be excused for not making the complaint."

Also the tenth, as follows:

"If the jury find from all the evidence in the case that the respondent, Flynn, was acting in concert with his co-defendant, Allen, and that while they were so acting in concert and together either or both of them, by the use of threats and other conduct calculated to intimidate the complaining witness, and that such threats and other conduct resulted in placing complaining witness in fear of great bodily harm, and that by reason thereof the respondent had sexual intercourse with said complaining witness, the jury find that she did not resist by reason of the threats and other conduct referred to, and the fears engendered thereby, but that said intercourse was against her will,—against the will of the said complaining witness,—then you should convict the respondent.

"Before proceeding to instruct you further, gentlemen, on my own motion, I will give you certain instructions which have been verbally requested by counsel for the respondent to give you."

The jury were also instructed as follows, viz.:

"I am also requested by counsel to instruct you that, to constitute the crime of rape, force must be used to overcome resistance of the woman to the sexual act; and that where no force is used the crime is not rape, even though the intercourse is against the will of the woman with whom the intercourse is had. I so instruct you in connection with what has already been said to you upon that subject. * * * To authorize a conviction for rape the jury must believe that the offense was accomplished by force, and against the will of the woman; and that there was the utmost reluctance and resistance on her part, or that her will was so overcome by fear that she did not dare to resist. And in this case, if the jury find that sexual connection was had with the witness Lizzie Schroder, and that said Lizzie Schroder was unwilling to submit to such intercourse, but finally consented or yielded through mere weakness of will, without any threats being made, or without fear of consequences if she resisted, then the offense would not be rape. But if the jury find that sexual intercourse was had with said Lizzie Schroder, and that she did not willingly submit to such intercourse, but submitted because of threats made against her if she did not yield to such intercourse, and through fear and apprehension of dangerous consequences or great bodily harm, and that her mind was so overpowered by fear that she did not dare to resist, then the offense would be rape, although she may have made little or no physical resistance to such connection."

"I am also requested by counsel for respondent to instruct you that, if you find that the act of intercourse by consent could have produced the injury, then it does not follow that the act of intercourse was by force because of the injury. That would be true, gentlemen,—that, if the injury would have resulted from consent, then it would not follow that force was used because of the injury. You may, however, take in consideration the injury as one fact or circumstance tending to aid you in determining whether the intercourse was forcible or by consent."

"But if you do not find the respondent's statement with

reference to the intercourse to be true, you should then examine, consider, and determine whether such intercourse was by Lizzie Schroder's consent, or whether it was accomplished by so working upon her fears that she did not dare to resist; and, if the latter, what part or share the respondent had or took in the transaction. If, as you have already been told, she did not resist because she did not want to resist, and was not then under the influence of any fear of the consequences if she did resist, then the offense charged was not committed, and you should acquit the respondent. But if, on the contrary, you find that Allen and respondent, acting in concert, took the girl Lizzie Schroder by force to the place where the intercourse took place, and there, by means of threats of great bodily harm, so overcame her will that she did not dare to resist for fear of the consequences if she resisted, and then and there had carnal intercourse with her, while she was under the influence of such fear, and that the respondent as well as Allen took part in every step and stage of the transaction, then the respondent should be convicted.

"It is claimed by the people, and admitted by the respondent, that both Flynn and Allen had intercourse with Lizzie Schroder on the occasion referred to in the information and in the testimony in the case. As you have already been instructed, if a rape was committed by Allen, as charged in the information, and the respondent knowingly and purposely assisted Allen in the commission of such rape, then the respondent as well as Allen would be guilty of the offense, without regard to the fact of the defendant having intercourse with her. If, however, you should find that Allen did not commit a rape on the witness Lizzie Schroder, then the defendant should not be convicted. Or, if you find that Allen did commit a rape on the witness Lizzie Schroder, but that respondent took no part in such offense in any way, either by making threats or assisting Allen in forcibly taking the girl to the place where the rape was committed, with the intent that she should be forcibly ravished, or in any other of the ways mentioned in these instructions, then the respondent should be acquitted. But if you find that the respondent as well as Allen made threats against the girl Lizzie Schroder, and that on such threats she was so put in fear of great bodily harm that she did not dare to make resistance to either Allen or the respondent for fear of the consequences if she resisted, and that while she was under the influence of such

fear of great bodily harm the respondent had intercourse with her, then the respondent should be convicted.

"In determining what was the character of the intercourse which is alleged to have taken place between Allen and Lizzie Schroder and between respondent and Lizzie Schroder, and whether such intercourse amounted to rape or not, and in deciding what share respondent took in the affair, you should, of course, take into account all of the evidence in the case, and consider the testimony of each witness as to any fact in the light of all the surrounding circumstances, and in the light of all the other evidence in the case, giving to each piece of testimony just such weight as you think it is entitled to, and then respond to the convictions which the evidence in the case taken as a whole makes on your minds."

Several exceptions were taken to the foregoing quotations from the charge, but, taken together, these instructions state the law applicable to the case correctly.

Exception was also taken to the explanation of a "reasonable doubt." The language used was substantially the same as that approved in the case of *People v. Finley*, 38 Mich. 482.

We find no error in the record, and the judgment must therefore be affirmed.

The other Justices concurred.

96 284
105 501

JAMES A. RANDALL v. GEORGE GARTNER, CIRCUIT JUDGE OF WAYNE COUNTY.

[See 92 Mich. 467.]

Pleading — Joinder of actions — Libel and slander — Election of count—Amendment of declaration—Statute of limitations.

1. A plaintiff may join all of his causes of action in one declaration, if, in separate suits, he could recover on each in the same form of action.
2. Where, in a libel suit for the publication of several articles on different days, the plaintiff counts separately upon each article, he cannot be compelled to elect upon which count he will proceed to trial.
3. Where several alleged libelous articles are declared upon in one count, which is demurred to for that reason, and by leave of the court an amended declaration is filed, in which a portion of the articles are set forth, one in each count, the amended declaration is a continuation of the original suit, and an objection that some of the articles were barred by the statute of limitations at the time the amended declaration was filed is untenable, the statute not having run against them when the original declaration was filed.

Mandamus. Argued April 25, 1893. Granted June 30, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order requiring relator to elect upon which count of his declaration he would proceed. The facts are stated in the opinion.

John Atkinson, for relator.

Dickinson, Thurber & Stevenson, for respondent.

LONG, J. The relator commenced suit in the Wayne

circuit court against the Evening News Association on September 27, 1890, for libel. Defendant demurred, setting up several causes of demurrer. In March, 1891, the demurrer was argued, and on February 10, 1892, the court sustained the demurrer, with costs, giving the plaintiff 20 days within which to amend. The cause was removed to this Court, and reversed as to costs, with leave to the plaintiff to amend without costs.[1] The original declaration counted upon a great many libelous articles, all of which were set out in one count. On September 19, 1892, plaintiff filed an amended declaration, selecting 20 of the articles included in the original declaration, and setting forth each one in a separate count. December 13, following, defendant moved the court below for an order striking from the amended declaration each of the counts therein which were based upon articles alleged to have been published more than two years before the amended declaration was filed, for the reason that under the original declaration, which contained but one count, the plaintiff could rely upon but one cause of action, and that it was not competent to bring in by amendment, as independent causes of action, such articles as, at the time of the amendment, were barred by the statute of limitations. On February 20, 1893, an order was made, directing that plaintiff, within 20 days, elect upon which of the counts of the amended declaration, based upon a single libelous article set forth in the original declaration, he would proceed, in lieu of the count in the original declaration, and that when such election should be made all of the counts of the amended declaration, based upon articles which, at the time of the allowance of the right to amend the original declaration, had been published more than two years prior to the granting of such right to amend the original declaration, be stricken from the amended declaration, and that the defendant have 20 days thereafter

[1] See *Randall v. Evening News Association*, 92 Mich. 467.

to plead. This proceeding is for *mandamus* to compel the court below to vacate the above order.

The court below was in error in holding that any of the published articles embodied in the original declaration were barred by the statute. These articles were declared upon in the original declaration, but we held that they were not well pleaded, by reason of their being set out in one count. They were not barred by the statute at the time the original declaration was filed, and the filing of the amended declaration was not the commencement of a new suit, but the continuation of the suit originally commenced, and did not introduce a new cause of action.

The court was also in error in requiring the plaintiff to elect upon which count he would proceed to trial, and to strike out the other counts. He had a right to proceed upon all the counts. These articles were published upon different days, and may each constitute a cause of action. There is no reason, however, for saying that he may not join the several causes of action, and have them all tried in one suit. It is settled that a plaintiff may join all his causes of action in one declaration, if, in separate suits, he could recover on each in the same form of action. *Tregent v. Maybee,* 54 Mich. 226. See, also, 1 Chitty, Pl. 199; 1 Tidd. Pr. 11, 12; *Coryton v. Lithebye,* 2 Saund. 117*a*–117*d*; *Craft v. Boite,* 1 Id. 246*a*; *Savile v. Jardine,* 2 H. Bl. 532.

The writ must issue, as prayed.

The other Justices concurred.

JOHN G. STRADLEY v. CHARLES J. PAILTHORP, ACTING CIRCUIT JUDGE OF CHIPPEWA COUNTY.

Corporations—Foreclosure of mortgage—Fraud—Intervention by stockholder.

Where a stockholder asks leave to intervene, and defend a foreclosure suit brought against the corporation, in which it has allowed an order *pro confesso* to be entered, on the ground of alleged fraud and collusion between the holders of the bonds which the mortgage was given to secure and the corporation, and of their fraudulent issue, he should place before the court in support of his application the sworn statements of those who are cognizant of the facts, and who make their affidavits upon actual knowledge.

Mandamus. Argued April 25, 1893. Denied June 30, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order denying leave to relator to intervene in a certain suit. The facts are stated in the opinion.

Lawrence F. Bedford (*John C. Donnelly*, of counsel), for relator.

Goff & Cady, for respondent.

GRANT, J. The relator is a stockholder in the St. Mary's Falls Water-Power Company, a corporation organized under the laws of this State. He petitions for the writ of *mandamus* to compel respondent to vacate an order denying him leave to intervene in a suit in equity wherein Amos J. McClung, as trustee, is complainant, and said water-power company is defendant.

The company issued bonds to the amount of $41,000 and executed a mortgage, to secure them, to Mr. McClung,

as trustee. The company defaulted in its payments, and Mr. McClung, at the request of the bondholders, filed a bill in equity to foreclose the mortgage. The bill was filed October 2, 1891. The company made no defense, and an order *pro confesso* was duly entered March 15, 1892. June 18, 1892, the relator filed a petition in the circuit court, praying that said order *pro confesso* be set aside, and that he be allowed to intervene and answer the bill of complaint filed therein. At the same time he tendered an unsworn answer, charging fraud and collusion between the bondholders and the directors of the company, and that the bonds were fraudulently issued. His petition to intervene was duly sworn to, but in it his charges of fraud and collusion are based entirely upon information and belief, and it contains no facts upon which his charges are made. In his proposed answer he denies that the bonds were issued for the purpose of purchasing or paying for any right of way, or in pursuance of any resolution of the company; alleges that they were issued for the fraudulent purpose of creating a debt against said company; that the money obtained for said bonds was not used for the purpose of buying right of way, and that the secretary of the company was not a stockholder at the time he signed the bonds; that the purchase of an additional right of way was not authorized by a vote of the stockholders or directors, nor were the bonds so authorized. He also alleges that the banks, who are holders of some of said bonds, are not *bona fide* innocent purchasers and holders; that the chief officers of the banks were stockholders in the company; and that some of the officers of the banks were also directors in the company. The answer then proceeds to allege misconduct, mismanagement, and misappropriation of the fund on the part of the directors of the company.

To this petition to intervene, Mr. McClung filed a sworn

answer, to which were attached copies of the proceedings of the meetings of the stockholders and directors at which the mortgage and bonds were authorized, and also a sworn statement of the expenditures of the money received on the bonds, and a copy of the certificate of the stock of the secretary, showing that he was a director of the company.

The respondent returns that it was admitted by petitioner's solicitor, in open court, upon the hearing of the petition, that the water-power company actually sold the bonds in question, and received the money therefor. He also returns that he became satisfied, from an examination of the petition and answer, and the papers filed in connection therewith, that the mortgage and bonds were valid, and in every way lawful, regular, and duly authorized; that their issue was ratified by the stockholders May 20, 1890; and that they were given, sold, and bought in good faith, for a valuable consideration, and that the proceeds thereof were received, and applied to the purposes authorized in the issue thereof. The record evidence produced at the hearing of the petition was directly contradictory of many of the assertions made in the proposed answer. The respondent also says, in his return, that he denied the application because it appeared from the evidence that justice would be promoted by so doing.

The relator, during all this time, was a resident at Sault Ste. Marie. He was a director in one of the banks which purchased $5,000 of the bonds. He was editor or proprietor of a newspaper in which the notices of the various proceedings were published. Previous to filing the petition in this case, he had filed a bill in chancery charging the directors with the mismanagement, etc., above referred to. That suit is still pending. Of course the misappropriation of the funds would not affect the validity of the bonds, unless the bondholders were parties to such misappropriation.

In cases of this character the facts claimed as a basis of a charge of fraud should be specifically and fully set forth in the pleadings. Legal proceedings will not be restrained upon statements made upon information and belief. When a party desires to restrain such proceedings, and especially after a delay, when he appeals to the conscience and discretion of the court, he should place before it the sworn statements of those who are cognizant of the facts, and make their affidavits upon actual knowledge. If it be said that the case involves large interests, it will be replied that all the more is it the duty of the party applying to be heard, and to secure the delay and stay of the proceedings, to state facts which will convince the court that he has a meritorious case, and that his delay is excused.

We do not think that the respondent abused the discretion reposed in him by the law, and the writ must be denied, with costs.

The other Justices concurred.

96 290
127 430

WILLIAM COURTRIGHT v. THE COMMON COUNCIL OF THE VILLAGE OF NEWAYGO.

Liquor traffic—Bond of dealer—Operating two bars under one license.

1. The liquor law of 1887 recognizes the fact that other lines of business are often carried on upon the same premises within which the liquor business is or is to be conducted, and makes a distinction between the *room* in which the liquors

are kept for sale and the *place* where the business is carried on.

2. The bond required to be given by a person who engages in the sale of intoxicating liquors must contain a description, not of the room or rooms where the liquor is to be sold, but of the place where the business is to be carried on.

3. The statute imposes the tax to be paid by liquor dealers, not upon the amount of their business, nor upon each bar, but upon the *business* of selling liquor at the *place* of business designated.

4. *Mandamus* will lie to compel the approval of a liquor bond in which the place where the business is to be carried on is designated by the name of a hotel owned and kept by the liquor seller, and in which he maintains two separate bars, one on the ground floor and one in the basement, the same having front entrances from the street, and rear entrances from the alley in the rear of the hotel, and being accessible from the hotel office.

Mandamus. Argued June 6, 1893. Granted June 30, 1893.

Relator applied for *mandamus* to compel respondent to approve his liquor bond. The facts are stated in the opinion.

George Luton, for relator.

William D. Fuller, for respondent.

McGRATH, J. This is an application for a *mandamus* to compel respondent to approve relator's bond as a retail dealer in liquors.

Relator is carrying on a hotel in the village of Newaygo known as "The Courtright," having a frontage of 175 feet on the main street, and which is wholly occupied by relator. It is insisted by respondent that relator has for some years operated, and now proposes to operate, two separate bars in said hotel,—one on the first floor, and one in the basement,—both of which have independent entrances from the

street, and also from the alley in the rear of the hotel, and both of which are accessible from the hotel office. The bond described the place at which the business is to be carried on as "at the Courtright," and respondent insists that the description is not sufficiently specific to prevent the maintenance of both bars under one license.

The form of the bond required by the law of 1887 is set forth in the act, and contains the following recital:

"*Whereas,* the above-named principal proposes to carry on the business of —— (and describing the place of business), at ——, in the county of ——."

The place of business of relator is the hotel known as "The Courtright," and that description includes any room within the curtilage. The statute[1] recognizes the fact that other lines of business are often carried on upon the same premises within which the liquor business is or is to be carried on, and makes a distinction in its restrictions between the room in which liquors are kept for sale and the place within which the business is carried on. Section 14 makes it unlawful to permit any student or minor to play at cards, or any game of chance, in any part of any building in which liquors are sold, while section 15 makes it unlawful to allow any minor to visit or remain in any room where liquors are sold, unless accompanied by his father or other legal guardian. Section 17 provides that all saloons, restaurants, *bars, in taverns or elsewhere,* and all other places where liquors are sold, except drug-stores, shall be closed on certain days, and during certain hours.

In *Goff v. Fowler,* 3 Pick. 300, defendant was licensed as an inn-keeper, and it was insisted that such license did not extend to a building detached from the house proper, but it was held that the detached store was a dependency.

[1] Act No. 313, Laws of 1887.

In *Com. v. McCormick*, 150 Mass. 270 (22 N. E. Rep. 911), it was held that a license to sell in a "one and a half story building" imported an authority to sell anywhere in such building.

In *City of St. Louis v. Gerardi*, 90 Mo. 640 (3 S. W. Rep. 408), the Planters' House occupied one-half of a square and had three street fronts, and a bar at each of the front entrances. The bars were screened off by partitions, and had direct communication, by means of doorways, with the office rotunda and restaurant. The ordinance provided that application for licenses should be made in writing, and should state specifically where the dramshop was to be kept, and that—

"All licenses issued under this ordinance shall be kept posted up in some conspicuous place behind the bar, and as near the center thereof as possible."

Held, that the place at which the dramshop was to be kept was the Planters' House; that the bar is simply the means of carrying on the business, and, where it is kept at the designated place, the mere fact of the licenses erecting more than one bar at such place, so connected would not render him guilty of a violation of the ordinance. See, also, *Salt Co. v. Wilkinson*, 8 Blatchf. 30; *Hochstadler v. State*, 73 Ala. 24; *Com. v. Stratton*, 150 Mass. 188 (22 N. E. Rep. 893); *Com. v. Jones*, 142 Id. 573 (8 N. E. Rep. 603); *Com. v. Barnes*, 140 Id. 447 (5 N. E. Rep. 252); *State v. Moody*, 95 N. C. 656.

Section 8 of the act provides that upon filing the bond the principal shall not be allowed to sell "in any other building or place than that specified in said bond without giving notice, and executing another bond." This language would seem to exclude the idea that the principal cannot sell elsewhere in the same building, and that if he should change the location of his bar to another room in the same building he would be obliged to give a new bond.

This section is discussed in *People v. Brown*, 85 Mich. 119, 121, and the language used is, "one place of business." The bond requires a description, not of the room or rooms, but of the place of business.

In the present case the entire premises are occupied by one proprietor. They have a well-known designation. They are connected by doorways, as are the rooms in which the bars are located. The whole is one place, with one proprietor. The statute imposes the tax, not upon the amount of the business, nor upon each bar, but upon the business of selling liquor at the place of business designated.

The *mandamus* must issue as prayed.

The other Justices concurred.

JOHN ABBOTT v. FRANK CHAFFEE.

[See 83 Mich. 256.]

Assignment for benefit of creditors—Failure to give bond—Fraudulent conveyances.

The assignee of an insolvent debtor, who, by reason of not filing the required statutory bond, failed to acquire the legal title to the assigned property, is not in a position to defend against an action of trover brought by the assignee of a mortgage given by the debtor prior to the assignment, and valid as between the parties thereto, on the ground that he holds the money arising from the sale of the mortgaged property for the mortgagor's creditors, and for that reason may set up as a defense that the mortgage was fraudulent as to them.

Error to Ingham. (Person, J.) Argued April 27, 1893. Decided June 30, 1893.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

S. L. Kilbourne, for appellant.

R. A. Montgomery and *Frank L. Dodge,* for plaintiff.

LONG, J. This case was in this Court at the October term, 1890, and is reported in 83 Mich. 256. On a new trial in the circuit court, verdict was again directed in favor of the plaintiff, and judgment was entered thereon for $519. Defendant brings error.

It appears from the defendant's testimony that the mortgage given was without consideration. The circumstances under which the defendant obtained the property for which the action of trover is brought are as follows: Mr. Elijah D. Kitchen was in the dry goods business at North Lansing. He became indebted for stock purchased for his store to various parties in the sum of about $3,000. Finding it difficult to meet his obligations when due, he applied to Mr. Francis M. Dodge for a loan of about $2,000. After some talk Dodge proposed, instead of loaning the money, to purchase the stock if he could get it cheap enough. Kitchen then told him of his indebtedness. After looking over the stock, Dodge proposed to give him $2,000 for it. The arrangement was concluded, and a bill of sale given by Kitchen to Dodge of all the stock, store, fixtures, etc. Dodge paid $100 down, gave a note for $400 at three months, and a note of $500 for six months. He delivered to Kitchen these two notes. He also made a note of $1,000, due in nine months. This he did not deliver, but put it in the bank, to be delivered to Kitchen in nine months if no litigation about the stock was had. At that time Dodge gave as a reason why he would not loan the money that litigation might arise over the stock, and when he put the $1,000 note in

the bank it was understood that it was not to be delivered if any litigation was had over it. He told Kitchen that he thought litigation would arise over the stock by the creditors. Dodge took possession of the store on the same day, and took about $50 worth of the goods out of the stock. On the next day, or the day after, Mr. Kitchen wanted to undo what had been done, and take back the stock. It was finally agreed by Dodge that he might do this, and it was arranged that Dodge might keep the $50 worth of goods, and have a horse, harness, and buggy which Kitchen owned, and take a chattel mortgage on the stock of goods for $400; and for this consideration he would give up the bill of sale, and turn the goods back to Kitchen. Dodge claims he resold the stock to Kitchen for the above property. The arrangement was made by which Kitchen got the goods back, and the money paid and notes given by Dodge were returned to him. Kitchen thereupon made the assignment mentioned in the former opinion of this Court, for the benefit of his creditors.

The question presented upon the record is whether, conceeding all that defendant's testimony tends to show, he has any defense to the action. Is he in a position to set up the fraudulent character of the transaction between Kitchen and Dodge, if it was fraudulent as to creditors? The statutory assignment had failed, as held in the former opinion, by reason of not giving the bond required, and in consequence the legal title did not pass to the defendant under the assignment. It is contended by defendant that he holds the moneys arising from the sale of the goods for the creditors of Kitchen, and that by reason of that he may set up the defense of fraud against the mortgage; that no consideration passed for it. On the other hand, it is claimed by the plaintiff that the resale of the goods by Dodge to Kitchen was a sufficient consideration for the mortgage.

We think the defendant is not in a position to set up the fraud, if one in fact was perpetrated upon Kitchen's creditors. No creditors are complaining, and the transfer from Kitchen to Dodge was valid between the parties. This being so, there was a sufficient consideration for the mortgage. The defendant does not occupy a position as to the property or to the creditors of Kitchen such as entitles him in a court of law to contest the validity of the mortgage.

Judgment affirmed.

The other Justices concurred.

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ALLISON L. HITCHCOCK v. GEORGE S. HOSMER, CIRCUIT JUDGE OF WAYNE COUNTY.

Transcript of judgment—Jurisdiction of justice—Stay of execution.

The filing of an affidavit for a transcript with a justice of the peace after the expiration of five days from the rendition of a judgment, and the filing of the transcript in the circuit court, divest the justice of jurisdiction of the cause, and prevent the judgment debtor from thereafter staying the issuance of an execution on the judgment.

Mandamus. Argued June 20, 1893. Granted June 30, 1893.

Relator applied for *mandamus* to compel respondent to vacate an order granting a motion to set aside a judgment. The facts are stated in the opinions.

Bowen, Douglas & Whiting, for relator.

W. B. Jackson, for respondent.

MONTGOMERY, J. The sole question presented in this case is whether the filing of an affidavit for transcript with a justice of the peace, and the filing of such transcript in the circuit court, after the expiration of five days from the rendition of judgment, and before a stay of execution has ever been entered with the justice, operate to divest the justice of jurisdiction of the cause, and to prevent the party against whom the judgment was entered from thereafter entering a stay with the justice.

We think this question should be answered in the affirmative. Section 6947, 3 How. Stat. (Act No. 173, Laws of 1885), provides that whenever an execution may by law be issued upon any judgment rendered by a justice of the peace for $20 or over, exclusive of costs, the party in whose favor such judgment shall have been rendered may proceed to take steps to file a transcript in the circuit court. Section 6948 provides for the filing of such transcript with the clerk of the circuit court. How. Stat. § 6949 is as follows:

"Such judgment shall have the same effect as a judgment rendered in the circuit or district court, and may in the same manner be enforced, discharged, and canceled; and execution may be issued thereon against both the surety and the person against whom the judgment was rendered, or either of them, in the same manner as if execution were to be issued by the justice."

Section 6993 provides:

"Whenever a transcript of a judgment rendered by a justice of the peace shall have been filed and docketed by the clerk of the circuit or district court for the county, all executions thereon shall be issued out of and under the seal of such circuit or district court, and the power and authority of the justice in respect to such judgment shall cease."

We do not see any ambiguity or uncertainty in the

language employed in these sections. At the expiration of five days from the rendition of the judgment execution "may by law be issued." The transcript may therefore be taken out and entered. This is done, and the case docketed in the circuit, and the "power and authority of the justice in respect to such judgment shall cease." The learned circuit judge took a different view, and set aside the judgment docketed in the circuit. In this, we think, he was in error, and the writ requiring the correction of this error should issue.

HOOKER, C. J., and GRANT, J., concurred with MONTGOMERY, J.

MCGRATH, J. *(dissenting)*. Relator recovered judgment before a justice of the peace against one Pokriefka, March 7, 1893. On March 13, 1893, relator took a transcript from the justice, filed the same in the circuit court, and an execution was issued thereon. March 14, 1893, Pokriefka filed with the justice a stay of execution. On March 23, 1893, Pokriefka moved the circuit court for an order recalling said execution and vacating the judgment in the circuit. The circuit judge granted said motion, and this is an application for a *mandamus* directing the circuit judge to vacate said order.

Section 3802, Comp. Laws 1857 (How. Stat. § 6963), provides that the party against whom any judgment shall be recovered may stay the execution thereon by filing security with the justice within five days after the justice shall be authorized to issue execution thereon. Section 3798, Comp. Laws 1857 (How. Stat. § 6959), provides that in the cases mentioned in section 3797, Comp. Laws 1857 (How. Stat. § 6958), and in suits commenced by attachment, "execution shall, on application of the person in whose favor the judgment was rendered, be issued forthwith, unless such execution may be and is stayed."

Section 3799, Comp. Laws 1857 (How. Stat. § 6960), provides that executions shall issue, except in the cases mentioned in the two preceding sections, at the expiration of five days after judgment, unless execution shall be stayed, and that execution shall not issue sooner without the consent of the debtor or the proof in the next section specified. Section 3800, Comp. Laws 1857 (How. Stat. § 6961), provides that upon a certain showing execution shall issue immediately, unless the same be stayed. Section 3806, Comp. Laws 1857 (How. Stat. § 6967), makes provision for recalling an execution issued within 10 days in case a stay be filed. Section 3786, Comp. Laws 1857, provided that a judgment creditor should be entitled to a transcript "whenever an execution shall be returned unsatisfied in whole or in part." Section 3832, Comp. Laws 1857 (How. Stat. § 6993), provides that upon the filing of the transcript in the circuit "the power and authority of the justice in respect to such judgment shall cease." In 1867, How. Stat. § 6947, was enacted, to take the place of section 3786, Comp. Laws 1857. The amended section provides that "whenever an execution may by law be issued upon any judgment" the judgment creditor shall be entitled to a transcript upon filing an affidavit setting forth that there are not sufficient goods and chattels liable to execution to satisfy said judgment. This section was further amended in 1885, and at the same time two new sections were added, providing that "whenever an execution may by law be issued upon any judgment rendered by a justice of the peace" the judgment creditor may, upon a showing made by affidavit, have a transcript, which he may file with any other justice within the State.

If section 6947 is to be given the construction and effect contended for by relator, then, in any case where a party in whose favor a judgment is rendered before a justice may obtain an execution within the 10 days, he may obtain a

transcript, file the same in the circuit or with another justice, and prevent a stay. Such a construction would defeat the intention of the Legislature as clearly expressed in the other sections referred to. It is true that under the sections above referred to executions may "by law be issued" "forthwith," or "immediately," or after the time within which an appeal may be taken has expired; but such executions issued before the 10 days shall have expired, within which a stay may be filed, are by law subject to recall. The execution may be issued, but it is issued subject, by express statutory provisions contained in the very act providing for its issue, to that infirmity. The amendment of 1867 was intended to avoid the delay consequent upon the return of executions, the life of which was 60 days. It simply substitutes the affidavit of the party for the return of the officer. It does not in express terms except the emergency executions which may by law be issued under the sections referred to, yet it contains no provisions recognizing the affidavits upon which such executions may be issued, nor does it contemplate that the affidavit therein provided for shall contain the proof of emergency. The other provisions of this act contemplate that the control of the justice over judgments shall be absolute, except in cases of appeal, until the lapse of the 10 days. None of the amending acts contain a repealing clause. The title of the act of 1867 is "An act to amend section 3786, in relation to transcripts of judgments rendered by justices of the peace."

All parts of the act must be considered together. The object of the amendment is apparent. It does not purport to interfere with or cut off the right to stay execution, or to divest the justice of control during the 10 days. If, therefore, a construction can be given to its language which will harmonize it with the other provisions of the act, and avoid repugnancy, that construction should be adopted.

To that end general words or language may be restricted.

The Legislature could not have intended that the right to an execution which, when obtained, was subject to a stay and to recall, could be made the basis for a transcript which, when granted and filed in the circuit or with another justice, would cut off the right to a stay. The language, "whenever an execution may by law be issued," should be held to mean an execution subject to no infirmities, and without liability to recall,—an execution which may by law be issued after the 10 days during which security may be filed and execution stayed. Such a construction gives effect to all parts of the act, recognizes the clear and evident purpose of the amendment, and preserves a right which the other provisions of the act are carefully framed to protect.

The *mandamus* should therefore be denied.

LONG, J., concurred with MCGRATH, J.

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ALEXANDER PARISEAU v. THE BOARD OF EDUCATION OF THE CITY OF ESCANABA.

Public officers—Mandamus—Resignation—Election to fill vacancy—Estoppel.

1. *Mandamus* is not the proper proceeding by which to oust from office an acting officer, who is not a party thereto.
2. Where a member of the board of education of a city places his resignation in the hands of the president of the board just prior to the charter election, after which he accepts a nomination for alderman in a caucus which places in nomination a candidate to fill the vacancy supposed to have been created by such resignation, both of whom are voted for at the election, and a nominee to fill such vacancy is declared elected on a

canvass of the votes by the common council, to which such resignation should have been tendered, and which alone had power to accept it, and the board of education admits said nominee to a seat in its body, said member is not in a position to question the validity of such action on the ground that the board alone had the power to fill the vacancy, if one existed, and that he never tendered his resignation to the common council, for which reason no vacancy existed, to be filled by election or otherwise.

Mandamus. Argued June 20, 1893. Denied June 30, 1893.

Relator applied for *mandamus* to compel respondent to rescind a resolution declaring James R. Champ entitled to a seat on said board, and to admit relator as a member thereof. The facts are stated in the opinion.

Carey & White for relator.

Cahill & Ostrander, for respondent.

LONG, J. Relator asks the writ of *mandamus* to compel the respondent to rescind a motion adopted by it May 3, 1893, declaring one James R. Champ entitled to the seat on said board held by relator, and to compel the respondent to admit him as a member of the board.

In the petition it is claimed that relator was duly elected a member of the board at a charter election held in the city of Escanaba in April, 1892, for the term of two years; that he duly qualified and acted as a member of the board until prevented by the action of the board, seating Mr. Champ in his place. Relator further sets up in his petition that he contemplated resigning his office, and handed his written resignation to the president of the board, but before it was acted upon he withdrew it, and it was returned to him. He further shows that the charter of the city of Escanaba provides that all resignations from office shall be made to the city council, subject to its

approval and acceptance, and that he never offered any resignation to that body; that the city clerk, without authority, acting upon information and belief, caused notice to be published before the election, in April, 1893, that there would be an election to fill a vacancy, and the election was held for that reason; that he has performed the duties of the office since his election, in April, 1892, and was present at the meeting of the board on May 3, 1893, ready to take part in its proceedings, but was prevented by the board adopting the resolution unseating him, and seating Mr. Champ.

It is admitted by the answer that the charter of the city provides that one school inspector from each ward shall be elected annually for the term of two years, and to hold their offices until their successors are elected and qualified, and that such inspectors shall constitute the board of education. Act No. 241, Local Acts of 1891. It is also admitted that under the provisions of the charter the resignations of officers shall be made to the common council, which consists of the mayor and aldermen, subject to its approval and acceptance. It is also admitted that relator was duly elected a member of the board in 1892, and acted as such until a meeting of the board held in March, 1893. It is alleged in the answer that in March, 1893, and prior to the holding of caucuses for the nomination of city and ward officers, the relator placed in the hands of the president of the board of education his written resignation from the board, and became a candidate for alderman of his ward, was nominated by his party, and accepted such nomination, had his name printed upon the ballot as such candidate, and was voted for as such alderman in April, 1893, but was defeated for that office; that relator participated in the caucus, and that in said caucus one Magnus Matson was nominated for school inspector to fill the vacancy caused by relator's resignation; that prior

to the holding of said caucuses the president of the board gave notice to the city clerk that an election would be held to fill such vacancy, and the clerk, acting upon such information, gave notice of such election; that Mr. Champ was also nominated in a caucus held for the nomination of city and ward officers, and was duly elected; that these votes for candidates for city and ward offices were canvassed by the common council of the city, and Mr. Champ declared elected to the office of school inspector, and he was admitted as a member of the board of education.

It is conceded that under section 18, chap. 4, of the charter of Escanaba, vacancies occurring in the board of education are to be filled by the board itself. It is therefore contended by the relator—

1. That the election by the electors of the city was void, for the reason that the board alone had the right and power to fill the vacancy, if there was a vacancy.
2. That the relator never tendered his resignation to the body authorized to act upon or accept it, and therefore no vacancy had occurred, to be filled even by the board itself.

The question, however, is presented, whether the relator is now in a position to raise these questions. He did tender his resignation to the president of the board, and it is apparent that he knew that his successor was nominated and presented to the electors as a candidate for the place. He took part in the caucus, and was himself a candidate for another office before the caucus, receiving a nomination at its hands. He knew the election was to be held to fill the vacancy, and acquiesced in that. The votes cast for the office were returned to the common council, canvassed by it, and the result declared,—that Mr. Champ was duly elected. The board of education, acting upon that declaration, admitted Mr. Champ as a member. The relator then, for the first time after the tender of his

resignation, set up a claim that his resignation was to the wrong body, and that the election of Mr. Champ was void. This must be presumed to be the first knowledge the board had of the relator's claim, from the fact that it is nowhere shown when he withdrew his resignation, or that the board had any knowledge of his claim till then.

It is true that by the provisions of the charter his resignation should have been tendered to the common council, but the clerk of the city had been advised that there was to be a vacancy, and, acting in good faith, published the notice of election. The vote was taken, and the council acted upon it, declaring Mr. Champ elected. This was equivalent to an acceptance of the relator's resignation, under the circumstances, by the council. The vacancy, by this act, was then declared, even if the relator were in a position to set up the claim of want of vacancy; and, though the election by the people may not be considered as giving Mr. Champ a right on the board, yet the action of the board after the vacancy thus occurred legally seated Mr. Champ, as the board, in case of a vacancy, had a right to fill it.

We think the circumstances are such, even if this were not the legal effect of the action of the common council and the board of education, that the relator is not in a position to set up a claim to a seat on the board. It was his own action that brought about this state of affairs, and there is no showing that the board has not acted in the utmost good faith.

The writ should also be refused on another ground. Mr. Champ took his seat on the board after his election, and has been exercising the duties of the office since. He is not made a party to these proceedings, and the effect of the order asked would be to oust him from the office. *Mandamus* is not the proper proceeding to oust him.

People v. Common Council, 18 Mich. 338; *School-Dist. v. Root,* 61 Id. 373; *Frey v. Michie,* 68 Id. 323; *Hallgren v. Campbell,* 82 Id. 255.

The writ must be denied.

The other Justices concurred.

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ELIZABETH VAN AUKEN v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Railroad companies—Injury at crossing—Running engine without headlight—Contributory negligence—Special questions—Traveling on Sunday.

1. Whether or not a traveler who is injured upon a railroad crossing in the open country on a dark night, by a train running without a headlight, is guilty of contributory negligence in failing to stop his team before entering upon the track, in order to listen for an approaching train, is at least a question for the jury, his view of the track being unobstructed other than by the darkness.
2. Where, under the evidence, there can be but one answer to a special question, it is not error for the court to direct the jury to give that answer.[1]
3. In nearly all the states it has been held, under statutes quite similar to our Sunday statute, that a party traveling upon the highway upon the Sabbath, either from necessity or for pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the company for its negligence from the fact that the injury occurred on Sunday.

Error to Van Buren. (Buck, J.) Argued November 30, 1892, and reargued January 4, 1893. Decided June 30, 1893.

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[1] See *Cousins v. Railway Co.*, 96 Mich. —, and note.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smiley, Smith & Stevens, for appellant.

George W. Merriman and *Boudeman & Adams,* for plaintiff.

MONTGOMERY, J. The question of most importance involved in this case is that of the contributory negligence of the driver of plaintiff's vehicle when they approached the crossing where the accident occurred. The scene of the accident is indicated by the diagram appended to the opinion of Mr. Justice GRANT. The highway and the railroad do not meet at right angles, so that in traveling from the east towards the railway track the view would not be directly in the face of an approaching train. The night when the injury occurred was very dark. The evidence shows that when approaching the crossing the horses were on a walk. No stop was made for the purpose of listening, but the driver and those in the vehicle testified that they looked for an approaching train, but saw none, and that they listened and did not hear any signal. The engine was running backward, and the testimony is conflicting as to whether there was any light at the rear end of the cab. The question presented is whether it was the duty of the driver, under the circumstances, to bring his team to a stop in order to listen for an approaching train.

Our decisions have settled the law as follows:

First. A railroad track is, in and of itself, a warning of danger, calling upon one about to cross to use his senses, and to look and listen for approaching trains. *Lake Shore & M. S. R. R. Co. v. Miller,* 25 Mich. 274.

Second. It is not incumbent in all cases for the driver to stop his team, if the track is clear, and he can safely rely on his sense of sight. *Guggenheim v. Railway Co.,*

66 Mich. 158; *Thomas v. Railway Co.*, 86 Id. 504; *Richmond v. Railway Co.*, 87 Id. 380.

Third. As to whether, in a particular case, the driver is justified in relying upon his sense of sight alone, must, we take it, depend upon the circumstances of the case presented.

No case precisely analogous to the one under consideration has been decided by this Court. In *Mynning v. Railroad Co.*, 64 Mich. 93, it appeared that on a dark and stormy night the deceased was killed while crossing the track, under circumstances which showed conclusively the negligence of the railroad company; that he was acquainted with the railroad crossing at the street in question; that he walked at a rapid pace towards and upon the railroad track, without checking his speed, or stopping or looking or listening, or taking any precaution whatever, to ascertain whether a train was about to pass; that others who were about to cross, whose opportunities for observation were no better than those of deceased, saw and heard the train. Mr. Justice CHAMPLIN, in rendering the opinion of the Court, said:

"Ordinary care would have required him to at least look up and down the track before crossing; and, if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger."

In *Brady v. Railroad Co.*, 81 Mich. 616, it appeared that the driver of the vehicle was familiar with the crossing; that the railroad track, for some distance before crossing the highway, runs through an orchard; that the trees coming near the surface of the ground, together with other trees and bushes there, partly obscured the view of persons going southward of any train going to the southeast. The track crosses the highway obliquely. The highway extends from north to south, and the track runs in a

north-westerly and south-easterly direction. It appeared that the plaintiff, sitting on the hounds of his wagon between the two hind wheels, drove upon the track without stopping, although he testified that he looked in both directions. The Court held as matter of law that he was guilty of contributory negligence. In the opinion Mr. Justice LONG states:

"The circumstances stated by the plaintiff himself show conclusively that he was not using ordinary care in approaching the crossing. Here was a crossing so much obstructed by intervening objects that, according to his testimony, he could not see a train coming from that direction—riding, as he was, upon the hounds of his wagon—until he was within 20 or 25 feet of the crossing, and then only a little distance up the track,—some few rods. He was riding with his back turned in the direction from which the train was approaching, and he knew that it was about time for its approach; and yet he drove along and upon the track without stopping; and even when his horse halted on reaching the track he urged her forward with the lines. * * * It was shown further that there was a mill near the crossing, which was in operation, and creating some noise and confusion. Others standing near there saw the train approaching, and had heard the sounding of the whistle at the crossing above. Some of them attempted to call the attention of the plaintiff to the train's approach, but were unable to do so, as he appeared to take no note of what was passing. As the facts are presented by this record, it was the duty of the plaintiff to have stopped his team, and to have taken some precaution to ascertain if the train was approaching, which he knew was about due."

And further, it was said:

"A greater duty was imposed upon the plaintiff in the present case by the fact that he knew the crossing to be a dangerous one. He knew its condition, and that he would be unable to see the train until arriving at the crossing. He had no right to close his ears, and drive along without stopping, when he must have known that the noise of his wagon and of the mill would shut off the sound from the approaching train."

In the present case there was no obstruction other than

the darkness, which, of course, would not have prevented the plaintiff and her companions from seeing a headlight. The sense of sight was therefore as safe a guide as in the daytime, unless it be held that travelers are guilty of contributory negligence as matter of law in not anticipating that trains will be run in the open country without headlights. We think the law ought not to be so. It is most unusual and extraordinary for this to occur. And we think it should be at least a question for the jury as to whether a traveler is in fault in failing to anticipate and guard against such an unusual thing as the running of a train without a headlight. The case might be different in a yard where switching is done, and where cars are switched in the nighttime without the use of a headlight, as was the fact in the Mynning case.

Exception is taken to the language of the court in that portion of the charge where it is said:

"The blowing of the whistle and the ringing of the bell a mile away from a crossing would, of course, give no warning to people about to cross a railroad track."

The court added this:

"The object of it is to warn people who cross the railway track that a train is approaching, so that the warning should be given within such a reasonable distance as would fairly notify people who are about to cross the track of the approach of a train."

We think there was no error in this part of the charge, when read in connection with the whole charge, and when it is considered in the light of the request of defendant's counsel which had been given by the court immediately preceding, as follows:

"The law requires of a railroad company that it cause the whistle to be blown not less than 40 rods from the crossing. It is not required to be blown within 40 rods of the crossing, nor within any other distance except a reasonable distance."

The court added to this:

"The law does not require the whistle to be blown within the 40 rods, nor does it specify the exact distance at which the whistle shall be blown and the train hands begin ringing the bell. That distance, however, should be a reasonable one. It must be more than 40 rods, but it would have to be a reasonable distance."

It must be remembered that preceding this charge the court had already directed the jury that, if the whistle was sounded at St. John's crossing, and the plaintiff and her party could have heard it by remaining quiet and listening, and they were at such a point that it was their duty to remain quiet and listen at the time, they would be guilty of contributory negligence if they did not hear it. It is evident from this that the court was calling the attention of the jury merely to what would be a reasonable distance under the statute which requires the whistle to be sounded. We see no error in that part of the charge.

Counsel for defendant requested the court to charge as follows:

"It does not appear from the testimony of the plaintiff herself that she looked and listened for a coming train when the vehicle in which she was riding was approaching the track; and, as she was more familiar with the locality than her driver, and as she has the burden of proving her personal freedom from contributory negligence, and as she was bound herself to look and listen for a coming train, she has not shown her personal freedom from contributory negligence, and she cannot recover in this action."

The plaintiff was called as a witness, and testified that she could remember nothing except going to Hartford and starting homeward. She was injured in her back, and her limbs paralyzed, so that she was unable to walk, and a great share of the time since the injury she had been entirely helpless. The last recollection, she testifies, she has was the party leaving Hartford going towards home,

and that it was a dark night. The witnesses called in her behalf, who were her companions in the buggy in which she was riding, however, testified that before they reached the crossing, and at some point which is not very definitely fixed, the plaintiff did look, and was apparently listening to see if she could hear the approach of a train. We think there was some evidence from these witnesses proper to be submitted to the jury upon the question of her due care in approaching the crossing, and that the jury, under the general charge of the court, were fully and fairly instructed upon this branch of the case, and the rights of the defendant fully guarded.

Counsel for the defendant requested the court to submit the following special questions of fact to be found by the jury:

1. Did the train in question make a rumbling noise as it passed over the bridges before reaching the place of the accident?
2. If the driver, Cavanaugh, had been listening for the coming train as he drove towards the track, could he have heard the train in question as it crossed the bridges?
3. Was there any noise which prevented plaintiff and her party from hearing the approaching train when they were within 100 feet from the track?
4. Was the whistle blown at all after leaving Hartford, and before the place of the accident?

The court submitted the first three questions. To the first the jury answered, "Yes;" and to the second and third answered, "No." The fourth question the court refused to submit to the jury, but directed them to answer "Yes," which they did. It is contended upon the part of defendant that the direction of the court to answer "Yes" was prejudicial to the rights of the defendant, for the reason that it had a right to know whether the jury were finding the facts in accordance with the evidence, or whether the jury entirely overlooked and ignored the evidence upon a given point when it was all one way; and

whether the jury were applying the law as given by the court to the facts as they found them.

The court was not in error in directing the answer to this question, for, as was well said by the court in directing the answer, "the testimony was all one way." It was shown by witnesses both for plaintiff and defendant, and not disputed, that the whistle was blown after the train left Hartford and before it reached the crossing, and there was no testimony tending in any degree to contradict this. Whether it was blown soon after the train left Hartford, at St. John's crossing, or at some other point on the road, is in dispute; but the question was not directed as to the point where it was blown, but whether it was blown at all after the train left the village. These special questions to the jury are intended for the purpose of a finding upon some particular question of fact in dispute on the trial. *Fowler v. Hoffman,* 31 Mich. 215; *Pigott v. Engle,* 60 Id. 221. There could have been but one answer to the question, and that was the affirmative one, which the court properly directed.

Defendant further requested the court to charge as follows:

"It appears by the testimony on the part of the plaintiff that at the time of the accident the plaintiff was engaged in an unlawful occupation, in that she was driving from a railroad station on Sunday, for pleasure, and not in any work of charity or necessity, and for this reason the defendant is not liable to the plaintiff for injuries resulting from the negligence of its employés."

This question was not presented by the oral argument, but we pass upon it because it is insisted upon in the brief of counsel. How. Stat. § 2015, provides:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The

foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense."

It cannot be said that under the testimony in this case the plaintiff was engaged in any unlawful enterprise, even within the terms of this statute, in riding from the railway station to her home in a peaceable and quiet manner on a Sabbath evening. If she had been engaged in an unlawful enterprise within the meaning of the statute, she would be subject to the penalty fixed by the statute. In nearly all the states it has been held under quite similar statutes that a party traveling upon the highway upon a Sabbath, either from necessity or for pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the railroad company for its negligence from the fact that the injury occurred on Sunday. *Knowlton v. Railway Co.*, 59 Wis. 278 (18 N. W. Rep. 17); *Jacobus v. Railway Co.*, 20 Minn. 130; *Railway Co. v. Frawley*, 110 Ind. 18 (9 N. E. Rep. 594); *Smith v. Railroad Co.*, 46 N. J. Law, 7; *Carroll v. Railroad Co.*, 58 N. Y. 126. It was held in *Sharp v. Township of Evergreen*, 67 Mich. 443, that—

"A person has the right to travel on a public highway on Sunday for any lawful purpose, and the township charged with the duty of keeping such highway in repair is liable for injuries received under such circumstances, the same as if received on a week-day."

The request was properly refused.

Judgment is affirmed, with costs.

McGRATH, J., concurred with MONTGOMERY, J.

HOOKER, C. J. (*concurring*). To permit the recovery of a judgment for negligence against a railroad company in a case where the injured party drives upon a straight track

in daylight, the circumstances should be exceptional; and, while darkness may reasonably make the use of the senses other than sight the more imperative when approaching a track, the necessity and uniform use of headlights may well lead travelers to expect and rely upon them. In the present case we must assume that the engine and caboose made comparatively little noise, which, if heard, might naturally lead to the inference that it was distant, or upon another railroad, which the absence of a headlight would be likely to confirm. The reflection from the headlight upon the end of the caboose, if where it could be seen, might be equivalent to a headlight, but from the relative directions of the railroad and highway *we* cannot say that it *should* have been seen; that being a proper question for the jury. The inference should not be drawn that absence of light excuses negligence, but under the facts in this case we cannot say as matter of law that the plaintiff did not exercise the care and caution which the ordinarily prudent traveler upon a country highway would have exercised. In my opinion, the circuit judge was right in submitting this question to the jury.

LONG, J. (*dissenting*). I am unable to distinguish this case upon principle from *Mynning v. Railroad Co.*, 64 Mich. 93, and from *Brady v. Railroad Co.*, 81 Mich. 616, and am of the opinion that under the circumstances shown the plaintiff and her party should have stopped and listened before entering upon the track.

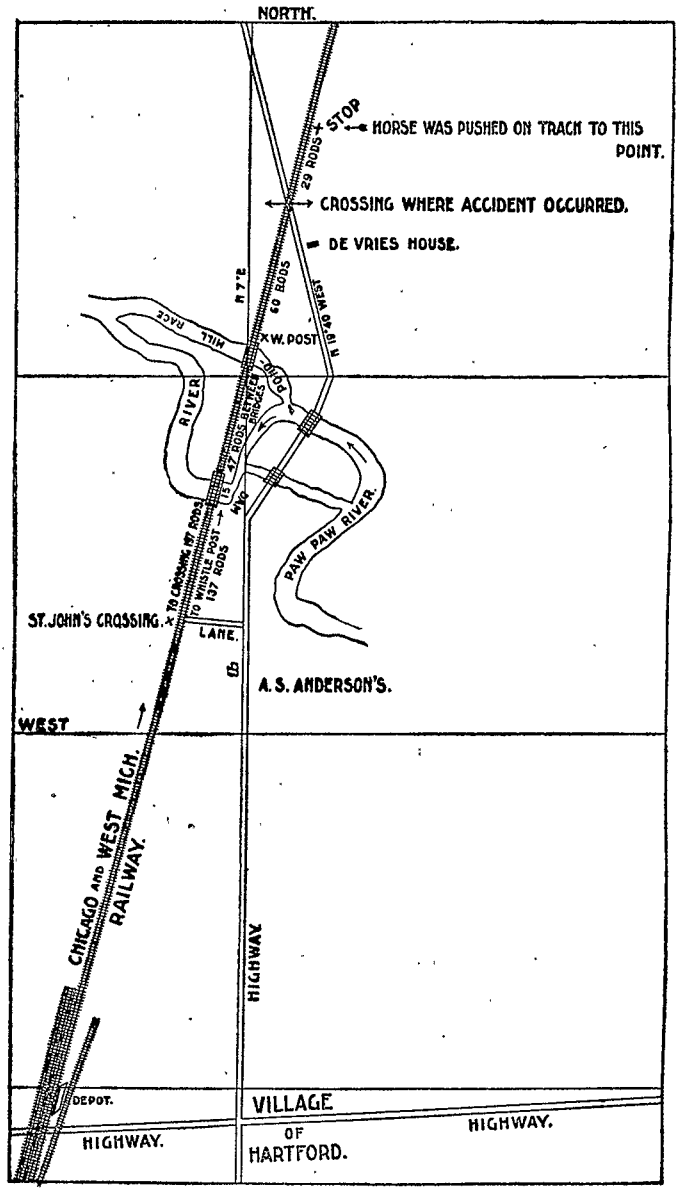
In actions for negligent injuries the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injuries, and that negligence on the part of plaintiff did not contribute thereto; and negligence on the part of the driver of a team is imputable to the plaintiff under well-settled rules in this State. The evidence in this case shows beyond dispute that the train with which plaintiff collided was making great noise, and

the plaintiff and her party could undoubtedly have heard its approach if they had stopped. The fact that it was so dark a night that one could scarcely see the length of the team necessitated that they should exercise more than ordinary care; and, as said in *Mynning v. Railroad Co., supra,* if it was difficult to distinguish an approaching train, then ordinary care required them to resort to their sense of hearing, and to pause and listen before entering upon this place of danger. This it is not pretended they did do, and I think the court should have instructed the jury that the plaintiff, under such circumstances, could not recover.

GRANT, J. (*dissenting*). I think the court should have directed a verdict in this case for the defendant, on the ground of the plaintiff's own negligence. She, and those who were with her at the time of the accident, testify that the night was very dark; so dark that they had difficulty in finding their team, which had been hitched to the fence by the roadside, to await the arrival of the excursion train upon which two of the party were to come.

The situation of the railroad and of the highway appears in the following diagram, page 318.

The distance from the depot to the crossing along the railroad is a little over a mile; from St. John's crossing, where it is conceded that the whistle was blown, to the crossing is one-half mile; from Anderson's to the crossing, in a direct line, is over half a mile; from the depot to the first bridge is about three-quarters of a mile. Plaintiff and all the members of her party, including the driver, were entirely familiar with the situation. They knew that they were nearing this crossing, which, under all the authorities, is a warning of danger. Trains are liable to approach at any time, and at a high rate of speed. The care to be exercised must be measured by the danger which is imminent. The greater the danger, the greater


NORTH.
STOP
HORSE WAS PUSHED ON TRACK TO THIS POINT.
29 RODS
CROSSING WHERE ACCIDENT OCCURRED.
DE VRIES HOUSE.
60 RODS
N. 19 RODS WEST
W. POST
MILL RACE
RIVER
DAM
15 RODS
TO CROSSING 87 RODS
TO WHISTLE POST 137 RODS
PAW PAW RIVER.
ST. JOHN'S CROSSING.
LANE.
A. S. ANDERSON'S.
WEST
CHICAGO AND WEST MICH. RAILWAY.
HIGHWAY
DEPOT.
HIGHWAY.
VILLAGE OF HARTFORD.
HIGHWAY.

must be the care. The question is what care, under the circumstances, the plaintiff and those with her owed to themselves and to the defendant in approaching the crossing. The claim of the plaintiff is that she and her party were not obliged to stop their team and listen, but that they had performed their whole duty when they looked back, as they were riding along, to see if they could see signs of an approaching train, and had listened, as well as they could, amid the noise made by their carriage and their two horses. If this constitutes in law proper care and prudence on their part, then the verdict should be sustained; otherwise it should not.

The road was gravel, mixed with clay. William Cavanaugh testified that the wagon was making a little rattling on the stones, and, again, that the wheels made a little noise running over the pebbles. Another of plaintiff's witnesses, Mr. Hilliard, said that it was what was called a "gravel road," covered with a gravelly cement; that it packed, and was as hard almost as stone. One of the party, Miss McShannock, testified that the wagon was making no more noise than an ordinary wagon would make. It is apparent that two horses, and a carriage containing four passengers, going over such a road, would make considerable noise, even upon a walk. It is moreover apparent that the only listening done was done while they were engaged in ordinary conversation. One of the party—John McShannock—testified:

"*Q.* What did you do in the way of listening to hear if there was anything coming?

"*A.* Well, we all listened. Wasn't making any great amount of noise talking."

Miss McShannock testified that they chatted and visited until they got within a little way of the track. Mr. McShannock testified that they were engaged in ordinary conversation, and were sometimes laughing. The only evi-

dence that plaintiff looked or listened comes from one of the party, who says:

"I know she looked around,—moved around on the seat. She was looking that way. I don't know whether she did or not. I supposed she did from her movement."

She herself testifies that she remembers nothing that occurred. There is no evidence in the record that they all at one time ceased talking, and listened. It requires but little noise in close proximity to one to prevent hearing another and greater noise at a distance, which would otherwise be distinctly heard. The night was still. There was no intervening object to obstruct the hearing. All the witnesses agree to this. In daylight the train would have been in plain sight of the plaintiff all the way from the village. The little mound or rise of ground was not above the line of vision, and could therefore have formed no obstruction to hearing. If plaintiff could not see, it became her clear duty to stop and listen.

In *Brady v. Railroad Co.*, 81 Mich. 616, the plaintiff was held guilty of negligence in attempting, without stopping and listening, to cross a railroad track so obstructed by intervening objects that he could not see a train approaching from one direction until he was within from 20 to 25 feet of the crossing. In that case plaintiff was alone, and, sitting upon his wagon, was approaching the crossing at a walk, and was looking for a train, which he knew was about due. He testified that he did not hear because the wind was blowing the sound from him. He was held guilty of contributory negligence. It was there said:

"A person familiar with a railroad crossing, having been frequently over it, and knowing its location, when approaching the same is under the highest possible obligation to observe such precautions as are needful to avoid a collision; and failure so to do is contributory negligence that will prevent recovery for damages, if any accrue;" citing *Haas v. Railroad Co.*, 47 Mich. 401.

The highest possible obligation certainly requires the exercise of every reasonable precaution to avoid the danger. It certainly makes no difference in what manner one's view of a railroad near a crossing is obstructed—whether by trees, or embankments, or by intense darkness. The duty in the one case is no other or different than in the other. If Brady, whose view was obstructed by trees, could not recover, on account of his own negligence in not stopping and listening, neither should plaintiff in this case, whose view was obstructed by intense darkness. If there is any difference in principle between the two cases, I am unable to discover it.

It is proven beyond controversy that, had the plaintiff and her party stopped their team and listened at any point within 10 rods of this crossing, they would have heard the approaching train, and the distressing accident would not have occurred. Under the evidence, when they were five rods from the crossing, the train was from 15 to 20 rods therefrom, and, of course, the distance between them and the train was about five rods less. Besides, it is a matter of common experience and knowledge that one can, upon a still night, with nothing to obstruct the hearing or distract the attention, hear an approaching train in time to avoid collision at a crossing. To hold otherwise would be "to fly in the face" of a fact known to all, and to discredit our own senses. What plaintiff's witnesses heard, under circumstances as favorable or more unfavorable, certainly plaintiff must be held able to have heard if she had listened. One Fred F. Allen was driving over this same road on his way home from the depot at the same time, and heard the train when it was 20 or 25 rods distant. He also testified that he had heard the train on still nights, going over this piece of road, when he was a mile away. This witness had his wife and child

with him. One Orange Hutchins was living at the Anderson place, marked upon the diagram. He was 20 rods from the train, and after the accident heard the voices at the crossing, half a mile distant. John Srackengast came to Hartford on the same train, and walked home on this same road. When at Anderson's he heard the train, and heard the whistle on the St. John's crossing. Joseph DeVries lived close by this crossing, and was therefore in the same direction from the approaching train as was the plaintiff. He heard the train come over the bridges. R. W. Stickney also came to Hartford to meet this train, went into the depot and remained awhile, and when he came out he heard the train going across the bridge three-quarters of a mile distant. He was more than twice as far from the first bridge as was the plaintiff when nearing the crossing, and more than three times as far from the second bridge. Henry Thomas was approaching another crossing when this same train came along, and testified that he was driving within 10 or 15 rods of the crossing, when his attention was attracted by the rumbling noise of the train. The above were all witnesses for the plaintiff. For the defense one August Ament, who lived 70 rods north of this crossing, testified that on a still night he could hear trains crossing these bridges. The driver, Cavanaugh, testified that when about four rods from the crossing he started his horses from a walk into a trot, but he thinks that they came to a walk when within about two rods of the crossing, and the first knowledge he had of an approaching train was when the horses stepped upon the plank of the crossing, when he "noticed the locomotive loom up."

I think this case is ruled by *Brady v. Railroad Co.*, *supra*. It is true that in that case Brady knew that a train was about due, but that can make no difference with

the rule. Railroads have the right to run trains out of schedule time, and are constantly doing it. It is the duty of every traveler upon a public highway to approach these crossings with the same care and caution as he would if he had the knowledge that a train was due. When one drives, on a dark night, upon them, without stopping to listen, he is, in my judgment, guilty of gross negligence. He not only disregards his duty towards himself, but his legal duty to those who are traveling upon railroads, for he endangers not only his own life, but the lives of others. See *Grostick v. Railroad Co.*, 90 Mich. 594; *Apsey v. Railroad Co.*, 83 Id. 432; *Pzolla v. Railroad Co.*, 54 Id. 273.

Railroad companies and travelers upon the highway are alike bound to the exercise of great care in approaching these dangerous places. The former are liable if they neglect the statutory signals. But this does not justify the latter in assuming that they will hear these signals without stopping to listen when they cannot see. If these signals were given, and the traveler should drive his team upon the crossing without stopping and listening, he would certainly be guilty of negligence, and liable in damages for all the injury which resulted. Neglect of duty by either does not excuse the negligence of the other. When both neglect this plain duty, both are equally guilty, and neither can recover, because each, by the exercise of proper care, could have avoided the accident. The rule as to care must apply to the citizen in his individual as well as in his corporate capacity.

The rule requiring the traveler to stop and listen when he cannot see is reasonable. It imposes no hardship or inconvenience. A stop of a few seconds would, in this instance, have warned them of the approaching train. Upon what principle of reason or justice can plaintiff and her companions be held excusable for not doing so? They

do not say, nor is it claimed, that they could not have heard the noise of the train if they had stopped. They only say that they believe that they could have heard the whistle and bell without stopping the noise which they themselves were making, and which was under their own control. The plaintiff and her companions ask the jury to believe their opinions that, notwithstanding that the noise made by their horses and carriage and their conversation was sufficient to drown the noise of the train until it struck them, yet it was not sufficient to drown the noise of the whistle and bell, and that they would have heard them had they sounded; and this, too, in the face of her other witnesses, that they heard the train at a much greater distance from the track than was she, and that they also saw the lights upon it.

If one must use all his senses, it is his clear duty to put himself in condition to use them; otherwise he has not complied with the law, which requires him not only to listen, but to listen attentively. The duty to stop and listen is supported by the following authorities: *Railway Co. v. Strommel,* 126 Ind. 35; *Railroad Co. v. Beale,* 73 Penn. St. 504; *Mynning v. Railroad Co.,* 64 Mich. 93; *Chase v. Railroad Co.,* 78 Me. 353; *Flemming v. Railroad Co.,* 49 Cal. 253; *Henze v. Railway Co.,* 71 Mo. 636; *Pence v. Railway Co.,* 63 Iowa, 746; *Merkle v. Railroad Co.,* 49 N. J. Law, 473 (9 Atl. Rep. 680).

Beach on Contributory Negligence says (section 181):

"In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. It is also so consonant with right, reason, and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in the law courts. The traveler on the highway must even come to a halt for this

purpose; but he is not required to get out of his wagon, and go forward on foot, for the purpose of looking, especially when such a course would not have prevented the collision, but would rather have exposed the traveler to the very peril it was designed to avoid."

In *Mynning v. Railroad Co., supra,* it is said:

"Ordinary care would have required him [the traveler] to at least look up and down the track before crossing; and, if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger."

In *Railway Co. v. Adams,* 33 Kan. 427, plaintiff, in company with others, was riding along the public highway, and drove upon the track without stopping. In that case, as in this, plaintiff's testimony was that she and her companions did not see the train. It was there said:

"It is the duty of a traveler upon a highway, about to cross a railroad track, to make a vigilant use of his senses in order to ascertain whether there is a present danger in crossing. * * * It is true that the wind was blowing in nearly an opposite direction from which the train was coming, but several of plaintiff's witnesses heard the train, and we have no doubt that, if the plaintiff or Adams had given heed and listened, they would have discovered its approach, and could thus have avoided the accident."

In that case it was proven that the whistle was not sounded 80 rods from the crossing, as required, and the negligence of the defendant was regarded as proven. See, also, *Grippen v. Railroad Co.,* 40 N. Y. 50.

It is said in *Chase v. Railroad Co., supra:*

"The verdict is clearly wrong. The rule is now firmly established in this state, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen; but, if his view is obstructed, then it is his duty to listen, and to listen *carefully.* And if one is injured at a

railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, *presumptively* he is guilty of contributory negligence, and, if this presumption is not repelled, a recovery for the injury cannot be had. * * * This [the obstruction] would make it the traveler's duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially if riding in a sleigh with bells attached, it would be necessary to stop his horse; for surely he could not listen carefully and effectually without stopping his horse, and thus stilling the noise of his own team."

This was what was called a "wrecking train." It had been sent out to repair a fallen bridge near by. After repairing the bridge they returned to Hartford, late in the day, to await orders. It arrived at Hartford at about 7 o'clock, where it awaited for an excursion train to pass. The engine and tender were built solid, and the tender was about 10 or 12 feet shorter than the ordinary kind of tenders. The cab projected out over the tender. Defendant's witnesses testified that a red light was hanging from a hook in the center of the back end of the roof of the cab. This is the customary place for hanging a lantern in running backward. There were two white lights on the front of the engine, near the pilot; one light on each side of the caboose, towards the rear end, near the corner; and one on the rear, and near the top. The engine was in front of the train, running backward. Its headlight was burning, and reflected against the end of the car behind it. It was necessary to run the train in this manner, because there was no turn-table between the fallen bridge and the place of the accident. It was not, therefore, negligence *per se* to run this engine backward. This oftentimes becomes necessary. In *Mahlen v. Railway Co.*, 49 Mich. 585, a passenger train was running without a headlight, and this was excluded by the court from the consideration of the jury. Several of the witnesses for

the plaintiff saw the lights upon the train, and in the caboose, where there were several men.

Judgment should be reversed, and a new trial ordered.

JOHN SHUFELT v. THE FLINT & PERE MARQUETTE RAILROAD COMPANY.

Railroad companies—Injury at crossing—Contributory negligence.

1. Railway trains must run where the view is obstructed by cuts, embankments, trees, and other things; and he who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence.
2. The plaintiff's wife is held to have been guilty of such negligence in failing to stop her team, and look and listen for an approaching train, before attempting to cross defendant's track, as to bar a recovery, it appearing that had she done so she could have seen the train when she was at a distance of from 18 to 20 feet from the crossing.

Error to Osceola. (Judkins, J.) Argued February 8 and 9, 1893. Decided July 25, 1893.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Charles A. Withey, for appellant.

C. M. Beardsley and *O. F. Wisner*, for defendant.

GRANT, J. I concur with my Brother MONTGOMERY that there was no negligence in the rate of speed of the defendant's train, or in the piling of the wood along its track. I think the circuit judge was correct in directing a verdict for the defendant.

1. The plaintiff's wife was herself guilty of contributory

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negligence. The road was dry and hard. She had two horses, and a lumber wagon with a box, and a spring seat fixed upon the box. She did not stop her team to listen. She had been for a long time familiar with the crossing, and had frequently driven over it. When upon the little rise of ground from 90 to 100 feet from the crossing, she looked to the west, and saw no train approaching. The horses were accustomed to the cars, and were not afraid. They were farm horses. She said she was on a slow walk. She did not stop, and the horses stepped upon the track just as the train struck them. If the woodpile, from the rise of ground to the track, obstructed her view of the approaching train, it was her duty to stop and listen when nearer the track. Had she stopped upon the rise of ground, it is quite probable that she would have heard the train. She testified:

"I did not stand still. My horses were on a walk, and when I got there I pulled on the lines, and came almost to a standstill, and looked, and listened if I could hear the cars, and I did not hear them, so I went along. I was on a slow walk. * * * I did not stop. I drove right onto the crossing. The horses were between the rails when I first saw the train. When I got on the track the train was right there."

She did not listen for any train or signals, from the rise of ground to the track. She evidently assumed that there was no danger of the approach of a train before she could get across. In this she was not in the exercise of common prudence, either for her own safety, or that of those traveling upon the railroad. *Van Auken v. Railway Co., ante,* 307, and authorities there cited.

But, according to the evidence of her own witnesses, when she came within 20 feet of the track she could have seen the train, had she looked. It is no excuse to say that she was looking to the east. The track to the east was in plain view for some distance back from the cross-

ing. The danger, if any, was from the other direction. She could, however, have looked both ways in an instant, and had ample time to stop within 20 feet. While she was walking her team, according to her own testimony, less than 100 feet, the train, which was running at a lawful rate of speed, ran about 80 rods. Passengers upon the highway must be charged with knowledge of the lawful rate of speed at which trains may run, and must govern themselves accordingly. Trains are not limited in the rate of speed they may run in the country, and across the public highways, where the travel is limited. The commerce of the country demands rapid transit. *Robinson v. Railroad Co.*, 79 Mich. 328.

These trains must run where the view is obstructed by cuts, by embankments, by trees, and other things. He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence. My own views of the duties of travelers upon the highway, in approaching railroad crossings when they cannot see, are fully expressed in *Van Auken v. Railway Co., supra*, and the authorities there cited.

2. The court was, in my judgment, correct in holding that it was conclusively established by the evidence that the statutory signals were given. I deem it proper to refer to the entire testimony in the case on this point, and the circumstances surrounding each witness who has testified thereto, in order that there may be no misapprehension of the facts to which the law is to be applied.

Mrs. Shufelt's testimony amounts simply to this: That, if the signals were given, she did not hear them. The only reason she had for saying that they were not given was because she did not hear them. She was in the midst of the noise made by two horses and a lumber wagon traveling over a hard road, and did not listen from the time she left the rise of ground until she reached the track.

Miles J. McKay was sitting on his horse, 30 or 40 rods south of the crossing, facing west of north, and was watching the train all the time it came around the curve. He was waiting for a man who was coming across a farm near where he stood. His testimony, on direct examination, is: "I did not hear any signal,—whistle or bell." On cross-examination, he said: "I was not paying particular attention to the whistle and bell; had no occasion, that I know of, particularly."

Virgil Wells and his brother were driving with a team about half a mile north of the crossing, saw the train come around the curve, and testified: "We did not hear the train whistle or ring any bell." On cross-examination he said: "I did not hear whistle or bell. They might have sounded. I did not hear them. That is as much as I can say about it."

Cephas Wells was with the last witness at the time. He testified: "I saw the train a minute or two,—a second or two. I did not hear it whistle or ring. We were within hearing distance. I did not notice any indications of a whistle, by a puff of steam or anything. I was watching it as it rounded the curve." Cross-examination: "I wasn't paying attention to see if the whistle or bell sounded. I wasn't interested. All I can say on that subject is, I didn't hear it."

Timothy Fee was a farmer whose house was about 40 rods west of the highway, and 30 rods south of the railroad. He was in his field west of his house, cutting corn. He said: "I did not notice the train when it passed. I did not hear it whistle or ring. It is a general occurrence for trains to pass there every day. I paid no attention to the like. I was within hearing distance, but I did not hear it." Cross-examination: "I paid no attention to the train. I might have seen it, but did not remark it. I can't say I saw it. I don't remember whether I did or not. I won't

swear it did not ring or whistle either. I did not hear it to draw my attention. Trains pass and repass so frequently I pay no attention, unless they whistle to drive stock off."

Justus Berry lived 80 rods north of the crossing. From his house the railroad is visible from the curve to the crossing. He was at work to the west of his house, and saw the train just as it came out of the curve. He said: "I can't say positively whether it whistled or rung, or either. I can always hear them plain, and usually note it; but I can't say, in regard to that special train, whether it did or didn't. I don't remember hearing it. I did when they got down to the crossing. I heard them toot the alarm. I thought it was cattle. They were then behind the woodpile, very close to the crossing, I should judge."

The above is all the evidence on the part of the plaintiff on the subject of signals.

The engineer of the train testified positively that he sounded the whistle for the crossing. The fireman and the conductor also testified that the whistle was blown. The conductor testified that the train was behind time; that he had passengers for Grand Rapids, was anxious to make the connection at Reed City, and was listening for the sound of the whistle. The bell was rung automatically, by air; and the fireman testified it was last started at Chase, seven miles west; that it rung continuously from there till the time of the accident; and that he stopped it after the accident. The engineer also testified that the bell was ringing.

Joseph Finsterwald was at the depot in Reed City, waiting for this train. He testified that while standing upon the platform he heard the crossing whistle; that at the time it whistled he was walking with another man to the west side of the depot to get a cigar; that on hearing the whistle for the crossing he remarked to his companion that they would not have time to get the cigar; that his companion,

who was one of the employés of the depot, replied that they would have time, as the train stopped a few minutes. They got the cigar, and on their return saw the train standing about half a mile up the track.

Nathaniel Clark, a resident of Reed City, was coming towards the south, on this same road, about 80 rods north of the crossing. He heard the crossing whistle,—two whistles. Shortly after that he heard the whistle again. He was then going up a grade in the road, and the crossing was hidden from his view. On reaching the top of the grade, he saw the train backing up. He testified: "I know, by sound, the first whistle I heard was for Walker's crossing. The next would be about at the curve west of the highway. I am positive I heard the whistle, and also heard the bell ring."

Augustus Roberts lived about a hundred rods south of the crossing, Was in his field, sowing grain, and heard a whistle. He said: "It seemed the usual short whistle, and I did not pay any attention to it. It was a locomotive whistle for the crossing." Afterwards, he saw the train backing up.

Samuel Wolfe is a farmer, and has lived in the vicinity 21 years. He was in the smoking car of the train. He testified that he had been noticing the whistles for several crossings west of this one. He heard the whistle for this crossing. He wanted to take the train north at Reed City, and knew that this train was late.

Louis Barrett lived in Reed City. Was approaching the crossing from the depot at the time. He did not see the train until it was standing on the track near the crossing. Was familiar with locomotive whistles. Supposed the crossing whistles to be two whistles,—two long blasts. Heard two whistles, and said it might have been more.

Marcus Laffler was at the depot, waiting for the train. Was standing between the rails. There was quite a crowd

upon the platform. He was facing west, watching for the train. Saw steam escape, and then heard the sound of the whistle, after which the train came down, and stopped about half a mile from the depot. There were one or two blasts of the whistle, and the steam sailed to the south. "I saw one puff of steam, and heard a short blast of the whistle, and there were two or three long puffs of steam, and two or three sounds."

John I. Edwards was waiting at the depot to take the train. Walked to the extreme west end of the station, and stood looking west up the track. Heard the usual whistle for the crossing.

William Hogan lived at Reed City. Was about 30 or 40 rods east of the crossing. Heard the train coming, and saw it. Heard the whistle, and saw the escaping steam from the whistle. The train was just then rounding the curve west of the crossing. It was the crossing whistle. On cross-examination he said that the first whistle was blown around the curve, where he could not see the curve. He went out for the purpose of driving some cows off the track.

John Finkbeiner testified: "Heard the train when it was coming to Reed City. Heard the whistle, but did not know whether it was for the crossing or for the curve."

Fred Kopnick was working in a mill east of the crossing,—the same mill where the two last witnesses were employed. Heard two whistles. Afterwards, he heard another one, and then saw the train backing up.

F. C. McCollum, a physician, was on the train. Had been reading a few days before how they made signals by whistles, and recollected that two toots, followed by two short ones, were the signal for a crossing, and, having nothing else to do coming home, watched all the crossings. He heard two whistles, followed by two short ones, and knew that this was the last crossing before entering Reed

City. He said: "I am positive the signal whistle I heard on that train was for that crossing."

George Forest was on the train. Heard the whistle for this crossing. He said it was a regular crossing whistle,—two long and two short.

Barlow Davis, postmaster at Evart, was at the depot, standing on the track, when the train came around the curve. He remembered very distinctly that it whistled, and that the whistle he heard was the usual signal for a crossing.

Of the six witnesses for plaintiff, not one was paying any attention or listening for the signals. One did not even hear the train. The testimony is purely negative, and of the weakest character. We know from common experience that people usually pay no attention to sounds to which they are daily accustomed. All these witnesses lived for several years in close proximity to this railroad, where these signals were given many times daily. Placing this testimony in the strongest light for plaintiff, and it shows only that these six witnesses were in position where they might have heard the signals, had they been paying attention and listening; but they were not, and therefore they cannot tell whether they were given, as some of them frankly state. The duty to give these signals is imposed by statute, and the presumption is that defendant's employés performed it. It was therefore incumbent upon plaintiff to overcome this presumption by competent evidence, from which the jury might justly infer the fact that the duty was disregarded. Whether, in the absence of any evidence by defendant, a case was made for submission to the jury, we need not determine. Of the 16 witnesses who testified for the defendant, 6 were upon the train, were paying attention, and swear positively that the signals were given. Of the other 10, 8 swear positively that they heard them, and the fair inference from the testimony of the other 2 is that the

signals they heard were the regular crossing signals. The danger signals are so different from the crossing signals that one would readily note the difference. To submit the question to the jury, under this evidence, would be equivalent to saying to them that they might base their verdict upon prejudice, and not upon the facts proven. A verdict for the plaintiff, under this evidence, would be a reproach upon the jury that rendered it, and upon the court which permitted it to stand.

This precise question was involved in *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 274, where the evidence on the part of the plaintiff was substantially the same as in the present case. The charge of the court substantially directed a verdict, and this Court held that if the verdict had been contrary to the instruction the court should have promptly set it aside.

It has also been decided by the court of appeals of New York. *Culhane v. Railroad Co.*, 60 N. Y. 137. It is there said:

"It is proved by the positive oath of the two individuals on the engine, one of whom rang it, and by two others, who witnessed the occurrence, and heard the ringing of the bell. The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened, or gave heed to the presence or absence of that signal. * * * As against positive, affirmative evidence, by credible witnesses, to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching, and listening for it, that their attention was directed to the fact, so that the evidence will tend, to some extent, to prove the negative. A mere, 'I did not hear,' is entitled to no weight, in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence, justifying a submission of the question to the jury as one of fact."

Beauchamp v. Mining Co., 50 Mich. 163, is not decisive

of this case. There is no similarity in the facts, which are not stated in the opinion. Young Beauchamp was struck by a stone when he was 500 feet from the defendant's mine. No statutory warning was there required. The sole question was not, as in this case, whether the warning was given, but also whether, if given, it was sufficient. There was no stated time for these blasts. The warning was usually given by the cry of "Fire" by the miners. If that warning cry was given, still the question remained for the determination of the jury whether it was sufficient. There was evidence tending to show that the warning was given from two to five minutes before the blast, and while the deceased was in a store a still further distance from the mine, and that when he was struck he was behind an elevation where he could neither see the mine nor be seen by the miners. The writer of this opinion was the circuit judge before whom that case was tried. The issue involved, so far as the notice is concerned, will appear from the following portion of the charge:

"If the defendant cries out from near its mine, 'Fire,' it must go further, and cry out in such a way that any persons within reach of where these stones were liable to be thrown would naturally be expected to hear the warning or alarm so given. As to whether such notice was given, you will take into account the surroundings, the situation, the distance to the road, the place where the boy was hit, and whether there was a hill or elevation between him and the place where these men were at the mine when the signals were given."

The defendant requested the court to charge, not only that the warning cry was given, but that it was sufficient to warn the deceased, who was out of sight, behind an elevation, and these two propositions were united in the same request.

The judgment is affirmed.

LONG, J. I concur in the result reached by my Brother

GRANT, on the ground that the plaintiff's wife should have stopped, and looked and listened, before attempting to cross the track.

HOOKER, C. J. The plaintiff's wife approached the defendant's railroad, in a lumber wagon, upon a highway. A bank and a woodpile obstructed a view of the track as she approached. The woodpile commenced about a rod from the highway, and extended 15 rods along and parallel with the track, at a distance of 18 feet therefrom. From the crossing the railroad could be seen for a distance of 80 rods. She drove upon a walk, and when her horses' feet were between the rails she saw the train, and tried to turn them off from the track, but was struck by the engine, and injured.

Aside from any other question raised by this record, that of contributory negligence is conclusive. It was her duty to look both ways, after getting where she could see, before venturing upon the track, and she should have taken sufficient time to do so, though it became necessary to stop her team for the purpose. At a point 18 feet from the track, and while yet in a place of safety, she could have seen the train for a quarter of a mile, and the fact that she did not see it until it was close to her is conclusive of the fact of her negligence, in the absence of exculpatory facts. A person is not justified in driving upon a straight track, in the face of an approaching train, without looking for it, and obstructions to the view, in proximity to the track, increase the obligation of extreme caution. Many decisions of this and other courts sustain the doctrine, which we will not further notice, in view of the full and repeated discussion of the question to be found in our reports.

The judgment should be affirmed.

MONTGOMERY, J. (*dissenting*). The plaintiff brought this action to recover damages for injuries occasioned by a collision of the defendant's passenger train with the plaintiff's team, which at the time was being driven by plaintiff's wife. The declaration avers that the train was running at an unusual rate of speed; that the defendant had caused wood to be piled near the track in such manner as to obscure the view of the train as it was approaching the crossing; and that the engineer of the train, upon approaching the crossing, failed to give the statutory signals by ringing the bell and blowing the whistle. At the conclusion of the testimony the circuit judge directed a verdict for the defendant, principally upon the ground that the testimony failed to show the negligence complained of. There was no such unusual rate of speed shown as constituted negligence, nor was the piling of the wood, in the manner in which it was piled, negligence, in and of itself; so that the substantial ground of negligence was the failure to give the crossing signals.

1. The evidence adduced on the part of the plaintiff was, it is true, in a sense, negative evidence; but we are constrained to hold that it was not so in any such sense as to justify us in holding, as matter of law, that it had no tendency to prove the failure to give the statutory signals. From the nature of the case, the only way this could be proven by the plaintiff was by offering testimony of those who had an opportunity to hear the signals, and who were in such a position that they must have heard them, if they were in fact given. Mrs. Shufelt testified as follows:

"*Q.* What do you say as to whether this train whistled or not?

"*A.* I did not hear the train whistle. It did not whistle.

"*Q.* What do you say as to whether it rang the bell?

"*A.* It did not. It didn't ring any bell there. I did not hear it if it did."

Four other witnesses were called, who testified that they did not hear the bell ring or the whistle sound.

The question is whether this testimony, standing by itself, uncontradicted, tended to establish the fact that the defendant omitted this duty. While the testimony offered to contradict this claim was strong, and may have been convincing, yet it will not do to establish, as a rule of law, that testimony which has a tendency to prove a fact may be withdrawn from the consideration of the jury because it is overborne by contradictory testimony. In such case the proper course is to submit the question to the jury, under proper instructions as to the weight of negative testimony, as compared with positive evidence; and if the jury disregard such instructions, or if their verdict is founded rather upon prejudice than a due consideration of the testimony, it becomes the duty of the trial judge to exercise his power to set aside the verdict on this ground. This may be a case in which a result adverse to the defendant upon this ground would call for the exercise of this power. Upon this we are not called upon to express an opinion, but have no doubt that if the occasion arises for the exercise of such power the learned circuit judge will not hesitate to perform his duty in that regard.

The case is very similar to that of *Beauchamp v. Mining Co.*, 50 Mich. 166. It was said in that case:

"There was direct evidence in the case that a warning was given, in the usual and customary manner, before the blast was fired, and witnesses testified that they did not hear any warning, although within hearing distance at the time. Under such circumstances, while we might fairly suppose that a jury would believe testimony of a positive, rather than that of a negative, character, yet so many other considerations enter into the inquiry as to whether a sufficient warning was given or not, that it would be unsafe, as a general rule, for the court to withdraw such a question from the consideration of the jury. The relative positions of the several witnesses; the manner in which they were

engaged at the time; their apparent interest or bias; their appearance upon the stand,—these and other matters require attention and deliberation; and, where the trial judge declines to take the case from the jury, the case should be an exceeding clear one that would justify this Court in finding error. The question whether any—and, if so, a sufficient—notice was given was one of fact, upon which the evidence, though perhaps weak upon one side, was conflicting, thus bringing it clearly within the proper province of the jury to pass upon. If any error was committed by the jury, the remedy is not in this Court, but in the court below, upon a motion for a new trial, or to set aside the verdict." See, also, *Guggenheim v. Railway Co.*, 66 Mich. 156, 159.

The circuit judge apparently relied upon the case of *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 274. In that case it was said:

"It was also claimed on the trial that the bell of the locomotive of this train was not rung on the approach to the crossing; and, though there was some evidence on the part of the plaintiff tending to show this, most of her witnesses merely saying they did not hear or notice the bell, but some of them stating that it was not rung, the evidence on the part of the defendant was so overwhelming and convincing to the contrary that the judge, in giving the case to the jury, remarked that it seemed to him that, under the evidence, the ringing of the bell could hardly be seriously questioned, but that he left it to the jury, etc. This remark was well warranted, and the evidence was such that, if the specific question had been left to the jury, and they had found the bell was not rung, the court should have promptly set aside the verdict."

In the case last cited the question was not withdrawn from the jury, but was submitted under instructions. It is proper to add that the expression of the circuit judge's opinion as to the weight of this testimony is not in accordance with the rule now obtaining in this State. *Blackwood v. Brown*, 32 Mich. 104; *Chase v. Iron Works*, 55 Id. 139; *Baird v. Randall*, 58 Id. 175.

2. It is contended, however, by the defendant, that, even

if the circuit judge erred in his conclusion upon this question, the plaintiff's wife was, as matter of law, guilty of contributory negligence, and that, therefore, the case should not, in any event, have gone to the jury.

The testimony offered on the part of the plaintiff tended to show that the highway over which Mrs. Shufelt was driving passed through a cut, and that, as she approached the track from the north, the bank, and the woodpile thereon, to the westward, obstructed her view of the track at the point where the train would be when she was opposite the pile of wood. Photographs were introduced in evidence, taken at a distance of 108 feet from the track, and at a distance of 75 feet, respectively. At the first point which she reached when approaching the track, namely, the one distant 108 feet, she had an unobstructed view of the track for a very considerable distance to and beyond the point where the track curved to the left, and it is claimed that she could also see a train approaching the crossing from a point 75 feet distant; and the photograph taken at this point, with the train abreast of the woodpile, makes it apparent that the smokestack and parts of the upper portion of the cars would be discernible. But when she reached this point the train with which the collision occurred must have been at a considerable distance up the track, and the line of vision would be above the top of the cars at the point where they must have been, if on a level with the point opposite the woodpile.

The plaintiff offered testimony tending to show that as the crossing was approached the view of the approaching train would be obscured for a distance of 3 or 4 rods, at least, until within 18 or 20 feet of the track, when the track was clear to view again. Mrs. Shufelt testified as to the care she exercised, as follows:

"*Q.* When you got on the top of this hill, what did you do to see whether there was a train coming or not?

"*A.* I slacked up my team, and looked.
"*Q.* They were on a walk then, were they not?
"*A.* Yes, sir.
"*Q.* And if you slacked up——
"*A.* I came pretty near to a standstill, to see if I could hear anything of them.
"*Q.* Were you expecting a train?
"*A.* No, sir; I was expecting the train had got to Reed City long before I got to the track.
"*Q.* What did you do?
"*A.* I looked to see if I could see any cars coming.
"*Q.* Looked to the west?
"*A.* I looked to the west, and the east too.
"*Q.* You didn't hear anything?
"*A.* I didn't hear anything.
"*Q.* Or see anything?
"*A.* Or see anything.
"*Q.* What did you do then?
"*A.* I went along.
"*Q.* The team on a walk or trot?
"*A.* On a walk."

She further testified that it was because of the obstruction of the bank and woodpile that she could not see the cars coming; that she heard no signal. And in answer to a question on cross-examination:

"*Q.* From the top of the hill down to the crossing, you were looking west were you not?
"*A.* Yes, I was looking west, and east too.
"*Q.* When looking west, you looked to see if you could see the cars coming?
"*A.* I turned my head first one way and then the other, to see if I could see the cars coming."

She further testified:

"The horses were between the rails when I first saw the train. When I got on the track the train was right there, —right close by."

With this testimony, that she looked carefully at the top of the hill, and that she continued to took to the east and west, before us, we think it is not competent to say, as matter of law, that she was guilty of contributory negligence because she failed to stop in a distance of 18 or 20

feet, where a view of the cars could be obtained. The distance from where she was sitting in her seat, to the heads of the horses, must have been some 10 or 12 feet, so that she could not have traversed to exceed 8 or 10 feet after passing the point where the train was obscured from view. If she was in fact looking in the other direction at this moment, it was not necessarily negligent; and it appears that she did in fact discover the train as early, at least, as the horses reached the first rail of the track, as she pulled the team to the left, and the train striking the horse nearest to the track caused the injury. The fact that she had looked when within a few rods of the track, and when her view was unobstructed; the fact that the train was behind time, so that she had some reason to believe that no train was approaching; and the fact that, according to the testimony of plaintiff's witnesses, no signals were given,—when taken in connection with the testimony of Mrs. Shufelt, that she did in fact look both ways, we think, justified the submission of the question of contributory negligence to the jury. The case is not unlike *Guggenheim v. Railway Co.*, 57 Mich. 488, 66 Id. 150. See, also, *Cooper v. Railway Co.*, 66 Mich. 261, in which case it was said:

"It is a wholesome precaution for persons approaching the track of a railroad to look both ways, and to listen for approaching trains, and it is what is generally required. But it is not a rule of universal application. Every case must depend upon its own circumstances."

See, also, *Richmond v. Railway Co.*, 87 Mich. 374; *Evans v. Railroad Co.*, 88 Id. 442. These latter cases, it is true, were cases in which the traveler was lulled into a sense of security by appearances created by the defendant. But in the present case it appeared that no train was due at the time, and that Mrs. Shufelt had in fact looked up the track before passing the point of obstruction; and to hold that she was negligent, as matter of law, under the circum-

stances of this case, is to hold that she must have kept her eyes constantly towards the west, to the neglect of a like duty to note the approach of any train that might be coming from the east.

See, also, the case of *Railway Co. v. Ives*, 144 U. S. 408. In that case it appeared that for a considerable distance before the crossing was reached a view of the railroad was obstructed, so that it was not until a traveler was within 15 or 20 feet of the track that he could get an unobstructed view of the track to the right. One witness testified that, if he was in a buggy, his horse would be within 8 feet of the track before he could get a good view of it in both directions. The deceased was driving along with his wife, in a buggy. It appeared that they stopped at some distance back from the track to listen for any train that might be passing, and while there a train on one of the other roads passed by, going out of the city. They then drove ahead to the track, and just as they reached the track, and while apparently watching the train that had passed, they were struck by one of defendant's trains, coming from the right, at the rate of 20 to 40 miles an hour. It was held, under the circumstances of that case, that the question of contributory negligence was for the jury.

In *Greany v. Railroad Co.*, 101 N. Y. 419, it was said of a case similar to the one under consideration:

"Whether she looked exactly at the right moment, or in each direction in proper succession, or from the place most likely to afford information, cannot be determined, as matter of law; and whether, upon the whole, and in view of all the surrounding circumstances, including the negligent conduct of defendant, she exercised due care, was a question which the trial court could not properly decide for itself, but was bound to submit to the jury, as one which they alone could answer." See, also, *Kellogg v. Railroad Co.*, 79 N. Y. 72.

In *McGill v. Railway Co.*, 25 Atl. Rep. 540, negli-

gence of the railroad company was shown, and it was further shown that the deceased stopped, and looked for a train, about 50 feet distant from the track. The court say:

"The only question on the motion for judgment of nonsuit was his alleged contributory negligence in not stopping, looking, and listening at a point where he could have had a better view of the approaching train. According to the opinion of some of the witnesses, from the position he occupied at the end of the bridge, he could have seen, over the box-cars, etc., the top of the smokestack of the engine and tops of the passenger coaches. As to that, however, the testimony was somewhat conflicting. It is reasonably certain, however, that he neither heard nor saw the rapidly-approaching train, because it cannot be presumed that he would willfully drive upon the track in front of the train, to his own sure destruction. Conceding, for the sake of argument, that there was some evidence tending to show that the deceased was guilty of contributory negligence in not stopping at a point where he might have had a more unobstructed view, that evidence should have been submitted to the jury, under proper instructions as to the principles of law involved. It was their exclusive province to consider and weigh the testimony, and draw therefrom such conclusions of fact as, in their judgment, were warranted." See, also, *Ellis v. Railroad Co.*, 138 Penn. St. 506; *Newhard v. Railroad Co.*, 19 L. R. A. 563.

The case of *Haas v. Railroad Co.*, 47 Mich. 401, we think, is clearly distinguishable from the present. In that case the deceased, after checking his team for an instant two or three rods from the crossing, went forward on a brisk trot until the heads of his horses came in collision with the engine. In the present case the plaintiff's wife approached the crossing with the team under perfect control, and the only fault, if any, was that she failed, at the very instant when she could have discerned the train to the west, to look in that direction. The jury might have found, if they believed her testimony, that she was directing her attention to the east. This was a question for the jury.

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

McGRATH, J., concurred with MONTGOMERY, J.

ADDISON B. MORELAND AND FRANK MORELAND v. GEORGE N. HOUGHTON, ANNA H. GARDNER, AND CHARLES H. VAN WAGONER.

[See 94 Mich. 548.]

Mortgage—Foreclosure.

Where the assignee of a mortgage assigns it as security for a debt which is less than the amount due on the mortgage, he is entitled to the excess, and; in a suit by his assignee to foreclose the mortgage, the decree should provide for the payment to him of the surplus, if any, arising on a sale of the mortgaged premises, to the amount of his claim.

Motion for a rehearing. Submitted April 4, 1893. Decided July 25, 1893. Decree modified, and case remanded for further proceedings according to the opinion. The facts are stated in the opinion, and in 94 Mich. 548.

Atwood & Caskey (*E. F. Bacon,* of counsel), for complainants.

Charles R. Mains, for appellant.

PER CURIAM. A motion for a rehearing having been made in this case, our attention is challenged to the fact that a larger sum was due upon the mortgage than the amount due the complainants, and for the security of which it was assigned to them. The appellant, Van Wagoner, was entitled to this excess.

The case will be remanded to the court below to ascer-

tain and determine the amount actually due upon the mortgage, and the decree below will be modified to the extent that on the sale of the mortgaged premises, or on payment of the amount found due upon the mortgage into court, the money shall be applied, first, to the payment of the sum due complainants, with interest and costs; and, second, the balance, if any, shall be paid to the appellant, Van Wagoner, to the amount of his claim.

Neither party will recover costs in this Court.

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ALVAH C. FILER v. WILLIAM H. SMITH.

Arrest—False imprisonment—Probable cause—Identification—Evidence.

1. Whether an officer is justified in making an arrest without a warrant, upon information that one has been issued for a respondent charged with adultery, whose photograph has been sent to the officer, and between which and the party arrested (who is found stopping at the same hotel where is a woman who is believed to answer the description of the one with whom the adultery is charged to have been committed), he discovers a resemblance, depends upon whether the resemblance is so striking as to be convincing to a man of ordinary prudence and good judgment, which question should be admitted to the jury.
2. A prosecution for adultery can only be instituted in this State by the husband or wife of one of the adulterers, and, whatever suspicions an officer may have, he has no right to make an arrest for adultery, of his own motion.
3. An officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, arrests a party upon a charge of felony, having reasonable grounds to suppose him to be the guilty party, and the one named in his warrant, is not liable, if he proves to be innocent, for the damages suffered in consequence of the arrest.

4. An officer who makes an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, and who can only act, if he act at all, upon photograph or description, or both, should be excused if he acts honestly and prudently, making such inquiry and examination as the circumstances afford him an opportunity to make.
5. Where, in a suit for false imprisonment, the plaintiff, and the photograph upon the strength of which the arrest was made, are in court, it is error to permit the defendant to testify to the opinion of third persons, given after the arrest, as to the resemblance between the photograph and the plaintiff.
6. The advice of attorneys given after the arrest is no justification of the arrest, and, if admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts, an examination of all the evidences of identification offered by the arrested party, and a disclosure of whatever suggestions were made by him regarding his identity.
7. A plain, unvarnished account, published in a newspaper, of the fact of the plaintiff's arrest, is admissible as tending to show the publicity given to the arrest, and the consequent injury.

Error to Muskegon. (Dickerman, J.) Argued April 6, 1893. Decided July 25, 1893.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

L. King Soper, for appellant.

Chamberlain & Cross, for defendant.

McGRATH, J. Plaintiff had been for some five days at Muskegon, engaged in soliciting orders for trees or shrubbery, and had taken several orders. He boarded at a private house, at which several other persons were at the time boarding. Defendant, who is the sheriff of Muskegon county, on the 14th of December, 1891, received from one Cane, the sheriff of Isabella county, by letter, information that in August, 1891, one Reynolds had eloped from Mt. Pleasant with a Mrs. Nichols, the pair taking with them the five children of the latter. The letter contained a description

of Reynolds and Mrs. Nichols, and a photograph of the former. On receipt of this information, defendant telegraphed to Cane that he thought his man was at Muskegon. Cane replied, stating that he had a warrant for Reynold's arrest, and requested that he be arrested and held. Plaintiff was arrested accordingly. Cane arrived the next day, and declared that plaintiff was not the man, and plaintiff was discharged, and he now brings suit for false imprisonment.

The defense was that defendant acted in good faith; that there was a striking resemblance between the photograph and plaintiff; that on the 11th of December a woman who had been boarding at the same place had been arrested for larceny; that this woman had at first given her name as Campbell, and again as Nichols.

The court instructed the jury that—

"In all cases of felony an officer has a right to arrest without a warrant, and may arrest on suspicion alone, and may justify such arrest by showing facts and circumstances upon which, in good faith, he had the suspicion of the guilt of the party arrested, and such suspicion, if well grounded, may be a complete justification of the arrest of the party charged; so that, in this case, if you find that the defendant had good reason to believe, and in good faith did believe, that the plaintiff, Filer, was guilty of the crime of adultery, then defendant would be warranted in making the arrest upon such charge, and holding him therefor."

This instruction could not fail to mislead the jury, under the circumstances of this case. A prosecution for adultery can only be instituted in this State by the husband or wife of one of the parties to the crime. Whatever suspicions an officer may have, he has no right to make an arrest for adultery, of his own motion. There was no charge of adultery against Filer, and no ground for suspecting him guilty of that offense.

If a warrant was in fact issued, defendant would have had an undoubted right to arrest Reynolds. *Drennan v. People*,

10 Mich. 169. The question here is, was defendant justified in arresting plaintiff, under the circumstances detailed by him? He claims to have relied, first, on the resemblance indicated by the photograph; and, second, upon the fact that the woman arrested December 11 gave her name, on one occasion, as "Nichols." Reynolds was described in the letter as 50 years of age; plaintiff was 38. This woman had two children; the fugitive had five. There was nothing suspicious about plaintiff's conduct. Defendant had seen him several times before the arrest under circumstances which indicated that plaintiff knew that he was the sheriff. Plaintiff was present at the house when the sheriff was there with Mrs. Campbell in his custody. Plaintiff knew of her arrest, and the sheriff knew that he was aware of the fact of her arrest. Plaintiff evinced no uneasiness because of her arrest, nor had he manifested any concern regarding it, more than might have been manifested by any one of the boarders at the house. He continued to remain there for several days after her arrest. Mt. Pleasant was but about 100 miles away. It appears that, at the boarding-house, plaintiff was known as Mr. Filer, and the woman as Mrs. Campbell. There was no testimony that defendant had at any time before the arrest made any inquiry, at the boarding-house or elsewhere, as to the nature of plaintiff's business, his name, the length of his stay at Muskegon, what his relations were with Mrs. Campbell or Mrs. Nichols, or as to how long Mrs. Campbell had been in the city; nor was there any evidence of any improper relations between plaintiff and Mrs. Campbell, or that there had been any intimacy between the two, or that there was anything more than a boarding-house acquaintance between them. When plaintiff was arrested, he protested against his arrest; insisted that his name was not Reynolds, but that it was Filer; exhibited his memorandum-book, with the name "A. C. Filer" printed in gilt letters upon

the back; took from his pocket certain letters that he had received at Muskegon, addressed to A. C. Filer, and showed the postmark thereon; exhibited a tax receipt for taxes paid at Battle Creek; and later gave the name of the cashier of one of the banks at Kalamazoo, and desired that he be telegraphed to; but, notwithstanding, he was locked up at 1 o'clock in the daytime, and kept in jail, in the ward with other prisoners, for 30 hours.

It is undoubtedly true that an officer is justified in making the arrest of a person formally charged with an offense, though it turns out that the person so charged is innocent; so, if he makes an arrest for a felony without a warrant, although he has no personal knowledge, but acts upon information received from one whom he has reason to rely upon, and although it may be that the person so charged is not guilty, or no felony in fact has been committed. *Samuel v. Payne,* 1 Doug. 359; *Hobbs v. Branscomb,* 3 Camp. 420; *Holley v. Mix,* 3 Wend. 350; *Burns v. Erben,* 40 N. Y. 463; *Cahill v. People,* 106 Ill. 621; Crock. Sher. § 49; 1 Chit. Crim. Law, 22. In *Williams v. Dawson,* referred to in *Hobbs v. Branscomb, supra,* Buller, J., laid down the rule "that if a peace officer, of his own head, takes a person into custody on suspicion, he must prove that there was such a crime committed."

The rule is laid down by Mr. Bigelow, in his work on Torts (4th ed. p. 140), that—

> "The officer, in executing his process, must arrest the person named in it. If he do not, though the arrest of the wrong person was made through mere mistake, it may be a case of false imprisonment."

Citing *Coote v. Lighworth,* F. Moore, 457; *Dunston v. Paterson,* 2 C. B. N. S. 495. A number of authorities may be cited in support of this rule: Add. Torts, § 805; *Davies v. Jenkins,* 11 Mees. & W. 754; Gwynne, Sher. 99; *Griswold v. Sedgwick,* 6 Cow. 460; *Lavina v. State,* 63 Ga.

513; *Hays v. Creary*, 60 Tex. 445; *Comer v. Knowles*, 17 Kan. 436. I do not think, however, that an officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, upon a charge of felony, arrests a party, having reasonable grounds to suppose him to be the guilty party, and the one named in his warrant, is liable to the arrested party, who turns out to be innocent, for whatever damages he may suffer in consequence of the arrest. Such a rule would materially interfere with the apprehension of fugitives from justice. Probable cause is a justification for criminal proceedings. Criminals who seek safety in flight are usually apprehended through officers in other localities, and by means of photographs and descriptions of the person. As is said in *Brockway v. Crawford*, 3 Jones (N. C.), 433,—

"The law encourages every one, as well private citizens as officers, to keep a sharp lookout for the apprehension of felons, by holding them exempt from responsibility for an arrest or prosecution, although the party charged turns out not to be guilty, unless the arrest is made, or the prosecution is instituted, without probable cause, and from malice."

In *Eanes v. State*, 6 Humph. 53, a murder had been committed in Franklin county by one Payne, who made his escape, and the governor issued a proclamation offering a reward for the apprehension of the criminal. One Martin was arrested in Sullivan county. The particulars of personal description annexed to the governor's proclamation applied in some respects to Martin, and in others did not. The court say:

"The liberty of the citizen is so highly regarded that the officer arresting a supposed felon without warrant must act in good faith, and upon grounds of probable suspicion that the person to be arrested is the actual felon. If he may not, under such circumstances, make an arrest, the escape of criminals would be but little obstructed by the

official proclamation of the governor, and the police of the state, instead of being, as public policy urgently requires, vigilant and effective, would be altogether the contrary."

The rule was laid down in *Maliniemi v. Gronlund*, 92 Mich. 222, that a private person has a right to arrest a man on suspicion of felony, without a warrant, but if he does, and it turns out that the wrong man is imprisoned, he must be prepared to show, in justification, first, that a felony has been committed; and, second, that the circumstances under which he acted were such that any reasonable person, acting without passion or prejudice, would have fairly suspected that the plaintiff committed it, or was implicated in it. This rule is supported by a long line of authorities. Cooley, Torts (2d ed.), p. 202, and cases cited. But, as Mr. Cooley says,—

"A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony had been committed." 7 Amer. & Eng. Enc. Law, p. 675, and cases cited.

In *Rohan v. Sawin*, 5 Cush. 281, the court say:

"The public safety, and the due apprehension of criminals charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law. * * * As to constables and other peace officers, acting officially, the law clothes them with greater authority [than private persons], and they are held to be justified if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party to await further proceedings, under a complaint on oath, and a warrant thereon."

Upon the same principle, and for the same reason, an officer making an arrest upon a warrant, or upon knowl-

edge that a warrant is out, of one whose person is unknown to him, who can, under the circumstances, only act, if he act at all, upon photograph or description, or both, should be excused, if he acts honestly and prudently, making such inquiry and examination as the circumstances of each particular case afford him an opportunity to make. It is practically impossible to apprehend runaways in any other way, and the protection of society from these major crimes demands that some latitude be given to these officers of the law, who are separated from local influences and clamor, and must be presumed to act fairly and honestly.

But in all such cases, where the facts are not disputed, the question of probable cause is one of law, for the court. *Hamilton v. Smith,* 39 Mich. 222, 227; *Burns v. Erben,* 40 N. Y. 463; *McCarthy v. DeArmit,* 99 Penn. St. 63. To afford a justification, there must be not only a real belief, and reasonable grounds for it (1 Chit. Cr. Law, 15), but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. In *Holley v. Mix,* 3 Wend. 350, the court, referring to an arrest made upon information received, say:

"The officer should not, however, receive every idle rumor, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest one upon the information of another."

Defendant was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent man. *Stanton v. Hart,* 27 Mich. 539, 541. He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph (*Sugg v. Pool,* 2 Stew. & P. 196), especially as there was, within easy reach, means of identification. He says he did not know, and did not ask, plaintiff's name or business, until after the arrest. A few moments devoted to inquiry at the boarding-house

would have revealed the situation, and would have shown that there was no reason for associating him with the woman in question. An officer is not warranted in relying upon circumstances deemed by him suspicious, when the means are at hand of either verifying or dissipating those suspicions without risk; and he neglects to avail himself of those means. The case made by defendant did not justify the arrest, and the jury should have been so instructed.

The court erred in admitting the testimony of defendant as to the opinion of Hunsberger and Johnson, given after the arrest, as to the resemblance between the photograph and plaintiff. Both plaintiff and photograph were in court, and before the jury.

The testimony of the attorneys as to the advice given to defendant was clearly inadmissible. It did not appear just what facts were stated upon which the advice was predicated. In no event could advice given after the arrest was made justify the arrest. Even though admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts, an examination of all the evidences of identification offered by plaintiff, and a disclosure of whatever suggestions had been made by plaintiff regarding his identity. The opinions of these witnesses as to the resemblance between plaintiff and the photograph were likewise inadmissible.

The fact of the publication in a newspaper of the fact of plaintiff's arrest was set up in the declaration; and as tending to show the publicity given to that fact, and consequent injury, the publication should have been admitted. It was a plain, unvarnished account. Its publication was privileged. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought

about by intervening agents, provided such agents were set in motion by the primary wrong-doer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant's act that it must be deemed to have been contemplated.

It follows that the judgment must be reversed, and a new trial ordered.

GRANT, J., concurred with MCGRATH, J.

MONTGOMERY, J. I agree with my Brother MCGRATH that it is generally a question of law as to what constitutes probable cause to justify an arrest without warrant. But it is apparent at a glance that the rule is not one susceptible of establishing a general test, by which the question may be determined in all cases. Generally, it is a justification if sufficient facts are known to the officer to justify a reasonable belief that a crime has been committed, and that the party arrested is the guilty party. I am not prepared to say, however, that it should be held, as matter of law, in the present case, that the resemblance of the plaintiff to the photograph of the person alleged to have committed the offense is not, when coupled with the other facts proven, sufficient to justify the officer, but whether there was justification must depend upon the closeness of the resemblance between the photograph and the person arrested. It is manifest that this precise question is one that cannot be determined as matter of law, and should, therefore, be submitted to the jury. The language of the court in *Cochran v. Toher*, 14 Minn. 385, is peculiarly applicable to this case:

"It is manifest that no finding of specific facts could be made by the jury, not embracing a conclusion as to the reasonable effect of the same in fact, from which, under any rule of law, the court could pronounce the con-

clusion, as a legal inference, that they did or did not constitute reasonable cause."

In the present case it would seem that the party arrested had recently come to the county of his arrest; that he was boarding at the same house with a woman who was believed to answer somewhat to the description of the woman with whom the party accused had eloped. The officer, at the time of the arrest, had in his possession a photograph of the accused party, and had information that a warrant was issued for his arrest, and, upon discovering a resemblance between the present plaintiff and such accused party, caused the plaintiff's arrest. In my judgment, whether the arrest was justified under these circumstances depended upon whether the resemblance was so striking as to be convincing to a man of ordinary prudence and good judgment, and this question should have gone to the jury.

I concur with my Brother McGRATH on the other grounds.

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

HOOKER, C. J., and LONG, J., concurred with MONTGOMERY, J.

96	357
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132	1250
96	357
f138	2262
96	357
141	343
96	357
158	626

LORENZO COREY v. OSCAR WEBBER AND CLARENCE W. CHAPIN.

Action—Money had and received.

1. The remedy by an action for money had and received should not be so extended as to create rights which do not exist either at law or in equity.

2. A *bona fide* indorsee of a negotiable note, transferred before maturity and for value, cannot recover from a creditor of the payee the amount received by him from the maker under his disclosure as garnishee of the payee, as money had and received for the use and benefit of the indorsee.

Error to Ionia. (Smith, J.) Argued April 18, 1893. Decided July 25, 1893.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

F. A. Miller (*William O. Webster,* of counsel), for appellants.

N. O. Griswold, for plaintiff.

MONTGOMERY, J. The sole question in this case is whether the plaintiff is liable to the defendants for money coming into his hands, under the circumstances stated below, as in an action for money had and received.

The facts are that on October 14, 1890, the firm of Tripp & Delaney, of Mamaroneck, N. Y., were indebted to one C. T. Cadwell in the sum of $505.27, and that on that day the firm made its note, payable to the order of said Cadwell two months after date, to secure the payment of said amount. This note was, before maturity, indorsed by Cadwell to defendants, and transferred in the regular course of business, and for value. In the fall of 1890 the plaintiff brought suit in a New York court having jurisdiction against Cadwell, and garnished Tripp & Delaney. Tripp & Delaney thereupon made disclosure, and paid the money over to the sheriff, who remitted it to the plaintiff. It does not appear whether the note was due at this time or not. It is claimed by defendants that under these circumstances the plaintiff should be held to have received this money for the use of defendants, and is liable for money had and received.

It is clear that the payment of this money to the plaintiff by Tripp & Delaney in no way affected the defendants' right to sue and recover upon their note. They acted at their peril in making such payment. *Hosley v. Scott,* 59 Mich. 420; *Hitchcock v. Miller,* 48 Id. 603; *Hirth v. Pfeifle,* 42 Id. 31. The question of whether Tripp & Delaney could themselves recover back the money paid to plaintiff cannot, perhaps, be definitely solved from the facts appearing on this record. The general rule, however, is that money paid under judicial process cannot be recovered back, the remedy being, if any, by a reversal of the judgment, and, if this cannot be done, the payor is without remedy. Bish. Cont. § 272; *Walker v. Ames,* 2 Cow. 428; *Cobb v. Curtiss,* 8 Johns. 470. Have these defendants, who have lost nothing by the action taken by the plaintiff, a greater right than Tripp & Delaney are shown to have? We think not.

The remedy by an action for money had and received is comprehensive, and may be employed in a great variety of cases where the right to a fund in the possession of the defendant exists; but it should not be so extended as to *create* rights which do not exist either at law or equity. It is conceived that where no privity exists between plaintiff and defendant, and where the plaintiff has no title to the fund, and where also it appears that there is no relation of trust, legal or equitable, no right exists in the plaintiff to demand the money, and hence that no remedy by action for money had and received can be applied.

The cases cited by counsel for defendants do not, as we read them, establish any rule in conflict with the foregoing statement. In *Beardslee v. Horton,* 3 Mich. 563, defendant was agent of one Mrs. Culver, and, as such, collected the money in question,—a specific thing in the hands of the agent. By an assignment the title to this passed to the

plaintiff. He was permitted to recover after demand and refusal.

In *Moore v. Mandlebaum,* 8 Mich. 433, the defendant was an agent of the plaintiff, and held the money sought to be recovered as trustee.

In *Walker v. Conant,* 65 Mich. 194, the money was paid to the defendant under a mistake of fact, the circumstances showing that the defendant had no right to receive the fund. She would therefore hold the money subject to an equitable trust. In that case it was said:

"There need be no privity of contract alleged or proved *other than* such as arises out of the fact that the defendant has received the *plaintiff's* money, and which, in equity and good conscience, she ought not to retain."

The question presented in this case, as reported in 65 Mich. 194, was disposed of on demurrer, but the case was again before the Court after the facts had been developed on a trial, and is reported in 69 Mich. 321. It there appeared that the situation of Mrs. Conant had been changed, so that in equity she could not be asked to return the money. "She received it in good faith, in satisfaction of a just and equitable claim, and when it was due on honor and in conscience." It was held, therefore, that the plaintiff could not recover.

It will be seen that in each of these cases there was either privity, or a right in the plaintiff to the specific money which was the subject of the action. So in *Martin v. Sheridan,* 46 Mich. 93, the plaintiff was the actual owner of the fund.

The cases decided elsewhere cited by counsel are similar. In *Brand v. Williams,* 29 Minn. 238, plaintiff and defendant held successive attachments. The sheriff realized enough to pay all the attachments. The defendant fraudulently induced the sheriff to pay over to him all the pro-

ceeds of the sale. It seems clear that the plaintiff had a right to the funds in the hands of the sheriff, and the defendant's appropriation of the fund was wrongful.

In *Bank v. Bank,* 19 Fed. Rep. 301, the money received was the avails of checks. The court said:

"The indorsement by plaintiff for collection was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title to the paper or *the ownership of the proceeds* to another."

No case has been cited by defendants' counsel, nor have we in our research found one, which goes the length of sustaining the contention of defendants. On the other hand, the cases of *Patrick v. Metcalf,* 37 N. Y. 332; *Butterworth v. Gould,* 41 Id. 450; and *Hathaway v. Town of Cincinnatus,* 62 Id. 444,—are not distinguishable in principle from the present. The rule is thus stated in *Hathaway v. Town of Cincinnatus:*

"When a debtor owes a debt which two persons not in privity with each other severally claim, and the debtor pays the debt to one in recognition of his claim and in repudiation of the claim of the other, and it turns out that the latter was the rightful claimant, he cannot recover of the former the money paid by the debtor."

The same rule is held in *Butterworth v. Gould,* in which case it was said: "In such case, moneys are not received by the defendant to the plaintiff's use."

In the present case it is not contended that there was any intention on the part of Tripp & Delaney to create any trust, or pay any money to the use of defendants. There was no title in the defendants to the fund, no trust created, and no privity between them and plaintiff. Moreover, the plaintiff was by the act of Tripp & Delaney in making payment of this claim disarmed, and could no longer pursue his debtor. It would be a manifest injustice to permit others to reap the fruits of plaintiff's diligence, and, in case of the insolvency of his debtor, deprive

him of all remedy, where, as in this case, he has in good faith successfully pursued a legal remedy for the collection of his debt.

The judgment will be affirmed, with costs.

The other Justices concurred.

ABRAHAM DECOO v. JOHN WOODWORTH.

Will—Payment of legacy—Mortgage—Subrogation of executor.

A father bequeathed to his son a mortgage given to him by the son, charged with the payment of a legacy to his daughter. The daughter made an arrangement with her father's executor by which he agreed to surrender certain notes he held in his individual character against her husband, and take her receipt in full for the legacy, and the son agreed to give his note to the executor for the amount of the legacy, and the executor agreed to discharge the mortgage and close up the estate. The arrangement was carried out, except as to the discharge of the mortgage and the settlement of the estate. The receipt was filed in probate court, and no assignment of the claim of the legatee was asked for or taken. The executor kept the note for nearly two years, and then returned it under cover, and, as executor, commenced a statutory foreclosure of the mortgage, claiming that he was mistaken as to the solvency of the son when the note was given, and had the right to surrender it, and sue on his original obligation to pay the legacy. And in a suit brought by the son to enjoin the foreclosure it is held that the agreement of the executor to discharge the mortgage entered into the consideration for the note, and that he cannot be allowed to revive the mortgage, nor can he use his office as executor to enforce the payment of the note.

Appeal from Eaton. (Hooker, J.) Submitted on briefs April 20, 1893. Decided July 25, 1893.

Bill to enjoin the statutory foreclosure of a mortgage.

Complainant appeals. Decree reversed, and one entered as prayed. The facts are stated in the opinion.

Dean & McCall, for complainant.

Huggett & Smith, for defendant, contended:

1. The evidence shows that the note was not taken in full payment of the legacy, and that the defendant made no unqualified promise to discharge the mortgage.
2. A promissory note is no payment unless expressly agreed to be so taken; citing *Gardner v. Gorham*, 1 Doug. 510; *Jennison v. Parker*, 7 Mich. 365; and, if dishonored when due, it cannot be regarded as a payment for any purpose; citing *Ex parte Blackburne*, 10 Ves. 206; *Markle v. Hatfield*, 2 Johns. 460; *Putnam v. Lewis*, 8 Id. 389; and, if taken for an antecedent debt, the debt is not discharged, unless the note is given and received in absolute payment thereof, and the burden of proof is upon the party asserting the fact to show that it was so given and received; citing *Geib v. Reynolds*, 35 Minn. 331, and cases cited.

MCGRATH, J. Complainant had given a mortgage to his father, who died testate in May, 1888, leaving the mortgage to complainant, charged with the payment of decedent's debts, his funeral expenses, the erection of a monument upon the family burial lot, and the payment of $400 to complainant's sister, Mrs. Bursons. Defendant was named, appointed, and qualified as executor. Complainant had, in 1888, paid the funeral expenses and debts, and had erected the monument. Woodworth had a personal claim against the husband of Mrs. Bursons of $457, for which he held Bursons' notes. He regarded this claim of little value, and considered complainant as solvent. In November, 1888, he made an arrangement with Mrs. Bursons by which he was to surrender her husband's notes, take her receipt in full for the legacy, and take complainant's note for $400, and look to him for that amount. This arrangement was carried out. Bursons' notes were surrendered, Mrs. Bursons gave her receipt "in full of the legacy," and complainant gave his note to Woodworth for

$400, payable one year after date. The receipt given by Mrs. Bursons was filed in the probate court. No assignment of Mrs. Bursons' claim was asked for or taken.

Defendant's version of the transaction is as follows:

"*Q.* Did you at the time agree with Hannah Bursons and her husband to take the note or obligation of Abraham De Coo for $400, in payment of her legacy?

"*A.* Yes, that was the agreement upon which the notes were surrendered. * * *

"*Q.* Soon after your return home, did you see Abram De Coo, Jr., in relation to this matter, state to him the arrangement that you had made with Hannah Bursons and her husband, and request him to give you his note of $400?

"*A.* Well, it was, I think, in May. I went down to Grand Ledge, and I stayed with Abram over night, and I told him there that I had made this arrangement; and he gave me a note, at my request, for $420, in payment of this legacy and some other business."

Complainant testifies that when he gave the note to defendant the latter agreed to close up the estate and discharge the mortgage. Defendant does not deny this. His testimony is as follows:

"*Q.* To refresh your recollection, at the time Mr. De Coo gave you the $400 note, did you not state to him, in the presence of his wife, that everything was fixed up satisfactorily? 'Come up, and we will go to Charlotte and discharge the mortgage?'

"*A.* I did not; not in them words.

"*Q.* Did you say so in substance?

"*A.* I will state what I said: I stated then that we would come out sometime, and straighten the business all up, and I would get my discharge and the discharge of the bondsman.

"*Q.* And you meant, of course, that that included the discharge of the mortgage?

"*A.* Yes, of course; all of the business. * * *

"*Q.* Was there anything said, at the time you took the note, that you took it in payment of the legacy?

"*A.* I think there was. Well, nothing in particular said, more than this. Abe and I settled up, and added $20 that he also owed me, and put it all in one note.

"*Q.* What was said about your taking that note in payment of the legacy?

"*A.* Well, we was to meet at Charlotte, and settle up the business. * * * * * * * * *

"*Q.* You say this was after he had given you the note?

"*A.* Yes. Now, this was not the talk, but it was my supposition,—that he would come out, and the whole thing would be settled up, so that I could get my discharge; and that would include the discharge of the mortgage. This I said to Abe; that some time we would go out to Charlotte, and we would settle the whole matter up, so that I could get my discharge. After this note was signed, I went and saw Abe, and wanted him to go to Charlotte and fix this matter up, so that I could get the release of Mr. Hudson, who was on my bond. There was a day set, and on that day I came down here. I came for the purpose of making a final settlement."

He says further:

"I never asked him to pay the note but once, and that was about six months after it became due. At the time I took the note, I considered him perfectly solvent. If I had known his financial condition, I would not have taken this note. I never expected to get my pay on the Bursons notes."

Defendant kept the note for 1 year and 10 months, then returned it under cover, and, as executor, commenced a statutory foreclosure of the mortgage. His theory now is that he was mistaken in regard to complainant's solvency at the time that the note was given, and that he had a right to surrender the note, and sue on the original obligation. But the original obligation was due to Mrs. Bursons. Complainant was released from that obligation, and assumed another,—the indebtedness of Bursons. Mrs. Bursons receipted in full for the legacy, Woodworth filed that receipt in the probate court, complainant gave his personal obligation to Woodworth, and both parties agreed that the mortgage should be discharged, the estate closed, and Woodworth's bondsman released. Complainant owes defendant $400, but, in consideration of his assumption of

the promise to Woodworth, the latter agreed to discharge the mortgage and close up the estate. The very security which he claims the right of succession to he agreed to discharge, and that agreement entered into the consideration for the note. He cannot now be allowed to revive the mortgage, nor can he be permitted to use his office as executor to enforce payment of an obligation running to himself.

The decree below is reversed, and a decree entered here for complainant, with costs of both courts.

LONG and MONTGOMERY, JJ., concurred with MCGRATH, J.

GRANT, J. (*dissenting*). In 1876, complainant purchased from his father certain land, a part of which is involved in this suit. The purchase price was $3,200, and he executed to his father a mortgage for $2,200 to secure the unpaid purchase price. The father died testate, devising to complainant this mortgage, charged with the payment of a legacy of $400 to his daughter, Mrs. Bursons, a sister of complainant, his just debts and funeral expenses, and the erection of a gravestone. Defendant was appointed executor of the will. Defendant commenced a foreclosure of this mortgage by advertisement, and complainant filed the bill in this cause to restrain the foreclosure proceedings, upon the ground that he had paid the debts, funeral expenses, the legacy to his sister, and had erected a suitable gravestone or monument. There were no debts to pay, and it is conceded that complainant paid the funeral expenses and erected the monument; but it is denied that he paid the legacy to his sister.

Mrs. Bursons' husband was indebted to defendant in the sum of $457, borrowed money. It was arranged between complainant, defendant, Mrs. Bursons, and her husband that the $400 bequeathed to Mrs. Bursons might be applied on the debt due from Mr. Bursons to defendant,

and that complainant would pay the amount of the legacy to defendant. The arrangement was carried out, and defendant credited Mr. Bursons with the $400, and took a receipt from Mrs. Bursons, acknowledging the receipt of the legacy. The receipt read as follows:

"Received of John Woodworth, executor of the estate of Abraham De Coo, deceased, the sum of $400, being payment in full of my legacy in said will, and as heir at law of said deceased."

Thereupon complainant gave his note to defendant for $420, which included the amount of the legacy, and $20 which complainant owed defendant. The note was due one year from date. Complainant did not pay the note when it became due, whereupon defendant returned the note to him, and commenced the foreclosure proceeding.

Complainant has no equities. He has not paid the legacy, or any part thereof. The executor paid it for him, and under an agreement with him. He has not come into court with clean hands. He has not complied with the rule that "he who asks equity must do equity." Under the arrangement, defendant succeeded to the rights of Mrs. Bursons, and had the same right to foreclose the mortgage for the payment of the legacy as he would have had if Mrs. Bursons had received nothing. The note by complainant to defendant was not given and received in payment. The mortgage was not discharged, and complainant was not entitled to a discharge until he himself had paid the legacy. Complainant having failed to pay the note, the defendant had the legal right to return the note, and resort to his rights under the mortgage. Since the note was not received in payment, its only effect was to extend the time of payment. Complainant can relieve his land from the lien of the mortgage by paying the $400, with interest from November 12, 1888, the time when defendant paid it for him.

The decree should be affirmed, with costs.

HOOKER, C. J., took no part in the decision.

The People v. Margaret C. Cook.

Criminal law—Soliciting female to enter house of prostitution—Evidence.

1. Soliciting a female, who is already a prostitute and in a house of ill fame, to go into another house of like character, is not an offense within the meaning of 3 How. Stat. § 9286, which makes it a felony to solicit a female to enter a house of ill fame, resorted to for the purpose of prostitution or lewdness, for the purpose of *becoming* a prostitute.
2. It is not a necessary element of the crime that the house should already have been resorted to for the purpose of prostitution by other females, the *gravamen* of the offense being the soliciting of females to enter a house of prostitution for the purpose of becoming prostitutes,—that is, a house designed and kept for that purpose, whether it had already been resorted to by others for the like purpose or not.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued April 25, 1893. Decided July 25, 1893.

Respondent was convicted of soliciting certain females to enter a house of ill fame for the purpose of becoming prostitutes, and sentenced to confinement in the Detroit House of Correction for four years. Judgment reversed, and new trial ordered. The facts are stated in the opinion.

Maher & Salsbury, for respondent.

A. A. Ellis, Attorney General, and *Alfred Wolcott,* Prosecuting Attorney, for the people.

Long, J. Respondent was convicted in the superior court of Grand Rapids, under an information charging that she did solicit and induce Emma Haehn and Lillie Pail, females, to enter a house of ill fame, situate at Woodville, resorted to for the purpose of prostitution and lewdness, for the purpose of becoming prostitutes.

It appeared that at the term of court at which the respondent was tried, and before her trial came on, one Frank Smith had been prosecuted and convicted under an information charging that he did solicit and induce one Anna Nelson, a female, to enter a house of ill fame in the city of Grand Rapids, resorted to for the purpose of prostitution and lewdness, for the purpose of becoming a prostitute; and that Lillie Pail, named in the information against respondent, was a witness against said Frank Smith; and also that said Anna Nelson was to be used as a witness against the respondent, her name being indorsed on the information for that purpose. The same panel of jurors remained during the term of court, and several of them who served on the panel in the case against Frank Smith were called in the case against the respondent. Counsel for respondent examined these jurors on *voir dire*. They were asked if they served as jurors in the case of *The People v. Frank Smith*, and heard Lillie Pail testify. This was answered in the affirmative. Counsel then asked:

"Did you, from the evidence in that case, form any opinion as to her character for virtue and chastity?"

The answer, under objection from the prosecution, was excluded. Five jurors who sat in the case of Smith remained on the panel in the present case.

Lillie Pail was called as a witness for the prosecution, and testified substantially that on Sunday, December 12, 1892, the respondent asked her to go to Woodville, into a house of prostitution, to become a prostitute. On the next day she saw the respondent again, who gave her 50 cents to pay her fare and that of Anna Nelson on the train to go there, the respondent at the same time telling her that other girls were going, and to go to the depot, but not to recognize her there. The witness also testified that before that time she had had illicit intercourse with a man for

pay. This was only a few days before the respondent solicited her to go to Woodville. The testimony tended to show that the house to which the respondent solicited these girls to go was a new one, but the witness Lillie Pail testified that the respondent said it was a sporting house.

The statute under which the prosecution was had reads:

"Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, and every person who shall solicit or in any manner induce a female to enter such house for the purpose of becoming a prostitute, or shall by force, fraud, deceit, or in any like manner procure a female to enter such house for the purpose of prostitution or of becoming a prostitute, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the State prison not more than five years, or in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court." 3 How. Stat. § 9286.

It is contended by counsel for respondent that the conviction must be set aside for the reasons:

1. That there was no evidence that the house to which these females were asked to go had ever been resorted to for the purpose of prostitution or lewdness.
2. That the words used in the statute, "for the purpose of becoming a prostitute," imply a change of state or condition, and that these females were shown to have already become prostitutes before being solicited.
3. That the testimony did not show that the respondent solicited Lillie Pail to go to this house, and that what was said amounted to nothing more than an inquiry if she would go to a sporting house.
4. That the court erred in permitting the jurors who had formed part of the panel on the trial of Frank Smith to sit in this case.[1]

1. The testimony tended strongly to show that the

[1] See *People v. Troy*, *post*, —, where a challenge for cause was sustained under a similar state of facts.

respondent had prepared this house at Woodville as a house of prostitution, and visited Grand Rapids for the purpose of soliciting females to go there for the purpose of prostitution. It is not a necessary element of the offense that the house should already have been resorted to for such a purpose by other females. The *gravamen* of the offense is in soliciting females to enter such house for the purpose of becoming prostitutes,—that is, a house designed and kept for that purpose, whether it had already been resorted to by others for that purpose or not. If the testimony of Lillie Pail is true, the respondent had prepared a house for the purpose of prostitution,—a "sporting house," as she told the witness.

2. The offense was charged in the language of the statute,—that is, soliciting females to enter a house of ill fame, kept for the purpose of prostitution and lewdness, for the purpose of becoming prostitutes. There was some testimony tending to show that these girls had already entered upon a life of shame, and that when the respondent found them they were then, or had been, inmates of a house of prostitution. The question is therefore presented whether the Legislature intended to create an offense under the statute which should apply to one who solicits a female who is already a prostitute to enter a house of prostitution, and especially where the female so solicited is at the very time an inmate of a house of prostitution. The language of the statute is peculiar: "Every person who shall solicit or in any manner induce a female to enter such house for the purpose of becoming a prostitute," etc. It is contended by counsel for respondent that the word "becoming," as used in this statute, implies a change of state or condition, and that one who is already a prostitute cannot, within the meaning of the statute, become what she already is.

The court, speaking of this subject to the jury, said:

"It is not a question of removing prostitutes from this

city to some other town, to get rid of them. The statute is aimed at the person who is so depraved as to become the go-between between innocent girls and houses of ill fame, or between women and houses of prostitution, by means of solicitation. If the court should charge that the Legislature intended to forgive the person whose business it was to solicit women of pronounced bad character from one house of ill fame to another (which I shall not charge), then, in such case, it would be a matter of serious deliberation whether Lillie Pail had become such a notorious prostitute, she being a young girl of 17 or 18, and never, so far as the evidence in the case is concerned, had submitted her person to a man until a few days before the alleged solicitation,—as to whether she was what would be termed a common prostitute."

The court had evidently overlooked the testimony of Lillie Pail. She was asked:

"*Q.* What were you doing at this time? What were you employed at,—what work, if any?

"*A.* I was in a sporting house. It would have been a week Monday night that I had been there. Mrs. Cook came on Sunday night. That sporting house was located next door to Nellie Angel's, what was called 'No. 50 East Fulton street.' It was kept by a Mrs. Wilson.

"*Q.* Had you been doing business there, as you call it?

"*A.* Yes, sir.

"*Q.* By 'business' you mean entertaining men for pay, as sporting women do?

"*A.* Yes, sir.

"*Q.* Having illicit intercourse with men for pay; that is what you mean by 'business?'

"*A.* That is what I mean; yes, sir."

The court in its charge did not direct the jury whether the respondent could or could not be convicted if the girl Lillie Pail was a common prostitute at the time she was solicited to go to Woodville, but left that question an open one, putting the case to the jury upon the theory that the evidence would not warrant them in finding she was a prostitute at that time. The charge was misleading to the jury, and the court should have construed the statute, so that the jury might have such construction as a guide in their

deliberations. There was strong evidence that the girl was a common prostitute, and then actually in a house of prostitution. The clause under which the information was filed makes the offense complete when the solicitation is of females to become prostitutes. Some force must be given to the word "become;" and it is evident that the Legislature did not intend to make the offense complete by the mere soliciting of a female who is already a prostitute, and in a house of ill fame, to go from that place into another house of like character. The next clause of the act makes it an offense to procure a female by force, fraud, deceit, or in any like manner, to enter such a house for the purpose of prostitution. The same statute also punishes in like manner all persons who keep houses of ill fame, resorted to for the purpose of prostitution or lewdness. The court should have directed the jury that if they found the female Lillie Pail to have been a common prostitute, and actually in a house of prostitution, at the time respondent solicited her to go to Woodville, the respondent should be acquitted of the offense charged in the information.

The other questions raised need not be noticed.

Judgment reversed, and new trial ordered.

The other Justices concurred.

GEORGE E. WESTON v. POTTER G. CARD.

Sale—Warranty—Estoppel—Parties.

1. A warranty of a harvesting machine provided for notice to the warrantor of its failure to work as warranted, and for a second trial in the presence of the agent of the warrantor, and, if it

still failed to work, that it might be returned by the purchaser, and that *continued use* of the machine should be considered conclusive proof that it filled the warranty. An agent of the warrantor started the machine, and it failed to work. On the next day, two of the warrantor's agents made a second trial, with a like result. On the third day, three of the agents and the purchaser worked all day with the machine, after which one of the agents demanded a settlement, claiming that the machine worked as warranted, which the purchaser denied, and refused to settle for it. On the fourth day the purchaser tried the machine alone, and on the fifth day he notified the agent that it would not work, and was informed that it was his machine, and that he must pay for it; whereupon, and on the same day, he returned it to the agent from whom he purchased it. Suit was brought to recover the value of the machine, and a verdict was directed in favor of the plaintiff on the ground that the defendant made the machine his own by using it on the fourth day. And, in reversing the judgment entered on the verdict, LONG and GRANT, JJ., hold that such use was not such a *continuous use* as to estop the defendant from claiming that the machine did not fill the warranty; in which reversal HOOKER, C. J., and MONTGOMERY, J., concur, on the ground that the question whether the defendant continued the use of the machine with the intention of accepting it, as answering to the terms of the warranty, should have been submitted to the jury.[1]

2. The question whether a machine fills the warranty under which it is sold, if in dispute, is one of fact for the jury.

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[1] See the following cases, in which questions arising on the sale and warranty of harvesting and mowing machines are discussed:

1. *Grieb v. Cole*, 60 Mich. 397, holding that a reference in an order for a mowing machine to a blank warranty printed on the back of the order, to which the warrantor's printed signature is affixed, constitutes the order and warranty one instrument; that the warrantor is bound by the printed signature; that such a purchase implies that the machine shall be a new one,—that is, not second hand, or the worse for wear; that the purchaser may show, under the plea of the general issue, that the machine delivered was a second-hand one; and that it is immaterial that, though second hand, it filled the terms of the warranty.

2. *Osborne & Co. v. Bell*, 62 Mich. 214, holding that evidence of the sale of duplicate machines the same year defendant purchased his, that they all worked well, and without complaint from vendees, and that the machines were in general use throughout the country, is inadmissible in a suit to recover the value of the machine sold the defendant, which he claims failed to fill the plaintiff's warranty; also that where a machine is sold to two vendees, who are not partners or joint owners, the statement of one that the machine worked well will not bind the other, and that a demand for the notes of the vendees, which they had agreed to give for the pur-

3. An agent cannot recover in his own name upon an order given to him in his individual character to procure a machine of his principal, to whom the purchase price is to be paid, and whose warranty he countersigns as agent, and delivers to the orderer, without averring an assignment of the contract.[1]

Error to Hillsdale. (Lane, J.) Argued June 15, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Guy M. Chester and *Fred M. Twiss,* for appellant.

St. John & Lyon, for plaintiff.

LONG, J. Defendant ordered a binder of plaintiff. The machine was delivered to defendant, at Hillsdale, in June. On July 3, plaintiff's son and an agent of the Warder, Bushnell & Glessner Co. set up and started the machine, and it failed to work. July 4, plaintiff and the agent went to defendant's, and tried the machine, but failed to make it work. July 5, plaintiff and two other of the

chase price on the delivery of the machine, must be made upon both before bringing suit to recover the value of the machine on their failure to give the notes.

3. *Wood Mowing & Reaping Machine Co. v. Gœrtner*, 63 Mich. 520, holding that under a contract for the delivery of a harvesting machine at a designated railroad station, *ready for use*, the machine cannot be considered as delivered until set up as a machine; and that the different parts, which none but an expert can put together and form into a machine, cannot be called one until they are attached together, so as to form a complete harvester.

4. *McCormick Harvesting Machine Co. v. Cochran*, 64 Mich. 636, holding that it is competent, in a suit involving the alleged breach of a warranty that the machine sold the defendant should do as good work as the one sold to his brother, for witnesses who had seen both machines work to testify to their relative merits, and that it is not essential that the grain in which the machines were working should have been of the same heft and height, that being a matter for cross-examination and for the consideration of the jury; and that it is not competent for the plaintiff to show, on rebuttal, that the machine sold is as good as any in the market.

5. *Platt v. Broderick*, 70 Mich. 577, holding that under an agreement for the sale of a mowing machine, by the terms of which the purchaser has the right to return the machine if it does not suit him, it is immaterial whether the machine works well or not.

[1] See *Peirce v. Closterhouse*, 96 Mich. 124, and note.

company's agents went to defendant's again, and worked with the machine all day, defendant working with them during the time. After the close of the day's work, plaintiff demanded settlement for the machine, claiming that it worked as warranted. Defendant refused to pay, or give a note, because the machine did not work. July 6, defendant, in the absence of any of the company's agents, tried the machine again, working with it during the day, and claims that it did not fulfill the warranty. On the 7th he went to Hillsdale, saw the plaintiff, and told him that the machine did not fulfill the warranty. Plaintiff then said: "It is your machine; you bought it, and have to pay for it." On the same day defendant returned the machine to plaintiff, at Hillsdale.

There is a clause in the warranty of the machine as follows:.

"If the said machine does not perform as above [warranted], immediate notice must be given to the Warder, Bushnell & Glessner Co., Chicago, Ill., or to their agent from whom the machine was bought, subject to a second trial in their presence, when, if the failure is found not to have arisen from any defect in the machine, it shall be kept by the purchaser, and continued use shall be considered conclusive proof that it fills the warranty; but, if upon said second trial, said machine does not work as above, it may be returned to us, and the money will be refunded."

Plaintiff brought suit for the value of the machine, and on the trial the facts were found substantially as above set forth, and the court directed a verdict in favor of the plaintiff.

The reason given by the trial judge for this ruling was that, inasmuch as the defendant again tried the machine, or used it, on July 6, he was estopped from relying upon the contract of warranty, and had, in fact, made the machine his own. The court arrived at this conclusion from the interpretation he gave the words in the contract, "continued use shall be considered conclusive proof that it

fills the warranty." The circumstances under which the defendant used the machine on July 6 would not, however, estop him from claiming that the warranty had not been fulfilled. If he had used the machine without making any complaint, undoubtedly he would have made the machine his own, or at least would not be permitted to say that it did not do good work and was not as represented; but the mere fact that he used it July 6 was not such a continuous use as to estop him from making the claim. The agents of the machine company had tried for two days to make it work, and, according to defendant's claim, had not succeeded. The defendant tried it again on July 6, and claims that it did not do good work. If it did not fulfill the warranty, by the terms of the contract the defendant was not bound to keep it. If there was any dispute as to whether it did or did not, it was a question of fact for the jury. If it did not fulfill the warranty, the court should have directed the verdict in favor of the defendant.

The contract of warranty was made by the Warder, Bushnell & Glessner Co. of Chicago. The plaintiff claims to recover the value of the machine, as sold by him, and at the same time it is conceded that the warranty is from the company, which he represents as agent. Under this contract which defendant had from the company, payments were to be made to the company direct, and not to the plaintiff. No claim was made on the trial that plaintiff could recover except under the contract with the company. It cannot be said that the order and warranty constituted a contract with the plaintiff. He was dealing with defendant as the agent of the company, and as such agent issued the written warranty, which the company was bound to fulfill. It was not the personal guaranty of the plaintiff, but of the company. Yet the plaintiff did not aver in his declaration, or prove on the trial, any assignment of the

contract. In order to recover in his own name under this contract, the plaintiff should have averred and proved an assignment of the contract.

Judgment reversed, and new trial ordered.

GRANT, J., concurred with LONG, J.

MONTGOMERY, J. I concur in the result, on the ground that it was a question for the jury as to whether the defendant continued the use of the machine with the intention of accepting it, as answering to the terms of the warranty.

HOOKER, C. J., concurred with MONTGOMERY, J. McGRATH, J., did not sit.

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JOHN E. SMEBERG v. ELLEN CUNNINGHAM.

Adverse possession—Ejectment—Streets—Abutting owners.

1. A holding cannot be adverse if the holder does not believe in his title; citing *Campau v. Lafferty*, 43 Mich. 431.
2. Possession, in order to ripen into a title to land, must be actual, continuous, visible, notorious, and hostile to that of the real owner.[1]
3. An entry with intent to remain in possession until the real owner claims the land, or demands rent, is not hostile.
4. Mere occupancy of land, in person or by tenants and boarders, or both, for the statutory period, without recognizing any one as landlord, and without paying rent to any one for the use of

[1] For cases bearing upon the question of what constitutes adverse possession, see *Cook v. Clinton*, 64 Mich. 310; *Murray v. Hudson*, 65 Id. 670; *Beecher v. Galvin*, 71 Id. 391, 395; *Greene v. Anglemire*, 77 Id. 168; *Shearer v. Middleton*, 88 Id. 621; *Deer Lake Co. v. Iron Co.*, 89 Id. 180; *Michigan Land & Iron Co. v. Thoney*, Id. 226; *Manufacturing Co. v. Swift*, Id. 503; *Sauers v. Giddings*, 90 Id. 50; *Clark v. Campau*, 92 Id. 573; *Paldi v. Paldi*, 95 Id. 410; *Pendill v. Agricultural Society*, Id. 491; *Judson v. Duffy*, 96 Id. 255.

the land, is not such an adverse possession as is necessary to establish title in the occupant.

5. An abutting lot-owner in a city owns the fee of the land to the center of the street, with the right to its use, subject to the public easement, and may set out shade trees, construct a sidewalk, and exercise other acts of ownership and possession which do not interfere with the public use.[1]

6. The owner of a lot abutting upon a public street in a city can recover in ejectment against one who ousts him of the use and possession of the land lying between his lot and the center of the street, under How. Stat. § 7790, which forbids a recovery unless the plaintiff has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established on the trial.[2]

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[1] See *People v. Foss*, 80 Mich. 559, holding that when the travel upon the wrought portion of a country highway has been in a uniform and beaten track, leaving grass to grow and ripen undisturbed upon either side, no one but the abutting land-owner has the right to harvest it; that he can maintain trespass or trover against any person cutting and taking it away against his will, and has the right to protect it against wanton and malicious damage or destruction, whether attempted under the guise of travel upon the highway or in some other way.

[2] For cases involving the questions of *what* interest a plaintiff must have in order to maintain an action of ejectment, and the *manner* in which it must be set forth in the declaration, see:

1. *Busch v. Nester*, 62 Mich. 382, holding that where timber has been wrongfully cut, but remains on the land, a recovery in ejectment of the land establishes title to the timber, so as to make its subsequent removal wrongful; and, as supplementing this decision, see *Wilson v. Hoffman*, 93 Mich. 72, holding that, after the title to the land has been so established, the plaintiff can maintain an action of trover for logs cut by the defendant from the standing timber and removed from the land during the pendency of the suit, and while in possession of the land under a *bona fide* claim of title adverse to the plaintiff.

2. *Shaw v. Hill*, 79 Mich. 86, holding that the possession of land is sufficient to authorize a recovery in an action of ejectment against a mere intruder, and, in the absence of proof of a paper title on either side, the presumption of title is in favor of the first possessor; but see same case, 83 Mich. 322, holding that, while the right of possession of a plaintiff under color or claim of title may be *prima facie* title as against a mere intruder, yet when the defendant shows an equitable interest in the land, unconnected with and independent of plaintiff's claim of title, he may show in defense plaintiff's want of title.

3. *Harrington v. Port Huron*, 86 Mich. 46, holding that ejectment will not lie for anything that is not tangible or capable of being delivered to the plaintiff by the sheriff under a writ of possession, nor for a mere trespass, right of way, or easement.

4. *Michigan Land & Iron Co. v. Thoney*, 89 Mich. 226, holding

Error to Marquette. (Stone, J.) Argued June 16, 1893. Decided July 25, 1893.

Ejectment. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Ball & Hanscom, for appellant, contended:

1. The occupancy by defendant was not adverse or hostile to the real owner; citing *Sparrow v. Hovey,* 44 Mich. 63; *Yelverton v. Steele,* 40 Id. 538; *Shearer v. Middleton,* 88 Id. 621.

2. Adverse possession, in order to be effectual, "must be retained under a claim of right to hold the land against him who was seised, and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right;" citing *Thompson v. Pioche,* 44 Cal. 517; *Thompson v. Felton,* 54 Id. 553; and the presumptions are in favor of the party establishing the legal title; citing How. Stat. § 8701; and the act of supposed disseisin, if equivocal in its nature, is presumed to be in accordance with, and not in hostility to, the title of the true owner; citing 3 Washb. Real Prop. 499; *Fosgate v. Hydraulic Co.,* 9 Barb. 294.

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that a vendor in a land contract giving the vendee the right to the possession of the land cannot maintain ejectment to recover such possession until he terminates the contract relation by notice of forfeiture and demand of possession, or until the happening of some other fact or circumstance giving the right to such possession.

5. *Drake v. Happ,* 92 Mich. 580, holding that ejectment is the proper action in which to try boundary lines.

6. *Goodall v. Henkel,* 60 Mich. 382, holding that a failure to aver the nature and extent of the plaintiff's claim to the land renders the declaration fatally defective, and that, while the objection should be raised by demurrer, the error is such as to demand an affirmance of a judgment rendered in favor of the defendant on other grounds; and see *Ludeman v. Hirth,* 96 Mich. 17, holding that it is error to refuse to allow the plaintiff to amend his declaration, after issue is joined on the merits, by setting forth the estate he claims in the land.

7. *Reilly v. Blaser,* 61 Mich. 399, holding that a judgment for the entire premises cannot be sustained where the plaintiff establishes his title to but an undivided interest in the land.

8. *Bringhurst v. Railroad Co.,* 78 Mich. 570, holding that the verdict must follow the declaration as to the description of the premises, and the extent and quality of the estate claimed; and that where title is established to but an undivided interest in the land described in the declaration, and the defendant is in peaceable possession, and not an intruder, judgment should be rendered accordingly, and the declaration amended to correspond with the right established at the trial.

Charles R. Brown & Son, for defendant, contended:

1. Our statute forbids ejectment when the plaintiff has not, when he commences his suit, a valid, subsisting interest in the premises, and a right to recover the possession thereof; citing How. Stat. § 7790; *Donihue v. Rankin*, 31 Mich. 148; *Grand Rapids v. Whittlesey*, 33 Id. 109; *Bay Co. v. Bradley*, 39 Id. 166.
2. It must be conceded that the plaintiff is not the absolute owner of the land in question. By the statute, the legal title is vested in the city, and it is only upon the abandonment of the street, if it has been used, that the plaintiff or his heirs could acquire an absolute title in fee. At most, he has a mere reversionary interest in the land to the center of the street, and a party having a mere reversionary interest cannot maintain ejectment.
3. The statute of limitations has regard to the laches of the owner, and denies him a remedy for the recovery of his rights because he has failed to pursue them within a limited time; citing *Showers v. Robinson*, 43 Mich. 502. That there should be a continued possession for the statutory period to bar the right of entry is admitted, but it need be such only that, if wrongful, an action of trespass might be maintained at any and all times; and a right of entry must be enforced within the period of limitation; citing *Cook v. Hopkins*, 68 Mich. 517; and any intrusion may continue long enough to bar such right; citing *Campau v. Dubois*, 39 Mich. 280.
4. The acts of Peter White in platting two large tracts of land, in which is situated the 50 feet in dispute, did not operate as a disseisin, and no entry or act of the true owner which does not have that effect is of any avail to break the continuity of possession; citing *Donovan v. Bissell*, 53 Mich. 462; and How. Stat. § 8705, is applicable to such a case; citing *Riopelle v. Gilman*, 23 Mich. 33.

GRANT, J. Plaintiff is the owner of the record title to the land in controversy. Defendant claims title by adverse possession. The land is described in the declaration as—

"That portion of Palms street lying north of the center line of said street, and south of the north line of said street, and abutting on lots 15 and 16 of block 1 of White's addition to the city of Marquette."

From 1871 to 1880 the Champion Iron Company was owner of the governmental subdivision which included this

land. The land was mainly unoccupied, but at some time a small house had been built upon it, but when or by whom does not appear. The owners of the land do not appear to have paid much attention to it for many years, though Mr. Peter White, of Marquette, had general charge of it. A fence had been built inclosing some of the land around the house. The land was platted in 1888. The house is in Palms street, and the land which defendant claims is directly in front of plaintiff's lots, on which he erected a house. One of his lots fronts on Palms street, and the other is on the corner of Palms and Champion streets. While he was building his house and improving his lots, he used the street covering the land in controversy, and built with reference to it. During this time defendant saw what he was doing, but made no objection or claim of ownership to him until after he had lived upon his lots six months, when she built a fence along the front of his lots. Poor people appear to have moved into this house at various times, and to have occupied it without paying rent, or claiming any right either to the house or to the land. One Hudson, a witness for the defendant, testified that he occupied the premises with his mother in 1873 and part of 1874; that his mother was poor, the house was empty, and he knew of no authority given them to occupy it; and that when his mother moved out the defendant moved in. Defendant occupied it until some time in 1888 or 1889, when she removed to another part of the city, but her daughter testifies that she left some goods in the house, and that she had boarders who slept there.

The character of the possession will appear from defendant's own testimony:

"*Q.* State how you came to go and live there.

"*A.* Well, a man by the name of Mr. Neff lived in the house, and my man worked there. We lived by the furnace, and he came into the house, and said that it was a good place for a poor family, and that it would be near his

work, and he said that he lived in there quite a good many years, and he said that he never paid any rent, nor no rent was ever asked of him, he says; and he said he had poor health, and couldn't do any work. He worked on the docks. 'That I ain't able to do,' he says; 'I am going out west to get a bit of land.' Well, then I saw my husband, and asked him whether I would go. I says, 'I would like to look at it;' and he said it was pretty good, and 'you will never have to pay any rent.' So I went and moved in there, to see how we would get along there, and I told Mrs. Swineford I would live there, and make it my home, and the rest of my family, and keep it; when nobody was looking for rent, I would keep it."

On cross-examination she testified that, some five or six years after she went into the house, she had a conversation with a Mr. Ely, in which he told her that it was his brother and Mr. Wells who owned the house; and that "the reason she kept it was because they were dead."

Defendant's daughter was asked what claim she heard her mother make, and she replied:

"Quite a few times, when I was going to visit her, she always said she was going to live there, because my father, he wanted her to go out west, and she wouldn't go; it was a wild place, and she had a place of her own.

"*Q.* Did she give any reason for her claim?

"*A.* She thought nobody had ever bothered her, and never had come to look for rent and bother with her place, and she thought she might as well stay there."

On cross-examination this witness said that if her mother had had to pay rent she would not have lived there.

Meanwhile, the owners of the land paid the taxes, and the property was sold and mortgaged, and the owners of the record title exercised the usual acts of ownership over land situated as this was.

Defendant was poor, and during a large portion of the time of her occupancy of this house was the recipient of aid from the poor fund of the county. Mr. Maynard, for many years one of the superintendents of the poor, testified that in 1885 she asked him to pay the rent of the house,

saying she was not able to do it. Peter White testified that in 1880, after the land was sold by the Champion Iron Company, he had the entire charge of the property, paid the taxes, exercised other acts of ownership over it, and in that year asked the defendant to pay rent, and she replied that she was too poor to pay it. These statements were denied by her, and, so far as they are concerned, it was, of course, a question for the jury.

The following special questions were submitted to the jury at the request of defendant's counsel, and respectively answered by the jury, as follows:

"*Q.* Did the defendant occupy the premises in dispute, either by herself or her tenants and boarders, or both, for a period of 15 years, continuously, prior to the commencement of this suit, without recognizing any one as her landlord?

"*A.* Yes.

"*Q.* Did the defendant ever pay rent to any one for the premises in dispute?

"*A.* No."

1. The court, as requested, should have instructed the jury that the defendant had failed to establish title by adverse possession. She did not enter under any claim or color of right, nor in the belief that she had any right. Her entry and possession were the same as those of former occupants, who claimed no right to the property. She did not intend to retain possession, according to her own evidence, any longer than she could do so without the payment of rent. This was a recognition of title in some one else, and was conclusive evidence that her entry and possession were subject to that title. The answers to the special questions do not, of themselves, establish a case of adverse possession necessary to establish title. Mere possession is not sufficient. It must not only be actual, continuous, visible, and notorious, but it must be hostile to the title

of the real owner. An entry with the intent to remain in possession until the real owner claims it, or demands rent, is not hostile. These questions clearly gave the jury to understand that such possession was sufficient to establish title in defendant. Their verdict can be explained upon no other theory. Her actual residence upon the property was not 15 years. Including the time during which, according to her daughter's testimony, she had some goods in the house, her possession was barely 15 years. The statute of limitations, in such cases, begins to run only from some act of possession so open, notorious, and hostile that it constitutes, in law, a notice to the real owner. The entry, under the circumstances of this case, was not such an act. No subsequent act or assertion upon her part, even if sufficient, is shown to have occurred 15 years prior to the commencement of the suit.

It was said by Mr. Justice CAMPBELL in *Campau v. Lafferty*, 43 Mich. 431, "that a holding cannot be adverse if the holder does not believe in his title." It was also said in that case that "a possession may be maintained long enough by an undisturbed and defiant trespasser to bar an ejectment." The defendant in this case did not believe in her title, nor was she a defiant trespasser.

2. It is contended that the plaintiff has no such title in this land as would sustain an action of ejectment. The plaintiff is the owner of the fee of the land to the center of the street, and has the right to its use, subject to the public easement. He may set out shade trees, construct a sidewalk, and exercise other acts of ownership and possession which do not interfere with the public use. He has a valid and subsisting interest, under How. Stat. § 7790. The rights of the public are not here in issue, and the question whether the municipality could maintain an action of ejectment is not involved. Plaintiff was ousted of his

possession and use by the act of the defendant. Under such circumstances, ejectment is the proper remedy.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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EMMA COUSINS v. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Railroad companies—Injury to passenger—Alighting from moving car—Contributory negligence—Damages—Instructions—Special questions.

1. It is error to instruct the jury in a negligence case that the plaintiff is entitled to recover the money she may have expended in an attempt to be cured of her injuries, in the absence of any testimony tending to show such expenditure.

2. While it is *prima facie* negligent for a passenger to attempt to alight from or to board a moving train, it is not in all cases negligence *per se* to attempt to do so.

3. If a passenger is, by the wrongful act of the carrier, placed in a position where, under a sudden impulse to save himself from serious inconvenience, he attempts to alight from a moving train, where the danger is not imminent, and where persons of ordinary care and caution would make the attempt, the question of his negligence in making the attempt is for the jury.

4. It is not the duty of the court to submit mere questions of evidence to the jury for special findings, but the questions must be so framed as to call for an answer which may be controlling on the main issue.[1]

[1] For cases bearing upon the construction of How. Stat. § 7606, as amended by Act No. 15, Laws of 1885, which provides for the submission of special questions to the jury, not exceeding five in number, and each to be in single, short sentences, readily answered by yes or no, see:

1. *Pigott v. Engle*, 60 Mich. 221, holding that it is not error to refuse to submit questions upon immaterial, inconclusive, or admitted matters.

Error to Hillsdale. (Lane, J.) Argued June 29, 1893. Decided July 25, 1893.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

C. E. Weaver (*George C. Greene* and *O. G. Getzen-Danner*, of counsel), for appellant.

Guy M. Chester, for plaintiff.

MONTGOMERY, J. The plaintiff was a passenger on the defendant's regular train, and received the injuries which she complains of while attempting to alight from the train at Pittsford. The plaintiff's contention is that the train

2. *Oliver v. Sanborn*, 60 Mich. 346, holding that a finding that the plaintiff acted in good faith in the purchase of land is not conclusive in the appellate court, where it appears from the record that the jury did not apply the proper legal standard to test the good faith of the purchase, under the facts and circumstances of the case.

3. *Loomis v. Armstrong*, 63 Mich. 355, holding that where, on an accounting by an administrator in the circuit court, an issue is framed, and certain special questions are submitted to the jury by agreement of the parties, other questions presented by the contestant after the testimony is taken should not be submitted; and that special questions can only be submitted in cases where the verdict is conclusive upon the facts found.

4. *Cook v. Clinton*, 64 Mich. 309, holding that a plaintiff cannot assign error upon the action of the court in permitting the defendant to withdraw special questions upon the return of the jury for further instructions, in the absence of the plaintiff's attorney, for which neither the court nor the defendant was in fault, it appearing that the facts asked to be found were submitted in the general charge, and that the case was one proper to be submitted to the jury.

5. *Miner v. Vedder*, 66 Mich. 101, holding that whether the statute applies to the trial of an issue of fact framed in the Supreme Court in a *mandamus* case, and sent down to the circuit for trial, is doubtful; and that a refusal to submit special questions, none of which are material to the issue in such a sense that their determination would, either one way or the other, serve any useful or important purpose in arriving at a decision of said issue, is, at the most, non-prejudicial error.

6. *Beecher v. Galvin*, 71 Mich. 391, holding that the object of the statute is to ascertain whether the jury, in making up their verdict, have properly applied the law as given by the court to the facts in the case; and that it is error to direct what answer shall be made in case the general verdict is rendered in a certain way.

7. *Transportation Co. v. McMorran*, 73 Mich. 467, holding that the purpose of the statute is to enable the court to know whether in finding generally the jury have properly considered the necessary ele-

failed to stop a sufficient length of time to afford reasonable opportunity for getting off; that while attempting to alight with all possible dispatch, and following closely after another passenger, she was thrown to the ground, and received serious injuries. It appears that the plaintiff discovered that the train was in motion while on the platform or in the door of the car. She recovered a verdict of $7,000, and defendant appeals. The assignments of error are numerous, but we shall advert only to those which present questions which are likely to arise upon a new trial.

1. The first error relied upon is the refusal of the learned circuit judge to instruct a verdict for the defendant. We think that, under the circumstances of this case, the

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ments of the finding, and that the general verdict must yield to the special findings.

8. *Balch v. Railroad Co.*, 78 Mich. 654, holding that special questions which do not call for conclusions on any fact in issue, but only on the truthfulness or accuracy of certain named witnesses on certain facts which are matters of evidence merely, however significant they may seem, are very objectionable.

9. *Harrison v. Railroad Co.*, 79 Mich. 409, holding that it is error to refuse to submit special questions in a negligence case, the answers to which would determine whether the proximate cause of the accident complained of was the negligence of a superior servant or of a fellow-servant of the plaintiff.

10. *Sherwood v. Railway Co.*, 82 Mich. 374, holding that it is error to refuse to submit special questions, unambiguous in form, and relating to a question of fact in issue.

11. *Railroad Co. v. Campau*, 83 Mich. 31, and *City of Grand Rapids v. Luce*, 92 Mich. 92, holding that it is not error to refuse to submit special questions to the jury in a condemnation case.

12. *Zucker v. Karpeles*, 88 Mich. 414, 425, holding:

a—That it is error to refuse to submit special questions to the jury if proper in form and substance.

b—That the court may submit the questions to the opposite counsel for inspection, who has the right to frame questions, and to have the jury instructed to answer them if they find a general verdict against his client.

c—That counsel are not obliged to furnish special questions until after the arguments are closed, but, if they do so, there is no reason why the questions should not be discussed to the jury if they relate to the merits of the controversy; but that it is improper for counsel to *instruct* the jury how to answer them.

13. *Van Auken v. Railway Co.*, 96 Mich. 307, holding that where there can be but one answer to a special question, the testimony as to the matters embraced therein being undisputed, it is not error for the court to direct such answer.

defendant was not entitled to this instruction. The law upon the subject ought no longer to be in doubt. It is undoubtedly *prima facie* negligent for a passenger to attempt to alight from or board a moving train, but it is not in all cases negligence *per se* to attempt to do so. If one is, by the wrongful act of the carrier, placed in a position where, under a sudden impulse to save himself from serious inconvenience, he attempts to alight from a moving train, where the danger is not imminent, and where persons of ordinary care and caution would make the attempt, it is not necessarily negligent. In such cases it becomes a question for the jury. See Beach, Contrib. Neg. (2d ed.) § 147; Bish. Non-Cont. Law, § 1101; Whart. Neg. § 377; Thomp. Trials, § 1684; 2 Amer. & Eng. Enc. Law, 762; *Shannon v. Railroad Co.*, 78 Me. 52; *Crissey v. Railway Co.*, 75 Penn. St. 83; *Strand v. Railway Co.*, 64 Mich. 216; *McCaslin v. Railway Co.*, 93 Id. 553.

2. Error is assigned upon the refusal of the circuit judge to submit the following special questions to the jury:

"1. Did the conductor assist Mrs. Pettyt to alight from the train?

"2. Did he wait at that point, to see if other passengers were coming, before starting for the head of his train?

"3. Did he walk from that point to the baggage car before giving the signal to the engineer to go ahead?

"4. Had the car gone a distance of about 30 feet when Mrs. Cousins stepped off."

We think the court was right in refusing to submit these questions. Whatever the finding of the jury might have been thereon, such finding would not have been inconsistent with the general verdict for the plaintiff. It is not the duty of the trial judge to submit mere questions of evidence to the jury. The questions must be so framed as to call for an answer which may be controlling of the main issue. *Balch v. Railroad Co.*, 78 Mich. 654; *Crane v. Reeder*, 25 Id. (Ann. ed.) 304, and note. Reliance is

placed by defendant's counsel upon *Sherwood v. Railway Co.*, 82 Mich. 374; but a careful reading of that case will disclose that the main issue was whether the plaintiff attempted to alight while the car was in motion, and the pleadings were so framed as to make that the vital issue in the case. It was held that an affirmative answer to the questions proffered would have demonstrated that the train was in motion when the plaintiff descended the steps to alight, and that, under the pleadings in that case, such a finding would have been inconsistent with the general verdict. But in the present case, while it may be true that an affirmative answer to these questions would have demonstrated that the train was in motion, yet this was not necessarily conclusive of her right to recover. The theory of plaintiff was that the train was in motion before she attempted to alight, but that she discovered this fact after she had reached the platform of the car, and that she acted as a reasonably prudent person might be expected to act under the circumstances, in the excitement occasioned by the defendant's alleged default.

3. The plaintiff is a married woman, and offered no testimony which tended to show that she had expended any money in an attempt to be cured of her injuries. The circuit judge, in stating the plaintiff's claim to the jury, said that it was a part of her claim that she had been put to a considerable expense in seeking to be cured of the difficulty which was brought upon her by the negligence of the company, as it is claimed by her; and further instructed the jury that, if the plaintiff was entitled to recover,—

"She would be entitled to recover such amount as would reasonably compensate her for the injury which she received, and the moneys which she may have expended in seeking, reasonably, to cure herself of injuries which she so received, since such injury and before the bringing of this suit; and more particularly she is entitled to recover for the

pain, suffering, loss of capacity to work and enjoy herself as a member of society, as well as for moneys she may have expended in seeking to cure herself of this malady."

There was error in giving these instructions to the jury. See *Reed v. Railroad Co.*, 57 Iowa, 23; *Eckerd v. Railway Co.*, 70 Id. 353; *Folkerts v. Standish*, 55 Mich. 463; *Seligman v. Ten Eyck Estate*, 60 Id. 267; *Hudnut v. Gardner*, 59 Id. 341; *Stilson v. Gibbs*, 53 Id. 280.

The judgment will be reversed, and a new trial ordered.

HOOKER, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

MARTIN L. SWEET v. MICHAEL COLLETON AND ADOLPH LEITELT.

Statute of frauds—Promise to pay the debt of another.

The verbal promise of the sureties on the bond of a public contractor, given to secure the payment of labor and material claims, to repay to a third person the money realized from the discount of the contractor's note on the strength of the third person's indorsement, which money the sureties receive, and agree to apply in payment of said claims, is not within the statute of frauds.

Error to Kent. (Adsit, J.) Argued June 8, 1893. Decided July 25, 1893.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

Fletcher & Wanty, for appellants.

G. A. Wolf (*Bundy & Travis*, of counsel), for plaintiff.

McGRATH, J. One Britton had entered into a contract with the city of Grand Rapids for improving a street. Defendants were sureties upon his two bonds, conditioned, one to pay all indebtedness for labor and materials, and the other for the performance of the work. In the course of the work Britton had become in arrears to his employés, and applied to plaintiff for assistance in getting the necessary money with which to liquidate this indebtedness. Plaintiff agreed to assist him, and to secure plaintiff Britton gave him an order upon the city for estimates as they became due. Before the order was presented to the city for acceptance, and before plaintiff had advanced any money or incurred any liability, defendant Colleton, who knew of the indebtedness, who had become suspicious of Britton, and of whom certain of the unpaid laborers had demanded their pay, induced the city officials to refuse to accept the order given by Britton to plaintiff. Thereupon plaintiff declined to furnish the money or lend his assistance. Britton then arranged a meeting between defendants, plaintiff, and himself at the bank of which plaintiff was president. At that meeting Britton executed a note for $500, plaintiff indorsed it, and the amount was paid over to defendants, who applied it to the liquidation of the labor claims.

The case was tried before a jury, and the court found:

"That on November 16, 1887, the parties to this action, together with said Britton, met, and the following arrangement and agreement was made: The plaintiff was to advance $500 to the defendants, to be paid to said laborers and material-men, and the defendants were to repay the same to plaintiff; that the money was so paid to and received by defendants; and defendants then and there agreed to repay the same to plaintiff, which they never did, and absolutely refuse to do."

It is insisted that the testimony does not support this finding. Plaintiff testified that he told defendants that, as

the order had been countermanded, he would not have anything to do with the matter; and they said "if I would pay the money over to them they would pay me back;" that, on the strength of that, the note was made and delivered over to the bank, and the money was paid over to Colleton.

"The money was obtained on my credit. They did not say they would pay the bank, because they knew the bank was loaning it on my credit,—on my indorsement. They did not say they would pay the note if Britton didn't; they said they would pay me. The bank loaned this money entirely on my indorsement."

Defendants deny any promise whatever. Britton was wholly irresponsible. The theory of plaintiff, supported by Britton, is that defendants were brought to the bank for this very purpose. Defendants' theory, that they were sought out and brought there for the sole purpose of receiving the money, is unsupported by the circumstances. Their presence was not necessary to enable Britton to procure the money upon his own credit. They had frustrated his plans for getting the money, and did not in that interview withdraw their opposition to the acceptance of the order. Their action was not calculated to strengthen Britton's credit. Plaintiff had required the order as security, and had not relied on Britton's responsibility. Without the order plaintiff had no idemnity. The testimony of plaintiff and Britton, corroborated as it is by the circumstances, supports the finding. It is a mere play upon words to say that plaintiff did not advance the money. He caused it to be furnished.

This suit is not brought upon the note, but upon defendants' promise. The relation of debtor and creditor did not exist between Britton and plaintiff when the promise was made by defendants. Their's was the original promise upon which plaintiff relied. Defendants did not promise

to pay the note or the bank. Plaintiff did not expect Britton to pay, and did not afterwards look to him. When defendants made the promise, it was to pay an indebtedness to plaintiff, then originating. It was a promise to pay their own debt. Although the money obtained was used to pay a debt for which Britton was primarily responsible, yet it was one for the payment of which defendants were being importuned and were sureties. Their purpose was to promote their own interests. The consideration was therefore ample.

In *Potter v. Brown*, 35 Mich. 274, Potter had failed in the performance of an undertaking to become co-signer of a note, and to pay the note at maturity, in consideration of which promise Brown signed it. The note was a joint and several note, signed by Brown with Shively and Maynard, and was payable at the bank to the order of the cashier. There was evidence tending to show that the note was intended to be used to pay Shively's debt, but, as between Brown and Potter, the loan was obtained on behalf of Potter. The Court say:

"The fact that Potter might use the money for Shively's benefit would not make it any the less Potter's money, and the ultimate purpose to which it was to be applied could not control. * * * The note was a new debt, created to borrow money of the bank, * * * which Potter was to receive and advance as his own to Shively."

The test to be applied is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of a third person; whether the party promising contracted an independent obligation of his own, or whether his position to the creditor was that of surety merely. The liability of defendants was in no sense contingent, unless we assume what defendants do not claim, viz., that their promise was to pay the note in case of Britton's default. Defendants insist that

they made no promise. The giving of the note to the bank was not the original promise, nor did it concern defendants how the money was procured. The credit was given to them. They promised to pay plaintiff. That promise was an independent one. As between the parties to this suit, Britton's liability, if any, was contingent, and his promise must be regarded as collateral, if in any event plaintiff could enforce it.

The judgment is therefore affirmed.

HOOKER, C. J., LONG and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

JOSEPH RYNALSKI v. THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.

Fire insurance—Conditions of policy—Proofs of loss.

A failure to furnish proofs of loss within 60 days after the fire, as required by the Michigan standard fire insurance policy, will not prevent a recovery in a suit commenced within the 12 months limited by the policy, and after the proofs of loss are furnished; citing *Steele v. Insurance Co.*, 93 Mich. 81.

Error to Bay. (Cobb, J.) Argued June 8, 1893. Decided July 25, 1893.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Lindner, Porter & Haffey (*James Van Kleeck*, of counsel), for appellant.

Simonson, Gillett & Courtright, for defendant.

MONTGOMERY, J. This is an action on a Michigan standard policy of insurance. The circuit judge directed a verdict for the defendant, on the ground that the plaintiff failed to show that proofs of loss were furnished within 60 days after the fire.

There is no question that proofs were furnished before suit; indeed, the defendant's plea sets up that such proofs were furnished, and asserts as a defense that the plaintiff was guilty of fraud and false swearing in making the proofs. The suit was instituted within the 12-months limitation fixed by the policy. The case is ruled by *Steele v. Insurance Co.*, 93 Mich. 81.

Judgment reversed, and a new trial ordered.

The other Justices concurred.

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THE PEOPLE'S SAVINGS BANK v. WILLIAM H. EBERTS, JOHN M. EBERTS, AND LENA HOWARD.

[See 70 Mich. 210; 76 Id. 35.]

Res judicata.

Where in a suit planted upon the theory that the complainant's title to the land in controversy is valid, and that the title claimed by defendant is void, and creates a cloud upon that of the complainant, the reverse of said claim is found by the court, and a decree is made accordingly, that question is *res judicata* in an action of ejectment brought by the defendant against the complainant's grantees, who purchased the land after the making of said decree.

Error to Wayne. (Hosmer, J.) Argued June 8, 1893. Decided July 25, 1893.

Ejectment. Defendants bring error. Affirmed. The facts are stated in the opinion.

John Miner (*Morgan E. Dowling,* of counsel), for appellants, contended:

1. The court erred in directing a verdict for the plaintiff on the ground that the decree in the Lafferty case was a bar to the defense in this suit; citing *Nims v. Vaughn,* 40 Mich. 356; *Gamble v. East Saginaw,* 43 Id. 367; *Blake v. Hubbard,* 45 Id. 1.

2. In the Lafferty case six questions were decided:

   a—That the statute gives an equitable lien to creditors.

   b—That the will of the testator gave a testamentary lien to creditors.

   c—That the filing of a residuary legatee's bond did not render nugatory the statutory and testamentary liens.

   d—That the bond of a residuary legatee is merely intended as additional security for creditors.

   e—That the testator, by the terms of his will, excluded his residuary legatee from taking anything until there should be a residue after the payment of his debts, and, as the debts exceeded the whole value of the estate, there was nothing for the residuary legatee to take.

   f—That the giving of a residuary legatee's bond does not close the estate; it merely excuses the executor from returning an inventory, and confers upon him the right to dispose of both the real and personal estate without being licensed.

   The Court will notice that all of the above questions bear directly upon the validity of Mrs. Lafferty's title, while, in the present case, all of the questions raised relate exclusively to the validity of the plaintiff's title, and none of these questions were decided in the Lafferty case.

3. The plaintiff will undoubtedly claim that the decision in the Lafferty case affirms its title. But this is not so. On page 60 the Court say: "Under the facts disclosed by this record, the complainant's claim constitutes a cloud upon the title of the purchaser at the administrator's sale." This is mere *dictum.* The Court did not pass upon the validity of plaintiff's title at all. Besides, it was held in the case of *Vroman v. Thompson,* 51 Mich. 461, that a decree on bill, answer, and evidence, in the absence of a cross-bill, where the bill is filed to set aside cloud on title, and the bill is dismissed, cannot affirm defendant's title.

C. J. O'Flynn, for plaintiff.

GRANT, J. The issues in this case are the same as those in *Lafferty v. People's Savings Bank*, 76 Mich. 35. The defendants in this case are the grantees of Martha Lafferty, the complainant in that suit, and are therefore her privies. After that case was decided, the plaintiff brought this action of ejectment against the defendants, who were in possession. In the present case each relies upon the same conveyances, the same proceedings, and the same facts as were those in the former suit. The issues and facts will be found fully stated in that opinion, and it is unnecessary to restate them now. That suit was planted upon the theory that Martha Lafferty had a good and valid title to the land in controversy, and that the title claimed by the People's Savings Bank, obtained under a sale authorized by the probate court, was void, and created a cloud upon her title. The title of the bank was there held valid, and Martha Lafferty's alleged title was held to constitute a cloud upon the title of the bank. The question is therefore *res judicata*. It is the well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same facts. *Hickox v. Railway Co.*, 94 Mich. 237, and authorities there cited.

Judgment affirmed.

The other Justices concurred.

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GEORGE W. COOK v. CHARLES C. CANNY.

Partnership—Action at law—Instructions—Error without prejudice.

1. A partner can maintain an action at law upon the agreement of his copartner, contained in the articles of partnership, to pay

a certain sum for an interest in a patent which is to form the basis of their subsequent partnership relations and dealings.

2. The giving of an erroneous instruction to the jury, which is rendered unimportant by their finding upon a special question of fact, is error without prejudice.

Error to Wayne. (Reilly, J.) Submitted on briefs June 9, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

J. W. Donovan, for appellant, contended:

1. One partner cannot sue a copartner in an action at law about a matter involved in the unsettled copartnership business. This is the rule laid down by Lindley, Collyer, Parsons, and other standard authors, and followed in 17 Amer. & Eng. Enc. Law, 1254. See, also, *Hills v. Bailey,* 27 Vt. 548; *Smith v. Small,* 54 Barb. 223; *Miner v. Lorman,* 56 Mich. 214; *Vance v. Blair,* 18 Ohio, 532.

Frank T. Lodge, for plaintiff.

GRANT, J. On September 5, 1888, plaintiff filed an application for letters patent of the United States for improvements in underground conduits for electrical conductors. October 12, 1888, plaintiff and defendant entered into written articles of agreement for a partnership, by which the plaintiff agreed to assign to defendant an undivided one-third interest in the invention, and the patent which might be obtained therefor, in consideration of $1,000, which the defendant agreed to pay as follows: $300 in cash as soon as notice was received of the allowance of the patent; a monthly payment of $30 per month for eight months from the date of allowance; and $460 on the first day of September, 1889, if said conduit should be a practical success, and should perform the duties specified and required for such work. The agreement further provided for carrying on the business after the allowance of

the letters patent, and defined the duties of each partner. These provisions are not necessary to a determination of the case. The letters were issued, and the assignment duly made to the defendant. Plaintiff admitted payments of $303.75. The defendant claimed to have paid $464. Plaintiff gave evidence tending to show that the conduit was a practical success. Defendant gave evidence tending to show the contrary, and that the contract was abandoned by mutual consent. The court instructed the jury that, if the conduit was not a practical success, or if the contract was abandoned by mutual consent, the plaintiff could not recover. At the request of the defendant the following special question was presented to the jury, viz.: Do you find that the conduit was a practical success? Which question the jury answered in the affirmative.

Verdict and judgment for the plaintiff for $840.95.

1. It is first insisted by defendant that a suit at law cannot be maintained on account of the partnership relations. The sum sued for does not grow out of transactions subsequent to the formation of the partnership. It is an independent consideration, which defendant agreed to pay the plaintiff for an interest in the letters patent which were to form the basis of their subsequent partnership relations and dealings. The sum which the defendant agreed to pay was to launch the enterprise in its very inception. This case, therefore, forms one of the exceptions to the rule that one partner cannot maintain an action at law against his copartner for work done or money expended in the partnership. An agreement to pay money or to furnish stock for the purpose of launching the partnership is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by

one partner against his copartner. 1 Story, Eq. Jur. § 665; *Brown v. Tapscott,* 6 Mees. & W. 119; *Van Ness v. Forrest,* 8 Cranch, 30; *Currier v. Rowe,* 46 N. H. 72; *Neil v. Greenleaf,* 26 Ohio St. 570; *Howard v. France,* 43 N. Y. 593; *Crater v. Bininger,* 45 Id. 545; Lindley, Partn. 1024.

2. The court instructed the jury that under the contract defendant was obligated to pay the $30 dollars per month, irrespective of the question whether the conduit was a practical success. In view of the fact that the jury found that it was a practical success, it becomes unimportant to determine this question. If the instruction was error, it was error without prejudice.

Judgment affirmed.

The other Justices concurred.

EDWARD C. LYMAN v. WILLIAM J. GIDDEY, EXECUTOR, ETC.

Bail—Action on bond—Surrender of principal.

The *right* of special bail to surrender their principal expires eight days from the commencement of a suit upon the recognizance, after the timely and regular issuance, and return "not found," of a body execution against the defendant; citing *Begole v. Stimson,* 39 Mich. 288; *Koch v. Coots,* 43 Id. 30.

Error to Wayne. (Brevoort, J.) Argued June 9, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant.

C. E. Warner, for plaintiff.

GRANT, J. September 12, 1887, plaintiff commenced suit in the circuit court of the United States for the eastern district of Michigan, by *capias ad respondendum,* against Edmund W. Donovan and two others. Donovan's bail was fixed by the judge of that court at $10,000. He was arrested and imprisoned. Subsequently the bail bond was reduced by the court to $500. October 17, 1887, in pursuance of this order, a new bail bond was given for that sum, executed by James Giddey and James C. Wells. Upon the trial of that suit, plaintiff recovered a verdict for $12,455, on which judgment was rendered June 15, 1888. June 22, 1888, a *fi. fa.* was issued, returnable July 13, which was returned July 18 *nulla bona.* August 7, 1888, a *ca. sa.* was issued against the defendant Donovan, which was returned September 14, "Defendant not found." November 2, 1888, this suit was brought against Mr. Giddey upon the bail bond. Donovan had not been surrendered by his bondsmen. The court directed a verdict for the plaintiff. Mr. Giddey died before the trial, and, upon the suggestion of his death, the executor was admitted to defend the suit. Upon the trial, defendant's counsel offered to show:

1. That Donovan was in the eastern district of Michigan during the life of the writ of *ca. sa.,* and in the city of Detroit, and that the attorneys for plaintiff knew it.

2. That, while Giddey was sick, his son went to the marshal, during the life of the *ca. sa.,* and asked him if he wanted the body of Donovan, and, if so, he would bring him, to which the marshal replied, "No."

3. That, about three years after this suit was begun, the defendant executor caused Donovan to be located, and got an agreement from him to surrender himself if plaintiff's attorneys wanted him, and that plaintiff's attorneys refused to accept the surrender.

4. That defendant's counsel then offered plaintiff's attor-

neys to produce said Donovan if they would cause to be issued an *alias* writ of *ca. sa.*, which was also refused.

This offer of testimony was rejected.

Defendant's counsel apparently relies upon How. Stat. § 7334, which provides that—

"If it appear on the trial of any such action against bail that an execution against the body of the defendant was not issued as herein directed, or that it was not issued in sufficient time to enable the sheriff to execute the same, or that directions were given by the plaintiff or his attorney to prevent the service of such execution, or that any other fraudulent or collusive means were used to prevent such service, the bail shall be entitled to a verdict in their favor."

The writ was properly and timely issued and returned. All the proceedings were regular. The offer did not tend to show any directions on the part of the plaintiff or his attorneys to prevent service, or that any fraudulent or collusive means were used to prevent it. The defendant's right to surrender Donovan expired after eight days from the commencement of suit. Plaintiff's cause of action was then complete, and neither he nor his attorney were under any legal obligation to issue a new writ, to accept the surrender of Donovan, or in any manner to waive his rights. This case is ruled by the following cases: *Begole v. Stimson*, 39 Mich. 288; *Koch v. Coots*, 43 Id. 30.

Judgment affirmed.

The other Justices concurred.

ELLA BURK v. EMILY A. SPROAT.

Deed—Delivery—Intent.

1. The question of the delivery of a deed to take effect presently is one of intent, to be established by the proofs.
2. The proofs in this case are held to show that the grantor never intended to place her deed to the complainant beyond recall, and that she did recall and destroy it before conveying the land to the defendant.

Appeal from Kent. (Grove, J.) Argued June 8 and 9, 1893. Decided July 25, 1893.

Bill to quiet title. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Maher & Salsbury, for complainant.

Arthur C. Denison and *Loyal E. Knappen,* for defendant.

LONG, J. This bill is filed to establish the complainant's title to a certain piece of land in Kent county, and to procure the cancellation of a deed which she claims clouds her title.

It appears that the land formerly belonged to R. G. Chaffee, the husband of Mary A. Chaffee, and was by him conveyed, with other lands, to his wife, a short time before his death, in 1886. The 40 acres in question constituted the Chaffee homestead, and on May 8, 1888, Mrs. Chaffee executed a deed of the same to the complainant. On the same day she also made a will, by which she disposed of all the other of her real estate and personal property. In the seventh clause of the will she states:

"I give, bequeath, and devise all the rest of my real and personal estate to Ella Burk, to whom I am under many obligations."

These papers—the deed and will—were prepared by a neighbor of Mrs. Chaffee, and after their execution, it is claimed, she stated she would submit them to the judge of probate, and, if they were all right, she would deliver them to Lucius C. Burt, to be held by him until her death, when he was to deliver the deed to the complainant, and the will to the defendant, who was named by the will as executrix. The complainant and defendant are nieces of Mrs. Chaffee, and at the time of the execution of the deed and will the complainant was living with her. A short time after these papers were executed Mrs. Chaffee took them to the probate office, and showed them to the probate register, and was advised that they were all right in form. In the early part of September, 1888, Mrs. Chaffee, who was then about 60 years of age, was stricken with paralysis. Soon after this she sent for Mr. Burt, who resided about a mile from her, and delivered the papers—the deed and will—to him, saying, as it is claimed, that he knew what to do with them. A few weeks after the papers were handed to Mr. Burt, it was arranged that the complainant should visit her mother in Kansas, and that during that time Mrs. Chaffee should stay with the defendant and her husband at Grand Rapids. She went there on Saturday, October 13. Two days before going to live with the defendant she took the deed from Mr. Burt, and two or three days later destroyed it. After she had gone to live with the defendant, she made and delivered a deed of the land to her. Mrs. Chaffee lived about two and a half years after this deed was made. She died in March, 1891. The defendant's deed was placed on record soon after Mrs. Chaffee died. Defendant and her husband are in possession of the premises in controversy, claiming under the deed from Mrs. Chaffee.

It is contended by the complainant:

1. That the deed to her from Mrs. Chaffee conveys the

absolute title, and that the delivery to Mr. Burt was intended to be a delivery to her, to take effect after the death of the grantor, who had no right to recall it.

2. That, though there was no absolute delivery of the deed, and Mrs. Chaffee had the power to recall and destroy it, yet the complainant took title under the will, which has since been probated, and is therefore in a position to contest the title claimed by the defendant under her deed, and does contest it on the ground that Mrs. Chaffee, at the time of its execution, was mentally incompetent to make a deed, and was unduly influenced to make it.

Defendant contends:

1. That the bill is multifarious.
2. That the complainant's remedy is at law.
3. That there was no delivery of the deed to complainant.
4. That Mrs. Chaffee was mentally competent to make a deed to defendant, and was not unduly influenced to make it.

The court below found from the evidence that the deed made by Mrs. Chaffee to complainant was never delivered to her, but was intended by Mrs. Chaffee as a testamentary disposition, and was subsequently revoked; and that the deed to the defendant from Mrs. Chaffee was made and delivered to defendant, and was free from fraud or undue influence, and that Mrs. Chaffee was mentally competent to make it. The court thereupon dismissed the bill, with costs.

We need not discuss the points raised by the defendant's counsel that the bill is multifarious, or that complainant has a remedy at law. It is apparent from the evidence in the case that the deed to complainant was never delivered to her to take effect as a deed, nor ever placed by Mrs. Chaffee in the hands of Mr. Burt for delivery, so that she had no right to revoke it at any time before her death; and the evidence falls short of proving that Mrs. Chaffee was mentally incompetent to make the deed to the defendant, or that any fraud or undue influence was practiced

upon her by the defendant, or any one on her behalf, which caused her to make it. The question of the delivery of the deed to complainant to take effect presently is one of intent. After Mrs. Chaffee had recalled it, she stated that it was never delivered. Mr. Burt, when called upon by Mrs. Chaffee to give it back to her, did so at once, and without question. He therefore never made any claim to its possession until Mrs. Chaffee died. It is evident from the whole transaction that Mrs. Chaffee and Mr. Burt both understood that, in order to constitute a delivery, it would be necessary to put it into the grantee's hands; and, not intending to make a delivery, Mrs. Chaffee left it with Mr. Burt, so that she could recall and revoke it at pleasure.

In *Schuffert v. Grote*, 88 Mich. 650, a deed was made from father to son, and actually delivered to the grantee. The father said he did not want it to go on record, and the son handed it back to him. The father afterwards destroyed it, and made a new deed to another. It was held that it was clearly his intent to make only a testamentary disposition of his property, and that his deed was subject to revocation. In the present case, the deed was never delivered to the grantee, but placed in the hands of Mr. Burt, who was clearly the agent of the grantor, and not of the grantee.

In *Pennington v. Pennington*, 75 Mich. 600, the deed was delivered to Mr. Niles, to be delivered to the grantee after the death of the grantor; and it was held that it was subject to the grantor's right to rescind or alter it at pleasure. There were as strong reasons in that case for holding a delivery of the deed as in the present.

The question under the case is one of intent, to be established by proofs. We are satisfied that Mrs. Chaffee never intended to place the deed to the complainant beyond recall, and she did recall and destroy it before deeding to defendant.

We need not set out the testimony given upon the trial by which complainant sought to establish the fact of Mrs. Chaffee's mental incompetency, and the exercise of undue influence over her by the defendant. It is not satisfactory, and falls short of showing either.

We think the court below reached the correct conclusion, and the decree below will be affirmed, with costs.

The other Justices concurred.

ELON HOLMES v. GEORGE M. HORGER.

96 408
f137 157

Malicious prosecution—Evidence—Nunc pro tunc entry of judgment of discharge.

Where a respondent, who has taken an appeal from a conviction before a justice of the peace of the crime of larceny, appears in the circuit court, and is discharged on the ground that the value of the property is alleged in the complaint at more than $25, and the clerk fails to enter the judgment of discharge, such judgment, entered *nunc pro tunc* pending the trial of a suit brought by the respondent for malicious prosecution after his discharge, is admissible on said trial as evidence of the actual termination of the criminal prosecution.

Error to Wayne. (Reilly, J.) Argued June 9, 1893. Decided July 25, 1893.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant.

Edwin Henderson, for plaintiff.

LONG, J. This is an action for malicious prosecution,

and on the trial in the court below plaintiff had verdict and judgment for $150.

The facts may be briefly stated: Plaintiff and defendant are both residents of the township of Springwells, Wayne county, and are near neighbors. They were born and reared in the same neighborhood, went to the same school, and, up to the fall of 1891, were always friends. In the spring of that year, defendant was elected overseer of highways, and had in his possession a road scraper belonging to his district. In November the plaintiff, who was working for his father, took his team, drove to defendant's place, entered his yard, and inquired of defendant's men where the scraper was, and, in plain view of the defendant, hitched to it, and drove away, to use it upon the highway. He used it for one or two weeks, when defendant told plaintiff's father that the scraper must be returned, or there would be trouble. On the same day defendant ordered the scraper returned he visited a justice of the peace, and told him what the plaintiff had done, and wanted a warrant for larceny of the scraper. The justice remonstrated with him, and suggested some other course to get it back. He returned the next day to the justice's office, made a complaint in writing against the plaintiff for larceny, setting forth in the complaint the value of the scraper at $49. The warrant was issued by the justice, and the plaintiff was arrested. The justice's docket shows that, upon the plaintiff's being brought before him, he found plaintiff guilty upon his plea, and suspended sentence. The plaintiff appealed the case to the circuit court, where he was discharged by order of the court, on the ground that the justice had no jurisdiction to try the cause. After the trial of the present case had been commenced, it was ascertained by counsel for plaintiff that the judgment in the case of the people against plaintiff had never been entered in the circuit. Plaintiff, by his counsel,

appeared in the circuit court in that cause, and moved the court for entry of the judgment discharging plaintiff *nunc pro tunc*. This motion was granted, and the judgment of discharge entered as of February 8, 1892, that date being prior to the time of the commencement of the present suit. On the trial plaintiff offered this judgment entry in evidence, for the purpose of showing his discharge under the criminal prosecution before the commencement of this suit. This was objected to, on the ground that it did not establish the fact of the discharge from arrest prior to the beginning of the action.

It is a general rule that a conviction before a justice of the peace is a bar to an action for malicious prosecution, and, if the party bringing the action relies upon an exception to it, he must allege the facts which create the exception, and prove them, or the conviction will be conclusive of probable cause. *Phillips v. Village of Kalamazoo*, 53 Mich. 33. It appeared upon the face of the complaint and warrant before the justice, however, that the justice had no jurisdiction to try the cause set out in the complaint, as the value of the property was alleged at a sum exceeding $25, and the circuit court very properly ordered the discharge from the facts appearing on the face of the papers. The plaintiff, after appealing his case to the circuit, appeared therein, and was actually discharged by the court, but the clerk failed to enter the judgment of discharge of record. The question is therefore presented whether the judgment of discharge entered *nunc pro tunc* is evidence of the actual termination of the criminal prosecution before commencement of suit. Counsel for defendant contends that the judgment so entered is not evidence of this fact, and cites *Whitwell v. Emory*, 3 Mich. 84. That was an action of ejectment. To rebut the plaintiffs' case, the defendant attempted to show title in himself, acquired under a judgment and execution against Reuben

Abbott, the common source. To prove the judgment, he introduced a journal entry of the same court, which entry was originally in form as follows:

"December 6, 1841.

"On hearing counsel in this cause, on motion of George Woodruff, plaintiffs' attorney, judgment for plaintiffs on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in the plaintiffs' declaration, and the clerk having computed the amount due on said bond at $800, the penalty thereof, to be discharged on the payment of $624.11, and costs to be taxed."

By virtue of this entry, and the proceedings thereunder, defendant claimed title to the land in question. This entry remained on the journal without amendment, no steps being taken respecting it, until after the commencement of the ejectment suit, and up to the day of the trial thereof, June 19, 1851, when, upon *ex parte* application of the defendant, an order was made for the amendment of the foregoing entry by the insertion between the words "at" and "$800" of the words "$624.11, ordered final judgment for." To the admission of the entry plaintiffs' counsel objected, and the same was received in evidence subject to the objection. It was said by this Court:

"To the admission of the journal entry of December 6, 1841, and the amendment made June 19, 1851, the plaintiffs' counsel objected. * * * Before this amendment was made, there was clearly no final judgment entered in the cause. * * * From the subsequent action of the court, it would seem that the omission was thought to embrace the assessment of the amount due upon the bond, and that which it was conceived went to constitute a judgment, viz., the words 'ordered final judgment for,' and without which there was no evidence of an adjudication by the court. * * * The entry, with the amendment, then, comes far short of evidence of a judgment, but is rather in the form and nature of an interlocutory order or a common rule, which, by some accident, had found its way into the journal of the court.

"But the amendment was void because without the jurisdiction of the court. At the common law, while the

proceedings are in paper an amendment can be allowed, or a judgment could be set aside before the adjournment of the term at which it was rendered; but at a subsequent term the court had no power to change the record of a previous term. By various statutes, both in England and this country, power is given to courts to amend in many cases, which they could not exercise at common law. Under our statute the court may, at the time, amend clerical errors; but that which enters into the consideration of the court, and constitutes a part of the judgment, cannot be changed after the term. Much less has a court power, under the form of an amendment, to render a judgment."

It was further said by the Court in that case that, were this error susceptible of correction by amendment, it would be necessary that the parties to be affected by it be cited before the court, especially where the matter had slept for 10 years, as any other course might work irreparable mischief to parties wholly unconscious of their situation, and jeopardize rights fairly and honestly acquired; and that, before any judgment could be perfected in the cause, it was certainly necessary that the parties to be affected should have an opportunity to be heard.

Our attention has also been called to *Ninde v. Clark*, 62 Mich. 124. That was an action of ejectment also. Plaintiff claimed title under an execution sale. It appeared that on September 29, 1866, the jury rendered a verdict in an action of *assumpsit* in the circuit court, and, without any entry of judgment, the execution was issued and levied, and the property in dispute sold thereunder. October 27, 1882, and nearly 16 years after the sale under the execution levy, the plaintiff procured a judgment to be entered on the verdict. The circuit court found against the plaintiff in the ejectment suit upon that record. It was shown upon the trial that the defendants in the ejectment suit never had any actual notice of the rendition of any judgment in the suit in which the execution issued, and it was admitted that the judgment was imperfect and

inoperative until cured by order of the court. It was said by this Court that the defendants were not bound to take notice that this correction might be made; that there might have been valid reasons in the mind of the circuit judge who tried the cause in which the judgment was rendered *nunc pro tunc* why he did not order a judgment entered upon the verdict of the jury at the time, but that there was nothing whatever appearing why he did not do so; that defendants in the ejectment suit, having neither actual nor constructive notice of any judgment upon which the execution was issued, could not be affected in their holding of the premises by the subsequent entry of a judgment *nunc pro tunc,* and, having acquired their title in good faith and for value, were entitled to the possession of the premises.

The principle in these cases is not applicable to the present. In those cases the parties were attempting to establish title through execution sales, where no judgment in fact had ever been entered, and by reason of which no execution could legally issue. The right which they asserted to the premises was dependent upon the validity of the proceedings, and no valid sale could be made except under an execution issued upon a valid judgment rendered prior to the time execution was issued. In the present case the gist of the action was the arrest and imprisonment of the plaintiff without probable cause. It is true that, under the rules of law, no action could be maintained for malicious prosecution until after the plaintiff had been legally discharged by the court. It was shown upon the trial that the plaintiff was discharged by the circuit court prior to the time he commenced this action, but, through negligence of the clerk, the judgment of discharge had not been entered. The judgment was subsequently entered of record in the circuit court, and the

plaintiff was permitted to use that judgment entry in this case as evidence of his discharge prior to the time he commenced his action. The court below very properly permitted this evidence of his discharge to be introduced on the trial of the case. It also appears from the proceedings had before the justice that he had no jurisdiction to enter a judgment of conviction under the complaint and warrant.

It is further contended that, inasmuch as the defendant stated all the facts within his knowledge to the justice which he claimed constituted the offense, and took the justice's advice whether they constituted probable cause, he was justified in making the complaint, and was not responsible thereafter for the proceedings which were subsequently taken. The court charged the jury upon that question:

"If the defendant went to the justice of the peace, and stated to him all of the facts within his knowledge, and merely followed the advice of the justice, then he cannot be held liable in this action; but it must appear from the evidence in the case that all of the facts concerning the taking of this scraper were laid before the justice, so that the conclusion that Holmes was liable for criminal prosecution was the operation of the mind of the justice based upon Mr. Horger's full statement to him, and not merely the operation of the mind of Mr. Horger."

The testimony in the case fully justified this charge, and of which the defendant has no right to complain. No one can read this record without arriving at the conclusion that the defendant, Horger, persistently urged upon the justice that a warrant issue, and that he was actuated by a feeling of hatred against Holmes, and sought his arrest to gratify his revenge. He must have known that when the plaintiff took the scraper he did not intend to steal it, but that he was to use it upon the highway upon the public work.

Some other errors are claimed. We have examined them, but do not consider them worthy of notice.

Judgment must be affirmed.

The other Justices concurred.

THOMAS LORD, GEORGE S. LORD, AND JAMES R. OWEN v. JAMES E. WIRT.

96 415
125 544

Attachment—Dissolution—Fraud—Evidence—Certiorari.

1. Rulings of a circuit judge on the admission of evidence, on a hearing upon a petition to dissolve an attachment, cannot be reviewed on *certiorari;* citing *Schall v. Bly,* 43 Mich. 401.
2. The finding of a circuit judge that a defendant in an attachment suit has not disposed of his property with intent to defraud his creditors is conclusive, if there is any evidence to support it; citing *Sheldon v. Stewart,* 43 Mich. 574; *Powers v. O'Brien,* 44 Id. 317.
3. Vendors who sell goods to a merchant during the time a chattel mortgage is withheld from record, without actual notice of its existence, are not in *fact* defrauded, as their rights are in no way jeopardized by the giving of the mortgage.[1]

Certiorari to Chippewa. (Steere, J.) Submitted on briefs June 9, 1893. Decided July 25, 1893.

Plaintiffs bring *certiorari* to review proceedings dissolving an attachment. Order of dissolution affirmed, and writ of *certiorari* dismissed. The facts are stated in the opinion.

George A. Cady, for petitioners.

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[1] See *Kennedy v. Dawson,* 96 Mich. 79.

Bedford & More (E. S. B. Sutton, of counsel), for defendant.

LONG, J. *Certiorari* to review the proceedings of the circuit judge of Chippewa county on a petition to dissolve a writ of attachment. The writ was dissolved, and the property restored to the defendant.

Defendant was carrying on business as a druggist at Sault Ste. Marie, this State, and plaintiffs were doing business at Chicago. Credit was given defendant for goods purchased between April 14 and December 21, 1892, to the amount of $1,078.68, and for which he owed at the last-named date $735.05. The attachment was sued out for $657.39, on the ground that he had assigned and disposed of his property with intent to defraud his creditors, and that the debt was fraudulently contracted. The plaintiffs, on the petition to dissolve the writ, showed that they extended credit on the financial standing of the defendant; that in June, 1890, defendant visited Chicago, and stated to them that he desired to purchase the interest of his partner, and in order to do so it might be necessary to give a chattel mortgage on the stock; that they requested him, if he found it necessary so to do, to advise them at once, that they might protect themselves; that after the defendant returned home he wrote them as follows:

"SAULT STE. MARIE, MICH., July 20, 1890.

"LORD, OWEN & CO.,

"Chicago, Ill.

"GENTLEMEN: I have bought the half interest in the drug-store of Dr. Bacon, and now have complete control. I did not place a mortgage on the stock, as I thought I would have to. The consideration of the sale was $1,100, and I have three years to pay it in. I intend to center my trade with you as much as possible, and expect as fair dealing as we have enjoyed before. Please send me statement of all accounts due, and I will pay it up as fast as

trade will permit, which will probably be in about 60 days. Trusting this will be satisfactory, I am,

"Yours truly,

'JAMES E. WIRT.

"Successor to JAMES E. WIRT & Co."

Defendant continued to purchase from plaintiffs until December 21, 1892. On April 14 of that year defendant executed and delivered to one Andrew Blank a chattel mortgage on his stock for the sum of $1,600. This mortgage was not filed until December 21, 1892, and the writ of attachment was issued the 28th of that month.

Defendant testified on the hearing before the circuit judge that the value of the stock at the time the attachment was issued was from three to four thousand dollars; that the mortgage was given for a *bona fide* consideration, to secure Mr. Blank for certain indorsements, among which was a note for the purchase of his partner's interest in the business in 1890, but given to the bank. He further testified that he did not have the conversation, to his recollection, with the plaintiffs in Chicago, as testified by them; that when he gave the chattel mortgage he supposed Mr. Blank would put it on file, and never knew that it was not on file until December 28, 1892, the date the attachment was issued.

It is stipulated that the following requests were made by the plaintiffs, and refused by the circuit judge:

1. That the defendant has assigned and disposed of his property with intent to defraud his creditors, and that he fraudulently contracted the debt and incurred the obligation respecting which the attachment was brought.

2. That there is a total want of evidence authorizing a dissolution.

3. That the evidence makes a *prima facie* case for plaintiffs, sustaining the writ, and shows an entire absence of proofs legally tending to disprove the case so made.

The circuit judge decided and ruled that the attachment should be dissolved, because the evidence showed

no fraud; that, inasmuch as the chattel mortgage was shown and conceded to be void, under section 6193, How. Stat., therefore the plaintiffs were not injured by it, and were not defrauded by the defendant in his contracting the debt and incurring the obligation.

We think the conclusions reached by the circuit judge cannot be reversed by this Court. He found, upon the evidence submitted, that the defendant had not assigned his property with intent to defraud creditors. There was some evidence to support this finding, and the findings are conclusive. *Sheldon v. Stewart,* 43 Mich. 574; *Powers v. O'Brien,* 44 Id. 317. Under the statute (section 6193) the chattel mortgage was void against any claims which the plaintiffs had for goods sold between the time the mortgage was given and the time of filing, so that their rights were in no manner jeopardized by the giving of the mortgage, and they were not, in fact, defrauded; and the evidence of the defendant, which the circuit judge had a right to consider, had a tendency to show that he did not intend to defraud them. This was a question of fact for the determination of the circuit judge, and his finding, being supported by some evidence, cannot now be disturbed by this Court. *Sheldon v. Stewart, supra.*

Some question is raised by the affidavit for the writ of *certiorari* that the circuit judge also erred in the admission of certain evidence; but the rulings of the circuit judge on the admission of evidence cannot be reviewed on *certiorari. Schall v. Bly,* 43 Mich. 401.

The writ of *certiorari* must be dismissed, with costs.

The other Justices concurred.

SAMUEL S. EDGAR v. ANDREW H. BECK, CATHERINE M. BECK, AND ROBERT EDGAR.

Mortgage—Foreclosure—Installments of interest.

1. How. Stat. § 8498 (subd. 4), which provides that, in cases of mortgages given to secure the payment of money by installments, each of the installments after the first shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage, includes installments of interest becoming due by the terms of the mortgage, as well as installments of principal.
2. The language used in *Miles v. Skinner*, 42 Mich. 181, 185, which is opposed to this view, was not necessary to the decision of that case, and therefore may be disregarded.

Appeal from Montcalm. (Smith, J.) Submitted on briefs June 9, 1893. Decided July 25, 1893.

Bill to foreclose a mortgage. Defendant Edgar appeals. Decree affirmed. The facts are stated in the opinion.

S. F. Kennedy (*John Lewis*, of counsel), for complainant.

F. L. Allen (*Fitzgerald & Barry*, of counsel), for appellant.

MCGRATH, J. This is a proceeding in chancery to foreclose a mortgage given by defendants Beck. A prior statutory foreclosure had been had for installments of interest, and upon the sale the premises were bid in by complainant. Before the year had expired, defendant Edgar, for a nominal consideration, took a deed from defendants Beck, and paid the amount for which the

premises had been sold to the register of deeds. The notice of sale recited that there was due at that date $293.10 of principal, and $100.02 of interest, and that the sale was for the purpose of recovering the amount of said interest and the costs of foreclosure. Defendant now insists that the former sale extinguished the mortgage.

Subdivision 4, § 8498, How. Stat., provides that,—

"In cases of mortgages given to secure the payment of money by installments, each of the installments mentioned in such mortgage after the first shall be taken and deemed to be a separate and independent mortgage, and such mortgage for each of such installments may be foreclosed in the same manner, and with the like effect, as if such separate mortgages were given for each of such subsequent installments, and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such installments had been made upon an independent prior mortgage."

This statute was undoubtedly intended to include installments of interest becoming due by the terms of the mortgage, as well as installments of principal. It was evidently passed, as is said by Mr. Justice COOLEY, in *McCurdy v. Clark*, 27 Mich. 445, 447, "in consequence of the decision in *Kimmell v. Willard's Adm'rs*, 1 Doug. 217, in which it was held that a foreclosure under the power of sale for the satisfaction of one installment, and a sale of the land therefor, forever disincumbered the land of the mortgage." In the Kimmell case the foreclosure was for installments of interest past due; the discussion relates to "installments" past due, and to become due; and the *syllabus* recites that—

"Where a mortgage is foreclosed by advertisement under the statute for a default in the payment of one of several installments, and the mortgaged premises are bid off for the amount of such installment only, they are thereby forever disincumbered of the mortgage."

The decision was handed down at the July term, 1843,

and the section of the statute above referred to was enacted in 1844. The Legislature seems to have adopted the term "installments" as used in that case, and there is nothing to indicate the use by it of that term in a more restricted sense than it was used by the Court. It certainly cannot be said that the amendment avoids the consequences which would result from that adjudication under a similar state of facts, unless the word "installments" is construed to include installments of interest. The amendment does not in express terms refer to installments of principal only, and a mortgage is given to secure the payment of installments of interest, as well as installments of principal.

It is true that in *Miles v. Skinner*, 42 Mich. 181, 185, language is used which is opposed to this view, but in that case the foreclosure was for one of several installments of principal, as well as an installment of interest, both of which became due November 16, 1867. The notice was dated January 15, 1868. The sale was had April 14, 1868, and interest was computed upon the principal not due, as well as upon the past-due principal, from November 16, 1867, the date when the installments of principal and interest became due, until the date of sale, including about five months' interest not due at the date of sale. Otherwise, the proceeding would have been within the protection of the statute, in any view; for that was a foreclosure for an installment of principal, as well as for an installment of interest, and the same result must must have followed if it had been upon a foreclosure commenced for an installment of principal only, and the sale had included interest not yet due upon other installments. A foreclosure of a mortgage payable in installments, for an installment of principal, that did not include an installment of past-due interest upon unmatured installments of principal, would be a rare proceeding, and, if the inclusion of past-due interest upon installments of principal not yet due is held to

exhaust the mortgage, it is safe to say that very few foreclosures of installments, had under the statute, have not disincumbered the land of the mortgage. It certainly was not the intention of the Legislature that, in a proceeding to foreclose one of the several installments of principal, past-due interest upon other installments of principal not yet due should be excluded. The language referred to as used in *Miles v. Skinner* was not necessary to the decision of that case, and therefore must be disregarded.

The statements in the brief of counsel for appellant, in the present case, that the amount for which the premises were sold included accrued interest on the whole amount owing on the mortgage up to date of sale, and that interest was reckoned from the date of the note up to the time of the sale, are not supported by the record. The mortgage was for $293.10, and had run four years and nearly three months, at 10 per cent. The notice set forth the amount of interest due as $100.02. The sale was for $102.50, and costs, showing that the only interest added at the time of the sale was the accrued interest on the amount stated in the notice.

The decree is affirmed, with costs to complainant, and the record remanded.

The other Justices concurred.

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98 532

JOHN J. MULGREW v. ELLEN G. COCHAREN, SURVIVOR OF HERSELF AND ALEXANDER COCHAREN.

Novation—Evidence.

1. Where there is some evidence justifying a finding that a novation has taken place, whereby the defendant has been released

from liability, it is not error to submit that question to the jury.

2. Where the owner of a vessel, after mortgaging it to secure the payment of his note, sells it to a third party subject to the mortgage, and the purchaser agrees to pay the note and mortgage as a part of the purchase price, and that the mortgagor shall be released from all further liability thereon, all of which is assented to by the mortgagee, a complete novation is effected.

Error to Muskegon. (Dickerman, J.) Argued June 13, 1893. Decided July 25, 1893.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

DeLong & O'Hara, for appellant.

Brown & Lovelace, for defendant.

LONG, J. This is an action on a promissory note. Defendant, under her plea of the general issue, gave notice that at the time of the giving of the note, and as a part of the same transaction, defendants gave to the plaintiff a mortgage upon a schooner for the same amount as the note, the mortgage being given to secure it; that, after the giving of the note and mortgage, the defendants executed and delivered a bill of sale of the schooner to one Darius N. Avery; that it was understood and agreed between the defendants, the said Avery, and the plaintiff, who was then the owner and holder of the note as well as the mortgage, that the bill of sale to Avery should be subject to the mortgage, and, as a part of the consideration of said bill of sale, that said Avery should pay the note and mortgage, and defendants should be released and discharged from further liability thereon, the said Avery being substituted in the place of said defendants, and becoming in law thereby a new party in place of defendants, as the debtor of the plaintiff.

The plaintiff, on the trial, offered the note in evidence, and rested. The note was dated September 7, 1885, was given for $260, with interest at 8 per cent. per annum, due two years from date, and was signed by both defendants. The defendant, to maintain her defense, gave testimony to show, substantially, that plaintiff and Alexander Cocharen bought the schooner in 1884, and were equal owners. They gave back a mortgage for $1,000. The plaintiff operated a feed store on the land of Ellen G. Cocharen, under the name of J. J. Mulgrew & Co., and Alexander Cocharen was the company of that firm. Mulgrew sold his interest in the schooner and the feed store for $260, and took the note in suit, together with a mortgage on the schooner to secure the payment of the note. Alexander Cocharen took the vessel as master, and in October, 1886, was arrested for obtaining a cargo under false pretenses. At that time there was about $200 remaining unpaid on the $1,000 mortgage given by plaintiff and Alexander Cocharen on the purchase price of the schooner. The plaintiff's note and mortgage were also unpaid, and there were some claims against the schooner for supplies. The defendants thereupon gave to Darius N. Avery a mortgage on the vessel for $558.21. On the 25th of October, 1886, three days after giving Avery the mortgage, there was a talk between the defendant, her husband, and Avery, at which the plaintiff was not present, in which Avery verbally promised to pay off all the claims against the schooner, particularly the plaintiff's claim, if she and her husband would give him a bill of sale of the schooner. The vessel was estimated to be worth $1,400, and it was agreed that, after paying all claims against her, Avery would turn over the balance of the moneys, over and above that amount, to the defendants. Defendant and her husband gave Avery a bill of sale. Mr. Avery and the plaintiff met the defendant a few days thereafter at

the store. Defendant claims to have relied upon Avery's promise to pay the plaintiff's claim, though the promise was not in writing.

Defendant was asked upon the trial:

"What was said there at that time pertaining to this $260 matter that he has brought suit for?"

This was objected to, on the ground that what might have been said between the parties three or four days after the bill of sale was given to Avery was incompetent, as it was not a part of the consideration moving from one party to the other. The objection was overruled, and the witness answered:

"Mr. Cocharen told Mr. Mulgrew that this was the man that was to pay him, for he (Avery) agreed when we sold out the schooner that he was to pay all debts and demands there was against it."

The defendant was further asked:

"*Q.* What did he say at that time,—what did Mr. Mulgrew say at that time,—as to whether he would take Mr. Avery for the payment of this $260, instead of you and your husband?

"*A.* Well, he said he accepted Mr. Avery for his pay.

"*Q.* And what did he say as to whether he would not look to you and your husband after that?

"*A.* Well, he never looked to us; he never named it afterwards, until after the fall that he got married."

The witness further testified that Mr. Avery said he would pay the note.

This claim of the defendant that a novation had taken place was denied by the plaintiff.

The court directed the jury as follows:

"If you find, by a fair preponderance of the evidence in this case, that it was agreed by and between Darius N. Avery, Alexander Cocharen, Ellen G. Cocharen, and John J. Mulgrew that, as a part of the consideration for said transfer, said Avery agreed to pay the note sued on in this case, and that Mulgrew agreed to accept said Avery

as his debtor in place of said Cocharen and his wife, and to release Cocharen and his wife from said debt, then I charge you, as a matter of law, that such agreement operated as a release to said Cocharen and wife of and from all further liability on said note, and your verdict should be for the defendant."

The only question presented is whether there was any evidence from which the jury would be justified in finding that a novation had taken place. The testimony has been set out substantially as given, and we think, from the claim made by the defendant, that the jury might well say that an arrangement was made between the parties by which the Cocharens were to be released, and Avery assumed the payment of the note, and that the plaintiff agreed to accept Avery as his debtor in place of the Cocharens. It is true that the plaintiff denies that any such arrangement was made, but the only question which concerns us is whether there was any evidence warranting the submission of that question to the jury. We think there was, and therefore there was no error in the charge.

Judgment affirmed, with costs.

HOOKER, C. J., MCGRATH and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

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104	49
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117	41
96	426
154	382

JOHN WACHSMUTH v. THE MERCHANTS' NATIONAL BANK AND HERMAN O. LANGE.

False imprisonment—Justification—Order to hold to bail—Jurisdiction—Corporations—Liability for tort—Authority of bank cashier.

1. A resolution offered to the common council of a city by a member of the council, reciting the affirmance by the Supreme

Court of the State of a decree against the principal surety on the bond of a bank as depository of the money of the city, and that the decree will in all probability compel the surety to pay at least $125,000, and that for this reason the council does not deem it entirely safe to leave the money on deposit in said bank without additional security, and directing the withdrawal of the money, and its deposit in the other city banks, until such additional security is given, is, as a matter of law, absolutely privileged.

2. Where the affidavit upon which a circuit court commissioner indorses an order to hold to bail in a libel suit shows, upon its face, that the alleged libelous publication was, as a matter of law, absolutely privileged, the order is void, and affords no protection to the parties instituting the proceeding, procuring the order, and delivering the process to the sheriff for service.[1]
3. A cashier of a bank will be presumed, *prima facie*, to have had authority to direct the commencement of a suit for libel, where, in the affidavit upon which the order to hold to bail is made, he avers his official character and authority to make the affidavit for and on behalf of the plaintiff bank, and the regular attorneys for the bank act as attorneys for the plaintiff, and are employed and paid by the bank, one of whom is a director therein, and the bank applies for a *mandamus* to compel the circuit court to set aside an order quashing the *capias*, and pays the expenses of that proceeding.
4. In order to authorize a bank to show the want of authority of its cashier to institute a libel suit by *capias* in its name, in a suit brought by the defendant for false imprisonment, such alleged want of authority should be specially pleaded.
5. A corporation may be liable in tort, even though a malicious intent is necessary to be proven, the motive of its agent being imputable to the corporation.

Error to Muskegon. (Dickerman, J.) Argued June 13, 1893. Decided July 25, 1893.

Case. Defendants bring error. Affirmed. The facts are stated in the opinion.

F. W. Cook and *Sessions & Bassett*, for appellants, contended:

[1] See *Johnson v. Morton*, 94 Mich. 1, for a discussion of this question.

1. The order to hold to bail protects the defendants; citing *Gordon v. Farrar*, 2 Doug. 411; *Ward v. Cozzens*, 3 Mich. 260; *Wall v. Trumbull*, 16 Id. 236; *West v. Smallwood*, 3 Mees. & W. 418; *Miller v. Adams*, 52 N. Y. 409; *Rutherford v. Holmes*, 66 Id. 370; *Fischer v. Langbein*, 103 Id. 84; *Tompkins v. Sands*, 8 Wend. 468; *Easton v. Calendar*, 11 Id. 90.

DeLong & O'Hara, for plaintiff.

McGRATH, J. This is an appeal from a judgment for plaintiff in an action for false imprisonment.

Plaintiff, on October 20, 1891, was a member of the common council of the city of Muskegon. The Merchants' National Bank was the financial depository of said city. John Torrent was president of said bank, and defendant Lange was cashier. On that date, plaintiff, as alderman, presented to the common council of the city, at a session thereof, the following preamble and resolution:

"*Whereas*, by a late decision of the Supreme Court of this State, a decree of the circuit court for the county of Muskegon, in chancery, was affirmed against John Torrent, and which decree will in all probability compel the said Torrent to pay at least $125,000; and *whereas*, the said Torrent is the principal surety of the Merchants' National Bank on its bond as depository of the moneys of the city of Muskegon; and *whereas*, this council does not deem it entirely safe to leave the city's money on deposit in said bank without additional security to be approved by this council:

"*Therefore, be it resolved* by the common council of the city of Muskegon that, for the security of said city, an order be drawn on the city treasurer in favor of Leonard Eyke, the city treasurer, for the sum of $184,000, and that the money so received by said Leonard Eyke as the proceeds of said order be deposited in the other four banks of the city in equal proportions, and there kept until such additional security to the satisfaction of this council be given by the said Merchants' National Bank.

"JOHN WACHSMUTH."

A motion to refer the resolution was lost by a vote of three to nine. A motion to adopt was lost by a vote of five to seven. On October 26, 1891, the Merchants'

National Bank commenced an action on the case for libel by *capias*, which was issued upon the affidavit of the defendant Lange. An order to hold to bail in the sum of $2,000 was indorsed by a circuit court commissioner, and plaintiff was arrested, committed to jail, and afterwards gave bail.

It is contended that the order to hold to bail protects the defendants. The officer indorsing the order was one of special and limited jurisdiction. The affidavit disclosed that the resolution was offered by plaintiff as a member of the common council to that body, and related to a matter in the line of plaintiff's duty as a public officer. In other words, the affidavit, upon its face, showed that the resolution charged as libelous was, as a matter of law, absolutely privileged. So far from setting forth any facts and circumstances tending to show grounds for granting the order, the affidavit expressly negatived any liability whatever to the plaintiff. The defect was therefore jurisdictional, and the order was absolutely void, and affords no protection to the parties instituting the proceedings, procuring the order, and delivering the process to the sheriff for execution. An arrest and imprisonment in a civil case upon void process is as one without process, and cannot be justified. Good faith, honest belief, and the advice of counsel may be shown to rebut the presumption of malice, and to avoid punitive damages, but not to justify an arrest and imprisonment under an absolutely void process. *Johnson v. Maxon*, 23 Mich. 129; *Johnson v. Morton*, 94 Id. 1; 7 Amer. & Eng. Enc. Law, 679, 681 (note 1), 19 Id. 516; *Vredenburgh v. Hendricks*, 17 Barb. 179; *Fischer v. Langbein*, 103 N. Y. 84; *Miller v. Adams*, 52 Id. 409; *Bonesteel v. Bonesteel*, 28 Wis. 245; *Fenelon v. Butts*, 53 Id. 344.

It is urged that malice cannot be charged against a corporation unless it is shown that the act done was ordered

by the board of directors. The suit was instituted in the name of the corporation. Its cashier made the affidavit, in which he alleged that—

"He is cashier and agent of the Merchants' National Bank of Muskegon, Michigan, the plaintiff named in the annexed writ of *capias ad respondendum*, and is duly authorized to and makes this affidavit for and in behalf of said plaintiff."

The attorneys for the plaintiff were the regular attorneys of the bank, were employed and paid by the bank, and one of the attorneys was at the time a director in said bank. A motion was made by defendant to quash the *capias*, which was granted. Application was then made to this Court by the bank for a *mandamus* directing the circuit court to set aside the order quashing the writ. The expenses of that proceeding were shown to have been paid by the bank. The cashier must be presumed, *prima facie*, to have had authority to direct the commencement of the suit. *Frost v. Machine Co.*, 133 Mass. 565, where it was held that the general manager or agent of a corporation must be presumed to have had authority to direct the issue of a writ of replevin, for the improper service of which the corporation was sued. The ratification of an unauthorized act of an officer of a corporation may be presumed from acts of recognition and acquiescence. Beach, Priv. Corp. § 196. Again, defendants' plea sets forth that the alleged acts, if committed at all, were committed by the "said defendant Herman O. Lange, acting as the cashier and agent of the Merchants' National Bank." In order to avail themselves, in any event, of want of authority, the fact should have been pleaded. Beach, Priv. Corp. § 863.

It is now well settled that a corporation may be liable in tort, even though a malicious intent is necessary to be proven. The malice of the agent is imputable to the corporation. Cooley, Torts, (2d ed.) p. 136; 7 Amer. & Eng. Enc.

Law, 684; Beach, Priv. Corp. §§ 428, 445, 447, 453, 455. As is said by Mr. Beach (section 455):

"The doctrine that an action will not lie against a corporation for a tort is exploded. The same rule applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is said to be so well settled as not to require the citation of authorities."

See, also, *Bacon v. Railroad Co.*, 55 Mich. 224, 228; *Goodspeed v. Bank*, 22 Conn. 530; *Carter v. Machine Co.*, 51 Md. 290; *Reed v. Bank*, 130 Mass. 443; *Vinas v. Insurance Co.*, 27 La. Ann. 367; *Railroad Co. v. Jackson*, 81 Ind. 19; *Quigley v. Railroad Co.*, 11 Nev. 350; *Miller v. Railroad Co.*, 8 Neb. 219; *Williams v. Insurance Co.*, 57 Miss. 759; *Railroad Co. v. Schuyler*, 34 N. Y. 30.

In *Goodspeed v. Bank* the court say:

"But, after all, the objection to the remedy of this plaintiff against the bank in its corporate capacity is not so much that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected to that species of tort which essentially consists in motive and intention. The claim is that, as a corporation is ideal only, it cannot act from malice, and therefore cannot commence and prosecute a malicious or vexatious suit. This syllogism or reasoning might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist, who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance every day. And, if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say that the 'vexatious suit,' as it is called, was instituted, prosecuted, and subsequently sanctioned by the bank, in the usual modes of its action, and still to claim that, although the acts were those of the bank, the intention was only that of the individual directors, is a

distinction too refined, we think, for practical application."

The judgment is affirmed.

HOOKER, C. J., LONG and GRANT, JJ., concurred. MONTGOMERY, J., did not sit.

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CLARENCE B. WARDLE, RECEIVER OF THE HOME MUTUAL FIRE INSURANCE COMPANY OF IONIA, CLINTON, AND MONTCALM COUNTIES, v. JOSEPH L. HUDSON.

Mutual fire insurance companies—Appointment of receiver—Action to recover assessment—Statute of limitations.

1. An action of *assumpsit* brought by the receiver of a mutual fire insurance company under section 17 of Act No. 82, Laws of 1873 (How. Stat. § 4263), to recover an assessment made by him as receiver, is barred by the statute of limitations unless commenced within six years next after the assessment is due and payable.
2. The following propositions are summarized from the opinion of Mr. Justice LONG:

   a—"Specialty by statute" means some right or cause of action given by statute which does not exist at common law, and the nature or cause of action does not depend in such a case, in any degree, upon any contract relation.

   b—Members of a mutual fire insurance company, if liable at all for assessments made by a receiver under Act No. 82, Laws of 1873, can be made so only by the contract existing between them and the corporation, which contract is evidenced by the application and the policy.

   c—The statute of limitation does not begin to run on a deposit note given by a member of a mutual fire insurance company, whereby he agrees to pay a sum certain, or any part thereof, when

[1] For cases construing various provisions of the act cited, see *Insurance Co. v. Spaulding*, 61 Mich. 77; *Tolford v. Church*, 66 Id. 431; *Bacon v. Clyne*, 70 Id. 183; *Wardle v. Townsend*, 75 Id. 385; *Wardle v. Cummings*, 86 Id. 395.

required, and which, by its terms, is part of the absolute funds of the company, until an assessment is laid.

d—Any defense which a member might make against an action brought by the company to recover an assessment made by the board of directors is equally available in an action by the receiver, upon whom the statute merely confers the authority to levy and collect such assessment.

Error to Ionia. (Smith, J.) Argued June 7, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Reversed, and judgment entered for defendant for the costs of both courts. The facts are stated in the opinion.

Clute & Clute, for appellant.

Clarence B. Wardle (*George E. Nichols,* of counsel), for plaintiff.

LONG, J. The plaintiff company, of which Mr. Wardle is receiver, organized and began doing business in 1879 by virtue of Act No. 82, Laws of 1873, and the amendments thereto. From its organization up to 1884, its membership grew to about 2,000, at which time the company became insolvent, and failed to collect assessments from many of its members. The insolvency becoming apparent, the Commissioner of Insurance of the State served upon the officers of the company a notice to close up its affairs unless, within 60 days, they collected assessments and paid up its losses and debts. The company failed to do this, and upon petition of the commissioner the plaintiff in this suit was appointed receiver by an order of the court. The receiver found that the indebtedness amounted to about $22,000, and he proceeded to assess upon all members a sum sufficient to pay the debts and liabilities. Two policies had been issued to the defendant,—one September 24, 1880, and the other September 1, 1882,—in the usual form of

the policies issued to members. The receiver assessed against the defendant, upon those policies held by him, the sum of $33.80. This assessment was made May 25, 1885, in accordance with the order of the court, under section 17 of the act under which the company was organized. The total amount of assessments made was $50,000, the amount assessed against each member being in proportion to the amount of the insurance or interest of each member. This assessment became due and payable to the receiver from the defendant on July 15, 1885. The defendant has been a resident of the State during all the intervening years up to the present time. This assessment not having been paid by the defendant, this action in *assumpsit* was commenced on February 24, 1892, to recover the same. Defendant pleaded the statute of limitations. The court below found the above facts, but held that the action was not barred by the statute of limitations, and gave judgment in favor of the plaintiff. Defendant brings error.

The only question raised in this Court is whether the action is barred by the statute of limitations. Section 17 of the act provides that the receiver may sue in *assumpsit* to recover the moneys so assessed. It is admitted that these moneys became due and payable July 15, 1885,—more than six years before the action for their recovery was commenced. Defendant insists that the case is governed by section 8713, How. Stat., which provides that "all actions of *assumpsit* or upon the case, founded upon any contract or liability, express or implied," must be brought within six years next after the cause of action shall accrue, and not afterwards; and that the obligation of the defendant to pay grows out of the contract relations between the parties, and hence falls within the terms of this section.

It is contended, however, by plaintiff's counsel that, for several reasons, the statute does not run against this claim. The first is that, when the commissioner determined to wind up the affairs of the company, he began suit in the circuit court for Ionia county under sections 9, 15, and 17 of the act of 1873, and upon filing the petition, as required by section 17, plaintiff was appointed receiver, and made the assessment as required by the act; that this was the first step in the suit; that, the assessment not having been paid, the bringing of the present action is but the second step in the same proceeding. This claim has no force. If the amount became due and payable to the receiver on July 15, 1885, the action was barred before this suit was commenced, unless, for some other reason, such claims are brought out of the statute.

It is contended, however, that there was no privity of contract between the receiver and the defendant, either express or implied, and that the only basis of liability is created by the statute under which the proceedings are being had to wind up the affairs of the company, and under which the receiver was appointed, and that the claim, therefore, is nothing more or less than a specialty by statute; hence that the statute of limitations has no application, as that statute can apply only to cases where there is a privity of contract between the parties to the action, and no other. "Specialty by statute" means some right or cause of action given by statute which does not exist at common law. In such cases the nature or cause of action does not depend, in any degree, upon any contract relation. There is no original obligation whatever created by the act of the parties. In the present case, the defendant, if liable at all, could be made so only by the contract existing between him and the insurance company. The evidence of this contract is the application and the policy. Section 1 of the by-laws of the company declares

that the application shall be made a part of the contract of insurance, and be considered a warranty. The statute confers on the receiver merely the authority to levy and collect the assessment, which, without this authority, rests with the board of directors. Any defense which a party might have made against an action brought by the original party is equally available, and may be made with like effect, when the action is instituted by the receiver. High, Rec. § 205; *Railroad Co. v. Railroad Co.*, 46 Vt. 792; *Bangs v. Duckinfield*, 18 N. Y. 597. The rule seems to be well settled that the statute of limitations does not begin to run on a deposit note given by a member of a mutual insurance company, whereby he agrees to pay a sum certain, or any part thereof, when required, and which, by its terms, is part of the absolute funds of the company, until an assessment is laid. *Bigelow v. Libby*, 117 Mass. 359; *In re Insurance Co.*, 10 R. I. 42. In the present case, the assessment had been made more than six years prior to suit brought. If this had been made by the board of directors, no question could have been raised but that any action would be barred. The receiver stands in no better position. The case of *Smith v. Bell*, 107 Penn. St. 352, is quite similar in principle to this. It was held that the action for the assessment could be brought at any time within six years, as the statute of limitations commenced to run at the date of the assessment.

The court below was in error in holding that the action was not barred.

Judgment below must be reversed, and judgment entered here for defendant for costs of both courts.

The other Justices concurred.

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ELIZA WOOD v. THE METROPOLITAN LIFE INSURANCE COMPANY.

Pleading—Amendment of declaration—New party.

A declaration in a suit by a widow upon an insurance policy issued in her favor upon the life of her husband cannot be amended on the trial by joining his daughter, to whom an interest in the policy had been assigned prior to her father's death, as a coplaintiff.

Error to Wayne. (Reilly, J.) Argued June 16, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Reversed, and no new trial ordered. The facts are stated in the opinion.

Haug & Yerkes, for appellant.

James H. McDonald, for plaintiff.

LONG, J. The policy sued upon was issued by the defendant company January 5, 1891, for $500, upon the life of Thomas B. Wood. It contained the following condition:

"If said life dies by his or her own hand or act within three years from the date hereof, whether said life be sane or insane, this contract of insurance shall thereby and thereupon become void and of no effect; but, as an act of grace, the premiums received will be repaid to the person or persons designated in condition fifth herein, but no greater amount will be paid."

Thomas B. Wood died September 8, 1891. On the next day after his death plaintiff furnished the defendant company with proofs of death, stating in said proofs that the insured died by suicide. Payment was refused; and defendant, in its plea of the general issue, gave notice that it would offer as a defense that the insured committed

suicide, making the policy null and void. The case was tried before a jury, and a verdict rendered in favor of the plaintiff for half the amount of the policy, with interest.

On the trial the plaintiff put in evidence the proofs of death which she had furnished to the defendant company, and also claims to have introduced testimony tending to show that the death was accidental. After her testimony had been given, the defendant called the plaintiff's attention to an assignment to her daughter of a portion of the policy sued upon. Plaintiff admitted the making of the assignment, which was in writing, and the court thereupon, on motion of her counsel, permitted an amendment to the declaration, making the daughter one of the parties plaintiff in the suit.

The court submitted to the jury for their determination the question whether the death was accidental, or whether the deceased came to his death by his own hand, stating to them:

"It rests upon the plaintiff to satisfy you by a preponderance of proof that the death of the deceased was accidental, because it is undisputed that the taking of the arsenic was what caused his death; and if he took it with the intention of destroying his own life there can be no recovery, but if he took it by mistake the plaintiff is entitled to recover."

Defendant's counsel raise three questions:

1. That the court was in error in permitting the amendment to the declaration, adding a new party as plaintiff.
2. That, the plaintiff having shown by her proofs of death that the deceased came to his death by his own hand, she is now estopped from setting up the claim that the death was accidental.
3. That there is no testimony in the case showing or tending to show that the deceased came to his death by accidental means.

In the present controversy we need pass upon but one question, and that is whether the amendment to the decla-

ration was properly allowed. It is contended by plaintiff's counsel that it was properly allowed, for the reason that the defendant took no notice of this assignment to plaintiff's daughter of a portion of the policy when it accepted the proofs of death; that no one was claiming anything from the company but the plaintiff; that there was nothing on the policy to show that it had been assigned, and that the company did not notify plaintiff's attorney that such an assignment existed, but sought to use it as a technical defense on the trial; that, in the light of these things, it would be a great injustice not to allow the amendment. Counsel cites, in support of this contention, *Mercantile Ins. Co. v. Holthaus,* 43 Mich. 423. All that was held in that case, however, was that separate interests held by several persons in the same policy of insurance may be united by the assignment of the policy to one individual, who may bring suit upon it.

Section 7631, How. Stat., provides:

"The court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."

This statute has been given a very liberal construction by this Court, but in no case has it ever been contended that an amendment to bring in new parties in an action at law could be allowed. In *Wood v. Circuit Judge,* 84 Mich. 521,[1] an amendment to a declaration was allowed substituting heirs of a member of a mutual benefit association as plaintiffs in a suit brought in the name of the administrator to recover upon an insurance policy. This was allowed upon the ground that it was not a substitution of new parties to the action, but the substitution of persons beneficially interested, as in both cases, whether in

[1] See 94 Mich. 39.

the name of the administrator or of the heirs, it was really a claim of the heirs. The real parties remaining the same, the change was of nominal parties only, and the amendment was permissible, under the authority of *Morford v. Dieffenbacker*, 54 Mich. 593; *Kimball & Austin Manfg. Co. v. Vroman*, 35 Id. 310; *Merrill v. Kalamazoo*, Id. 211; *Kinney v. Harrett*, 46 Id. 87.

In the present case, however, the action was brought in the name of Eliza Wood as sole plaintiff, while the title to a portion of the policy was in fact in her daughter, under a written assignment, which had been filed with the company prior to the death of Mr. Wood. The plaintiff admitted her signature to this assignment. The court was in error in permitting this amendment to be made. When it appeared upon the trial that the plaintiff was not the sole owner of the claim, the court should have directed a verdict in favor of the defendant. Plaintiff could not maintain the action in her own name when it appeared that she was not the sole owner of the claim, and, under the most liberal construction of the statute of amendments, the court had no power to amend by bringing in another party plaintiff.

In this view of the case, we decline to pass upon the other questions raised.

Judgment reversed. No new trial will be ordered.

The other Justices concurred.

CHARLES BATEMAN v. THE GRAND RAPIDS & INDIANA RAILROAD COMPANY, AS GARNISHEE OF CHARLES A. BLAISDELL.

[See 83 Mich. 357.]

Judgments—Chattel mortgage—Concurrent remedies—Bar.

1. The recovery of a judgment by a mortgagee upon a chattel-mortgage note collateral to the mortgage, without satisfaction thereof, will not prevent him from bringing an action of replevin for the mortgaged property.
2. Where, pending an action of replevin by a mortgagee for the mortgaged property, he recovers a judgment in justice's court upon the mortgage note, which is collateral to the mortgage, which judgment is not appealed from, nor pleaded in the replevin suit, and judgment is afterwards rendered therein in favor of the mortgagor on the ground that there was nothing due upon the mortgage debt in excess of the sum tendered when the suit was commenced, and the judgment is affirmed in the Supreme Court, the latter judgment is a bar to garnishment proceedings for the collection of the justice's judgment.

Error to Kent. (Adsit, J.) Submitted on briefs June 16, 1893. Decided July 25, 1893.

Garnishment proceedings. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Ward & Ward, for appellant, contended:

1. Had the justice's judgment been pleaded in the replevin suit, it would have been an absolute bar, so far as the question of the amount due on the mortgage debt was concerned, if defendant's theory, that the causes of action were identical, is true; citing 2 Black, Judgm. § 726; and the judgment was just as binding after the time for appeal had expired, even though it did contain items of usurious interest, or even if wholly made up of such interest; citing Id. § 759.
2. Subsequent litigation covering the same ground has no effect

upon the validity of a judgment already rendered, where, as in this case, the first judgment is not in issue by the pleadings or otherwise; and, had the justice's judgment been in issue in the replevin suit, it must have been fatal to the defendant's case there; citing *Dimock v. Copper Co.*, 117 U. S. 559; *Reilly v. Bader*, 52 N. W. Rep. 522.

Frank G. Holmes, for garnishee defendant.

McGRATH, J. On April 2, 1888, one Blaisdell executed to plaintiff a chattel mortgage upon certain household goods to secure the payment of $84 "according to the conditions of a certain promissory note of even date and collateral hereunto." On February 28, 1889, plaintiff replevied the mortgaged chattels in the circuit court. In April, 1889, pending the replevin suit, plaintiff recovered judgment on the note before a justice of the peace. No appeal was taken from said judgment. The replevin suit was afterwards prosecuted to judgment. The judgment before the justice was not pleaded, and the court found that there was nothing due on the debt secured by the mortgage in excess of the amount tendered at the time of the commencement of suit, and gave judgment for the return of the property, and damages for its unlawful detention. Plaintiff appealed to this Court, and that judgment was affirmed November 21, 1890. See 83 Mich. 357. In September, 1890, plaintiff took out a writ of garnishment against the defendant company in the proceeding before the justice. The company answered September 12, 1890, admitting an indebtedness, and pleading the finding and judgment in the replevin proceeding. Plaintiff had judgment before the justice, and defendant appealed. After perfecting its appeal, the company filed a further plea, setting forth that in the replevin proceeding the same debt and subject-matter, in all respects, in this suit involved, was there finally adjudicated and determined in this Court. The case was tried before the court, the facts found, and judgment rendered for defendant, and plaintiff appeals.

The recovery upon the collateral obligation, without satisfaction thereof, was not a bar to the proceeding upon the mortgage. *Thurber v. Jewett,* 3 Mich. 295; *Drake v. Mitchell,* 3 East, 251; *Satterwhite v. Kennedy,* 3 Strob. 457; *Fisher v. Fisher,* 98 Mass. 303; *Vanuxem v. Burr,* 151 Id. 386; *McCullough v. Hellman,* 8 Or. 191; *White v. Smith,* 33 Penn. St. 186; *Karnes v. Lloyd,* 52 Ill. 113; *Fairchild v. Holly,* 10 Conn. 474; *Chipman v. Martin,* 13 Johns. 240.

In *Drake v. Mitchell,* Le Blanc, J., says:

"The giving of another security, which in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment."

In *Satterwhite v. Kennedy,* the court say:

"A creditor shall not have two satisfactions for the same debt, but there is no inconsistency in his pursuing two remedies. If one produces satisfaction, that is a bar to the other. A mortgage is a specific lien, and a judgment is a general lien. Both may be consistently pursued until the debt is satisfied."

Plaintiff has pursued both remedies. Both were distinct, and related to the same debt. Plaintiff had an opportunity, in the replevin case, to plead the former judgment, but neglected to do so, and must be held to have waived the estoppel. *Cooley v. Brayton,* 16 Iowa, 10; *Marsh v. Mandeville,* 28 Miss. 122. In the replevin case the mortgagor made a tender, the issue raised was the amount due upon that obligation, and the court expressly found that the debt had been paid and discharged. Thus we have two judgments,—one upon the collateral obligation rendered in April, 1889, by a justice of the peace, in a suit instituted pending proceedings upon the original obligation; the other, upon the original obligation, rendered in the circuit court, and affirmed on appeal to this Court, in which it is found and determined that the original debt is paid and dis-

charged, and the mortgage extinguished. As between these two judgments, we think that the latter should control. The action in which that judgment was rendered was instituted by plaintiff. The court acquired jurisdiction of the parties and the subject-matter, and was entitled to retain it to its final termination. The basis of that proceeding was the primary obligation. The judgment is that of a superior tribunal, and was last in point of time. *Insurance Co. v. Howell,* 24 N. J. Eq. 238; Freem. Judgm. § 332; *Semple v. Wright,* 32 Cal. 659; *Semple v. Ware,* 42 Id. 619; *Sharon v. Sharon,* 84 Id. 424; *Cooley v. Brayton,* 16 Iowa, 10.

In the case last cited, A. foreclosed a mortgage, making B. a party as a subsequent incumbrancer, and obtained a decree against B.; and B. afterwards foreclosed his mortgage, making A. a party as a subsequent incumbrancer, and obtained a decree against A. Held that, if A. wished to avail himself of his decree, he should have set it up in the second action, and, not having done so, his rights under it were lost.

In *Sharon v. Sharon,* complainant had obtained a decree for divorce, alimony, and costs. Before that action was commenced, the defendant had instituted proceedings in the circuit court of the United States against the complainant in the divorce case, by the name of Sarah Althea Hill, to cancel an alleged declaration of marriage. The action resulted in a judgment for Sharon. Afterwards, complainant in the divorce proceeding moved for a judgment in the state court for the alimony and costs against the executor of Sharon's estate, and judgment was entered accordingly. On appeal the court held that the judgment in the divorce proceeding was essentially based upon the identical contract which had been declared by the circuit court of the United States to be a forgery; that the circuit court of the United States acquired jurisdiction of the persons and

subject-matter before the commencement of the divorce proceedings, and, consequently, that no matter when its judgment was rendered,—whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons and subject-matter,—the final judgment in that case became binding and conclusive, as to that subject-matter, upon all persons and upon all courts and tribunals whatsoever.

The judgment is affirmed.

The other Justices concurred.

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HENRY C. LENTZ v. THE TEUTONIA FIRE INSURANCE COMPANY.

Fire insurance—Action on policy—Limitation.

Where, by reason of the refusal of an insurance company to pay a loss, a policy-holder becomes entitled to bring a suit, without furnishing proofs of loss, four months prior to the expiration of the time limited in the policy for commencing a suit thereon, and which is the earliest day at which he could have brought suit had he furnished such proofs, a suit thereafter brought is barred, unless the limitation clause has been waived by the company; citing *Law v. Accident Association*, 94 Mich. 266.

Error to Lenawee. (Lane, J.) Submitted on briefs June 7, 1893. Decided July 25, 1893.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. C. Winne, for appellant.

Wood & Bird, for defendant.

MONTGOMERY, J. Action on a policy of insurance. The loss is alleged to have occurred on the 23d of October, 1889. Three grounds of defense were urged in the court below:

1. That the property burned was not covered by the policy.
2. That no proofs of loss were furnished.
3. That the suit was not commenced within the time limited by the policy.

The circuit judge directed a verdict for the defendant on the ground that the policy did not cover the property burned. The record contains the substance of all the testimony. If it appears that there is any conclusive reason why no recovery should be had, the judgment should not be disturbed. *Dunning v. Calkins*, 51 Mich. 556; *Monaghan v. Insurance Co.*, 53 Id. 238.

The policy contains a provision that—

"No suit or action upon this policy shall be sustainable in any court of law * * * unless such suit or action shall be commenced within six months next after the loss shall occur."

The suit was not instituted until the 5th day of May, 1890,—6 months and 12 days after the fire. This delay operates to bar recovery, unless it is excused by the act of the company. This is claimed by the plaintiff. It appears that the adjuster of the company called upon the plaintiff, in company with the local agent, shortly after the fire, and, as the plaintiff testified, then agreed to pay him $25 by way of compromise; but on the 22d day of December he was informed by the local agent that the company denied any liability, the agent at that time offering to credit him $12.50 as a premium on a new policy of insurance. This he declined to accept. He now treats the repudiation of liability as excusing him from furnishing any proofs of loss, and justifying an action on the policy. Assuming that he is right in this contention, it unfortunately demon-

strates that he was not delayed in bringing suit by the negotiations. Had he furnished proofs of loss the day the fire occurred, the company would have been entitled to 60 days within which to make payment, by the terms of the policy. He could not, therefore, have brought suit earlier than December 22. He now brings suit without furnishing proofs of loss, on the claim that the company's refusal to pay waived such proofs. This he was entitled to do on December 22, the earliest day at which he could have brought suit had he furnished proofs. This distinguishes the case from *Voorheis v. Benefit Society,* 91 Mich. 469, and brings the case directly within the ruling in *Law v. Accident Association,* 94 Mich. 266.

Judgment affirmed, with costs.

The other Justices concurred.

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WILLIAM H. ROSS, EXECUTOR, ETC., v. THE CITY OF DETROIT.

Trial—Arguments of counsel.

Where the attorney for the plaintiff in a negligence case against a city, in his closing argument to the jury, in answer to a statement of the counsel for the defendant that the jury should not allow larger damages than the plaintiff had demanded in the claim presented to the common council, states that the city counselor had recommended to the council that a larger sum be paid, which statement is objected and excepted to, and is wholly unsupported by any evidence in the case, it is reversible error.

Error to Wayne. (Brevoort, J.) Argued June 20, 1893. Decided July 25, 1893.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

John J. Speed (*T. T. Leete, Jr.*, of counsel), for appellant.

L. C. Stanley (*Otto Kirchner*, of counsel), for plaintiff.

GRANT, J. This suit was instituted by Martha Ross. Upon her death the plaintiff, her executor, was duly admitted to prosecute the suit.

The declaration alleges that her claim for damages was presented to the common council for audit and allowance, and was rejected. Upon the trial this claim made by Mrs. Ross to the common council was introduced in evidence by the plaintiff. It stated that "she has decided to limit her claim to the sum of $2,000 on the basis of a prompt adjustment, but without prejudice to her rights in the event of a suit." During the trial, negotiations were entered upon for a settlement, and the trial was postponed for that purpose. The negotiations, however, failed.

Counsel for the defendant, in his argument to the jury, said that they should not allow larger damages than she herself demanded. Counsel for the plaintiff, in his closing argument, said: "Why, gentlemen of the jury, the city counselor himself has recommended to the council that a larger sum than this be paid." This statement was objected and excepted to, and the circuit judge made no comment to the jury upon it. There was no evidence in the case upon which to base such a statement, and it could hardly fail to prejudice the jury.

For this error the case must be reversed, and a new trial ordered.

The other Justices concurred.

THE PEOPLE v. LATIN SKUTT.

Criminal law—Incest—Evidence—Arguments of counsel—Instructions.

1. The Court adhere to the rule laid down in *People v. Jenness*, 5 Mich. 305, and hold that evidence was properly admitted, in a prosecution for incest, of acts of sexual intercourse between the parties at various times during a period of about eight years previous to the commission of the crime alleged, and of an act of familiarity, during that time, of such a character as to lead to the conclusion that its purpose was for such intercourse.
2. Where several witnesses testify to such acts of intercourse, and the respondent introduces no evidence, and no attempt is made to impeach the people's witnesses, it is not error for the prosecuting attorney to state to the jury that the commission of such acts is an undisputed fact in the case.
3. Where concessions and statements of counsel are recited in the charge to the jury, they will be presumed to have been made, unless the record shows that before the jury retired the attention of the court was called to the matter, and an opportunity given for correction; citing *Stanton v. Manufacturing Co.*, 90 Mich. 12, 15.
4. The question whether the intercourse took place under such circumstances as to constitute the crime of rape is held to have been fairly and properly submitted to the jury.

Error to Clinton. (Daboll, J.) Submitted on briefs June 22, 1893. Decided July 25, 1893.

Respondent was convicted of the crime of incest, and sentenced to imprisonment in the State prison for 10 years. Judgment affirmed. The facts are stated in the opinion.

Lyon & Dooling, for respondent.

A. A. Ellis, Attorney General, and *W. A. Norton,* Prosecuting Attorney, for the people.

GRANT, J. The respondent was convicted of incest with his own daughter, 16 years of age. Four errors are assigned. The crime was charged to have been committed July 30, 1892.

1. Acts of sexual intercourse between the respondent and his daughter were shown by the evidence at various times for a period of about eight years previous to the commission of the crime alleged; also during that time one act of familiarity was shown, which was of such a character as to lead to the conclusion that its purpose was for sexual intercourse. The evidence was properly admitted. *People v. Jenness*, 5 Mich. 305, 319. In that case evidence of acts of intercourse covering a period of five years was held competent. The reasons for the admission of such evidence are there clearly stated in an able opinion by Mr. Justice CHRISTIANCY. *People v. Hendrickson*, 53 Mich. 525, appears to be in conflict with *People v. Jenness*, though the facts in the two cases are different. In the former case, acts of familiarity and intimacy, occurring over two years before the prosecution was commenced, were held inadmissible in a prosecution for adultery, on the ground that they were too remote. We adhere to the rule laid down in *People v. Jenness*.

2. The prosecuting attorney, in his argument to the jury, used the following language:

> "It is an undisputed fact that this sort of conduct had been going on between the defendant and his daughter from the time she was eight years old down to the time of the commission of the crime for which he is now on trial."

Under the record in this case, we do not think this language was error. Several witnesses had testified to acts of sexual intercourse during the period covered. No evidence was introduced on the part of the respondent. No

attempt was made to impeach the witnesses for the prosecution.

3. In his charge to the jury the court used this language:

"In this case, upon the argument by counsel upon both sides, it has been conceded that, about the time and place charged in the information, the defendant and the complaining witness, his daughter, had sexual intercourse. It is claimed upon the part of the people that it was under such circumstances as make him guilty of the offense charged. It is claimed upon the part of the defendant that, while the intercourse took place, it was not under such circumstances as make him guilty under this charge, but constituted the offense of rape."

This statement by the court was not challenged by the respondent's counsel upon the trial, nor do they now state in their brief that it was not correct. Such statements in the instructions of the court will be presumed to have been correctly made where the record does not show that attention was called to them, and the court given an opportunity to correct them. *Stanton v. Manufacturing Co.*, 90 Mich. 12, 15. It is apparent upon this record that the line of defense was that the evidence established a case of rape, and not of incest.

4. The respondent's counsel requested an instruction that under the evidence, if any offense was committed, it was rape, and not incest, and that the verdict should be, "Not guilty." This instruction was refused, and the court instructed the jury that, if the intercourse took place because of threats made at the time or previously, the respondent was guilty of rape, and they should acquit. This instruction was given at the request of the respondent, and was favorable to him. We are not prepared to say that the instruction correctly states the law, and upon the question we pass no opinion. *State v. Chambers*, 53 N. W. Rep. 1090, is an instructive case upon this point.

The complaining witness testified that she consented to

the intercourse, and detailed the circumstances under which it took place. The testimony of the witness taken upon the examination was introduced upon the trial, in which she stated that on the 30th day of July, the date of the commission of the crime, the respondent threatened her that if she "ever told of him he would kill her," and that she would not have submitted to him at any time if he had not threatened her, and that she was under the influence of those threats or she would not have submitted to him. It is not necessary to state her entire testimony taken upon the examination and upon the trial It was fairly and properly left to the jury to determine whether the intercourse took place under such circumstances as to constitute the crime of rape.

We find no error upon the record, and the judgment is affirmed.

The other Justices concurred.

The People v. John Sykes.

Liquor traffic—Payment of tax—Right of administratrix to continue business.

If a wife, as administratrix of her husband's estate, can continue to carry on the business of liquor selling, in which he was engaged at the time of his death (which is not decided),[1] she cannot do so without first paying the tax and giving the bond required by the statute.

Exceptions before sentence from Ionia. (Smith, J.) Submitted on briefs June 22, 1893. Decided July 25, 1893.

[1] See *Smith v. Brennan*, 62 Mich. 349.

Respondent was convicted of engaging in the business of selling intoxicating liquors at retail without paying the required tax. Conviction affirmed. The facts are stated in the opinion.

George E. Nichols and *F. C. Miller*, for respondent, contended:

1. Upon the payment of the tax a property right vested in the decedent, which his death did not destroy, and which descended to his heirs and legal representatives.
2. "If the tax is paid, the traffic is lawful; but, if not paid, it is equally lawful. There is, consequently, nothing in the case that appears to be in the nature of a license. The State has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits; and that is all."—Citing *Youngblood v. Sexton*, 32 Mich. 413, 420. This case has been followed in every case in which we are able to find the question discussed; citing *Westinghausen v. People*, 44 Mich. 265; *Doran v. Phillips*, 47 Id. 228; *People v. Walling*, 53 Id. 264; *People v. Breidenstein*, 65 Id. 65. On the other hand, it has been held that the object of a license is to confer a right that did not exist without it; citing *Chilvers v. People*, 11 Mich. 43, 49; *Youngblood v. Sexton*, 32 Id. 420; Cooley, Tax'n (2d ed.), 596.[1]

A. A. Ellis, Attorney General, and *Royal A. Hawley*, Prosecuting Attorney, for the people.

LONG, J. There is no disputed question of fact in this case. May 2, 1892, one Michael Snyder paid to the county treasurer of Ionia county $500 as a tax, as required by law, for the purpose of carrying on the business at retail of selling spirituous liquors. He gave the required bond. He continued in business until August 26, 1892, when he died, leaving his wife, Mary Snyder, and two children, surviving him. His wife was appointed administratrix of his estate,

[1] See *Sherlock v. Stuart*, 96 Mich. 193, holding that, while the fee required to be paid as a condition to engaging in the business of selling intoxicating liquors is called a "tax," there are other conditions precedent which are inconsistent with a purely tax system, and partake of the character of a license.

consisting of about $300 of personal property. After her appointment as administratrix, Mrs. Snyder continued to carry on the business, and employed the respondent to assist her therein. December 29, 1892, both were arrested, charged with violating the liquor law, in that they were carrying on the business without having paid the tax required by law. They took separate trials, and the respondent, under the direction of the court, was found guilty. The case comes up on exceptions before sentence.

But a single question is involved: Has the administratrix of the estate the right to continue the business without again paying the tax required by Act No. 313, Laws of 1887? We think the court below was correct in its conclusions. The statute not only requires a tax to be paid, but a bond to be filed, before a person has the right to engage in that business. This bond must be executed, approved, and filed with the county treasurer before a tax can be paid and a receipt given. *Attorney General v. Huebner*, 91 Mich. 436. The statute prohibits the applicant from engaging in the saloon business until the bond has been approved by the proper body, and filed with the county treasurer, and the tax paid. If the administratrix could go on with the business under the payment of the tax by the decedent, then she might go on with it without giving any further bond. It would not be pretended that the decedent's bond would be any protection against unlawful sales made by the administratrix. The right to carry on the business is in the nature of a license to the party who complies with the statute, and it cannot be said to pass over to the administrator at the death of the party holding it. It must be held that the administratrix could not carry on the business without first paying the tax and giving a new bond, even if, as administratrix, she could carry on the business at all.

The court is advised to proceed to judgment upon the verdict.

The other Justices concurred.

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CHARLES RUPPEL v. THE ADRIAN FURNITURE MANUFACTURING COMPANY.

Trover—Evidence of value—Appeal—Estoppel.

1. Property is often the subject of legal valuation, concerning which no proof of value in the market can be given, because it is not brought into the course of trade, and it is incapable of any estimate in that mode; and, in such a case, the value is to be ascertained from such elements of value as are attainable, among which may be the cost of construction.
2. Where a corporation defends a trover suit on the ground that it has a lien upon the property for material and work used in its construction, and that the plaintiff agreed that it might retain possession until its bill was paid, it cannot on appeal raise the question for the first time that the detention of the property by its president was without authority from the corporation, and that he alone is liable therefor.

Error to Lenawee. (Lane, J.) Argued June 7, 1893. Decided July 25, 1893.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Westerman & Westerman, for appellant.

J. C. Winne, for plaintiff.

MCGRATH, J. This is trover for a bedroom set partially constructed by plaintiff upon defendant's premises.

But two questions are presented. A witness called by

plaintiff was asked how much it would cost to replace the set, or make another just like it. Plaintiff was an expert wood carver. The set had been the first constructed after a unique design invented by plaintiff. It was richly carved. It could not be said to have had an ascertained market value. The witness had himself worked upon the set ten and one-half months, and had testified that he knew how much time plaintiff had spent upon it. Other testimony had been given by experts of its value. Such opinions were, at best, but estimates. It was competent, in connection with such testimony, to show the actual cost of construction. Property is often the subject of legal valuation, concerning which no proof of value in the market can be given, because it is not brought into the course of trade, and it is incapable of any estimate in that mode. The value, in such case, is to be ascertained from such elements of value as are attainable.

The only other question raised is that the detention of the set by the president was without authority of the company, and he alone is liable in tort to plaintiff. This question does not seem to have been raised upon the trial below. On the contrary, the defense below was that the company had a lien upon the property for lumber and machine work which went into its construction. A bill for this work and materials, including other claims in favor of defendant and against plaintiff, was presented, and it was claimed that, for the lumber and machine work, defendant had a lien, and, further, that, upon presentation of the bill, plaintiff agreed that the set might remain until the bill was paid. Defendant cannot now and here be heard to say that the conversion was not its act.

The judgment is affirmed.

The other Justices concurred.

NELLIE ANDERSON v. DAVID CROWLEY.

Estoppel.

A failure to act upon information which proves to have been erroneous, and for which reason any attempted action would have been futile, does not amount to an estoppel.

Error to Saginaw. (Daboll, J., presiding.) Submitted on briefs June 9, 1893. Decided July 25, 1893.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

F. E. Emerick, for appellant.

Crane & Crane, for plaintiff.

MONTGOMERY, J. Replevin for a cow. Plaintiff recovered, and defendant brings error.

The undisputed testimony showed that the plaintiff owned the cow in question; that, during the summer of 1890, plaintiff was boarding temporarily with her parents, in the south of Saginaw, while her husband was engaged in the saloon business at Lansing. The cow in question was kept and cared for by the plaintiff. George D. Anderson, plaintiff's husband, visited his family in Saginaw on Sunday, the 16th of November. He then informed his wife that a man named Crumb at Lansing would take the cow and keep her, free of charge, provided he could have the milk from her until the plaintiff and her children removed to Lansing. Plaintiff assented to her husband's shipping the cow to Lansing, and, on the morning of the 17th of November, the cow was taken to the train by the husband, and placed in the car for shipment. The cow was, however, the same day, and before leaving Saginaw,

sold by plaintiff's husband to one Brown, who lived in Kentucky. The plaintiff accompanied her husband to Lansing on the same day; and there is some testimony offered by the defense which tends to show that the plaintiff had admitted that she learned on her arrival at Lansing that the cow had been sold to Brown. The defendant called witnesses to testify that she had also stated that she learned that the cow was at Crowley's at this time; and it is insisted that it was her duty to take steps to reclaim the cow at once, and, not having done so until Crowley became the purchaser, a few days later, she is now estopped from claiming title.[1]

Apart from the fact that it does not appear that plaintiff had any notice of any intended purchase by Crowley, and the further fact that Brown, the only purchaser of whom she had then heard, has in no way changed his position since, the further fact appears conclusively by the defendant's testimony that if the plaintiff had attempted to act upon the information, which she is alleged to have possessed, that the cow was at Crowley's, any attempt to remove the property would have proven futile, for the cow was not then at Crowley's, but at a livery stable kept by one Penoyer.

The circuit judge was right in holding that there was no estoppel under these circumstances, and in directing a verdict for plaintiff.

Judgment affirmed, with costs.

The other Justices concurred.

[1] Counsel cited, in support of this contention, *Dann v. Cudney*, 13 Mich. 239; *Case v. Erwin*, 18 Id. 434; *Paneling Co. v. Parsell*, 38 Id. 480.

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ALEXANDER R. METCALFE v. SYDENHAM FLAGG MILLER ET AL.

Partition—Who may maintain—Reversioner.

A husband who purchases an interest in the life-estate of his wife in land of which she is in possession, and an undivided interest in the reversion, cannot maintain a bill for the partition of the land as against the other reversioners.

Appeal from Wayne. (Gartner, J.) Argued June 20, 1893. Decided July 25, 1893.

Bill for partition. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

John G. Hawley, for complainant.

C. A. Kent, for defendants James A. and Oliver S. Miller.

Frank P. Guise, for defendants Robert M. Chamberlain and B. G. Miller.

MCGRATH, J. This is a bill for partition.

Samuel Miller died in 1881, seised of certain real estate. He left a will, by which he devised to his "heirs at law, as the same would be distributed by the law of descent of the State of Michigan as said law now is." Decedent left a widow, but no issue. In the settlement of the estate, the interest of his widow, Mary A. Metcalfe, now the wife of complainant, and one of the defendants herein, was determined by the following order of the probate court:

"That the use, net income, rents, and profits of the real estate, or interest therein, of which the said testator died seised, except such as may be sold under the order of this court for the payment of any debts existing against said

estate, under the provisions of the will of the testator or otherwise, and the possession of such real estate, shall be decreed to belong to and be the property of the said Mary A. Miller, for and during the period of her natural life, subject, however, to the payment of all taxes or assessments against the said property, and all necessary expenses to keep said property in repair and condition."

Complainant has since purchased one seventy-second part of the reversion, and one-fifth of the life-estate.

Mary A. Metcalfe filed an answer, admitting the matters set forth in the bill, and joining in the prayer thereof. Certain of the reversioners answered, denying complainant's right to partition. The court below dismissed the bill, and complainant appeals.

At common law, estates in remainder or reversion could not be compulsorily partitioned, nor could tenants in remainder or reversion interfere with tenants in possession. After the statutes of Henry VIII., partition was only allowed when there was an actual tenancy or holding of the parties to the writ, and when any of the parties were seised or possessed of a particular estate for life or for years the partition was necessarily temporary only, and commensurate with their estate. To make the partition absolute, another writ against the remainder-man was necessary when his estate fell into possession. Our statute relating to the partition and distribution of estates in the probate court follows the rule which succeeded the adoption of these statutes. How. Stat. § 5983 (being section 21, chap. 226), expressly provides that—

"When the term of a widow entitled to dower or other life-estate in the lands of a deceased person shall expire, the reversion may be assigned to the persons entitled to the same, and partition thereof be made in the manner prescribed in this chapter in relation to other estates of deceased persons."

How. Stat. § 7850 (being section 1, chap. 270), providing for partition in equity, is as follows:

"All persons holding lands as joint tenants or tenants in common may have partition thereof in the manner provided in this chapter."

Section 7852 provides that—

"Such suit may be maintained by any person who has an estate in possession in the lands of which partition is sought, but not by one who has only an estate therein in remainder or reversion."

These chapters relate to the same subject,—the partition of estates,—and must be construed with reference to each other. Chapter 270 was designed to give to courts of equity jurisdiction in partition cases.

"The mischief," says Mr. Freeman, "attending the ownership of estates in cotenancy, which the various statutes of partition were intended to avoid, was that which arose from disputes in regard to the occupancy of lands. * * * Through the operation of the writ of partition, it was intended that the undivided possession should be severed, and that each person having the right to be in possession of the whole property should exchange that right for one more exclusive in its nature, whereby, during the continuance of his estate, he should be entitled to the sole use and enjoyment of some specific purparty." Freem. Coten. & Part. § 440.

It will not be contended that, prior to the division of the life-estate, its owner could have demanded partition as against the reversioners. There was no concurrent holding. The action is in its nature possessory. Its object is to distribute the possession between those entitled to possession. It is an adversary suit. *Seiders v. Giles*, 141 Penn. St. 93 (21 Alt. Rep. 514). She had an estate in possession. If she had purchased an interest in the reversion she would still have been the sole owner of the estate in possession.

Tenants in common are persons who hold by unity of possession. 4 Kent, Com. 367. Where two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds, they are ten-

ants in common. The only characteristic common to tenants in common is that of undivided possession. 2 Rap. & L. Law Dict. 1256. Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole. It is in this sense that the term "tenants in common" is used in the statute. A reversioner has neither actual nor constructive possession, or the right to either, but has simply an estate in expectancy, the life-estate intervening. The owners of the life-estate are holders as tenants in common, and, as between them, partition may be had; but it does not follow that either is entitled to a partition as against the reversioners.

Complainant and his wife are the owners of the particular estate. That estate must stand alone, subject to its advantages and disadvantages, and may be sold if not divisible. The object of the statute was not to subject the reversion to the burdens or infirmities of the particular estate, but to enable joint tenants or tenants in common, or persons having an undivided possession, to have partition between themselves. One of the reasons that the statute requires the petition to set forth the rights and titles of all persons interested is to enable the court to determine the very question which we have been considering.

The decree of the court below is affirmed, with costs to defendants.

The other Justices concurred.

THE ST. CLAIR MINERAL SPRINGS COMPANY, LIMITED, v. THE CITY OF ST. CLAIR.

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Negligence—Instructions to jury—Proximate cause.

1. A request for an instruction in a negligence case, that the jury find a verdict for the plaintiff if they find that the defendant was negligent in a matter not the proximate cause of the accident, and which leaves out of consideration such proximate cause and the alleged contributory negligence of the plaintiff's servant, is properly refused.
2. It is a much better practice for the trial judge to draw the attention of the jury in a negligence case to the issues they are to determine, and inform them what facts, if found, will constitute negligence and render the defendant liable, than to give them a general definition of negligence.

Error to St. Clair. (Canfield, J.) Argued June 23, 1893. Decided July 25, 1893.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Avery Bros. & Walsh, for appellant.

Atkinson, Vance & Wolcott, for defendant.

GRANT, J. Front street, in the defendant city, crosses Pine river. The old bridge having become defective and unsound, the city took it down, and was contructing a new one in its place. To accommodate the public travel, the city constructed a temporary bridge across the river, outside the line of the street. This temporary bridge consisted of a scow 20 feet wide, 60 feet long, about 4½ feet high, and which would carry from 75 to 80 tons. The river was navigable at this point, and the scow had, occasionally, to be swung out of position to permit the passage of vessels. Aprons were fastened by hinges to the approaches on each

side, which, when the scow was in position, were dropped onto it for the purpose of affording passage. The scow had five snubbing posts on each side, 14 feet apart, 4 by 6, and 18 inches high. Scantling, 2 by 4, were spiked on each side of these posts, and extended 18 inches above them. On top of these was spiked a railing made of scantling, with one or two boards below. Midway between these stanchions were placed posts, which were toe-nailed to the scow. The height of the water varied with the wind from 15 to 19 inches, according to plaintiff's evidence, and from 8 to 9 inches, according to defendant's evidence.

Plaintiff's servant was driving a horse and wagon loaded with 48 bushels of potatoes. He had passed over the scow, the horse and front wheels had passed up the apron, and the hind wheels were close to it, when the horse stopped, backed up, the wagon cramped, struck the railing, which gave way, and the horse and wagon, with its contents, fell into the river, and the horse was drowned.

The negligence alleged is that the defendant "allowed, caused, and permitted the bridge to be and remain in an unsafe condition, and did allow and permit the traveled portion thereof to become out of repair, and uneven, with sudden elevations and depressions, of great height and depth, and in a floating, insecure, and unsteady condition, and to remain without a sufficient guard or rail along the sides thereof." It then alleges that, "on account of a certain declivity in the roadway of said bridge, the horse and wagon were thrown against the rail along the side of said bridge, and said rail, being weak, insecure, and worthless, gave way, and said horse and wagon were, in consequence, precipitated into the river."

After very clearly and fully stating the claims of each party, the court gave the following instruction:

"If you find from the evidence that the scow used as a part of the bridge leaked, and that the defendant failed

to keep it properly pumped out and free from water, and allowed it to become partly filled with water, and that this caused it to settle down into the water, causing, with the load driven by plaintiff's servant, the float to sink down low, so as to make the apron at the south end of the bridge so steep as to be dangerous and unsafe for travel, and that plaintiff's servant attempted to pass over at the south, and was drawing with the horse a load of reasonable weight, and was in the exercise of reasonable skill and caution in the management of the horse and load, and by reason of such unsafe condition of the apron the horse was unable to draw the load over it, and was so compelled to fall back with the load,—and in so going back the wagon broke through the railing or the barrier on the side of the boat,—and was drowned, and you also find that the officers of the city had notice and knowledge of the defective condition of the bridge and railing, and thereafter had reasonable time and opportunity to put the same in proper condition, and did not use reasonable diligence so to do, then the plaintiff would be entitled to your verdict.

"If you find the fact to be that when the plaintiff's horse was being driven across the bridge, on the day in question, the passage from the scow to the approach was so steep as that it was not reasonably safe,—whether the steepness was caused by the sinking of the scow from leakage, or by the receding of the water in the river, as shown by the evidence,—but on account thereof the horse was overcome by the load, when he would not have been overcome if the incline had been more gradual, and shall also find that such incline might have been made easier, on the part of the city, by the exercise of reasonable care and skill, and that this steepness and condition caused the loss of the horse, then the city would be liable, providing the plaintiff and the driver were not guilty of a want of ordinary care in the management of the horse, and reasonable time and opportunity to put the bridge in a safe condition occurred, as I have stated."

Verdict and judgment were for the defendant.

Only two of the errors assigned are relied upon:

1. It is insisted that the court erred in refusing to give the following request:

"And if you find that after the horse was overcome

with the load, and the wagon ran back, its progress would have been arrested by a rail of reasonable strength, and the accident prevented, and find as a fact that the rail on the scow was not reasonably strong, and on that account the wagon went over the brink, and the horse got drowned, the plaintiff would be entitled to a verdict."

This request was correctly refused. It entirely left out of consideration the proximate cause of the accident, and the contributory negligence of the plaintiff's servant. The law was correctly stated in the following portion of the court's instructions:

"If you find that the backing of the horse was not occasioned by the defective condition of the bridge or apron, then it would make no difference whether the railing was sufficiently strong or not, because in that case the defendant's negligence would not be the proximate cause of the injury." *Beall v. Township of Athens,* 81 Mich. 536.

2. Plaintiff's counsel presented a request giving the general definition of negligence, which the court did not give. It was unnecessary to give to the jury this general definition of negligence. In that portion of the instruction above given, the learned circuit judge concisely drew the attention of the jury to the issues they were to determine, and told them what facts, if found, would constitute negligence, and render the defendant liable. His instructions as to contributory negligence were equally clear and explicit. We think that this is a much better practice than it is to give to the jury general definitions.

In instructing the jury as to contributory negligence, the judge said that the driver was required to exercise such care as a reasonably prudent man would be expected to exercise under the circumstances, and that the law does not require that one placed in a position of peril, where he is called upon to act with promptness, should act with perfect prudence and deliberate judgment, but that he is only required, under such circumstances, to use such degree

of prudence as an ordinarily careful and prudent man would be likely to exercise under the same circumstances.

We find no error upon the record, and the judgment is affirmed.

The other Justices concurred.

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CATHERINE MCMAHON v. MARCEL DUMAS.

Liquor traffic—Civil damage act—Evidence.

1. The statute gives an absolute right of action to a wife against those who have caused or contributed to the intoxication of her husband which results in injury, and does not predicate her right of recovery upon knowledge on their part that he was a person in the habit of becoming intoxicated.
2. The questions whether the plaintiff's husband was intoxicated when he drank in defendant's saloon, and whether he was killed by a railroad train,—his body being found after daylight on the railroad track,—and by reason of intoxication, are held to have been properly left to the jury.

Error to Menominee. (Stone, J.) Submitted on briefs June 21, 1893. Decided July 25, 1893.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

R. C. Flannigan, for appellant, contended:

1. A person who sells liquor lawfully to an adult is not responsible for his death on account of his intoxication; citing *Bell v. Zelmer*, 75 Mich. 66; *Peacock v. Oaks*, 85 Id. 578; and the sale of liquor to a person in the habit of becoming intoxicated is lawful, unless, at the time of the sale, the person making it has knowledge of such fact; citing *Brockway v. Patterson*, 72 Mich. 128; *Fletcher v. Forler*, 83 Id. 52; *Faulks v. People*,

39 Id. 202; *People v. Parks*, 49 Id. 333; *People v. Roby*, 52 Id. 577.

W. H. Phillips and *Frank Bracelin*, for plaintiff.

GRANT, J. Plaintiff's husband was killed on the morning of October 12, 1890, before daylight, on the track of the Chicago & Northwestern Railroad. The condition of his body, which was found after daylight, showed that he had been struck by a passing train. Plaintiff claims that he came to his death by reason of intoxication, to which the defendant, a saloon keeper, contributed. There was evidence tending to show that he was in the habit of getting intoxicated. The plaintiff testified:

"My husband got drunk whenever he could get liquor, and, when he got his pay, he would spend more or less of his wages in drinking. Sometimes he would spend five or six or seven dollars, and sometimes more. He didn't get drunk oftener than twice a month. Every time he would go out, of course, he would get drunk. This was true of him for the last eight or nine years."

The deceased worked in a saw-mill at Carney, a small saw-mill town situated on the Chicago & Northwestern Railroad. Nadeau, another small town on the same road, is two miles distant. There were no saloons in Carney, but there were some in Nadeau, including the defendant's. The deceased left home between 6 and 7 o'clock in the evening, and went to Nadeau. In going between these two places, it was common for foot passengers to walk upon the railroad track. The deceased went to some of these saloons during the night, including that of the defendant, where he, with others, remained till between 12 and 1 o'clock in the morning. The defendant says that he came there between 11 and 12 o'clock, and admits that he had one glass of beer and a glass of cider while there, and that he once saw him under the influence of liquor. The deceased had purchased a bottle of whisky at another

saloon during the evening, and had also drunk at some of them. There was also evidence tending to show that the deceased conducted himself that evening as he usually did when intoxicated, and that he spent the most of his time from 7 to 1 o'clock in the saloons.

The declaration is in the usual form in such cases. Plaintiff recovered verdict and judgment.

1. The evidence of intoxication at the time the deceased was in the defendant's saloon and drank there is weak, but we think there was some evidence tending to show that fact. The deceased was in the habit of getting intoxicated, and, according to the evidence of the plaintiff, his appetite for intoxicating liquor was strong, and he gratified it whenever opportunity offered. He had spent a considerable part of the evening and night in the saloons, and there was evidence tending to show that he was in defendant's saloon between one and two hours when the defendant was violating the law in keeping his saloon open. We do not think the court erred in refusing to instruct the jury that there was no evidence that the deceased was intoxicated.

2. It is contended that there was no evidence that the deceased was killed by the railroad train, or by reason of intoxication. It is urged in this behalf that the night was dark and stormy; that the deceased had no lantern; that he might have been killed for the purpose of robbery, and his body placed on the track; or that he might have stumbled and fallen on the rail, and injured himself, so as to be unable to avoid the train. We think all these were questions for the jury. Under the evidence, the manner in which he came to his death was for the jury, not the court, to determine.

3. The court instructed the jury that plaintiff could not recover unless she had proven either that the deceased was intoxicated when the defendant sold the liquor to him,

or that he was a person in the habit of becoming intoxicated. The learned counsel for the defendant insists that there can be no recovery in such cases without proof that the defendant knew that the person was in the habit of becoming intoxicated. The statute does not predicate the right of recovery upon such knowledge on the part of those selling intoxicating liquors. It gives an absolute right of action against those who have caused or contributed to the intoxication which results in injury.

Judgment affirmed.

The other Justices concurred.

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SOLOMON FROST AND JAMES MURPHY v. THE MILWAUKEE & NORTHERN RAILROAD COMPANY.

Railroad companies—Accident at crossing—Gross negligence—Contributory negligence.

1. The mere fact that an engineer, at a distance of a mile or a mile and a quarter from a private crossing, sees a load of logs, to which horses are attached, standing on the track at the crossing, is not sufficient to warn him that the load is fast upon the track, and that the horses are unable to move it, and he is not called upon to check the speed of his train until signaled, or until near enough the crossing to see the danger for himself.
2. In order to convict a railroad company of willful and reckless conduct, or of gross negligence, in running a freight train into a load of logs, to which horses are attached, and which has become stalled on a private crossing, it must be shown that the engineer knew the situation at the crossing in ample time to stop his train, and that he ran on in spite of such knowledge, knowing the consequences which must ensue if he failed to stop the train before reaching the obstruction.
3. Where, in such a case, the servants in charge of the logs and

team see the smoke of the approaching engine while at a distance of a mile or a mile and a quarter from the crossing, and after they have abandoned their attempt to draw the logs off the track, and are preparing to unload them, it is their duty at once to unhitch the horses, and signal the approaching train.

Error to Menominee. (Stone, J.). Argued June 27, 1893. Decided July 25, 1893.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

B. J. Brown, for appellant.

Sawyer & Waite (*R. C. Flannigan,* of counsel), for plaintiffs.

GRANT, J. Plaintiffs were lumbermen, and at the time of the accident complained of they had several teams hauling logs from the east across the defendant's track to the Michigamme river. The crossing was constructed by the defendant in the usual manner, for the sole convenience of the plaintiffs, and was known as the "Frost & Murphy Crossing." Plaintiffs kept three or four men upon their logging road to keep it covered with snow, and, as the witnesses expressed it, "in good slipping condition." On the 14th day of February, 1890, Gould, one of plaintiff's teamsters, with a team of four horses and a load of logs, attempted to cross the track. It was a warm day, and the snow had softened so that the runners went through, and stuck, either upon the iron rails or the timbers of the crossing, or both. The horses were unable to pull the load off. Other teams of the plaintiffs were behind this one. First one span of horses was brought from the rear team, but the three teams could not pull it off. A fourth span was then brought, but the four could not move it. The reason why the eight horses could not pull the load off is

stated by the plaintiffs, in their brief, to be: "The horses were unmanageable, and could not be made to pull together." Four of plaintiffs' employés were present at the crossing. Being unable to pull it across, they then concluded to unload some of the logs, and draw them from the track. For this purpose the teamster told one of the others, named Carey, to take his team around across the track, to get ready to draw the logs off as they were unloaded. Just as the teamster got on the load, he saw the smoke of the approaching train, which was coming around a curve. Carey testified:

"Gould started to flag first, and then some of us fellows said it was too soon to flag; he had better throw off the logs; they couldn't see him through the smoke; and he threw off the logs, and when the train came in sight he flagged them again. * * * Between the time I saw the smoke and the time that I saw the train, I took my team off, and got them around between the road to the south side of the load. It was kind of a hard place. It took me a little time. When I saw the smoke, my team was ahead of his. After I saw the smoke, I went and unhitched my team. I took them around to the east side of the track. Then I took the chain off, and went in back behind the load, to put it on the log he rolled down. When I unhitched it, his team was right over the track, and mine was right ahead a little; I should think it was a rod. In going to the east side of the track, I went to the north side of the load."

Gould loosened the chain, and got one log off, but Carey had not time to draw it off the track. The teamster, who was upon the load, then waved his coat with one hand, and his hat with the other, as a signal to the train. The train, however, did not stop. As it neared the crossing the teamster jumped from his load, and tried to unhitch the horses; but the traces were taut, and he had not time to unhook them before the train struck the load, killing two of the horses, and destroying the harnesses and sleigh. When asked how long it took to unhook a span of horses

from the sleigh, he replied, "I can do it as quick as you can say it."

Plaintiffs rely upon the gross negligence of the defendant's engineer in not keeping a proper lookout, so that he might have seen the obstruction and signals given by the teamster in time to avoid the accident.

The train was coming from the north. It consisted of 19 cars, 14 of which were loaded with stone and ore, weighing from 25 to 30 tons each. 2,700 feet north is a cut about 500 feet long. North of this cut, and between one mile and one mile and a quarter from the Frost & Murphy crossing, is another crossing, known as the "Schwartz Crossing." A short distance north of the Schwartz crossing, the railroad curves. The train was going at from 20 to 24 miles an hour, and was running under orders, a little ahead of time. From about the center of the cut to the Frost & Murphy crossing is a slight down grade. Only two witnesses who saw the accident, Gould and Carey, were sworn in behalf of the plaintiffs. They both testify that no signal was given by the teamster until the train was within a half to three-quarters of a mile of the crossing, and that the load was upon the track for 20 to 25 minutes before it was struck by the engine. Gould testified that in his opinion the train was about three-quarters of a mile distant when he waved his coat and hat; and Carey, that it was from a half to three-quarters of a mile.

The defendant's engineer testified that when he came into the deep cut he saw an obstruction on the track, but supposed it was a hand car; that he did not see the object until he was in the cut, and could not see it before. He was an old engineer, but this was his second trip over this road, and he was not accustomed to seeing loads of logs. He said it may have been five seconds from the time he first saw the object till he whistled for brakes;

that he whistled before he saw what the object was. He further testified:

"I endeavored to reverse the engine. The first time and the second time, it slid. As a man of 18 years' experience, I did not want to see her slide, and I reversed her back again, and as soon as she caught—And she slid again, and I reversed her ahead; and, the third time I pulled her back, I left her there. By that time, it did not take long to get down to the logs; and the third time I had her reversed, I guess, I was looking out for my own life."

He jumped from the engine when seven or eight car-lengths from the logs. One of the brakemen was in the cab at the time, and corroborates the testimony of the engineer. He immediately ran back over the cars, and set five brakes. Seeing that a collision was inevitable, he also jumped from the train. The cars were properly equipped, and supplied with the usual number of brakemen.

In rebuttal a witness named BeDell was produced by plaintiffs, who had been a fireman, engineer, brakeman, conductor, and trainmaster on railroads. He testified that with a good, clean rail,—meaning a rail that is not wet or dampened by fog,—and with proper assistance from the engineer, without any brakeman, and with a good brake on the caboose, he should judge they ought to stop a train of 20 loaded cars, going at the rate of 18 or 20 miles an hour, with a vacuum brake on the engine, in from 1,200 to 1,500 feet, and that, in a down grade of three-tenths of a foot in 100 feet, it was his judgment that they could stop such a train in from 2,000 to 2,500 feet. He further said that it depended somewhat upon circumstances, and that he was basing his answers upon the supposition of a nice, warm day in winter, with the track as it should be upon that kind of a day; that he had heard the testimony on the part of the defendant, and made his answers in view of those conditions. On cross-examination he testi-

fied that he left railroading 10 years before; that he could not say whether ever in his experience he had stopped a train of equal weight, on level ground, running 18 or 20 miles an hour, in 1,500 feet, but he believed it could be done. He, however, said that it was a mere matter of opinion.

The court, in its instructions to the jury, said:

"It is claimed by plaintiffs that the employés of the defendant in charge of the train negligently, recklessly, willfully, and wantonly ran the same without keeping a proper lookout ahead, and without keeping a brakeman upon the cars, and without keeping said train under control, in view of danger. It is further claimed by plaintiffs that defendant's employés saw the said sleigh and horses on said crossing, and saw and understood the signals of the plaintiffs, in time to have stopped the same before it struck said sleigh and team, yet that the defendant did not stop, or attempt to stop, said train, but carelessly, negligently, willfully, wantonly, and recklessly ran the same into and upon said horses and said sleigh, thereby destroying them; and this is the negligence submitted to you."

In regard to the contributory negligence of the plaintiffs, the court used the following language:

"The court further advises you that it cannot be considered to be contributory negligence that the plaintiffs have merely not anticipated the defendant's negligence, for the plaintiffs have a right to presume that the defendant is going to act with ordinary care until they have some notice to the contrary, when it becomes their duty to take ordinary means to avoid it; that is, such means as a prudent person ought to take."

He further instructed them that there was no evidence of reckless conduct on the part of the servants of the defendant after the whistling or signal was given for brakes, but left it to the jury to determine whether the defendant was guilty of gross negligence and reckless conduct in not giving the signal as soon as it should have been given.

There is but little discrepancy as to the facts in this case, except it may be upon the question when the engineer whistled for brakes. Gould gave no evidence on this point upon his direct examination. On his cross-examination he testified that he heard a whistle,—one whistle, and a few sharp whistles afterwards,—and that the engineer and fireman jumped from the train "very shortly afterwards." He thought the engine was from 10 to 15 rods distant when they jumped. Carey testified, on direct examination, that the train was in his sight when it whistled. On cross-examination he said he was not in position to see the train when he heard the sharp whistle, but he imagined it was about 20 rods distant. This is all the evidence given by the plaintiffs to show how far the train was from the crossing when the signal for brakes was given.

We do not think, under this record, that the verdict and judgment can be sustained. There is no evidence on which to base a finding of willful, wanton, and reckless conduct on the part of the employés of the defendant. There is no evidence that the engineer did not use every effort to stop the train as soon as he saw the danger. Plaintiffs gave no warning until the train was within a half or three-quarters of a mile. Could he, at the distance of a mile or a mile and a quarter, have seen the load of logs across the track, with the horses attached, there was nothing in this fact to warn him that they were fast upon the track, and unable to move. The engineer was not called upon to check the speed of his train until he was signaled, or was near enough to see the danger himself.

The learned counsel for the plaintiffs, in their brief, say:

"The defendant was guilty of gross negligence, because, with a proper lookout, the engineer should have seen the obstruction on the track in ample time to have stopped the train. If they saw the obstruction before they reached the

cut, then the inference is irresistible that they ran on with a reckless disregard of consequences."

This might be true of trees blown across the track, or a slide of earth and stones from a hill or embankment upon it, of sufficient size to show the nature and character of the obstruction and the apparent danger. According to this contention, if an engineer sees a team standing upon a private crossing, from a half a mile to a mile distant, he must assume that the team is fast and unable to move, and at once proceed to stop his train. Such is not the law. In order to convict the defendant of willful and reckless conduct, or of gross negligence, it must certainly have been shown by the plaintiffs that the engineer knew the situation at the crossing in ample time to stop his train, and that he ran on in spite of that knowledge, and knowing the consequences that must result if he failed to stop. *Denman v. Johnston*, 85 Mich. 396. "Gross negligence," in this class of cases, is there defined as follows:

"The term 'gross negligence' has been used in cases decided by this Court, and has a definite meaning, when referred to, as authorizing a recovery for a negligent injury notwithstanding the contributory negligence of the plaintiff. It means an intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them."

It does not appear whether plaintiffs' employés knew that a train was about due. But this is of no consequence. All persons crossing railroads are chargeable with knowledge that trains may come at any time. Plaintiffs' witnesses testified that they did not remove their horses from the load after they found they could not haul it off the track, nor send any one up or down the track to signal any trains that might come, because they supposed they would have no difficulty in signaling a train from that

point in time to stop it. For the like reason, the teamster, who was on the load, waited to loosen the chain and roll off a log before he considered it necessary to wave his hat and coat as a signal of danger. The law does not justify persons in taking such risks. Plaintiffs had employés present who could have been sent either way in ample time to have avoided the accident.

The only evidence to show that the engineer and brakeman did not make every reasonable effort to stop the train is that of Mr. BeDell. His testimony is not sufficient basis for a finding of gross negligence. The learned circuit judge said that the train was running from 20 to 24 miles an hour, and such was the testimony. The opinion of the witness was not, therefore, based upon the evidence in the case. It is contrary to good sense to say that gross negligence may be based upon such an opinion. Carey's testimony as to the position of the train when he first heard a whistle is utterly worthless, for he was not in position to see it, and does not pretend that he saw it. Gould's testimony likewise fails to give any definite information as to the distance. Assuming that the whistle he heard was the first one, does the statement that they jumped from the train "very shortly afterwards," give any definite idea as to the distance or time? The whole thing happened in a very short time. Such testimony is not evidence of negligence; much less, of gross negligence or willful misconduct. It is significant, also, that Gould does not testify that only one whistle was blown, or that he heard but one. His testimony is not, therefore, necessarily in conflict with that of the engineer.

The instruction as to contributory negligence said, in substance, to the jury, that no duty devolved upon plaintiffs' servants, other than to attempt to remove the load from the track, until they saw the approaching train, and that it was not then their duty to unhitch their horses,

which could have been done in a moment. This instruction was erroneous. It was the clear duty of the plaintiffs' servants to unhitch the horses after they had abandoned the attempt to draw the load off the track, and saw the smoke of the approaching train. Had this been done, no substantial injury would have resulted, except that which the defendant received.

Judgment reversed, and new trial ordered.

HOOKER, C. J., and LONG, J., concurred with GRANT, J. McGRATH and MONTGOMERY, JJ., concurred in the result.

CHARLES E. McLEAN v. THE CHARLES WRIGHT MEDICINE COMPANY.

96	479
117	47
117	55
96	479
119	450
96	479
120	16
96	479
s56NW	68
133	2231

Corporations—Transfer of stock—Refusal of officers to enter transfer—Damages.

1. The entry of a transfer of shares of stock upon the books of the corporation is not necessary to the validity of the transferee's title, which becomes absolute upon the delivery to him of the certificate, with an assignment of the shares indorsed thereon, signed by the owner; citing How. Stat. § 4866; *Mandlebaum v. Mining Co.*, 4 Mich. 465.
2. A purchaser of shares of stock, upon the assignment and delivery of the certificate, becomes a stockholder, and is entitled to all of the rights of every other stockholder, notwithstanding the refusal of the president of the corporation to enter the transfer upon its books, and he may compel the making of such entry by the proper proceeding.
3. In the absence of proof of special damages, a transferee of shares of stock, to whom the certificate is assigned and delivered by the owner, cannot recover more than nominal damages in an action against the corporation because of the refusal of the proper officer to enter the transfer upon its books.

4. A judgment that the plaintiff take nothing will not be reversed when a recovery could have been had for nominal damages only, the question of costs not being affected.[1]

Error to Wayne. (Brevoort, J.) Argued June 28, 1893. Decided July 25, 1893.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Fraser & Gates, for appellant, contended:

1. Until the transfer was entered on the books, plaintiff was the owner only as between himself and Allington. He could not vote his stock, had no right to dividends, and could not even make a transfer to any other person.
2. The right to maintain this action, and the right to recover the value of the stock, is well established upon authority; citing *Sargent v. Insurance Co.*, 8 Pick. 90; *Bond v. Iron Co.*, 99 Mass. 505; *Murray v. Stevens*, 110 Id. 95; *Bank v. Kortright*, 22 Wend. 348; *Bank v. Bank*, 20 N. Y. 501; *Driscoll v. Manufacturing Co.*, 59 Id. 96; *Freon v. Carriage Co.*, 42 Ohio St. 30; *Insurance Co. v. Osgood*, 93 Ill. 69; *Mandlebaum v. Mining Co.*, 4 Mich. 465; *Walker v. Railway Co.*, 47 Id. 338; Cook, Stock, §§ 393, 573–576, and cases cited in notes.

George W. Radford and *Edward A. Barnes,* for defendant, contended for the doctrine of the opinion.

GRANT, J. One Allington was the owner of 555 shares of the capital stock of the defendant company. In May, 1891, he duly assigned the certificate and the shares of stock mentioned therein to plaintiff. The assignment was on a printed blank upon the back of the certificate, and authorized the assignee to make the necessary transfer on the books of the company. Plaintiff at once applied to Charles Wright, the president of the company, to have the transfer made upon the books of the company. The secretary was not then present, and the transfer was not made. Subsequently plaintiff again applied, and was then informed by Mr.

[1] See *Wyatt v. Herring*, 90 Mich. 581.

Wright that he would be very glad to transfer it, but that Mr. Allington had notified him that he (plaintiff) had no right to it. Plaintiff thereupon instituted this suit by filing a declaration, in which he set forth the assignment of the stock to him, his possession of the certificate, and the refusal on the part of the company to cause the transfer to be made upon its books. His allegation for damages is—

"That, by and through the aforesaid misconduct of the said defendant, the said shares of stock became and were wholly lost to the said plaintiff, and the said plaintiff thereby lost the benefit and advantage which he otherwise might and would have derived from the said shares of stock, and the said plaintiff hath been and is thereby deprived of great gains and profits, which he might, and otherwise would, have derived through the sale of the said shares of stock."

At the conclusion of the evidence, the court directed a verdict for the defendant, for two reasons:

1. There was no evidence of conversion.
2. Plaintiff had neither claimed nor shown any special damages by reason of the refusal to enter the transfer of stock on its books.

Plaintiff insisted that he was entitled to recover the full value of the stock, and that he had given evidence from which the jury might find the value.

The declaration is not one in trover for the conversion of the stock, but rather in an action upon the case for damages caused by the wrongful act of the defendant in refusing to register the transfer. We think the direction of the circuit judge was right. Under our statute and the decisions of this Court, plaintiff was the absolute owner of the stock, and possessed the evidence of title. He thereby became a stockholder, had the right to attend meetings, to share in the profits, and, in fact, was entitled to all the rights of every other stockholder, notwithstanding the refusal of the president to register the transfer.

He could by the proper proceeding have compelled the proper officers of the defendant to register the transfer. The statute provides that shares of stock may be transferred by indorsement and delivery of the certificates thereof, and that such transfers are valid between the parties thereto. Under this statute it is held that the transfer upon the books is not necessary to the validity of the purchaser's title. *Mandlebaum v. Mining Co.*, 4 Mich. 465. It was there held that a *bona fide* purchaser for value of such certificate, duly assigned, will be protected in his title the same as a purchaser of negotiable paper. See, also, *Walker v. Railway Co.*, 47 Mich. 338; *Daggett v. Davis*, 53 Id. 35.

Plaintiff had not been deprived of his property, nor of his evidence of title, nor of his possession thereof. It cannot therefore be said that he has wholly lost his property. On the contrary, he is entitled to all the rights and remedies of any stockholder. The defendant, by the action of its president, did not convert the stock to its own use, nor by such act become the owner thereof. Plaintiff gave no evidence of any special damages caused by the wrongful act of the defendant's president, and therefore could not recover any more than nominal damages. Inasmuch as this does not affect the costs, the judgment will not be reversed.

Judgment affirmed.

HOOKER, C. J., MCGRATH and MONTGOMERY, JJ., concurred. LONG, J., did not sit.

THADDEUS GALVIN AND JOHN GALVIN v. MICHAEL W. O'BRIEN.

96 483
s56NW 85
131 552

[See 81 Mich. 11.]

Contract—Rescission.

A party seeking to rescind an agreement on the ground of fraud or mistake must first place the other party *in statu quo*.

Error to Wayne. (Hosmer, J.) Argued June 28, 1893. Decided July 25, 1893.

Assumpsit. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Henry M. Cheever, for appellants, contended:

1. The general doctrine that parol evidence is inadmissible to vary the terms of a written contract is not questioned, nor the doctrine that all previous parol agreements are merged in a written contract; but it is equally well settled that a receipt is only *prima facie* evidence, and may be impeached. This, however, we did not seek to do, but sought to show that there was a misrepresentation, under which the agreement was signed by the plaintiffs, and this is always admissible; and fraud or mistake will not only vary, but may nullify, a written instrument.

Keena & Lightner, for defendant.

MONTGOMERY, J. In 1885, plaintiffs held about $40,000 of the capital stock of the Galvin Brass & Iron Works. The defendant was also a stockholder and director in the corporation. An agreement was entered into between the plaintiffs and defendant, by the terms of which defendant agreed, for a consideration of $3,000, to secure for plaintiffs the majority of the stock, so that at stockholders' meetings the plaintiffs could control the organization of the board, the election of officers, etc. The plaintiffs gave

their check to defendant for $3,000, which was paid, and a memorandum was placed on the back of the check by the plaintiffs, specifying the agreement in accordance with which the check was given, and signed by O'Brien, the defendant. It is claimed that the defendant subsequently promised to repay the $3,000. Later the People's Savings Bank, which was also interested in the corporation, and held two mortgages against the plaintiffs, amounting to some $1,900, was desirous of obtaining control of the stock of the corporation. The plaintiffs employed Col. Atkinson and Mr. Stevenson to negotiate a settlement with the bank and defendant, O'Brien. A settlement was effected, and an agreement entered into in the following language:

"The Galvin Bros. (Thaddeus Galvin, John Galvin), on the one part, and the Galvin Brass & Iron Works, the People's Savings Bank, and M. W. O'Brien, severally, on the other part, have settled in full all matters and differences between them, and all claims and counter-claims and demands they may have jointly or severally against each other, of every kind and description, the same as if such claims and demands were herein particularly described and mentioned. It is understood that certain patterns belonging to Galvin Bros. * * * will be delivered to Galvin Bros. on demand."

This is dated December 15, 1888, and signed by all the parties. Subsequently the bank sought to enforce collection of the two mortgages held by it against the plaintiffs, and the plaintiffs defended against these foreclosure proceedings, claiming that the mortgages were included in this settlement; but this claim was determined adversely to them. See 81 Mich. 11. They then brought this suit against defendant, O'Brien, to recover the amount of the $3,000 paid to him, claiming that the receipt or agreement was signed under a mistake of fact on their part.

The circuit judge directed a verdict for the defendant. No error was committed in the giving of this instruction. The plaintiffs' testimony offered in this case tended to

show, not that the claim upon which they now bring suit was not included in the settlement, but they seek to avoid the settlement as a whole because of the alleged misunderstanding on their part as to whether the mortgages held by the bank were included. No offer has been made to rescind this agreement. The plaintiffs have retained the benefit of it, and it does not appear but that the defendant understood the terms of the settlement. Mr. Stevenson, who negotiated the settlement on behalf of the plaintiffs, testified:

"There was no question at all but what Mr. Galvin and I thoroughly understood that that $3,000 claim was settled and embraced in the settlement. I do not say that Mr. Galvin understood the mortgages were included, but do say that Mr. Galvin knew that the $3,000 claim was settled."

Mr. Galvin testified, in effect, that Mr. Stevenson had full authority to effect a settlement of the matters in controversy. It is very clear from this testimony that the $3,000 item was in fact included in the settlement If the plaintiffs could under any circumstances avoid the agreement,—which we do not decide,—certainly it was incumbent upon them, before bringing suit upon the original obligation, to place the parties *in statu quo*. *Pangborn v. Insurance Co.*, 67 Mich. 683; *Crippen v. Hope*, 38 Id. 344; *Jewett v. Petit*, 4 Id. 508; *Walsh v. Sisson*, 49 Id. 423; *Headley v. Hackley*, 50 Id. 43.

To admit plaintiffs' contention here would result in making a contract entirely different from the one which they claim to have entered into, and much more to their advantage. It is their contention that this $3,000 claim was settled, and was offset against $1,900 of mortgages held by the bank. After discovery, as they say, that the $1,900 item was not included in the settlement, they seek to recover the full $3,000 from this defendant, profiting by their alleged mistake to the amount of $1,100, and this without

any offer to rescind the agreement. No illustration could better demonstrate the propriety of the rule which requires of a party seeking to rescind an agreement, on the ground of fraud or mistake, that he first place the other party to the contract *in statu quo.*

Judgment will be affirmed, with costs.

HOOKER, C. J., MCGRATH and GRANT, JJ., concurred. LONG, J., did not sit.

JOHANNA GILLESPIE v. LUTHER BEECHER.

[See 85 Mich. 347; 94 Id. 374.]

Stenographer's minutes—Second trial—Impeachment—Res judicata.

Where testimony is taken down by the official stenographer, the mere statement of a witness, who is sworn on a second trial, that he does not recollect giving certain testimony on the former trial, is not an impeachment of the stenographer's testimony, nor does it justify a court or jury in finding that the witness did not so testify.

Error to Wayne. (Hosmer, J.) Argued June 30, 1893. Decided July 25, 1893.

Case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant.

Henry M. Cheever, for defendant.

GRANT, J. When this case was in this Court before it was held that the testimony showed without contradiction that the rights of Mr. Gillespie under the lease had ter-

minated. 85 Mich. 353. This question is therefore *res judicata,* unless the testimony now is different from what it was then. The court submitted the question to the jury upon the theory that his testimony upon the last trial was different from that upon the first. The court said to the jury, after referring to the testimony upon the former trial:

"Mr. Gillespie said substantially that he was mistaken in giving that testimony, or that there was a mistake in incorporating it into the bill of exceptions, and therefore it still presents a case for your consideration."

The liability of defendant depended entirely upon whether the rights of Mr. Gillespie under the lease had terminated, and whether at the time of the assault he was in the lawful and peaceful possession of the premises. If defendant was in the lawful possession of the premises, he was guilty of no assault, but, on the contrary, both the plaintiff and her husband were guilty of an assault upon him.

Counsel for the plaintiff has furnished no index, as the rule requires. We have, however, examined the record, and compared the testimony of Mr. Gillespie with his testimony as quoted in the former decision. His attention was expressly called to his evidence quoted in that decision, and his only reply was, "I do not recollect saying it." Where testimony is taken down by a stenographer, who is an officer of the court, the mere statement of the witness afterwards that he does not recollect giving such testimony is not an impeachment of the stenographer's testimony, nor does it justify a court or jury in finding that he did not so testify. The instruction of the judge, therefore, in the present case was more favorable to the plaintiff than she was entitled to. Under the present record this question is *res judicata,* and it is therefore unnecessary to discuss any of the errors alleged.

Judgment affirmed.

The other Justices concurred.

96 488
s116 378

ROBERT J. MARSH v. JENNET F. MUELLER, ADMINISTRATRIX, ETC.

Partnership—Action at law.

An agreement by a retiring partner to pay one of the remaining partners, who form a new firm, one-half of the sum realized on a mortgage owned by him, in consideration of the agreement of said partner to pay to him one-half of his share of the profits and property realized from the new venture, will not make them partners *inter sese* as to the mortgage and the interest of the partner in the new firm, and an action at law can be maintained by the partner on said agreement; citing *Cook v. Canny*, 96 Mich. 398.

Error to Wayne. (Brevoort, J.) Submitted on briefs June 30, 1893. Decided July 25, 1893.

Claim against the estate of a deceased person. The administratrix brings error. Affirmed. The facts are stated in the opinion.

Henry M. Duffield, for appellant.

Dickinson, Thurber & Stevenson, for claimant.

GRANT, J. September 1, 1885, John C. Mueller, Robert J. Marsh, the claimant in this suit, and two others, entered into a copartnership. Mueller and Marsh each owned a one-sixth interest. December 3, 1885, this partnership was dissolved by mutual consent, and a new one formed by the members of the old firm, except Mr. Mueller, who retired. Marsh owned a one-sixth interest in the new firm. The business of both firms was the same. Mueller sold his interest to one of the old firm, named Riopelle, and received in payment therefor a note and mortgage for $3,200 On the same day, Mueller and Marsh executed the following agreement:

"John C. Mueller acknowledges that the mortgage given him to-day by E. F. Riopelle on lots A and B, Riopelle Farm, amounting to $3,200, belongs, one-half of it, to Robert J. Marsh, and that half to be paid to him as soon as realized on it, with the consent of both Mueller and Marsh.

"Robert J. Marsh acknowledges that John C. Mueller has an equal share with him in the interest he (R. J. Marsh) holds in the firm of Marsh & Riopelle, and also one-half in the soda apparatus stored at present in the house of said Marsh, 101 Catherine street, Detroit.

"Said Robert J. Marsh promises herewith to account to said J C. Mueller for all this interest as above stated, and give him his equal share as soon as he realizes upon it."

For some reason, which does not appear, each on the same day executed to the other separate statements. The one signed by Mueller is as follows:

"The undersigned acknowledges herewith that in the mortgage given him this day by E. F. Riopelle, amounting to $3,200, Robert J. Marsh has an interest in the same to the amount of $600, bearing interest at the rate of 6½ per cent. per annum, which will be paid to him at the expiration of the mortgage, three years hence, if not sooner realized, provided that the mortgage brings par value, or to such proportions as it may realize.

"The execution of this acknowledgment is depending on the filing and executing his (Marsh's) bond given to me this day in regard to his interest of the firm of Marsh & Riopelle, and for which is this present acknowledgment an equivalent. This acknowledgment not transferable."

The one signed by Marsh is as follows:

"The undersigned acknowledges herewith that I owe one-half of my interest in the firm of Marsh & Riopelle at Detroit to John C. Mueller, of the same place; that, in consideration for this interest, John C. Mueller has deeded to me a share in the mortgage given to him by E. F. Riopelle, of $3,200, on which I have received $1,000 in cash, and a further interest of $600 when realized upon, or mortgage expires. And I herewith promise faithfully to account to said Mueller all the profits, valuables, and stock I have and may receive as my share in the said firm

of Marsh & Riopelle, and turn over one-half of the same to said Mueller.

"I further acknowledge that J. C. Mueller has an equal interest with me in the soda-water apparatus and counter stored at present on my premises, and that I will turn over to him one-half of the proceeds, when sold with his consent. This presents not transferable."

September 8, 1886, Mr. Mueller sold and assigned this mortgage, for which he received the balance due thereon, with interest, $1,228.46. The mortgage was paid to the assignee and discharged August 17, 1888. Mueller died without having paid to Mr. Marsh his share. For this amount he presented his claim against the estate. Verdict and judgment in the circuit court were for the claimant.

It is contended by the learned counsel for the estate that the transaction between the parties was an exchange of the half interest in the mortgage for the half of Marsh's interest in the partnership; that the two were to be partners *inter sese* as to the mortgage and Marsh's interest in the firm of Marsh & Riopelle; and that, therefore, an action at law will not lie, but that the sole remedy is by bill in chancery for an accounting. We think otherwise. Mr. Mueller agreed to pay $1,600 to Marsh for one-half of his interest in the firm of Marsh & Riopelle, for which Marsh agreed to account to him. Marsh owed him nothing until the profits were received by him, or until some of the partnership property was turned over to him, and became his individual property. Mueller's obligations did not depend upon the success or failure of the partnership business. It was not contemplated that the payment of half the amount of the mortgage should be deferred till the partnership of Marsh & Riopelle was closed. The time of payment was limited only to the time when Mueller should receive the amount of the mortgage, or to its expiration. Marsh agreed to pay Mueller only when profits were declared and received, or some of the firm assets

were apportioned to him. Mueller paid a present consideration for future supposed gains and property. He stood in the same position as he would if he had given his note for the amount he agreed to pay. This case is ruled by *Cook v Canny, ante,* 398, and the authorities there cited.

Judgment affirmed.

The other Justices concurred.

JOHN WRIGHT v. JOHN SEELEY.

Judgment—Interest.

1. The judgment in an action *ex contractu* may include interest on the amount of the verdict from the time of its rendition to the time of the entry of the judgment; citing How. Stat. § 1598.[1]
2. It is error to enter a judgment, after the discharge of the jury, upon their verdict for a certain sum "and interest," for an amount in excess of that sum and the interest accruing on the verdict up to the time of the entry of the judgment.

Error to Wayne. (Brevoort, J.) Submitted on briefs June 30, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

George F. Robison, for appellant.

William Look and *H. F. Chipman,* for plaintiff.

LONG, J. This action was brought upon the common

[1] See Act No. 156, Laws of 1891, reducing the rate of interest to 6 and 8 per cent. per annum.

counts in *assumpsit*, and, on a trial, verdict was rendered in favor of plaintiff. The verdict is in form as follows:

"They say upon their oath that the said defendant did undertake and promise in manner and form as charged in plaintiff's declaration, and they assess the damages of the said plaintiff, over and above his costs and charges, at the sum of $204 and interest."

This entry of verdict was made June 9, 1892. On July 7, 1892, judgment was entered on the verdict for damages $204, "and interest computed at the sum of $94.78," making a total, as recited in the judgment, of "$294.78." No bill of exceptions was settled. The case comes here upon the record.

It is claimed that there was no warrant for the amount of interest added to the judgment. The statute provides for interest upon verdicts between the time of rendering the verdict and judgment. How. Stat. § 1598. In this case the time was less than one month, and the interest would have amounted to but little more than $1; yet the interest added in making up the total of the judgment is computed at over $90. It is evident that an error has been made. The record does not show what the plaintiff's claim was, whether upon a note or other contract, or upon open account, or what *data* the court had in fixing the time or rate of interest. The interest must have been computed from a date some months prior to the verdict. This was error.

In *Bell v. Ardis*, 38 Mich. 609, where a judgment was made to cover interest, and there was no *data* to show how much was due, the finding was treated on error as amounting to a mistrial.

In *Parker v. Railway Co.*, 93 Mich. 607, where the jury agreed upon a verdict of $968, but the foreman, in returning the verdict, stated the amount at $800, and the verdict was so entered, he failing to state the amount agreed upon

as interest, it was held error in entering judgment to include $168 interest, as there was no warrant for correcting the verdict after the jury was discharged.

The judgment must be reversed, and new trial ordered.

The other Justices concurred.

MATILDA RUNKLE v. COOL RUNKLE.

Divorce—Non-support—Cruelty—Condonation.

1. The Court cannot declare the failure to change habits of frugality to habits of liberality, gross, wanton, or cruel.
2. The act of a husband in striking his wife with his open hand upon her cheek is condoned by the wife's seeking a reconciliation, and apparently living happily with her husband thereafter.

Appeal from Cass. (O'Hara, J.) Submitted on briefs June 30, 1893. Decided July 25, 1893.

Bill for divorce. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

Harsen D. Smith, for complainant.

Howell & Carr, for defendant.

MONTGOMERY, J. This is a bill for divorce, and charges cruelty, and failure to furnish adequate support.

It is sufficient to say of the latter charge that we are not satisfied that the failure to support was shown to have been gross, wanton, or cruel, within the meaning of the statute. How. Stat. § 6229. It is undoubtedly true that the defendant is possessed of sufficient means to have

justified larger expenditures for living than he appears to have been willing to make, but the Court cannot declare the failure to change habits of frugality to habits of liberality gross, wanton, or cruel. It is evident that the defendant has accumulated his property by a life-time of frugality, and complainant must have known this before her marriage, and should have understood that that habit would continue after marriage, as before.

The cruelty is alleged to have consisted in striking complainant on two occasions, and of charging her with appropriating money belonging to defendant. It does appear that the defendant at one time struck complainant with the open hand on the cheek. This, however, was fully condoned, complainant herself seeking reconciliation, and the parties have apparently lived happily since. The other charge of personal violence, we think, is not sustained by a preponderance of the evidence.

The most serious ground for complaint is the charge which defendant made against complainant of appropriating his money. It is not likely that either party understood this to be a charge of technical larceny, and, while we are not prepared to hold that defendant was justified in making the charge as he did, the evidence shows that there were in the conduct of complainant some circumstances tending to excuse the defendant for entertaining the suspicion.

On the whole, we do not think the marriage ties between these parties should be severed. The circuit judge heard the testimony in open court, and was of this opinion.

The decree will be affirmed.

The other Justices concurred.

ELIZABETH GROSTICK, ADMINISTRATRIX, ETC., v. THE DETROIT, LANSING & NORTHERN RAILROAD COMPANY.

96 495
96 608
96 495
s56NW 24
131 609

[See 90 Mich. 594.]

Change of venue—Petition—Discretion of commissioner.

1. The statute (How. Stat. § 6495 *et seq.*) does not require that the application for the transfer of a suit, on account of the disqualification of the circuit judge, shall be verified, nor that it shall set forth that the judge of the circuit to which the suit is to be transferred is qualified to sit.[1]
2. The fact that another circuit judge is expected to hold a term of court in the county where the suit is pending does not affect the right or duty of the circuit court commissioner to act upon the application.
3. The only matter left to the discretion of the commissioner, where the application sets forth a proper cause for removal, which is established by the proofs, is the circuit and county to which the cause shall be transferred.
4. Such discretion cannot be said to have been abused by transferring the suit to a county in which the attorneys for both parties reside, instead of to an adjoining county, through which the defendant's railroad runs, and which can be more conveniently reached by the witnesses who reside in the county from which the transfer is made.

Certiorari to one of the circuit court commissioners of Livingston county to review proceedings to transfer a suit. Argued June 30, 1893. Order of removal affirmed July 25, 1893. The facts are stated in the opinion.

W. H. H. Russell, for plaintiff, and petitioner in *certiorari.*

Charles B. Lothrop, for defendant.

MONTGOMERY, J. This is *certiorari* to review proceed-

[1] See *Bolles v. Loan & Trust Co.*, 86 Mich. 229, and note, where the cases are collected and summarized.

ings had before John Cummiskey, circuit court commissioner of Livingston county, resulting in an order for the removal of the cause from Livingston to Wayne county for trial. The return shows that on the hearing of the petition for removal it appeared that the attorneys of both parties resided in Wayne county; that the plaintiff resided in Livingston county; that the judge of the Livingston circuit court was disqualified by reason of having been of counsel in relation to the subject-matter, while none of the judges of the Wayne circuit court were disqualified from hearing the cause. Upon this showing the order was made.

The statute (section 6495) provides:

"That whenever any civil suit or proceeding shall be pending in any circuit court in this State, either on the law or equity side of said court, in which the judge of said court * * * has heretofore been consulted or employed as counsel in the subject-matter to be litigated in said suit, * * * the same may be transferred to some other circuit court in the manner provided by this act."

Section 6498 provides for a hearing upon the application, and further provides that—

"If he [the commissioner] shall be satisfied that the judge of the circuit court where such suit is pending is disqualified to sit in said cause, within the intent and meaning of the first section of this act, he shall grant an order for the transfer of said cause or proceeding to the circuit court of some other county, which county shall be specified in said order."

It is clear that the proofs offered showed that the order was justified, unless it be held, in accordance with the plaintiff's contention, either that the commissioner failed to obtain jurisdiction to make the order because of the insufficiency of the petition, or that there was an abuse of discretion on his part in transferring the cause at all, in view of the fact that a trial could have been had before

another judge, or that he, in a similar manner, abused his discretion in transferring the cause to Wayne, instead of Washtenaw, county.

The criticism upon the petition is that it was not verified, and that it failed to set forth that the judges of the Wayne circuit court were qualified. The statute does not require the petition to be verified. Section 6496. It does state that such application shall be in writing, and shall set forth the grounds specifically for such transfer. Section 6498 makes provision as to the method of furnishing the evidence upon which the commissioner acts. The statute does not require that the petition shall set forth that the judge of the circuit to which the cause is to be transferred is qualified to sit. This fact, it is true, should be shown to the commissioner, but this showing is made on the hearing of the application, after notice to the other side. This must necessarily be so, for it cannot be known to the applicant to what circuit the commissioner would be disposed to order the case transferred.

The fact that another circuit judge was expected to hold a term of court in Livingston county could not affect the right or duty of the commissioner upon the application in question. The statute is imperative. If the showing before him complies with the statute, as was said in *Pack v. Circuit Judge*, 74 Mich. 33, "the only matter left to his discretion is the circuit and county to which the cause shall be transferred."

It is claimed, also, that there was an abuse of discretion in not removing the cause to Washtenaw, rather than to Wayne, county. None of the attorneys resided in Washtenaw county, but it does appear that the defendant's road runs through that county, and that it is more convenient to the witnesses who are residents of Livingston county to attend the case in Washtenaw county. Without

expressing any opinion as to whether the defendant has any such residence in Washtenaw county as would have authorized a removal of the cause there, we think there was no such abuse of discretion as would justify this Court in vacating the order made.

The order will be affirmed, with costs.

The other Justices concurred.

96 498
f125 560
96 498
137 70

JAMES HICKEY v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Nuisance—Overhanging trees—Abatement—Notice.

1. Branches of trees standing upon land adjoining the right of way of a railroad company, which overhang the right of way to such an extent as to obscure the view of its engineers when their duties require them to lean out of their cabs for the purpose of maintaining a lookout, are a nuisance, which may be abated by the company by trimming the branches off up to the line of the division fence, without notice to the land-owner, who has knowledge of the fact that the company claims they are a nuisance, and desires their removal.
2. The fact that the road-master of the railroad company offers the land-owner $10 to remove the trees, which he refuses to accept, will not confer upon him the right to exact further notice before the removal of the overhanging branches by the railroad company.
3. The following general propositions are summarized from the opinion of Mr. Justice MONTGOMERY:

   a—"It is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off;" citing Cooley, Torts, 567.

   b—"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances,

and the person over whose land they extend may cut them off, or have his action for damages, and an abatement of the nuisance, against the owner or occupant of the land on which they grow, but he may not cut down the tree; neither can he cut the branches thereof, beyond the extent to which they overhang his soil;" citing Wood, Nuis. § 112; *Grandona v. Lovdal*, 70 Cal. 161.

c—It is stated, without limitation, in Wood on Nuisances (section 834), that "any person injured by a nuisance, to the extent that he may maintain an action at law therefor, may remove so much of the nuisance as is necessary to secure to himself immunity from damage therefrom; but he must not be guilty of any excess therein, for, as to all excess of abatement, he will be a trespasser."

d—This general rule is, however, subject to exception; and it is stated in Wade on Notice (section 480*h*), that "where the act complained of is one of positive wrong or willful negligence, or the security of life or property is endangered, and the danger seems imminent, the party threatened with the injury may abate the same without giving notice to the wrong-doer, or waiting for him to remove it. Where, however, the nuisance is merely permitted to exist, and the case is not very urgent, notice, and an opportunity to remove it, is essential, before the complaining party would be justified in forcibly abating the same."

Error to Saginaw. (Gage, J.) Argued June 28, 1893. Decided July 25, 1893.

Trespass. Defendant brings error. Reversed. The facts are stated in the opinion.

Hanchett, Stark & Hanchett, for appellant.

Tarsney & Wicker, for plaintiff, contended:

1. Trees in the highway are the property of the adjacent landowner, and if they encroach upon the highway, and must be removed, he has a right, and must be afforded reasonable opportunity, to take them as living trees, and transplant them elsewhere. The order of removal should be given to him, and he should be afforded a reasonable time to comply with it before the commissioner should act further; citing *Clark v. Dasso*, 34 Mich. 86; *Ice Co. v. The Steamer Excelsior*, 44 Id. 229, 233.
2. If the overhanging branches of plaintiff's trees could be considered a nuisance, still the right summarily to abate upon the

part of the defendant can be no greater, but, we take it, must be very much less, than though there were a partial obstruction on a public highway; citing *Clark v. Ice Co.*, 24 Mich. 508, 511.

MONTGOMERY, J. The plaintiff was the owner of land adjoining the right of way of defendant, and had planted trees upon the land within his inclosure, and very near to the fence which is claimed by him to mark the line. It is claimed by the defendant that as a matter of fact the railroad company's right of way included the lands upon which the trees were grown. It would appear, however, that the plaintiff had fenced in all the lands within his present inclosure many years ago, and it is probable that he has acquired title by adverse possession. However this may be, it appears to us that the case was tried below, on the part of counsel for both parties, with the understanding that the title to the soil upon which the trees were growing was in the plaintiff. We shall treat the case, therefore, as though the title to the land, up to the line of the fence, was in the plaintiff.

The branches of the trees in question overhung the right of way of defendant to such an extent that at times they brushed against the face of the engineer, when his duties required him to lean out of his cab for the purpose of maintaining a lookout. On the 24th of September, 1891, the employés of defendant trimmed the branches of the trees up to the line of the fence. No claim is made that the trees were damaged beyond this, or more than was necessary to remove the overhanging branches.

The questions presented are whether these overhanging branches constituted a nuisance; whether, as a nuisance, the defendant had a right to cause them to be removed; and whether, before removing them, it was necessary to serve notice upon the plaintiff, that he might have the opportunity to remove them; and, if so, whether the notice

which he had of the defendant's desire that they be removed was sufficient.

The plaintiff's testimony was as follows:

"These trees had grown so that their limbs and branches extended over the fence into the railroad company's right of way 10 or 15 feet beyond the fence. In the spring of 1891, Mr. Sullivan, the road-master of the Michigan Central Railroad Company, came to me, and said that the trees and their overhanging branches were a nuisance to the railroad company for the reason that the engineers could not see ahead along the right of way on the curve there at my place. We talked awhile about the matter, and he finally offered me $10 for permission to cut down or remove the trees. I refused this offer. He said then, 'You had better take it, or some day I will get an order to cut down those trees, and then you won't get anything.' He also said that he would see the superintendent, and find out if the company would give me any more than $10 for the trees. Neither Sullivan nor any one else representing the railroad company ever saw me about the trees after that, and I never received any other offer for my trees."

The circuit judge instructed the jury as follows:

"It is the view of the court that it was the duty of the railroad company, having operated that road with these branches there for so long a time, to have notified Mr. Hickey that they were an obstruction, to a certain extent, to the line of their road; that he must remove the branches, or remove his trees, or that they did not desire them any longer to grow upon their land, which they had a right to do, without any reference to the obstruction of the view of the track; and that he must cut the branches, or remove the trees, or they would do so. Then, if he refused, they might, of their own motion, remove the branches from the line of the right of way. I base this opinion largely upon the case cited by counsel for the defendant, of *Earl of Lonsdale v. Nelson*, 2 Barn. & C. 302."

We think this instruction was erroneous. It is stated, without limitation, in Wood on Nuisances (section 834):

"Any person injured by a nuisance, to the extent that he may maintain an action at law therefor, may remove so

much of the nuisance as is necessary to secure to himself immunity from damage therefrom; but he must not be guilty of any excess therein, for, as to all excess of abatement, he will be a trespasser."

At section 838 it is said:

"The party judges at his peril, and if he errs in judgment he is answerable for all the damages that ensue; and if, in the exercise of the right, a breach of the peace is involved, he is answerable, by indictment, for the result."

This general rule is, however, subject to exception. It is stated in Wade on Notice (section 480*h*):

"Where the act complained of is one of positive wrong or willful negligence, or the security of life or property is endangered, and the danger seems imminent, the party threatened with the injury may abate the same without giving notice to the wrong-doer, or waiting for him to remove it. Where, however, the nuisance is merely permitted to exist, and the case is not very urgent, notice, and an opportunity to remove it, is essential, before the complaining party would be justified in forcibly abating the same."

The case of *Earl of Lonsdale v. Nelson* is understood to hold that nuisances created by act of omission may not be abated except after notice; but in the opinion in that case, by Justice Best, it was stated as follows:

"There is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred."

This case is referred to in *Jones v. Williams*, 11 Mees. & W. 181, in which case the court, laying down the rule that the alienee of land upon which a nuisance exists at the time of his purchase is not liable to an action without notice, said:

"We do not rely on the decision in *The Earl of Lonsdale v. Nelson* as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's *dictum* is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another."

It is worthy of note that it was conceded in the briefs of the counsel in *Jones v. Williams* that the notice or request is unnecessary before abating the nuisance of overhanging branches, the reason being stated that any person may lawfully stand in the highway over which the trees hang, and there cut them.

In Cooley on Torts (page 567), it is stated:

"It is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off."

In Wood on Nuisances (section 112), it is said:

"Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off, or have his action for damages, and an abatement of the nuisance, against the owner or occupant of the land on which they grow, but he may not cut down the tree; neither can he cut the branches thereof, beyond the extent to which they overhang his soil."

See, also, *Grandona v. Lovdal*, 70 Cal. 161 (11 Pac. Rep. 623.)

The purpose of notice, in such case, when required, it is evident, is to give to the owner the opportunity of himself abating the nuisance. It is undisputed, from the testimony in this case, that the plaintiff knew that the railroad company claimed that these trees were a nuisance, and desired their removal. The fact that it went so far as to offer

him $10 to do what he was legally bound to do did not, we think, confer upon him a right to exact further notice. He must be presumed to have known what his legal rights were. In the face of this, and with knowledge of the fact that the nuisance was objected to by the railroad company, he, in effect, said: "I refuse your offer of the gratuity of $10." We think he is not in a position to insist that he was entitled to further notice.

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

HOOKER, C. J., MCGRATH and GRANT, JJ., concurred. LONG, J., did not sit.

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HARRY C. VAN HUSAN v. JOHN A. HEAMES, REGISTER OF DEEDS OF WAYNE COUNTY.

Constitutional law—Recording of conveyances—Certificate as to payment of taxes.

1. The evident purpose of section 135, Act No. 206, Laws of 1893, which forbids the recording of deeds and certain other instruments unless the certificate of the Auditor General, or treasurer of the proper county, is presented to the register of deeds, showing whether there are any tax liens or titles held by the State, or any individual, against the land described in the instrument, and that all taxes due thereon have been paid for the five years preceding the date of such instrument, is to secure the collection of taxes, and, this being one of the general objects stated in the title to the act, the section is not void, under section 20, art. 4, of the Constitution, which provides that no law shall embrace more than one object, which shall be expressed in its title; citing *City of Grand Rapids v. Burlingame*, 93 Mich. 472.

2. Section 135 of the tax law of 1893 is construed as follows:

a—The expression "that all taxes due thereon have been paid

for the five years preceding to the date of such instrument" refers only to the taxes appearing upon the records kept by the Auditor General and county treasurer, and their certificate must be made from the facts shown by such records.

b—The instrument is entitled to record, unless the certificate shows that all taxes have not been paid for the five years previous to its date; and the sale of the land to individuals at the annual tax sales is payment of the taxes for which it is sold.

c—The certificate need not specify the unpaid taxes, nor the outstanding tax titles and liens.

d—The provisions of the section do not constitute an unwarrantable infringement of property rights, mere inconvenience, however great, not being enough to defeat a law.

3. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the Legislature, and the court cannot declare them void because they are harsh.

4. The recording of a deed is not necessary to pass title, such registry being only designed to record and preserve evidence of title, which passes upon the execution and delivery of the deed, and possession thereunder is notice to all of the rights of the grantee in possession.

Mandamus. Argued June 27, 1893. Denied June 30, 1893, and opinion filed July 25, 1893.

Relator applied for *mandamus* to compel the recording of a deed. The facts are stated in the opinion.

Wells, Angell, Boynton & McMillan, for relator.

A. A. Ellis, Attorney General, and *Ormond F. Hunt,* for respondent.

GRANT, J. Section 135 of Act No. 206, Laws of 1893, reads as follows:

"When any deed, land contract, plat of any town site, village, or addition to any town site, village plat, or city, or other instrument for the conveyance of title to any real estate, is presented to the register of deeds of any county in this State for record or filing in his office, he shall require of the person presenting the same a certificate from the Auditor General, or from the county treasurer of the

county, whether there are any tax liens or titles held by the State, or any individual, against such piece or description of land sought to be conveyed by such instrument, and that all taxes due thereon have been paid for the five years preceding to the date of such instrument, and in default of the presentation of such certificate he shall not record the same until such certificate is secured and presented. The register of deeds shall note the fact upon said deed that such certificate has or has not been presented to him when such instrument is presented for record, and, in case the person presenting such instrument shall refuse to procure such certificate, he shall indorse that fact upon said instrument, over his official signature, and shall refuse to receive and record the same: *Provided*, that the provisions of this section shall not apply to the filing of any town or village plat for the purpose of incorporation, in so far as the land therein embraced is included in a plat already filed in the office of the register of deeds, or in so far as the description of lands therein is not changed by such plat, nor to the filing of a copy of any town, village, or city plat in case the original plat filed in the office of such register of deeds has been lost or destroyed, nor to any sheriff's or commissioner's deed executed for the sale of lands under any proceeding in law or by virtue of any decree of any of the courts of this State, or any deed of trust by any assignee, executor, or corporation executed pursuant to any law of this State. A violation of the provisions of this section by any register of deeds shall be deemed a misdemeanor, and, upon conviction thereof, he shall be fined not to exceed one hundred dollars, and he shall further be liable to the grantee of any instrument so recorded for the amount of damages sustained, to be recovered in an action for debt in any court of this State."

Relator contends that this section is void, for the following reasons, viz.:

First. (a) The title to the act does not cover the section; (b) the act embraces more than one object.

Second. Its provisions cannot be complied with by the officers named.

Third. It is an unwarrantable infringement of property rights.

1. The evident purpose of the provisions of this section is to secure the collection of taxes, which is one of the

general objects stated in the title to the act. We think, therefore, that the section cannot be held void, under section 20, art. 4, of the Constitution. The rule of construction in such cases is stated in *City of Grand Rapids v. Burlingame*, 93 Mich. 472, as follows:

"If the title expresses a general purpose, all matters fairly and reasonably connected with that purpose, and all measures which would facilitate its accomplishment, would not be in conflict with the above provision of the Constitution."

The fact that it imposes a condition which must be fulfilled before a deed is entitled to record, thereby changing in this respect the recording act, does not affect its validity any more than the change in the jury law made by Act No. 150, Laws of 1881, affected the validity of that act. *Hall v. Burlingame*, 88 Mich. 438. See, also, *People v. Mahaney*, 13 Mich. 494.

2. The section must be interpreted in the light of other laws imposing duties upon the Auditor General and county treasurers, and requiring them to keep records of taxes paid and unpaid, of tax liens, and the issuance of tax deeds. It certainly was not contemplated by the Legislature that these officers should go outside the records of their own offices for information necessary to make the certificate. All State, county, township, and in many cases city, taxes, when not paid to the collector, are required to be returned to the county treasurers, and, when not paid to them, they are required to make return thereof to the Auditor General. A record is there kept of all such taxes, tax liens, and tax deeds. As to all other taxes above enumerated, the presumption is that they are paid. In view of these facts, it seems reasonable that the expression "that all taxes due thereon have been paid for the five years preceding to the date of such instrument" refers only to the records kept by these officers, and that

the certificate must be made from the facts shown by these records. With this construction of the section, the officers named can easily comply with it.

3. The instrument is entitled to record, unless the certificate shows that all taxes have not been paid for the five years previous to its date. If, at the annual tax sales, the lands have been sold to individuals, this is payment, within the meaning of the law. The public revenue has thus been collected, and neither the State nor municipality is any longer interested. It is entitled to record, notwithstanding the certificate shows that there are tax liens and tax titles held by the State for taxes which were assessed before the commencement of the five years named, and that there are tax titles held by individuals. Only when the certificate shows that the taxes have not been paid for the five years is it not entitled to record. Neither does the law require that the certificate specify the unpaid taxes, nor the outstanding tax titles and liens. The general certificate required by the act is sufficient.

4. We do not think that the provisions of the section constitute an unwarrantable infringement of property rights. Mere inconvenience, however great, is not sufficient to defeat a law. That is a consideration for the Legislature, and not for the court. The State may enact stringent measures to enforce the collection of the public revenue. The law provides ample remedies for the property-owner to contest the validity of the tax assessed against him. He may pay the tax under protest, and at once bring suit to recover it back. He may appear in court when the State brings suit to foreclose its lien, and there contest its validity. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the Legislature, and the court cannot declare them void because they are harsh. Besides, the recording of the deed is not

necessary to pass title. The registry law is only designed to record and preserve evidence of title. Title passes upon the execution of the deed, and possession under it is notice to all of the rights of the grantee in possession. A similar statute was held valid by the supreme court of Minnesota. *State v. Register of Deeds,* 26 Minn. 521.

Writ denied, but without costs, as this was an amicable suit to test the validity of the section.

The other Justices concurred.

MURRAY J. HOPPOCK ET AL. v. WILLIAM H. CHAMBERS ET AL.

Municipal corporations—Injunction—Parties.

The contractor is a necessary party to a bill filed by tax-payers against the president, clerk, treasurer, and trustees of a village, to restrain the payment of moneys under a contract entered into by the village council for furnishing a water supply.

Appeal from Benzie. (Judkins, J., presiding.) Submitted on briefs June 28, 1893. Decided July 25, 1893.

Bill to restrain the payment of moneys on a contract for a water supply for a village. Complainants appeal. Decree affirmed. The facts are stated in the opinion.

Pratt & Davis, for complainants.

D. G. F. Warner and *E. E. Benedict,* for defendants.

MCGRATH, J. This is a bill by certain tax-payers of the

village of Frankfort against the trustees and officers of said village, to restrain the payment of moneys under a contract entered into in May, 1890, by the council, with George L. Davis, trustee, for a water supply to said village. After the execution of said contract a corporation was formed, which succeeded to all the rights of said George L. Davis under said contract.

The bill is fatally defective, in that neither said Davis nor said corporation, so succeeding to his rights, is made a party defendant thereto. All the parties in interest, and whose rights may be affected, ought to be made parties. Jenn. Ch. Pr. 21, 22; Puter. Pl. & Pr. (Mich.) 37. The other parties to the contract in question would not be concluded by any decree herein, and the village, in case of a decree against it, would be subject to still further litigation.

The decree of the court below, dismissing the bill, is affirmed, with costs to defendants.

The other Justices concurred.

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ETTA RUTTER v. WILLIAM COLLINS.

Breach of promise of marriage—Evidence—Arguments of counsel.

1. Where, in a suit for breach of promise of marriage, the defendant admits making an offer of marriage, which the plaintiff testifies she accepted, which is denied by the defendant, who testifies that she avoided a reply, the subsequent conduct of the parties is admissible as bearing upon the truth of their respective stories as to what occurred at the time the offer was made.
2. The answer of the plaintiff to a letter from the defendant, in which he stated that she had never answered his proposition

by giving her consent or otherwise, and that he had concluded that she did not wish his company, and that he should live single the rest of his life, such answer stating that she thought he knew his proposition was accepted, and would not have him think otherwise for the world, and inviting him to come up that evening, as she would like to have a talk with him, is admissible in evidence in behalf of the plaintiff as a part of the *res gestæ*.

3. The jury must get the evidence from the lips of sworn witnesses, and not from the unsworn statements of the lawyers in the argument of the case.

Error to Clinton. (Daboll, J.) Argued June 30, 1893. Decided July 25, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Lyon & Dooling (M. V. Montgomery, of counsel), for appellant.

S. L. Kilbourne (John H. Fedewa, of counsel), for plaintiff.

McGRATH, J. Plaintiff sues for breach of promise of marriage. Defendant admits the proposal on January 1, 1886, but denies its acceptance. Plaintiff testified that the acceptance was express and immediate. Defendant insisted that plaintiff avoided the question, and gave no answer. The court instructed the jury as follows:

"No particular form of words is necessary to establish that contract. If you find that he made an offer, then the acceptance, and, for that matter, the offer, may be proved simply by actions and conduct as well as by express words; and in passing upon that question you have a right to take into account all that was said and all that was done that goes to make up, in your judgment, a proposal upon the one side, and an acceptance upon the other. * * * If in all they did and in all they said you find it was fairly understood between them that one had made an offer and the other had accepted it, that is a sufficient offer and acceptance in law. * * * The introduc-

tion, the invitation, and later on nearly every visit, as claimed by the parties, has been gone over, and the fact of some presents has been testified to, how they conducted themselves towards each other when in the presence of other people and when alone. All this has been allowed to be given you so that taking the evidence given, and the claim upon each side, you may use the facts surrounding the case in arriving at what was the real talk, understanding, and agreement of these parties as to this matter; and whatever light you think any of the facts and circumstances throw upon the matter, you have a right to take into consideration in passing upon that question."

These instructions were erroneous. Defendant admitted an offer of marriage, and there is no claim that the offer was repeated. Plaintiff testified to an express acceptance of the proposal, and gave the language which she alleges was used by her indicating her consent. If the jury believed the story told by plaintiff as to her acceptance of the proposal, there was a contract of marriage; if they did not, there was no such contract. If, when the offer was made, it was not accepted, but a reply was avoided, and plaintiff then and there stated that there was something that she wanted to tell him, but dare not, and, although urged to disclose, did not, and that interview then ended without further reference to the proposal, as insisted by the defendant, there was no contract. The subsequent conduct of the parties was admissible as bearing upon the truth of their respective stories as to what occurred on the evening when the offer was made, but that conduct did not tend to show a renewal or revival of the offer, and there was no pretense that the offer was in any sense pending. The jury should have been instructed accordingly.

To make out her case, plaintiff introduced a letter from defendant, dated February 20, 1886, which contained the following:

"I received your note yesterday, and, in reply why I don't come up there, would say that you have never answered my

proposition by giving your consent or otherwise; so I have concluded that you don't want my company, and therefore there was no use of my coming to see you any more. I have always thought more of you than any other young lady that I have ever met with, but you always seemed to doubt my sincerity, so I have given up, and have concluded to live single all the rest of my life."

After a concession by defendant's counsel that all letters received from plaintiff had been destroyed, plaintiff, under objection, introduced a copy of the following reply, dated February 22, 1886, explaining that she first wrote the copy, and, thinking it did not look well enough, wrote and sent another:

"MR. COLLINS,—

"*Dear Sir:* I thought, of course, you knew your proposition was accepted, and would not have you think otherwise for the world. Now, if you can come up this evening, I would like to have you; would like to have a talk with you. Now oblige me and come. ETTA."

Defendant's letter suggested a reply. It was in answer to an inquiry as to why he had not visited her. It was a complaint. It said to her: "I made a proposal of marriage to you, but you gave me no encouragement or reply, but doubted my sincerity, although I thought more of you than any other lady that I had ever met." She replied immediately. It is true that, ordinarily, the omission to reply to a letter is no evidence of the truth of the facts therein stated; but regard must be had to the relations of the parties, the nature of the correspondence, the questions involved. Here was a contract, it is true, but not a naked contract. A failure to respond to such a letter would have been inconsistent with the state of mind usually associated with a marriage contract. Plaintiff's letter was the natural and almost inevitable sequence of defendant's complaint. It was a part of the *res gestæ*. The failure to explain could not but have been an indication of indifference at

least. The letter does not attempt to set up any express acceptance of the proposal. In itself it has none of the earmarks of manufactured evidence. There was no error in its admission.

Objection is made to statements made by plaintiff's counsel in his closing address to the jury. In some particulars the criticism is justifiable. It is not necessary to go into details. It is sufficient to say that the jury must get the evidence from the lips of sworn witnesses, and not from the unsworn statements of the lawyers in the argument of the case. *Evans v. Town of Trenton*, 20 S. W. Rep. 614.

For the reasons given the judgment must be reversed, and a new trial ordered.

HOOKER, C. J., LONG and GRANT, JJ., concurred with MCGRATH, J. MONTGOMERY, J., concurred in the result.

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GEORGE W. STONE, RECEIVER OF THE CENTRAL MICHIGAN SAVINGS BANK, v. FRANK L. DODGE.

Banks and banking—Insolvency—Action by receiver—Assignment of deposit—Set-off.

In an action by the receiver of an insolvent banking corporation organized under Act No. 205, Laws of 1887, against a debtor of the bank to recover a sum due at the date of the suspension of the bank, the defendant cannot set off a certificate of deposit, procured by him from a creditor of the bank after its suspension, and before an application for the appointment of a receiver was made.

Error to Ingham. (Person, J.) Submitted on briefs June 27, 1893. Decided July 25, 1893.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

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

C. P. Black, for defendant.

McGRATH, J. The Central Michigan Savings Bank was organized under Act No. 205, Laws of 1887, with a commercial department and a savings department. On the 18th day of April, 1893, said bank, being unable to meet the then current demands upon it, closed its doors, and conducted no business thereafter. On May 4, 1893, the Commissioner of the Banking Department of the State filed a bill in the circuit court of Ingham county, alleging the insolvency of said bank, and praying for the appointment of a receiver for said bank. On May 8, 1893, plaintiff was appointed such receiver, and qualified as such. Plaintiff brought this suit to recover the sum of $3,529.27 due the bank upon the day of its suspension. Defendant was allowed to set off against this claim a certificate of deposit, dated July 19, 1892, for the sum of $4,000, issued to Nellie F. Butler by said bank, and which defendant purchased April 23, 1893, and judgment was rendered for defendant. Plaintiff appeals.

The sole question in the case is whether, in an action by the receiver of an insolvent banking corporation against a debtor of the bank to recover a sum due at the date of the suspension of the bank, the defendant may set off a certificate of deposit, procured by him from a creditor of the bank after its suspension, and before an application was made for the appointment of a receiver.

There can be no doubt that the certificate of deposit in this case would, in a proper case, be a proper subject of set-off. It is well settled that, in a suit by a receiver of an insolvent bank upon a note or obligation due the bank,

the defendant will be allowed to set off his deposit or a certificate of deposit held by him at the time of the suspension of the bank. *Dickson v. Evans,* 6 Term R. 57; *Pedder v. Preston,* 9 Jur. (N. S.) 496; *Bank v. Rosevelt,* 9 Cow. 409; *Ogden v. Cowley,* 2 Johns. 274; *McLaren v. Pennington,* 1 Paige, 112; *Miller v. Receiver,* Id. 444; *In re Receiver of Bank,* Id. 585; *Smith v. Fox,* 48 N. Y. 674; *Bank v. Tartter,* 4 Abb. N. C. 215; *Berry v. Brett,* 6 Bosw. 627; *Jordan v. Sharlock,* 84 Penn. St. 366; *Farmers' Deposit Bank v. Penn Bank,* 123 Id. 283 (2 L. R. A. 273); *Trust Co. v. Bank,* 9 L. R. A. (Ky.) 108; *Receivers v. Gas-Light Co.,* 23 N. J. Law, 283; *Platt v. Bentley,* 11 Amer. Law Reg. (N. S.) 171; *Clarke v. Hawkins,* 5 R. I. 219.

None of these cases, however, support the defendant's contention. Indeed, so far as the question here involved is discussed, they are opposed to that contention. In *Smith v. Fox, Jordan v. Sharlock, Bank v. Tartter, Clarke v. Hawkins, Receivers v. Gas-Light Co.,* and *Platt v. Bentley,* defendants were allowed to set off amounts which they had on deposit at the time of the bank's suspension. In *Clarke v. Hawkins,* however, the court expressly held that—

"The sum of $667, claimed by the defendant against the bank as a bill-holder to that amount, cannot be allowed to him in set-off; the whole of the bills, so far as we can learn from the evidence, having been purchased by him subsequent to the injunction against the bank, at a discount of 50 cents on the dollar. The injunction against the bank, like the death of the deceased insolvent (*Irons v. Irons,* 5 R. I. 264), must at least fix a period back of which claims against either cannot be purchased, carrying with them the equitable right of set-off against the claims for which the purchaser is liable to the estate of the insolvent bank or of the insolvent decedent in the hands of their respective administrators."

In *Dickson v. Evans,* Lord Kenyon says:

"It would be most unjust, indeed, if one person who happens to be indebted to another at the time of the

bankruptcy of the latter were permitted by any intrigue between himself and a third person so to change his own situation as to diminish or totally destroy the debt due to the bankrupt by an act *ex post facto*. In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties."

Ashhurst, J., in the same case, says:

"Much fraud and great injustice would be introduced if any other rule than that laid down by Lord Kenyon were to prevail."

Grose, J., adds the following:

"One object of the act was to prevent a debtor of the bankrupt going about the country for the purpose of purchasing the bankrupt's notes after the bankruptcy, and then pretending that he was a creditor at the time of the bankruptcy."

In *Pedder v. Preston*, the corporation of Preston opened an account at plaintiff's banking house, and afterwards, becoming invested with the functions of a board of health, opened a second account. Plaintiff's bank stopped payment. One of the accounts was overdrawn, and suit was brought to recover the amount of the overdraft. Held, that the other account owned by the same municipality could be set off.

In *Bank v. Rosevelt*, it was held that a set-off existing against a bank *when it stops payment* is allowable, but bills obtained by the debtors of a bank after it has stopped payment, though before a receiver is appointed, are not admissible as a set-off.

In re Receiver of Bank is to the same effect.

In *McLaren v. Pennington*, the court say:

"In relation to the set-off, there can be no doubt of his equitable right to be allowed for any demand which he had against the bank at the time of the repeal of its charter. If he has purchased up bills of the bank, or pro-

cured the assignment of other claims, since that time, he cannot avail himself of them as a set-off, but must come in for his distributive share with the rest of the creditors."

In *Miller v. Receiver*, Miller had a deposit in the bank in his name, and also held $1,150 of the bills of the bank, drawn from the bank on his account before the bank stopped payment, and the court held that the debtor was entitled to any equitable set-off which he had at the time when the bank stopped payment.

In *Ogden v. Cowley*, in a suit brought on a note by the assignee of a bankrupt, it was held that the defendant could not set off a check issued by the bankrupt, bearing date before the bankruptcy, without further proof that the check came into his hands prior to the bankruptcy.

In *Berry v. Brett*, plaintiff was receiver of an insurance company, which, in the course of its business, had liquidated the claim which defendant sought to offset.

In *Farmers' Deposit Bank v. Penn Bank*, at the time of its suspension, the Farmers' Deposit Bank (defendant below) held the check of the cashier of the Penn Bank.

In *Trust Co. v. Bank*, the bank, to which plaintiff's assignors were indebted, was allowed to apply the deposits sued for to the liquidation of that indebtedness.

The only case called to my attention which goes to the extent of the claim made by counsel for the defendant is that of *Moseby v. Williamson*, 5 Heisk. 278. The case was decided upon the ground that under the bankrupt law a banker was not insolvent unless he "stops or suspends *fraudulently* for a period of 14 days;" and, "in analogy to this rule as to bankruptcy," the court were unable to see "upon what ground the insolvency of a bank can be assumed from the simple fact of closing its doors for two or three days, or until some such step as filing a bill to have its insolvency determined has been taken."

In the case of *Smith v. Mosby*, 9 Heisk. 501, the same

court held that when a defendant, who is sued upon a note by the receiver of an insolvent bank, which has failed, and filed a bill asking to be wound up, offers as a set-off a certificate of deposit given by the bank, the burden is upon him to show that he received it previous to the filing of the bill by which the assets of the bank were impounded for the benefit of all its creditors.

In the case of *Marr v. Bank*, 4 Cold. (Tenn.) 471, the bank in 1862 was removed, by order of the Confederate officers commanding at Memphis, further south. After the war the assets of the bank, amounting to $25,000, were brought back, and were held by the officers of the bank, but they did not assume to continue the business of the bank. In the mean time complainant had recovered judgments against the bank upon the notes or bills of the bank, aggregating $27,321. Executions had issued upon these judgments, which had been returned *nulla bona*, and complainant sought by bill in equity to obtain a discovery, and the application of the assets to the payment of his judgments. The court, however, held that the bank was insolvent; that its assets were held by the officers of the bank in trust for all the creditors, and that no diligence on the part of a single creditor could defeat the right of the others to a *pro rata* distribution of the fund.

I have been unable to discover any statute in Tennessee similar to our own relating to the winding up of the affairs of a banking corporation, or restricting the right of the corporation after an act of insolvency. The insolvency of corporations does not generally, of itself, extinguish the power of the company to manage its assets, or fix the lien of creditors upon the specific property in hand. Mor. Priv. Corp. § 786. A corporation, being a person in law, has the same rights, and is subject to the same obligations, as an individual, unless the act of incorporation varies those rights and liabilities. Persons dealing with a corpo-

ration whose powers are restricted by its organic law are charged with a knowledge of such limitations, and are bound thereby. The act under which the bank in the present case was organized subjects banking corporations to State supervision. It regulates the manner in which the business shall be done. A commissioner is provided for, and every bank organized thereunder is subject to the inspection and supervision of such commissioner. Upon the refusal of a bank to submit its books, papers, and concerns to inspection, such commissioner may institute proceedings for the appointment of a receiver. A bank desiring to go into liquidation must first give notice to the commissioner. No consolidation of banks can be had without the consent of the commissioner.

Section 55 provides that—

"On becoming satisfied that any bank has refused to pay its deposits in accordance with the terms on which such deposits were received (if received in accordance with the provisions of this act), or that any bank has become insolvent, or that its capital has become impaired, or that any bank has violated any of the provisions of this act, or for any cause hereinbefore or hereinafter stated, the Commissioner of the Banking Department may forthwith, with the approval of the Attorney General, apply to a court of record of competent jurisdiction for the appointment of a receiver for such bank, who, under the direction of such court, shall take possession of the books, records, and assets of every description of such bank, collect all debts, dues, and claims belonging to it, and sell or compound all bad or doubtful debts, and sell all the real and personal property of such bank on such terms as the court shall direct, and may, if necessary to pay the debts of such bank, enforce all individual liability of the stockholders. Such receiver shall pay over all money so collected or received to the State Treasurer, and also make report to the commissioner of all his acts and proceedings."

Upon the appointment of the receiver it is made the duty of the commissioner to cause notice to be published,

calling upon all persons having claims to present the same to the receiver.

Section 57 provides for dividends under the direction of the commissioner, and requires the receiver to make ratable dividends of the moneys realized by him on the claims proven and determined, and the remainder of the proceeds, if any, after the costs and expenses of such proceeding and all debts and obligations of the bank are satisfied, shall be paid over to the stockholders.

Section 47 provides that—

"All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any bank, or of deposits to its credit, all assignments of mortgages, or other security on real estate, or judgments or decrees in its favor, or deposits of money, bills, or other valuable things for its use, or for the use of its stockholders or creditors, all payments of money, either after the commission of an act of insolvency or in contemplation thereof, with a view to prevent application of its assets in the manner prescribed in this act, or with a view to the preference of one creditor over another, shall be held to be null and void."

The primary purpose of these provisions is the protection of depositors and other creditors, and the provisions of the act should receive a liberal construction to effectuate that object. The object of section 47 is to secure a proportionate division of the assets of the bank between its creditors, and to prevent preferences. By force of this section, upon the commission of an act of insolvency the assets of the bank become actually impounded for the benefit of creditors. If a debtor can connive with his particular friends who may happen to have deposits in the bank (and a number of the debtors might do the same thing), the very object of this provision may be frustrated. It cannot be contended that the officers of the bank, after its suspension, could have received this certificate of deposit, and surrendered defendant's obligation. That obligation was an asset of the bank, and the effect of that

transaction would have been to prevent its application in the manner provided by the act. The law will not allow or compel the receiver to do what it expressly prohibits the bank from doing. *Diven v. Phelps,* 34 Barb. 224; *Bank v. Taylor,* 56 Penn. St. 14.

In *Diven v. Phelps,* the bank suspended business, closed its doors, and was insolvent on the 21st of September. The receiver was appointed November 9 following. In the mean time defendant had procured certain bills of the bank, which he undertook to offset to a claim in favor of the bank. The court say:

"The bills, having been obtained by the defendant after the bank had suspended and become insolvent in fact, could not, I think, be used as a set-off. * * * The bank could not then have paid this demand in any way. It was absolutely prohibited by statute from doing so. * * * If the bank, before the appointment of the receiver, had given up the defendant's note in satisfaction of his claim as holder of the bills, the transaction would have been void, and the note thus given up might have been recovered of the defendant as part of the assets belonging to such bank or the creditors thereof. * * * Before the defendant procured his bills, the bank held the note against him, and, the latter being insolvent, the note belonged equally to all the creditors of such bank. If the defendant could be allowed to purchase or receive the bills of the insolvent bank, and with them satisfy, and thus take from the assets, this amount, or any other, the policy of the statute, which is to secure perfect equality among all the creditors of insolvent corporations of this description, would be entirely defeated."

In the course of the opinion the court refer to 1 Rev. Stat. p. 591, § 9. That section is as follows:

"No such conveyance, assignment, or transfer, nor any payment made, judgment suffered, lien created, or security given, by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien,

security, or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require."

In the case of *Bank v. Taylor*, defendant owed the bank $35,000. One Rynd had in the bank a deposit of $44,000. The bank, being insolvent, stopped payment. The next day Rynd assigned his deposit to Taylor. Held, that Taylor could not set off the deposit against his indebtedness to the bank, as it would give a preference to one creditor of the bank after the act of insolvency. The court discuss the act of Congress of June 3, 1864, and especially section 52 of that act, which is substantially the same as section 47 of our own statute, above quoted. The court say:

"The bank is a creature of the act, dependent upon it for all its powers, and controlled by all the restrictions which the act imposes. * * * It provides a system for closing the affairs of an insolvent bank, the clear design of which is to place all creditors, except the government and note holders, on an equal footing. Its purpose is to disallow preference of one creditor over another, and it denies the power to make such preference at any time after an act of insolvency." Section 52, read in connection with section 50, "admits of no doubt that the purpose of Congress was to secure all the assets of the bank existing at the time of its act of insolvency for ratable distribution. We cannot assent to the argument that it was intended for no more than to avoid all acts of the bank itself, all voluntary transfers by it of its notes, bonds, deposits, etc., with a view to giving preferences. Its language is general, as applicable to legal as to voluntary transfers. But if the deposit made by Rynd can be set off against the bond debt due by Taylor to the bank, what is it but a transfer of the bond debt to the satisfaction of a creditor, thus giving him a preference? It is not contended that the bank was not prohibited from doing this, but it is insisted the transfer may be accomplished by an adversary proceeding at the suit of Rynd for the use of Taylor. It is not denied that Rynd, had he made no assignment of his claim, could not have obtained payment of the debt due him by calling upon the bank after

its doors were closed, and when it suspended payments. The bank, it is conceded, was not at liberty to transfer to him either their claim against Taylor or any of their assets, or to pay him any money; and, if so, can the thing be secured by a hostile proceeding? Will the law compel a payment or a transfer which the law prohibits a debtor from making? * * * If Rynd could in no way have obtained payment of the deposit due him except through the comptroller of the currency, how could he give to Taylor, by his assignment of the deposit, any right which he did not himself possess?"

It is not pretended that the bank was not insolvent in fact at the time it suspended payment. In *Bank v. Taylor* the only evidence of insolvency was the suspension of the bank. In *Diven v. Phelps, supra,* it was held that under the statute cited a recovery might be had whether the party receiving the payment knew of the insolvency or not. *Brouwer v. Harbeck,* 9 N. Y. 589; *Robinson v. Bank,* 21 Id. 406.

It was held in *Gillet v. Moody,* 3 N. Y. 479, that stopping payment is of itself sufficient evidence of the insolvency of a bank, and when there is nothing to rebut the presumption the evidence of insolvency is conclusive.

In *Dodge v. Mastin,* 5 McCrary, 411, it was held that the ordinary acceptation of the term "insolvent," when applied to a bank, means "inability to meet liabilities in the usual course of business."

In *Markson v. Hobson,* 2 Dill. 330, it is said: "A bank suspending payment and closing its doors against its creditors makes to the world a proclamation of its insolvency."

"Insolvency" is frequently defined as inability to make payments as usual, or as they mature, or according to the undertaking, or in the ordinary course of business. Webst. Unabridged Dict.; Anderson, Dict. 552; Wait, Insolv. Corp. § 28; *Bayly v. Schofield,* 1 Maule & S. 338; *Sacry v. Lobree,* 84 Cal. 41; *Walton v. Bank,* 13 Colo. 265, 272; *In re Dalpay,* 6 L. R. A. 108, and note.

Whatever may be the rule as to when a bank may be said to be insolvent, the closing of its doors and suspension of its business must be deemed *prima facie* evidence of insolvency, and it is clear that such an act is "an act of insolvency," under section 47, above given. In the present case, at the time of the transfer of the certificate the bank had remained closed for a period of five days.

The judgment must be reversed, and judgment entered here for plaintiff, with costs of both courts.

The other Justices concurred.

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PERCY T. COOK, ADMINISTRATOR OF THE ESTATE OF ADDISON P. COOK, DECEASED, v. DAVID S. FRENCH ET AL.

Equity practice—Decree pro confesso—Bill of review—Recording laws—Bona fide purchaser.

1. *Ex parte* proceedings by a complainant, taken after the defendant has entered his appearance and demanded a copy of the bill, but without giving notice to the complainant's solicitor, and of which the defendant has no notice or knowledge until after a *pro confesso* decree has been taken for want of an appearance, are irregular and void.
2. Where a grantee records his deed before a mortgage given by his grantor on the purchase of the land has been recorded, of which mortgage he has notice, his grantee, who receives his deed after the mortgage has been recorded, takes his title subject to the equities of the mortgagee.
3. A purchaser of land must ascertain at his peril whether a decree setting aside a prior mortgage was warranted or not, and he cannot claim immunity, as a *bona fide* purchaser, from the effect of a subsequent order setting aside the decree as unwarrantably entered; citing *Ritson v. Dodge*, 33 Mich. 463.

Appeal from Kent. (Grove, J.) Argued June 21 and 22, 1893. Decided July 25, 1893.

Bill to review a decree canceling a mortgage. Defendant French appeals. Decree affirmed. The facts are stated in the opinion.

Loyal E. Knappen and *Arthur C. Denison,* for complainant.

Spaulding & Walbridge, for appellant, contended:

1. There are no fatal irregularities in the proceedings. The subpœna was duly served, and the defendant should have appeared within 20 days after August 20, 1884. An appearance, under the statute, contemplates, not the mere entry of an order in the register's office, but notice to the other party; citing How. Stat. § 6636; and, as the defendant never appeared, he was not entitled to notice; citing *Warner v. Juif,* 38 Mich. 665.
2. No affidavit of non-appearance was necessary; citing *Low v. Mills,* 61 Mich. 44.
3. Cook, by not appearing, admitted the allegations of the bill, and the taking of proofs was not warranted by the practice; citing Dan'l Ch. Pr. (Perkins' ed.) 506, and note; *Ward v. Jewett,* Walk. Ch. 45; *Covell v. Cole,* 16 Mich. 223.
4. Bills of review are filed for errors of law apparent on the face of the decree, and for matters *dehors* the record; citing 1 Barb. Ch. Pr. 369; Story, Eq. Pl. §§ 404, 407; Puter. Ch. Pl. & Pr. (Mich.) 264; *Ryerson v. Eldred,* 23 Mich. 537; *Taylor v. Boardman,* 25 Id. 527. There is no error on the face of the decree, and there is no newly-discovered evidence of the claim made by this complainant, that the conveyance to Marshall by Kerr was fraudulent. Addison P. Cook knew as much about it 10 years before filing his petition for leave to file this bill as he did then, and for this reason the bill should be dismissed. The failure to appear and introduce this evidence during the pendency of the suit was culpable want of diligence; citing *Taylor v. Boardman,* 25 Mich. 527; and the case made by complainant shows inexcusable negligence in looking after his business, and nothing more; citing *Clark v. Circuit Judge,* 40 Mich. 167.

John W. Champlin, of counsel, for appellant.

LONG, J. This is a bill of review filed in the circuit court for Gratiot county, in chancery. The cause was subsequently removed to the circuit court, in chancery, for

Kent county, where it was heard upon the merits, and a decree entered granting the relief prayed for by complainant.

It appears that Addison P. Cook was on May 22, 1876, the owner in fee of the E. ½ of the S. W. ¼ of section 4, township of Hamilton, Gratiot county. He then resided in Jackson county. William Kerr, who resided in Gratiot county, had previously purchased from Mr. Cook an 80-acre tract in the township of North Star, Gratiot county. He had paid for this 80 acres in full. On May 22, 1876, Kerr visited Mr. Cook at his home, and purchased from him the 80-acre tract in the township of Hamilton for $1,200, paying $27 down, and giving back a purchase-money mortgage for $1,173, bearing date the same day as the deed, covering both the North Star and Hamilton parcels. Cook gave Kerr a warranty deed of the Hamilton land. Kerr immediately left for home, taking his deed with him. Mr. Cook sent the mortgage by mail to the register of deeds of Gratiot county. Kerr, early in the morning of the 24th, drove to the residence of William J. Marshall, of Gratiot county, several miles from his home, and about five miles from Ithaca, and made an arrangement with Marshall to deed him both parcels of land. Kerr went to Ithaca, had the deed made to Marshall, reciting a consideration of $2,000, and placed on record. He also put on record the deed from Cook to himself. These papers were recorded in the office of the register of deeds about 9 o'clock in the morning of the 24th. On the afternoon of the same day, the register of deeds received through the mail the mortgage given by Kerr to Mr. Cook, and recorded it. August 1, 1882, Marshall sold the North Star 80 to Homer N. Pember. March 19, 1884, Pember sold to defendant French. February 18, 1888, French conveyed by warranty deed to defendant McRoberts, and McRoberts conveyed to defendant Steinhammer. McRoberts, on his purchase, gave back to French a

purchase-money mortgage, which mortgage French afterwards assigned to defendant Robert H. Lee.

It appears, further, that on May 8, 1884, defendant French filed a bill in the circuit court, in chancery, of Gratiot county, against Addison P. Cook, to cancel the mortgage given by Kerr to Cook. Subpœna was issued, and personally served on Mr. Cook. September 13, thereafter, Cook entered his appearance in the cause, but no notice was served on the complainant's solicitors; and on September 19 affidavits of non-appearance and regularity were filed by complainant's solicitors, and upon which a decree was entered December 12, 1884, canceling the Cook mortgage. It was after the decree was entered that French deeded to McRoberts.

Addison P. Cook died intestate April 15, 1889, but before his death he had filed a petition for leave to file a bill of review in the proceedings commenced by French, which leave was granted to his administrator, who filed this bill June 1, 1890. Proofs were taken before a commissioner, and on the hearing the court below made a decree setting aside the decree made in 1884, canceling the Cook mortgage, and also decreeing that the Cook mortgage was a valid and subsisting lien upon the premises, having priority in point of time and in law to the deed given by Kerr to Marshall. The court below further found that Marshall, at the time of taking the conveyance from Kerr, had notice of the Cook mortgage, and was not a *bona fide* purchaser of the premises as against the mortgage. French alone appeals.

The decree below must be affirmed.

1. It is evident that Marshall, when he took the deed from Kerr, had actual knowledge of the Cook mortgage. We need not set out the evidence which leads to this conclusion. Kerr testifies to it, and, while Marshall denies

all knowledge of it, yet we think the manner in which the deed was made, and corroborating circumstances, strongly show the fact.

2. The proceedings by French, under his bill to set aside the Cook mortgage, were irregular and void. The affidavit of non-appearance was filed, and the proceedings to default were taken, after Mr. Cook had caused his appearance to be entered, and no notice was given him of any proceedings thereafter. The first notice he had was that another parcel of land belonging to him had been sold to satisfy the costs in that case.

3. Mr. Marshall, having notice of the Cook mortgage, was not a good-faith purchaser, as against the mortgage.

4. When French acquired his title, the mortgage from Kerr to Cook was on record in the office of the register of deeds, and this was notice to him of the claim that Cook made upon the premises. He therefore took his title subject to any equities which Cook had under the mortgage.

5. It is claimed that Cook was guilty of laches in not commencing proceedings to enforce the priority of his mortgage lien over the Marshall deed. We think no such laches have been shown. He insisted to Marshall that he should claim such priority. Marshall held the title until 1882, and after French acquired it, and attempted by his proceedings to remove the cloud and cancel the mortgage, Mr. Cook appeared in the cause. He was guilty of no misconduct, nor did he encourage any of the parties that he was making no claim. There are many excusing features showing why Cook did not sooner move, if, in fact, he was bound to assert his rights sooner. Marshall threatened suit, but never commenced it, though Cook asserted his rights. The case is governed by *Mickle v. Maxfield*, 42 Mich. 304; *Johnson v. Shepard*, 35 Id. 115. The court

below, in granting leave to file a bill of review, did not find any such laches, and we fail to discover from the circumstances why such should be imputed to him.

Those who purchased from French are resting satisfied with the decree below. They have not appealed. They, apparently, are willing to rely upon the covenants in their deeds from French. But, were this not so, they could claim no immunity, as subsequent purchasers, from the effect of the subsequent order setting the decree aside. *Ritson v. Dodge,* 33 Mich. 463. Purchasers buy at their own risk as to the validity of a decree. *McGoren v. Avery,* 37 Mich. 120.

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

McGrath, Grant, and Montgomery, JJ., concurred. Hooker, C. J., did not sit.

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The People v. Edward Troy.

Criminal law—Assault with intent to do great bodily harm—Constitutionality of act—Juror—Challenge for cause.

1. Act No. 71, Laws of 1883 (How. Stat. § 9122*a*), which makes it an offense to "assault another with intent to do great bodily harm, less than the crime of murder," is constitutional.
2. A juror who sat on the trial of a respondent for resisting an officer is subject to challenge for cause if called to sit on the trial, at the same term, of another respondent for an assault upon the same officer, with intent to do great bodily harm, less than the crime of murder, claimed to have been made while the other offense was being committed.

Exceptions before judgment from superior court of Grand

Rapids. (Burlingame, J.) Argued April 21, 1893. Decided July 26, 1893.

Respondent was convicted of an assault with intent to do great bodily harm, less than the crime of murder. Conviction reversed, and new trial ordered. The facts are stated in the opinion.

Maynard & Chase, for respondent.

A. A. Ellis, Attorney General, and *Alfred Wolcott,* Prosecuting Attorney, for the people.

LONG, J. Respondent was informed against, and convicted, under How. Stat. § 9122*a*, which reads:

"Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be punished by imprisonment in the State prison not more than ten years, or by fine not exceeding eight hundred dollars, or by both, in the discretion of the court."

The case comes to this Court on exceptions before sentence.

It appeared on the trial that on the night of May 23, 1892, two young men, by the names of Flanders and Ottobein, were engaged in a street fight. One of the parties called for help, when a police officer ran to the place, and sought to arrest the two. Ottobein broke away from the officer, and, while the latter was engaged in securing Flanders, he was struck on the head by a stone thrown by a person whom the officer afterwards claimed to recognize as the respondent. Flanders was complained against for the offense of resisting an officer, and the respondent was complained against, and convicted, under the statute above quoted. Flanders' trial came on first in the superior court of Grand Rapids, and he was found guilty by the jury. At the same term respondent was brought to trial, and seven of the jurors who sat in Flan-

ders' case were permitted, under objection, to sit in the case against respondent.

It is claimed by counsel for respondent that the verdict should be set aside for the reasons:

1. That the act under which the conviction was had is unconstitutional and void.
2. That the court erred in permitting the jurors who found Flanders guilty to sit in the case against respondent.
3. That the court erred in its charge to the jury on the question of *alibi*, claimed as a defense in the case.

This statute was passed in 1883. Act No. 71, Laws of 1883. Questions relative to convictions thereunder have been before this Court in *People v. Sweeney*, 55 Mich. 586; *People v. Ross*, 66 Id. 94; *People v. Sebring*, Id. 705; *People v. Lennon*, 71 Id. 298; *Turner v. Circuit Judge*, 88 Id. 359; *People v. Ellsworth*, 90 Id. 442; *People v. Miller*, 91 Id. 639.

In *People v. Sweeney*, the respondent was charged in one count with the crime of assault with intent to kill and murder, and, in the second count, with an assault with intent to do great bodily harm, less than the crime of murder. The claim was made in this Court that the count for the statutory offense of an assault with intent to do great bodily harm, less than the crime of murder, could not be joined with a count for the common-law offense of assault with intent to kill and murder. Mr. Justice SHERWOOD, writing for the Court, overruled this objection, and, in speaking of this statutory offense, said:

"It is unnecessary now to determine the extent of the injury required to bring a case within the statute under which the conviction in this case was had. It very clearly appears from the record that 'great bodily harm, less than murder,' was committed."

The respondent was convicted of this statutory offense, but the case was reversed because of the erroneous admission of evidence by the trial court.

In *People v. Ross,* Chief Justice CAMPBELL wrote for reversal, upon the ground that the proofs offered showed no more than simple assault. The prisoner was discharged.

In *People v. Sebring,* it appeared that, when the cause was called for trial, respondent's counsel moved to quash the information upon the ground that the complaining witness was the respondent's wife. This was the only error relied upon, and Mr. Justice SHERWOOD said:

"It would be a strange rule of law, indeed, either common or statute, which would not allow a wife, when assaulted and beaten until her life is endangered by a cruel and malicious husband, to resort to the courts, and make her complaint, and secure his arrest."

The conviction was affirmed.

In *People v. Lennon,* the respondent was charged in two counts, as in the case of *People v. Sweeney,* but convicted upon the count for assault with intent to do great bodily harm. The defense was that the respondent was acting in self-defense. Mr. Justice MORSE, writing for the Court, said that the proofs did not justify a conviction for any greater offense than assault and battery. The prisoner was discharged.

In *Turner v. Circuit Judge,* it was held that the respondent could not be convicted of assault and battery under an information charging him with the statutory offense of "assault with intent to do great bodily harm, less than the crime of murder," but not charging a battery, nor could the information be amended, after verdict and before judgment, so as to include the latter charge.

In *People v. Ellsworth,* it was held that one or more respondents might be informed against for an assault upon two persons with intent to do great bodily harm, less than the crime of murder, if the assault complained of was made by the same act, and that in *Turner v. Circuit Judge* it was not intended to hold that under such a

charge a person could not be convicted of assault and battery, if such lesser offense were properly charged in the information. The conviction was sustained, Chief Justice MORSE writing for the Court.

In *People v. Miller,* it was held that the intent to do great bodily harm, less than the crime of murder, under certain circumstances, might be inferred from the act itself, and that the facts appearing on the trial showed that the respondent intended to do great bodily harm. The conviction was affirmed. It was said by Chief Justice MORSE in that case:

"The assignments of error are mostly based on the main proposition that, under the evidence on the part of the people, there was no greater crime than assault and battery of which respondent could be convicted."

It is contended by the Attorney General that each of the foregoing cases, of necessity, involved the constitutionality of the act in question; and that especially in the case of *People v. Ellsworth, supra,* was that question raised. It appeared in that case that the respondent's counsel moved to quash the information in the court below on the ground that the information charged no offense known to the laws of this State. The motion was denied. The principal point made in this Court was, however, that the information charged the offense to have been committed upon two persons, and that, under the statute, the word "another" meant one person, and no more. But the conviction was affirmed, and the constitutionality of the act necessarily passed upon. It is also urged by the Attorney General that in *People v. Miller* the attention of the Court was again called to the statute, and the charge of the court below as to what would constitute the offense, and that, necessarily, the Court passed upon its constitutionality.

Assault and assault and battery were offenses at the

common law, and had their well-understood meaning. Our statute has not attempted to define them, but to fix and determine the punishment to be inflicted. Prior to the enactment of the statute under consideration, the Legislature had not attempted to fix any degrees of the offense of assault, except in cases where some other crime or misdemeanor was perpetrated or attempted to be perpetrated. Under the statute in question, the Legislature has fixed a penalty not to exceed 10 years' imprisonment in the State prison for an assault upon another with intent to do great bodily harm, less than the crime of murder, thus creating an offense of a higher degree than a common assault and battery.

The proposition that only in this State could such a statute be found led us to examine the statutes of other states for the purpose of verifying the statement. We find that several other states have quite similar statutes. Section 3875 of McClain's Annotated Statutes of Iowa (1884) provides a punishment for assault with intent to inflict a great bodily injury. Sections 6141, 6144, of the Minnesota Statutes (1891) provide a punishment for wrongfully and willfully wounding or inflicting grievous bodily harm upon another. Section 5595 of the Nebraska Consolidated Statutes (1891) provides:

"If any person assault another with intent to inflict a great bodily injury, he shall be punished, on conviction thereof, by imprisonment in the penitentiary for not less than one year nor more than five years."

The Public Statutes of New Hampshire (1891), by chap. 278, sections 20 and 21, add a greater punishment to what is termed "aggravated assault and battery" than is given to simple assault and battery. Section 4377 of Sanborn & Berryman's Annotated Statutes of Wisconsin provides:

"Any person who shall assault another with intent to do great bodily harm shall be punished by imprisonment

in the state prison not more than three years, nor less than one year."

These statutes have received construction in some of the states. In *Cokely v. State*, 4 Iowa, 479, it was alleged in the indictment that the defendant committed an assault and battery upon the person of C. C. How, with intent to inflict upon the person of him, the said How, a great bodily injury. It was said by the court:

"A battery is only an aggravation of the assault, and when the assault is charged to have been made with a dangerous weapon it is a still further aggravation; and where it is charged to have been made with an intention to commit great bodily injury it is only an offense in a different degree. The assault is still the original offense, and the means, the intent, and the extent to which it is carried qualify only the aggravation of this original offense, to which additional punishment is often affixed by the statute."

In *State v. Malcolm*, 8 Iowa, 413, it was said:

"It is the intent with which the injury is inflicted or attempted that constitutes the offense of an assault with intent to commit a great bodily injury; and, when the intent is shown, that which would be an assault, unaccompanied with the felonious intent, will be such when thus accompanied."

In none of the states where a similar statute has been in force has its constitutionality been questioned, so far as our researches have gone. It has been in force in this State nearly 10 years, and never, until the present case, has its constitutionality been seriously questioned, though in *People v. Ellsworth* and *People v. Miller* the question was presented, and passed without much consideration as to its merits. We see no difficulty about the definition to be given to the offense. The Iowa court in *Cokely v. State, supra*, found no difficulty in defining it, or in holding that the case under consideration came within the statute. It is the intent with which the injury is inflicted that

aggravates the assault, and brings it within the statutory definition of an assault with intent to do great bodily harm. It must be an intent to do a serious injury, of an aggravated nature. The trial courts seem heretofore to have had no difficulty in defining the offense, or in making a jury comprehend when a case falls within the statutory definition. This point of the learned counsel must be overruled.

We think, however, that the court erred in permitting the jurors who sat in the Flanders case to sit in the present. The facts are nearly identical, and must necessarily have all been called forth in the Flanders trial. The jury in that case must have considered them, and reached some opinion as to the merits of the controversy in the present case. The respondent was entitled to a fair and impartial trial by an impartial jury, who had no preconceived opinions of his guilt or innocence. We are aware that some English and American authorities hold that jurors who have sat in one case are not disqualified from sitting in a case against another joint respondent, who has taken a separate trial, and involving the same state of facts. We are not inclined to follow that doctrine. Where the issue is the same in both cases, it is but fair to the respondent that he have another panel of jurors to try his cause.

For this reason the verdict must be set aside, and a new trial ordered.

The other Justices concurred.

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LEWIS M. POWELL, ADMINISTRATOR, ETC., v. LEEFE ECKLER.

Conditional sale—Gift—Replevin.

1. An agreement for the leasing of a piano at an agreed monthly rental, and for its sale to the lessee at the expiration of the term of the lease upon payment to the lessor of a specified sum, merely gives the lessee the right to the use of the instrument on payment of the rent, with an option to purchase it on the terms stated.
2. Where, in such a case, the administrator of the estate of the lessee pays the balance of the rent and the sum required to be paid to purchase the piano, and receives a bill of sale from the lessor, he can maintain replevin against the widow of the lessee, who claims the instrument as a gift from her husband.

Error to Jackson. (Peck, J.) Argued April 19, 1893. Decided July 26, 1893.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Richard Price, for appellant.

Lewis M. Powell, in *pro. per.*

HOOKER, C. J. On the 28th day December, 1889, the following agreement was made between the Whitney & Courier Company and N. H. Eckler:

"This agreement, made this 28th day of December, 1889, between the Whitney & Courier Co., of the city of Toledo, state of Ohio, parties of the first part, and N. H. Eckler, of Jackson, Mich., party of the second part, witnesseth:

"That the said Whitney & Courier Co. have leased unto the party of the second part one Boardman & Gray piano, style 11, walnut, No. 16,646, branded, 'Boardman & Gray, of Albany, N. Y.,' for the term of five months from date hereof, for the sum of three hundred dollars for the whole

term aforesaid, to be paid as follows: One hundred dollars cash on the 15th day of January, 1890, and then fifty dollars cash on the fifteenth day of each following calendar month until the above sum is fully paid; payable at the office of the Whitney & Courier Co., 219 Summit street, Toledo, Ohio, with interest at eight per cent. per annum on all unpaid amounts, after becoming due, until paid.

"It is, however, provided that if at the end of five months, as aforesaid, the said party of the second part shall pay unto the said parties of the first part the sum of seventy-five dollars, with interest at eight per cent. per annum after becoming due, then the said Whitney & Courier Co. hereby agree to sell to said party of the second part, in consideration of the sum last mentioned, the said instrument, and to execute to said party of the second part a bill of sale of the same.

"It is further provided and agreed that the said instrument shall be kept insured for three-fourths its value, for the benefit of the said Whitney & Courier Co., by said party of the second part, and shall not be removed from the premises now occupied by said party of the second part during the continuance of the above-mentioned lease without the written consent of the parties of the first part; and that a failure to pay any or either of the aforesaid sum or sums of money as the same shall become due, or any removal, or attempt at removal, of said instrument from said place, without the written consent of the parties of the first part, shall make void this lease and agreement, at the option of the parties of the first part, and they shall have the right to enter and retake, and may enter and retake, possession of said instrument, at maturity of any payment, or any time thereafter, or upon the violation of the terms of the said lease, in any manner whatsoever, by the party or parties of the second part, and may retain any and all sum or sums of money paid on this agreement and lease, as damages, in part, for any injury to said instrument, and for the use of the same, and for expenses in moving the same.

"In witness whereof, the said parties to this agreement have hereunto set their hands and seals this 28th day of December, A. D. 1889.

"THE WHITNEY & COURIER CO.
"W. S. TUELL, TREAS.
Per T. G. ROBERSTON. [L. S.]
"N. H. ECKLER. [L. S.]"

The piano was delivered to Eckler, who placed it in his dwelling, where it remained until the plaintiff replevied it from Eckler's widow, the defendant. At the time of Eckler's death, June 8, 1890, there remained to be paid upon the rent of said piano the sum of $50, which fell due about a week later. Defendant remained in the dwelling, and had possession of the instrument, which she claimed as her own, alleging that it was a gift from her husband at the time it was brought to the house. Plaintiff, the administrator of deceased, claimed it as a portion of the assets of the estate, and a short time after he paid to the Whitney & Courier Company the sum of $125, being the $50 due for rent, and the amount of $75 additional, mentioned in the lease, and took an assignment of the interest of that company to himself, as administrator, whereupon he replevied the piano, after making a demand upon the defendant for the same.

By the terms of the agreement, defendant's husband acquired no title to the piano, beyond the right to use it for five months upon payment of the rent prescribed, and the option to purchase at the expiration of that time by paying $75 additional. Such agreement did not make him the purchaser of the piano, but gave him merely an option to purchase it later. *Richardson v. Hardwick,* 106 U. S. 252 (1 Sup. Ct. Rep. 213); *Couse v. Tregent,* 11 Mich. 65; *Dunlap v. Gleason,* 16 Id. 158; *Preston v. Whitney,* 23 Id. 260; *Smith v. Lozo,* 42 Id. 6; *Gustin v. School-Dist.,* 94 Id. 502. If deceased gave the piano to the defendant, as she claims, she acquired no better title to the instrument than he had. It gave her, at most, the right, as against the Whitney & Courier Company, to pay the rent, and, if she chose, exercise the option of paying the sum of $75 and taking the instrument. This she did not choose to do.

It was claimed upon the trial that she was entitled to the instrument free from any claim against it; that, by

giving it to her, her husband had signified an intention of purchasing it, *i. e.*, had exercised his option of doing so, and thereby become obligated to pay for it, and, being so obligated, the estate was bound to make such payment for the benefit of his wife. This position is untenable. Unless the gift was completed by delivery to his wife, it was void, for want of a consideration. If completed by delivery, it was executed only to the extent of his interest in it, and, there being no consideration to support a promise to purchase and pay for it, even if one had been expressly made, she cannot require the administrator to pay for the piano, nor could she have a valid claim against the estate for the purchase price of $75 had she paid it. *Whitaker v. Whitaker*, 52 N. Y. 368; *Wilbur v. Estate of Warren*, 104 Id. 192 (10 N. E. Rep. 263).

Nor will the facts of this case permit the conclusion that, as between the defendant and her husband's administrator, the purchase price of the piano is to be treated as a liability primarily against the estate, for the reason that it was not a debt against deceased. The deceased had never promised the Whitney & Courier Company to buy the piano, or to pay them for it. He died without obligating himself in any way to them. The only claim that they could have sustained against the estate was the amount of $50, back rent. To protect the estate, the administrator purchased the interest of the owners, and thereby he became vested with their right of possession at the expiration of the lease. Defendant's rights were not affected by this. If the piano was given her, as she claims, she could have paid the balance of the purchase price to the administrator, and become the owner. If it had not been given to her, she would, of course, have no such right. This is a question that we do not find it necessary to decide. As the undisputed facts show that the plaintiff was entitled to

the possession of the piano, the other questions may be disregarded.

The judgment should be affirmed.

The other Justices concurred.

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SARAH I. SMITH v. HENRY A. BLAKE.

Equity practice—Injunction—Demurrer—Mortgage—Fixtures.

1. The raising of technical questions after a hearing upon the merits is not favored, and a bill will not be dismissed upon a demurrer clause in the answer unless it is fatally defective, and past remedy by amendment.[1]
2. While a preliminary injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant, yet, if permitted to stand until the hearing, it should be perpetuated, if a basis for injunctive relief is established by the proofs.
3. Where the owner of land, upon which he has erected a foundry and machine shop, mortgages the land without mentioning the machinery in the building, which is owned by him, and, so far as necessary, fastened to the soil or building, and which is adapted to the business for which the building was erected, the mortgage will be held to cover the machinery, such being the intention of the parties, as shown by the preponderance of the proof.

Appeal from Cheboygan. (Pailthorp, J.) Argued April 21, 1893. Decided July 26, 1893.

Bill to restrain the removal of certain machinery. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

[1] See *Zabel v. Harshman*, 68 Mich. 270.

Henry W. MacArthur (*George W. Bell,* of counsel), for complainant.

George E. Frost (*Oscar Adams,* of counsel), for defendant.

HOOKER, C. J. Complainant is the owner of a mortgage upon certain premises in the city of Cheboygan, used as a foundry, machine shop, and blacksmith shop. This mortgage was made December 14, 1882, for $2,000, with interest at 8 per cent., and was foreclosed by advertisement, the premises being bid in for $2,402.61 by the complainant, who (the bill states) will become entitled to a sheriff's deed upon July 3, 1892, at which time her investment will amount to $2,594.82. The bill is filed to restrain the defendant from removing certain machinery upon the premises, viz.: One iron planer; one upright power drill; one shaper; three iron lathes; one wood lathe; one upright engine; one horizontal boiler; one band saw and frame; one rip saw and frame; one foundry cupola furnace and blower; and the belting, shafting, pulleys, and boxes necessary for the running and management of the above machinery.

It is contended that the bill must be dismissed under the demurrer clause in the answer, for the following reasons, viz.:

1. That the bill does not allege that the articles named are fixtures.
2. That it fails to show any claim of the property in controversy by the defendant, or threat of removal.
3. That no injunction can properly issue upon information and belief.

Had a demurrer been filed, these objections would have been fatal. But the law does not favor the raising of technical questions after hearing upon the merits, and will not permit the dismissal of a bill upon a demurrer clause in the answer unless the bill is fatally defective, and past

remedy by amendment. *Barton v. Gray,* 48 Mich. 164; *Bauman v. Bean,* 57 Id. 1; *Lamb v. Jeffrey,* 41 Id. 719.

The bill impliedly states that these articles are part of the realty. When we read the sixth clause in the light of the whole bill, no other inference can be drawn.

The failure to allege threats could have been the subject of amendment in the court below, and probably would have been had any one considered it necessary. Threats were not even proved; but, as defendant's answer claimed this property to be personalty, not covered by the mortgage, and this question was all that was litigated, we may consider the intention to remove admitted.

This brings us to the merits of the case. The proof shows that all of these articles were placed in a building erected many years ago for a foundry and machine shop, by the owner of both, and, while some of the machines were not fastened to the soil or building, they were heavy, and it was unnecessary. All were adapted to the business for which the building was erected. Furthermore, the preponderance of the proof shows that the parties understood that this property was to be covered by the mortgage. We think the decision of the circuit court in holding that the mortgage covered these articles was in accord with the Michigan authorities.

A point is made that an injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant. That is true where the injunction sought is preliminary, but we see no reason why relief by injunction cannot be based upon proof presented upon the hearing. In this case, while the injunction should not have been allowed, it was permitted to stand until the hearing, and, "sufficient equity appearing," it should be perpetuated. *Clark v. Young,* 2 B. Mon. 57.

The record may be remanded, with directions that complainant be allowed to amend her bill, whereupon the decree

may stand affirmed. Complainant will recover costs of both courts.

The other Justices concurred.

EDMOND G. REDMOND v. THE DELTA LUMBER COMPANY.

Master and servant—Negligence—Evidence.

1. The general rule is that negligence cannot be presumed from the mere fact of an injury, and, though it may be inferred from facts proved, it cannot be based upon guesses or conjecture; citing *Mining Co. v. Kitts*, 42 Mich. 34; *Toomey v. Iron & Steel Works*, 89 Id. 249.[1]
2. The mere fact that a machine, which is shown to have performed its accustomed work properly both before and after an accident, failed so to work on that particular occasion, is not sufficient to justify the conclusion of negligence; citing *Robinson v Wright & Co.*, 94 Mich. 283.

Error to Schoolcraft. (Steere, J.) Submitted on briefs April 28, 1893. Decided July 26, 1893.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

J. D. Turnbull, for appellant.

Moore & Moore, *C. W. Dunton*, and *J. W. McMahon*, for defendant.

HOOKER, C. J. The plaintiff was employed to operate a machine called a "jack," used for drawing logs into defendant's saw-mill. This jack consisted of an endless

[1] See *Porter v. Railway Co.*, 80 Mich. 156.

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chain, upon which the logs were held by iron spurs, and was operated by power applied through iron gearing to one of the pulleys, upon which the endless chain ran, by means of a belt running upon a friction pulley. This belt was loose, and was designed to run the jack when it was tightened, by bringing a third and movable pulley down upon the belt, which was done by pulling down a lever. When the lever was released, the effect was to remove this pulley, thereby loosening the belt, and stopping the machine. The heavier the load upon the jack, the more power was required upon the lever to keep the jack in motion, owing to the tendency of the belt to slip upon the pulley. Logs drawn up by the jack were unloaded upon skids on either side of the jack, and from the skids to the carriages, upon which they were sawed. The skids being nearly full, plaintiff drew a log up with the jack, which, falling upon the skids, crowded another log against a log upon the saw carriage, which in some way caused one of the logs to be thrown against plaintiff, seriously injuring him. The cause of the accident appears to have been the failure to stop the jack. Plaintiff claims to have released the lever, and that the jack did not stop as it should have done.

Plaintiff's counsel contends that the failure of the machine to stop when the lever was released raises a presumption of negligence, thereby making it necessary for defendant to show an absence of negligence upon its part. On the other hand, the defendant maintains that plaintiff's failure to release the lever caused the accident. Proof was offered to the effect that the jack worked properly immediately after the accident, and the plaintiff himself testifies that it had worked properly for 60 days before and up to the time when he was hurt, when it suddenly failed to respond to the release of the lever. No

proof was offered which tended to show that the machine was out of repair, unless the testimony that it failed to work was such proof.

Counsel for plaintiff contends that, if the jury should find that the accident resulted from the failure of the machine to respond to the release of the lever, it necessarily follows that it was from abnormal causes, and that in such case the law presumes negligence, and the *onus* is upon the defendant to show the cause of the accident, or at least that it was not due to its fault. He cites a number of authorities, several of which are New York cases, to sustain his view of the law.[1] They seem to be cases of injury to passengers by carriers, or to property by warehousemen, in both of which classes of cases the defendants are under obligations to exercise a high degree of diligence. Without implying that the rule contended for is the law of this State in such cases (a matter upon which we find it unnecessary to express an opinion), the doctrine cannot be applied to the facts in this case; the general rule being that negligence cannot be presumed from the fact of the injury, and, though it may be inferred from facts proved, it cannot be based upon guesses or conjecture.

In *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 41, an employé at a mine was injured by the fall of a bridge. The cause was unexplained. The Court held that, while it might be guessed or surmised that there was negligence somewhere, it did not extend beyond conjecture, and that, if the master was to be held liable under such circumstances as were disclosed by the record in that case, on mere guesses or inferences respecting the existence of fault somewhere, the rule that an employé assumes the ordinary risks of his employment would be wholly done away with. "When a

[1] *Curtis v. Railroad Co.*, 18 N. Y. 534; *Edgerton v. Railroad Co.*, 39 Id. 227; *Caldwell v. Steamboat Co.*, 47 Id. 282; *Seybolt v. Railroad Co.*, 95 Id. 562; 16 Amer. & Eng. Enc. Law, 453.

servant demands from his master compensation for an injury received in his service it is necessary that he trace some distinct fault to the master himself." 42 Mich. 39.

In *Hewitt v. Railroad Co.*, 67 Mich. 61, an engineer was injured in a collision with a flat car, which half an hour previous had run from a side track onto the main track, and stopped partly off the track. Various theories were suggested as to what caused the car to run from the siding, but there was no proof. In answer to special questions the jury found that the wind blew it off, and that it was not intentionally put there by any one. The Court held that, while negligence might be inferred from circumstances proved, it could not from conjecture, and set aside the verdict. See, also, *Early v. Railway Co.*, 66 Mich. 349; *Miller v. Railway Co.*, 90 Id. 230; *Robinson v. Wright & Co.*, 94 Id. 283; *Toomey v. Iron & Steel Works*, 89 Id. 249.

In the present case there is no evidence tending to show that the machinery was out of repair, unless it is to be assumed from the alleged fact that it did not stop when the lever was released. On the contrary, all of the evidence showed that immediately before and after the accident it was in working order. If there were anything to show that the machine had been out of order, and that its working was spasmodic or uncertain, there might be room for the contention that defendant was negligent in not keeping it in repair; but the mill was put in good order in the spring, and the jack had worked perfectly up to the time of the accident, clearly indicating that defendant could have had no notice that repairs were necessary. It had a man about the mill who looked after the machinery, and there was no proof that he was incompetent or neglectful. *Miller v. Railway Co.*, 90 Mich. 230. Nor is there anything to indicate that an inspection would have prevented this accident. It is contended that on a former

occasion the jack had drawn a log too far, but our attention is not called to any proof showing the cause. We cannot, therefore, say that there was any occasion to warn the plaintiff "that this machinery was liable not to obey the lever, and not work as designed." An effort was made to show that this accident might have been caused by the use of rosin upon the belt, but we are pointed to no proper evidence of such fact.

An examination of the record reveals no evidence of negligence on the part of defendant that would have justified the circuit judge in submitting the case to the jury.

Judgment affirmed.

The other Justices concurred.

HELEN M. ALBERTS v. THE VILLAGE OF VERNON.

Municipal corporations—Defective sidewalks—Evidence—Assignments of error—Instructions to jury.

1. It is competent for the plaintiff in a negligence case to show that another person was tripped by a loose board in the same sidewalk upon which plaintiff was injured in like manner some eight months thereafter, as tending to show a long continuance of the defective condition of the walk, from which notice to the defendant might be inferred; it appearing that the walk had not been repaired up to the time of the accident to the plaintiff.
2. An assignment of error based upon the refusal of the court to give the request, "In this case, your verdict will be for the defendant," and in the same language, is not sufficient, under Supreme Court Rule No. 12, which requires assignments of error to be special.[1]
3. It will not be assumed that the jury were led to disregard an

[1] See *Hecock v. Van Dusen, post,* 573.

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instruction on the subject of contributory negligence because it was not repeated in connection with the instructions upon the question of notice.

4. Error cannot be assigned upon the ground that an instruction which is correct in substance was not made more specific, a more particular instruction not having been asked for, nor any exception taken by which the attention of the court could have been called to the omission.

5. Where the language used in the general charge is substantially like that of a request to charge, the court has a right to assume that it covers the question from the standpoint of the counsel presenting the request.

Error to Shiawassee. (Newton, J.) Argued June 8, 1893. Decided July 26, 1893.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Watson & Chapman, for appellant.

A. L. Chandler and *S. F. Smith,* for plaintiff.

HOOKER, C. J. The plaintiff was injured by falling on defendant's board sidewalk, being tripped by a loose board. The proofs show that the walk was old, and the stringers so rotten that they would not hold nails driven into them. Evidence was given tending to show that no repairs had been made upon said walk for more than a year; and John Norton, a witness for plaintiff, testified to being tripped by a loose board in said walk some eight months before the accident to the plaintiff. The court admitted this, against defendant's objection and exception, as tending to show a long continuance of the defective condition of the walk, from which it might be inferred that defendant had notice of its worn and rotten condition. No error was committed in this. *Dotton v. Village of Albion,* 50 Mich. 129; *Moore v. Township of Kenockee,* 75 Id. 332; *Campbell v. City of Kalamazoo,* 80 Id. 655; *Girard v. City of*

Kalamazoo, 92 Id. 610; *Corcoran v. City of Detroit*, 95 Id. 84. That the witness fell, had no especial significance, except in connection with the fact that the boards were loose. In connection with the proof that no repairs were made subsequently, and before the accident to plaintiff, it was material.

William Shoemaker, another witness for plaintiff, testified that he was employed by the village to take up the walk soon after the accident, and that he found the stringers rotten, and had no difficulty in lifting the boards therefrom. It is said here that the fact that the village caused the walk to be taken up and repaired was not competent evidence to show that the walk was in bad condition. This point does not appear to have been made below, and the record indicates that the removal of the walk, affording the opportunity to learn particularly its condition, was the point aimed at. Incidentally, it was drawn out that it was removed at the instigation of defendant. No error was committed in receiving this testimony.

Defendant's first request was as follows, viz.: "In this case, your verdict will be for the defendant." An assignment of error is made in the same language. This is not a good assignment of error, under Supreme Court Rule No. 12, which requires assignments of error to be special. It does not point out the reason for the request, and leaves the Court and opposing counsel to ascertain as best they may whether the case is not defective in some particular. So far as we discover, however, the court was justified in submitting the case to the jury.

In discussing the question of notice, the trial judge said to the jury:

"The notice required in the proviso may be actual notice to the street commissioner, or by personal knowledge of such officer, or by the existence of the defects complained of being of such long standing that it might and ought to have been known, and that the want of knowledge may,

under given circumstances, imply want of due care; and, in the absence of proof of actual knowledge, you will determine from all the evidence in the case whether the walk, at the place the plaintiff claims she was injured, had been, prior to that time, out of reasonable repair, and not in a reasonably safe and fit condition for public travel, and whether it had continued for such length of time prior to the accident that the want of knowledge may, under the circumstances of this case, imply want of due care on the part of the village in keeping that sidewalk in repair. If you so find, in view of all the evidence in the case, and the inferences naturally to be deduced from such evidence, you can find for the plaintiff, in the language of the statute, 'such just damages as will compensate her for the injury sustained.'"

Counsel for defendant assert that this ignored the question of contributory negligence. A judge cannot easily discuss all questions in a case at once. The question of contributory negligence was not overlooked, and we cannot assume that the jury were led to disregard the instruction on that subject because it was not repeated in connection with the discussion upon the question of notice. This instruction regarding notice might have been more specific, but it was correct in substance. *Stebbins v. Township of Keene,* 55 Mich. 552, 60 Id. 214; *Woodbury v. City of Owosso,* 64 Id. 239. Error is assigned upon it for the reason that it did not state that "notice could not be presumed unless the defect was so open and notorious, of long standing, and of such a character as would attract passers-by, and the burden of proof of these facts is on the plaintiff." Defendant's counsel did not see fit to ask for more particular instruction, nor did they take any exception by which the attention of the judge could have been called to the omission.

The jury were instructed:

"From a request which I will give you on the part of the defendant, I will charge you, further, that if the plaintiff had knowledge or was aware of the dangerous condition of

the walk, and purposely ventured along it, seeing or knowing of the threatened danger, that would be contributory negligence on her part, and she could not recover."

It is contended that this unduly restricted the jury upon the subject of plaintiff's negligence. The language is substantially like that of defendant's fourth request, which was given, and which, we think, the court had a right to assume covered the question from defendant's standpoint.

We call attention to the fact that a record of a few pages would have been sufficient to raise all questions in this case.

The judgment of the circuit court will be affirmed.

The other Justices concurred.

MICHAEL CURREN AND CHARLES SEBRING v. MARENUS AMPERSEE.

Contract—Evidence—Impeachment.

1. It is competent for the plaintiffs, who seek to recover for the use of screws which they claim they permitted, at the request of the defendant, to remain under a building which they had moved for him, to show the number of screws thus used, and the length of time they were allowed to remain under the building.
2. Where, in a suit to recover for moving a building, the defendant seeks to recoup damages for alleged injury to the building, the opinion of a third person, expressed to the plaintiffs before the removal, as to the proper method of guarding against such injury, is immaterial.
3. Where, in such a case, the damages sought to be recouped are large, and the defendant testifies that the building was worth $400 or $500 when he bought it, it is competent to show on his cross-examination, as tending to discredit his statement of its value, that he only paid $85 for it.

4. Where, upon the trial of an appeal case, a witness testifies that he was not present when the contract sued upon was made, he may be contradicted by showing that he testified to the contrary on the trial in justice's court, if a proper foundation is laid; but it is not competent to show that his testimony as to his presence was contradicted by that of other witnesses.

Error to Kalamazoo. (Buck, J.) Submitted on briefs June 9, 1893. Decided July 26, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Oscar T. Tuthill, for appellant.

Frank E. Knappen, for plaintiffs.

HOOKER, C. J. The plaintiffs brought this action to recover for their services, and the use of some screws, in moving a building for the defendant. They assert that an oral contract was made, by which they were to have $10 a day for their labor in doing this work, and that the screws were subsequently left under the building, for a time, at defendant's request. The defendant claims that the plaintiffs were to receive no pay until the house was placed upon his lot in good condition, and that it was greatly injured by the plaintiffs. He seeks to recoup his damages arising therefrom. Upon the trial each party offered proof tending to prove his version of the contract. The house was shown to have been injured by moving, and each party offered testimony tending to show that the other was responsible therefor.

Michael Curren, one of the plaintiffs, testified that after the house reached its destination he received a letter from defendant's counsel. It was offered in evidence, and is as follows:

"July 2, 1891.

"*Dear Sirs:* You are hereby notified and required to proceed forthwith and put my building you moved on my

lot on Walbridge street in good shape, as you undertook and promised to do, and in default of your so doing this week I shall put men there to do it for you, and warn you not to remove the screws from under the building until the property is fixed and put in shape, whether you go on and do it or not.

"Yours truly, M. AMPERSEE. Per T."

The examination continued as follows:

"*Witness:* The screws remained there quite awhile. Ten dollars would be a proper charge for the use of them. We rent each screw out at 50 cents a day. There were about 30 screws.

"*Q.* You had 30 screws under there, and stayed there several days,—two or three weeks.

"*Mr. Tuthill:* I move to strike that out as immaterial and irrelevant.

"*The Court:* I think that is proper.

"*Mr. Tuthill:* Note an exception."

This evidence was admissible under the claim for the value of the use of the screws.

On cross-examination Mr. Sebring, one of the plaintiffs, was examined as follows:

"I am one of the plaintiffs. Have followed the moving business for about five years. When I talked with Mr. Ampersee, I told him we would put the building there the best we could. Took the job for $10 a day, and do it as quick as we could. The house was a heavy building, posted and beamed, 30 by 36 feet. It was in fair condition. Had good paper on the walls. Sills were pretty near sound. The first thing we did was to raise the house, and put timbers under it 24 feet long. Drew the house 15 rods before putting long timbers in. Put trusses in after we got started. The building could not have been moved safely the distance it went. If there had been a rod put through the sills, it would have made no difference. It could not have been moved without tearing the plaster off and partitions out. I told Mr. Ampersee, before commencing the job, that it wasn't worth moving, and he laughed at us. Know Mr. Wicks, the carpenter. He passed by the house several times when we were moving it. Had some talk with him.

"*Q.* Didn't he tell you and Curren, both, before you

moved that building, to move it safely you should put rods through the sills?

"*Mr. Knappen:* I object to that as immaterial,—whether some other man told him to do it some other way.

"*The Court:* I think that question would be objectionable, as to what Wicks said.

"*Mr. Tuthill:* Note an exception.

"*Q.* Wasn't Mr. Wicks there, talking to you about that, before Mr. Ampersee came up to see what you were doing?

"*Mr. Knappen:* I object to that for the same reason.

"*The Court:* The objection is sustained.

"*Mr. Tuthill:* Note an exception."

The opinions of Mr. Wicks were properly excluded as immaterial.

The defendant was cross-examined as follows:

"*Q.* These young men were depending on their labor for their living?

"*Mr. Tuthill:* I object to it as immaterial.

"*The Court:* Take it.

"*Mr. Tuthill:* Note an exception.

"*Witness:* Yes, sir; they wanted to work by the day. They said it would take a week or 10 days. When they got it on the lot, the building was spread."

Counsel for plaintiffs contends that this testimony tended to disprove the contract as testified to by defendant, the argument being that they would not have been disposed to make such a contract. Certainly, the fact that they depended upon their labor for a living was immaterial, and, if it had not the bearing contended for, should have been excluded. We think it was of no force, in the direction of establishing the proposition that the plaintiffs did not agree to deliver the building to defendant in good condition, upon his premises, which was the point involved. All agreed that they were to be paid by the day. The testimony should have been excluded.

Error is assigned upon the following: The defendant testified:

"I put 100 rolls of paper on the house. When I bought

the house, it had good gilt paper on it. After they got through, it was worth $200 less than when I bought it. Plaintiffs never said the building wasn't worth moving.

"*Mr. Tuthill:* The question as to what he gave for this building, I move to strike out as immaterial.

"*The Court:* I think that may stand.

"*Mr. Tuthill:* Note an exception."

The record does not show how this question arose, but it was proper, as bearing upon the question of damages. Defendant was seeking to recoup large damages for injury to his building. He had testified that it was worth four or five hundred dollars when he bought it. The price he paid, viz., $85, was legitimate proof upon this subject, and tended to discredit his statement of its value.

Michael F. Miller testified upon behalf of plaintiffs, upon rebuttal, as follows:

"*Q.* You are engaged in the shoe business here?

"*A.* Yes.

"*Q.* Were you one of the jury that tried the case of *Curren & Sebring v. Ampersee,* in Justice Harris' court?

"*A.* Yes, sir.

"*Q.* Do you know Mr. Hill, the son-in-law of Mr. Ampersee?

"*A.* Yes, sir.

"*Q.* Did you hear his testimony in the last trial, on which you found a verdict?

"*A.* Yes, sir.

"*Q.* What did he swear about the original bargain between the parties?

"*A.* He said he was present when it was made, and heard it.

"*Q.* Where did he say he stood?

"*A.* In a grocery store, somewhere near a barrel.

"*Q.* After he was sworn, did Mr. Sebring and Curren and Seifers and the little boy go on, and testify he was not there?

"*Mr. Tuthill*: I object to it as immaterial and hearsay.

"*The Court*: Take the answer.

"*A.* They did.

"*Q.* What did he say the original bargain was?

"*A.* I don't recollect what he said to that, exactly. I suppose I would recollect if it was brought to my memory.

"*Q.* Do you recollect Mr. Ampersee's testimony was, the bargain was not to pay a cent if it was not put in good shape?

"*Q.* That is Mr. Ampersee's testimony.

"*Q.* Did Mr. Hill swear to the same thing?

"*A.* He did."

It was proper to contradict Hill by showing that at the trial in justice's court he said that he was present when the contract was made, by way of impeachment, a proper foundation having been laid for it; but it was not proper to show that "Sebring and Curren and Seifers and the little boy" testified in justice's court that Hill was not present. Such testimony was hearsay.

It follows that the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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100 610

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123 680
123 682

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145 430

THE IONIA, EATON & BARRY FARMERS' MUTUAL FIRE INSURANCE COMPANY v. WILLIAM B. OTTO.

Mutual fire insurance companies—Withdrawal of member—Liability for subsequent assessments.

A member of a mutual fire insurance company who surrenders his policy, under a clause of the charter providing therefor on the payment of his proportion of all assessments to which the company is *then* liable, remains liable to assessment for such obligations as might lawfully be made the subject of assessment at the time of such surrender, but not for losses arising subsequently from failures to collect, or from any other cause; citing *Insurance Co. v. Spaulding*, 61 Mich. 77.

Error to Eaton. (Person, J., presiding.) Submitted on briefs June 9, 1893. Decided July 26, 1893.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Huggett & Smith, for appellant.

Ellis, Nichols & Miller, for plaintiff.

HOOKER, C. J. The defendant took a policy of insurance in the plaintiff company on January 5, 1884, and remained a member until November 16, 1889, when he surrendered it for cancellation. The entry of cancellation was made in the company's books upon the same day. At this time, defendant had paid his proportion of all assessments previously made, which covered no items after December 31, 1888. On January 15, 1890, an assessment was made to cover losses and expenses of 1889, which defendant paid. Subsequently, another assessment was made, as follows: For a deficiency in 1887, arising from error, mistake, or miscalculation in the amount assessed, and the amount realized from such assessment and from premium receipts, $3,748.95; for the year 1889, to cover disputed losses in litigation at the time of the cancellation, and to cover deficiency in collection of assessments for 1889, $5,730.63. His assessment amounted to $15.82. Upon his refusal to pay, this action was commenced, and, judgment being rendered against him, he appealed to this Court.

The plaintiff company is a mutual fire insurance company, organized under the statutes of this State (How. Stat. chap. 132). Section 4251 provides that the charter (*i. e.*, the articles of association) "may prescribe the liabilities of the members to be assessed towards defraying the losses and expenses of the company, and the mode and manner of collecting such assessments." By the terms of plaintiff's charter, "any member may withdraw at any time by surrendering his policy, and paying to the secretary his proportion of all assessments to which this company is liable at the time of his withdrawal."

This defendant returned his policy November 16, 1889, asking to withdraw. His assessments were paid. He subsequently paid the assessment made to cover the losses which had occurred in 1889, before November 16. By the terms of the contract, defendant had the right to terminate his membership "by surrendering his policy, and paying to the secretary his proportion of all assessments to which the company was liable at the time of his withdrawal." At the time of his surrender he had paid all assessments that had been made against him, but the assessment for losses and expenses for the year 1889 had not been made. The company was liable to assessment for these items, and, for aught that appears, such assessment might have been made at any time. It cannot be that defendant's liability for his proportion of the 11 months' losses could be avoided by a surrender of his policy, or its reception by the secretary. Yet such would be the effect of holding that a withdrawal could be effected upon a surrender of the policy, and payment of the assessments previously made. Defendant himself did not take that view, and promptly paid his proportion of 1889 losses to the date of his withdrawal, as we think he was legally bound to do.

If right in this, we are unable to see why he was not equally bound to pay his proportion of losses incurred in previous years, but not previously assessed, if there were any such, for which the company was liable to assessment at the time of his withdrawal. We are unable to say that there were any such included in the deficiency for the year 1887, as it does not appear that this deficiency was not the result of a failure to collect.

The deficiency for 1889 arose from three items:

1. The Van Alstine loss, in process of litigation at the time of the surrender, but subsequently compromised.

2. The Towle loss, in litigation, and which went to judgment against the company after the surrender.

3. A failure to collect the assessment made in January, 1890.

The identical language used in this charter was used in the charter of the Union Mutual Fire Insurance Company, which came before this Court in the case of *Union Mut. Fire Ins. Co. v. Spaulding,* 61 Mich. 80. In construing it the Court held that the defendant was relieved from liability upon payment of existing losses (*i. e.*, obligations); and it was held in that case that "losses that arose subsequently from failures to collect, or from any other cause, were not existing losses." The principle deducible is that a member cannot, by a surrender, escape liability for such obligations as might lawfully be made the subject of assessment at the time of his surrender. We think we can see how any other rule would be oppressive upon other members, and might subject the more careless or ignorant members to loss, through the withdrawal of the shrewder ones, who, by a show of litigation, might postpone assessments. The Van Alstine and Towle losses being assessable, at the option of the officers, at the time of the surrender, defendant was liable to assessment for them when the assessment was made, under the principle above mentioned.

This view does not, in our opinion, conflict with the case of *Tolford v. Church,* 66 Mich. 440, where the trial court expressly found, as a matter of fact, that the defendant had paid more than his proportionate share of the liabilities of the company at the time of the surrender of his policy for cancellation, although a deficiency arose later through failure to collect.

The case of *Hyde v. Lynde,* 4 N. Y. 387, seems to have been based upon a statute giving to the officers a discretion in the cancellation of policies, and the amount to be

paid by the policy-holder to be released. The decision was not unanimous.

As it appears that the judgment includes items upon which the defendant was not subject to assessment, it must be reversed, and a new trial ordered.

The other Justices concurred.

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124 629

REBECCA J. SMITH v. THOMAS CUDDY.

Deed—Cancellation—Confidential relations—Undue influence—Burden of proof.

1. The question in this case is held to be not whether the complainant was mentally competent to execute the deed sought to be set aside, but whether she intended at the time of its execution to make a final disposition of the land conveyed to defendant, which latter question is answered in the negative.
2. It is further held:

   a—That, under the circumstances of this case, the burden was upon the defendant to show not only that the complainant fully understood the terms, import, and effect of the instrument, but, if her intention was as expressed therein, to show that such intention was not produced by undue influence exerted by himself.

   b—That transactions of this nature are regarded by courts of equity with suspicion, and scrutinized with vigilance, the presumption being against their propriety; and it is the duty of courts to refuse judicial sanction to such an instrument until fully satisfied of the fairness of the transaction, and that it is the intelligent act of the person executing it; citing *Seeley v. Price*, 14 Mich. 541; *Witbeck v. Witbeck*, 25 Id. 439; *Wartemberg v. Spiegel*, 31 Id. 400; *Barnes v. Brown*, 32 Id. 146; *Jacox v. Jacox*, 40 Id. 473; *Duncombe v. Richards*, 46 Id. 166; *Finegan v. Theisen*, 92 Id. 173.

Appeal from Allegan. (Hart, J.) Argued June 14, 1893. Decided July 26, 1893.

Bill to set aside a deed. Complainant appeals. Decree reversed, and one entered for complainant. The facts are stated in the opinions.

C. R. Wilkes, for complainant.

George L. Yaple, for defendant.

McGRATH, J. This is a bill filed to set aside a deed given by complainant to defendant. The parties are brother and sister. Complainant is 68 years of age, and defendant 65. He is an only brother, and she an only sister. They came to this country in 1849, and settled in Nottawa township, St. Joseph county. They had $1,000, which was derived from their father's estate, which sum he invested in his own name in farm lands, upon which they lived together 10 or 11 years, at the end of which time complainant married one Brown, and went to Wayland, Allegan county. Her husband acquired the land in controversy, and died without issue some 15 or 20 years ago. Prior to his death, he conveyed this land to complainant, and she has ever since continued to live thereon. In December, 1888, complainant married Alonzo Smith, who lived with her on the farm until December, 1890, at which time they separated. The immediate cause of the separation was Smith's anxiety to visit some relatives in the West. He claimed that at the time of their marriage it was understood that he should make this visit. He had been at work upon the farm since their marriage, but had had very little money. She was penurious, and objected strenuously to his going. He was determined, and she said that if he went he need not return. Defendant was called in, articles of separation were executed, and Smith went west, remaining absent about three months. While there he wrote a letter to defendant and one to his wife. Neither was answered. Complainant informed her brother of the receipt of the

letter to her. He advised her not to reply, and she acted on his advice. On December 26, 1890, defendant wrote to complainant as follows:

"*Dear Sister:* I received your letter a few days ago. Were glad to hear that you were well. I was surprised that you got a letter from Alonzo. I hope you will be careful enough not to answer it, or give him any encouragement to think that you have any respect for him. I consider him a regular sponge, that intends to beat his way if he possibly can. Little by little he will encroach on you, until you get tired or ashamed, and then he will think he has done something smart. Return his letter, or in some way give him to understand that he cannot impose on you any longer."

Smith returned to Wayland, March 7, 1891. On that day defendant was at his sister's house, and while there some person stopped at the gate and reported Smith's return. Defendant says that he informed his sister of the fact; that she manifested some surprise; that he said to her: "You need not worry about it or feel bad. If you don't want to see him, you can fasten the door." Complainant says that he told her that, if Smith came there, to lock the door, and not let him in. On the same day, while defendant was on his way to the depot, he met Smith on the road, asked him where he was going, and Smith said he was going to see his wife. Defendant told Smith that according to the papers which had been prepared he had no wife; "I says, 'I forbid you going there to disturb that woman.'" After leaving Smith, defendant told Spielmacher, who was employed on the farm, and who was taking defendant to the depot, that if Smith came to the house, and Mrs. Smith did not want him there, to put him out, and he would pay all it cost. Smith called at the house twice that day, but found the door locked.

The deed in question was executed March 13, 1891. On the next day after the execution of the deed, Smith called at

his wife's house, and found defendant there. Defendant says of this interview:

"I heard talk in the other room, and after I got through eating breakfast I went in there. Mr. Smith was there, and he said to me: 'I come here to see Jane, whether she wanted me to come back. I feel as though I have an obligation resting on me without I hear from her own hand and her own mouth that she don't want me back any more. I feel guilty, and I would like to see her.' I said, 'All right, I will ask her to come in here.' I went to the barn, and asked Mr. Morris to come to the house and hear what would be said and done. So he came to the house, and opened the door between the two rooms. I said to sister, 'Mr. Smith is here, and would like to talk with you.' She came into the room, and he said, 'Jane, I come to see if you wanted me to came back and live with you.' 'Well,' she said, 'I guess not. It would not be long before the same old trouble would be up again.'"

Smith left the house, and did not appear there again until March 20, 1891, when complainant went to the house where he was staying, about a mile and half distant, told him that her brother had been defrauding her, and solicited him to return and live with her; and they together returned to the farm, where they have since lived. Except as stated, from the time of his return to Wayland, Smith had not seen his wife, nor had they communicated with each other, until March 20, the date of his return to the farm. Within a very few days after the execution of the deed, and before complainant had seen her husband, except at the interview when defendant was present, she learned of the nature of the paper executed, repudiated it, and declared that she had been deceived.

It is evident from this record that the deed was executed in consequence of Smith's reappearance. Complainant insists that she had been informed by her brother that the purpose of Smith's return was to get her property, and that the object of the paper was simply to protect her; that

she was advised by her brother to have papers drawn up giving him control of the place, so that he could keep Smith off; that she acted upon his advice; that she did not understand what kind of a paper her brother wanted for the purpose stated, but left it with him to determine, and that she did not understand that she was parting with the power of control over the property. Defendant insists that his sister had on several occasions expressed the intention that he should have her property upon her death; that the first conversation with her with reference to the execution of the deed was on the forenoon of the day upon which it is dated; that two days before that time he received a letter from her, which letter is alleged to have been lost, in which she stated that she had heard from her neighbors that there was a new law whereby a husband inherits half of the property of his wife dying without issue; that he called upon the judge of probate, who informed him that the statute did not interfere with the right of the wife to dispose of the property as she wished; that he then visited his sister, told her what the judge of probate had said, and they together went to the village, and the deed was executed and delivered.

The allegation of the answer that the conveyance was made in consideration of an indebtedness is wholly without support in the proofs.

There was nothing said in the interview with the scrivener who prepared the deed as to a purpose on her part to make a final disposition of the property, nor any expression of a desire to make her brother her beneficiary. She did, however, refer to Smith, and her troubles with him, and in the course of the conversation said that "if she could not trust it to her brother, she could not trust anybody." Some of the language which the scrivener says he used in explaining the instrument to her was calculated to convey the impression that the paper was what she supposed it to be. While

he says that he told her that she would have the use of the farm during her life, and at her death it would be the property of her brother, in the same connection he told her that "she could do as she pleased with it," and that "it would interfere in no way in her managing the property and controlling it during her life." He says that Cuddy "was the one that did the heft of the talking."

The language of Mr. Justice COOLEY in *Duncombe v. Richards*, 46 Mich. 166, 171, is applicable here. Referring to the magistrate who prepared the paper, he says:

"His evidence shows clearly that defendant was the principal actor in procuring the assignments to be made, but it also shows that the magistrate believed the intestate knew at the time what he was doing. But if the magistrate suspected no wrong,—and apparently this was the fact,—he might easily have supposed he saw evidences of intelligence which were only apparent, not real."

The question in the case is not whether complainant was mentally competent to execute a deed, but it is rather whether she intended at that time to make a final disposition of this property; whether she fully understood the import and effect of the instrument which she did execute. Until after the execution of this deed the relations between the parties were most amicable. Her brother had always been her confidential adviser. She had the utmost confidence in him. After the death of her first husband, and until this time, her brother had directed her affairs and the conduct of the farm, even to the smallest details. It was her brother who selected not only her tenants, but her employés, who made the terms and directed what should be done, even as to what crops should be raised upon the different parcels of land. He had possession of whatever notes she held, and looked after her collections generally. He visited the farm frequently, every month, as was admitted, and gave directions. She relied implicitly upon him, and invariably replied with reference even to matters

relating to the conduct of the farm that it "would be as Tom said." She was penurious, and grew more so as she advanced in years. She was unacquainted with business, was erratic, excitable, and not strong mentally. Her brother knew this. Spielmacher says that defendant "told me when I went there I should not pay much attention to her; I should go on and do what was right, and keep on doing so. He said if she said anything out of the way, or would offend me, to pay no attention to it." When complainant demanded a reconveyance from defendant he refused to give it, giving as a reason, "because as a brother I cannot see you robbed." She replied, "'Well, I will make you do it,' and I said, 'Well, perhaps you will, but if you attempt to act very foolish it may be necessary to have a guardian appointed for you.'" She had absolutely refused to let Smith have the money with which to go west, but it was her brother who suggested letting him go, giving him $300 in consideration of his work upon the farm, and the preparation of the articles of separation, and she at once consented. After Smith's departure she went to the village, to have prepared a lease of the farm to W. Spielmacher had telegraphed to defendant of her intentions, and defendant met her at the village, objected to a lease to W., suggested a lease to M., and the same was executed. In every instance his will dominated hers. She was doggedly obstinate with others, but in his presence she had on all occasions acted on his suggestion. No instance is mentioned in which his wishes and directions were not acceded to. There is no room for the suggestion that Smith had induced her to regret the disposition of her property, and change her mind. She repudiated the transaction before any conference with Smith, and as soon as she learned that the paper executed was irrevocable, and vested the title in her brother absolutely.

Under the circumstances of this case, the burden was

upon the defendant to show not only that complainant fully understood the terms, import, and effect of the instrument executed, but, if her intent was as expressed by that instrument, to show that such intention was not produced by undue influence exerted by himself. *Gibson v. Jeyes,* 6 Ves. 266; *Huguenin v. Baseley,* 14 Id. 273; *Hoghton v. Hoghton,* 11 Eng. Law & Eq. 134. Defendant's testimony fails to satisfy us upon either point. Transactions of this nature are regarded by courts of equity with suspicion, and scrutinized with vigilance. The presumption is against the propriety of the transaction, and, as has been frequently said in our own cases, the duty of courts is to refuse judicial sanction to such an instrument until fully satisfied of the fairness of the transaction, and that the instrument is the intelligent act of the person executing it. *Seeley v. Price,* 14 Mich. 541; *Witbeck v. Witbeck,* 25 Id. 439; *Wartemberg v. Spiegel,* 31 Id. 400; *Barnes v. Brown,* 32 Id. 146; *Duncombe v. Richards,* 46 Id. 166; *Jacox v. Jacox,* 40 Id. 473; *Finegan v. Theisen,* 92 Id. 173.

In *Jacox v. Jacox,* Mr. Justice GRAVES says:

"The actual conduct of relatives and others at the time in question towards the individual is generally of much greater value as proof of their conception of his mind or capacity than any term they may employ on the stand to express it."

In the present case, the best evidence of the incapacity of the complainant in matters of business was the almost absolute control which defendant assumed and exercised over her business affairs. Continuing, Mr. Justice GRAVES says:

"In case it appears from the facts that there was mental disorder, but not of a high degree or far advanced, it then becomes material to inquire into the nature of the transaction, and the influences leading to it; and if the circumstances disclose that the person under the infirmity, whether

through choice, accident, or otherwise, was as matter of fact for the time being in the place of ward of the other party, or was by his own consent, however brought about, in a state of submission to the judgment or opinion of the other, a presumption will arise adverse to the justice and equity of the bargain, and the bargainee will be required to show that no advantage was taken, and that in itself the arrangement was not only suitable, fair, and conscientious, but one expedient under the circumstances, and conducive to the interests of the other."

The decree below must therefore be reversed, and a decree entered here for complainant, ordering a reconveyance, the decree to stand in lieu of such reconveyance until the same is made, with costs of both courts to complainant.

HOOKER, C. J., LONG and MONTGOMERY, JJ., concurred with MCGRATH, J.

GRANT, J. *(dissenting).* I cannot concur with the conclusion reached by my Brother MCGRATH. The proof fails to establish a case of mental incompetency on the part of complainant to execute the deed. The record is equally barren of any evidence establishing any false or fraudulent representations made by defendant to her as an inducement to execute it.

If the deed was read and explained to her at the time of its execution, she cannot now be heard to say that it is different from what she then understood, or that its effect is otherwise than she supposed. She had both executed and received deeds before, and there is no doubt but that she fully understood their form and effect. The provisions of this deed are of the simplest character. It conveyed the fee to him, but retained a life-estate to her, with the entire use and control of the land during her life. She testified that she had always intended that this land should go to her brother, and she frequently so stated to others. He had befriended and aided, by advice and

otherwise, both her and her first husband. He had counseled and advised her since his death, and it is not shown that in a single instance his counsel was unwise, or was prompted by selfish motives. During a long life there had been nothing to mar their intimate and friendly relations until after the execution of this deed. It was natural that she should seek his counsel and advice after the death of her husband, and equally natural that he should give it. She and her second husband, Smith, had had serious trouble, and separated, and had not become reconciled when the deed was made. She had before that learned that upon her death Smith would inherit one-half of the land, if she should die seised of it. It was therefore entirely natural that she should execute the deed in accordance with her previously declared intention.

In reply to a leading question from her counsel she said that defendant asked her for a deed.

"*Q.* To keep Smith off?
"*A.* To keep him off the farm. Well, I supposed that was all it was going to amount to."

This is all the representation or inducement to which she testified.

Her marriage with Smith had proved unfortunate. They had quarreled, drawn up articles of separation, she had given him some money, and he had gone to his own children, in the state of Washington. In these troubles defendant had taken no part, except as he was requested to by either complainant or her husband. After Smith's return, defendant acted in her interest, and all he did was prompted by a sole desire to properly guard her rights.

Complainant, after some evasion, admitted that the deed was read over to her by the scrivener who drew it. She does not deny that he explained it to her. The scrivener, a man of excellent character, testified that he read the deed to her before she executed it, and explained it to

her, telling her that she would have the entire use and control of the land, and that at her death it would belong to her brother.

This land, constituting a farm of 160 acres, had been her homestead since she was married to her first husband. She had no intention of selling it, but intended to keep it as long as she lived. She occupied a portion of the house, and rented the rest to her tenant who worked the farm. The farm and what money she had furnished her a comfortable living. She had no children, and, aside from Smith, the defendant was her sole heir. Under these circumstances, there was nothing unnatural in this disposition of her property. This is, therefore, not a case where the grantee must assume the burden of showing competency and absence of undue influence. There was no relation of trustee and *cestui que trust.*

Admitting all the evidence on her part to be true, and it has no tendency to sustain the claim of undue influence. In order to establish a case of undue influence, there must be a wrong-doer to be resisted, and one incapable of resisting and understanding and protecting his interests. *Latham v. Udell,* 38 Mich. 238, 241. It was there said:

"We do not know of any rule of law or of morals which makes it unlawful or improper for a wife to use her wifely influence for her own benefit or for that of others, unless she acts fraudulently, or extorts benefits from her husband when he is not in a condition to exercise his faculties as a free agent."

This language is applicable to the present case. A brother is justified, both in law and in morals, to influence a sister whom he has aided, as in this case, to make provision by which at her death he may receive the property. Complainant, at the time of making the deed, was under no moral obligation to Smith, with whom she was not then on friendly terms. It is unnecessary to determine what influence operated to suddenly embitter her mind

against her brother. She said to the scrivener that she could trust her brother. This statement was prompted by long experience, and the defendant has since done nothing to show that her confidence was misplaced.

The decree should be affirmed, with costs.

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THOMAS L. HECOCK v. CHARLES VAN DUSEN ET AL.

[See 80 Mich. 359.]

Practice in Supreme Court—Assignments of error—Findings of fact—Taxes—Validity of deed.

1. An assignment of error, "that the court erred in rendering judgment for the defendants," is not sufficiently specific to meet the requirements of Supreme Court Rule No. 12.[1]
2. A finding, as a conclusion of law, that certain tax deeds introduced by the plaintiff are invalid, will not be regarded as a finding of fact; and an assignment of error that "the court erred in finding plaintiff's tax deeds, or any one of them, void," based upon an exception to said finding, will not entitle the plaintiff to a review of the facts upon which the conclusion is based.
3. A finding that certain tax deeds were offered in evidence, purporting to convey the land on account of delinquent taxes assessed thereon for certain specified years, for which the land was sold, and that there were certain irregularities in the proceedings to levy and collect the taxes on the land for said years, and that for several of said years the levy for township, highway, and school purposes was in excess of the amounts authorized by law, will be construed as finding that the land was sold for said unauthorized taxes.

Error to Monroe. (Kinne, J.) Argued June 16, 1893. Decided July 26, 1893.

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[1] See *Alberts v. Village of Vernon, ante,* 549.

Trespass. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in the former report of the case.

Randall & Corbin, for appellant.

John O. Zabel and *G. Morris,* for defendants.

McGRATH, J. This is an action of trespass, and is before us for the second time. 80 Mich. 359.

The case was tried without a jury, and error is assigned upon the findings.

The first, second, and fourth assignments are disposed of by the former opinion.

The sixth assignment of error, viz., "that the court erred in rendering judgment for the defendants," does not conform to the requirements of Supreme Court Rule No. 12, and will not be considered.

There was evidence tending to show that defendants had, prior to the commencement of this suit, entered upon the land, and cleared off a portion thereof, and the finding will not be disturbed.

The fifth assignment of error is as follows:

"The court erred in finding plaintiff's tax deeds, or any one of them, void."

The court found, "as a conclusion of law," that the tax deeds introduced by plaintiff were invalid. Plaintiff excepted to the finding "that, as a matter of law, all of said plaintiff's tax deeds are void." The court's conclusion of law is not to be regarded as a finding of fact, and neither the exception taken nor the assignment of error entitles appellant to a review of the facts found upon which the conclusion is based.

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[1] The deed for the year 1874 was not introduced in evidence on the last trial.

Upon the argument the deeds for the years 1875, 1877, 1878, and 1880 were conceded to be invalid.[1]

The court found that for the years 1871, 1873, 1876, and 1879 the levy for township, highway, and school purposes was in excess of the amounts authorized. But it is insisted that there is no finding that the lands were sold for the unauthorized taxes. The court finds that plaintiff offered in evidence certain deeds from the Auditor General,—

"Purporting to convey to the plaintiff the above-described premises on account of delinquent taxes assessed thereon for the years, * * * for which taxes said land was sold to said plaintiff. The court finds from the evidence the following irregularities in the proceedings to levy and collect the taxes on the land in controversy for the several years for which said deeds were given."

No such question was raised in the court below. The contest there was as to the validity of the assessments for the purposes named. Plaintiff filed requests for findings, but no allusion is made in the record to this question. As to these years, the questions actually tried were entirely immaterial, if the fact was that the unauthorized taxes were not included in the amounts for which the land was sold.

In *Stockle v. Silsbee*, 41 Mich. 615, 618, as to the title for 1869, the finding stated that its invalidity was based *in part* upon State and county taxes returned as delinquent; and this Court held that the objections to the State and county taxes were not plausible, and that it was not shown that any particular township, school, or highway tax was among those for which a sale was made. In the same case the sale for 1871 was found to have been made "for said State, county, and other taxes," and the Court say:

"Although this is a little indefinite, it is, perhaps, to be understood as a statement that the sale was made for all the taxes mentioned in the finding as having been

levied for that year. This would include township, highway, and school taxes, as well as those levied for the State and county."

In the present case, we think the court must be understood as referring to, and treating of, defects in the proceedings to levy and collect taxes which were included in the term, "delinquent taxes assessed," for which said lands were sold.

The judgment must therefore be affirmed.

The other Justices concurred.

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THE PEOPLE v. ALBERT TAYLOR.

Criminal law—Prize-fighting—What constitutes—Pleading.

1. It is sufficient in an information under How. Stat. § 9306, which makes it an offense for any person to "be a party to or engage in a prize-fight," to follow the language of the statute in charging the offense.
2. How. Stat. § 9306, in so far as it seeks to punish those who are parties to or engage in "any other fight in the nature of a prize-fight," is inoperative, the elements constituting such "other fight," etc., not being defined, and there being no source to which the court can go to ascertain the legislative intent.
3. As to what constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant.
4. To constitute prize-fighting, under How. Stat. § 9306, there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, coupled with an intent to inflict upon such contestant some degree of bodily harm.

Exceptions before judgment from the superior court of Grand Rapids. (Burlingame, J.) Submitted on briefs June 16, 1893. Decided July 26, 1893.

Respondent was convicted, under How. Stat. § 9306, of engaging in a prize-fight. Conviction set aside, and new trial ordered. The facts are stated in the opinion.

Dunham & Preston, for respondent.

A. A. Ellis, Attorney General, and *Alfred Wolcott*, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was convicted under an information containing two counts, based upon How. Stat. § 9306, which provides that—

"Any person who shall hereafter be a party to or engage in a prize-fight, or any other fight in the nature of a prize-fight, in this State, or who shall aid or abet therein, shall, on conviction thereof, be punished," etc.

The first count of the information charged that the respondent—

"At the city of Grand Rapids, in the county of Kent, did then and there unlawfully engage in a prize-fight with one Edgar Broom, and did then and there fight a prize-fight with said Edgar Broom, contrary to the statute."

The second count of the information charged that—

"The said Albert Taylor did then and there engage in a fight in the nature of a prize-fight with one Edgar Broom, contrary to the statute."

The respondent moved to quash the information, on the ground that no offense is charged therein, and the refusal to quash the information is assigned as error.

1. It is contended that prize-fighting is not an offense at the common law, and that, where a statute creates a new offense, it is necessary to set out the facts and circumstances, so that the court may judge whether the act charged comes within the prohibition of the statute. It is undoubtedly the general rule that when an offense is created by statute an information is sufficient which charges

the offense in the words of the statute. This rule is not, however, universal. Wherever it is essential to apprise the respondent of the precise offense charged, and an averment in the language of the statute is not sufficient to do so, the courts will require that the information be more specific. But this can only occur where the words of the statute may by their generality embrace cases which, while falling within its literal terms, are not within its meaning or spirit. Such, we think, is not the case as to the offense here under consideration. Prize-fighting is prohibited by the statute, and there is no species of prize-fighting which is innocent while this statute is in force. As to what constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant. A similar statute has been twice before the supreme court of Massachusetts, and indictments following the language of the statute have been upheld. *Com. v. Welsh,* 7 Gray, 324; *Com v. Barrett,* 108 Mass. 302. It is true that the supreme court of Mississippi reached a different conclusion in *Sullivan v. State,* 67 Miss. 346 (7 South. Rep. 275), but we think the Massachusetts doctrine more in accord with the holdings of this Court. See *People v. Kent,* 1 Doug. 42; *Rice v. People,* 15 Mich. 9; *Durand v. People,* 47 Id. 332.

2. It is objected that so much of the act as seeks to punish for engaging in a fight in the nature of a prize-fight is unconstitutional, as the title is not broad enough to include this provision. The title is—

"An act to prohibit, discourage, and punish prize-fighting within the State of Michigan."

We do not think the statute open to this precise objection, as we are unable to see that the words, "or any other fight in the nature of a prize-fight," can be treated as defining any offense other than a prize-fight. The elements

which go to constitute any other fight in the nature of a prize-fight are not defined in the statute, and there is no source to which we can go to ascertain the legislative intent. We think, therefore, but one offense is defined in the statute. It follows from this that the second count of the information charges no offense.

The court, in its charge to the jury, undertook to define what constitutes a prize-fight, and instructed the jury as follows:

"A prize-fight is defined to be where two persons, by an agreement between themselves, or by their authorized agents, or by any other person, with their (the principal's) consent and acquiescence, meet together in a ring, or its equivalent, in the presence of other persons, present as spectators, and for money or other valuable property strike at and against each other with their hands and fists, whether their hands or fists are bare or inclosed in gloves of any weight, and whether the same is for 'points,' so called, or for personal conquest alone, and whether for a limited number of rounds or to a finish, provided, that the arrangement or agreement was such that a 'knock-out,' so called, shall be deemed to be a point in favor of the contestant inflicting the same, and against the person suffering therefrom, to an extent that the greater portion of the money or other valuable thing is given to the one who inflicts the injury and knock-out than is given to him who suffers the same.

"A fight in the nature of a prize-fight is one containing all the elements of a prize-fight, except that it shall not be necessary to prove that any money or valuable thing passed to either or both of the contestants on account of the fight."

A want of familiarity with the terms employed in the charge makes it difficult for us to determine whether the respondent was prejudiced by the instruction given by the learned trial judge. It is apparent that it would have been far better to employ language which could be interpreted by one unskilled in the terms employed by the profession, especially as the evidence is not returned, and we are unable to gather from anything in the record what the term "knock-out" means. We think to constitute prize-

fighting under this statute there must have been an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded; and there must have been an intent to inflict some degree of bodily harm upon the contestant. Whether these elements of the offense existed in the present case we are not instructed by the evidence, and we are unable to determine from the language employed by the charge that the jury were required to find the presence of these elements before they should return a verdict of guilty. See 19 Amer. & Eng. Enc. Law, 157.

The other questions presented are not likely to arise on a new trial.

The conviction will be set aside, and a new trial ordered upon the first count of the information.

McGRATH, LONG, and GRANT, JJ., concurred with MONTGOMERY, J. HOOKER, C. J., concurred in the result.

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THE PEOPLE v. WILLIAM PALMER.

Homicide—Self-defense—Evidence—Instructions—Manslaughter.

1. Where the testimony in a homicide case shows that, on the day of the killing, the deceased exhibited a revolver with which he had armed himself, and threatened to shoot the respondent if he ever crossed his path, it is error to refuse to instruct the jury to consider the threats and the exhibition of the revolver in determining which party was the aggressor, and the probable character of the assault; citing *People v. Harris*, 95 Mich. 87.
2. Where there is testimony in a homicide case which, if believed, would warrant a verdict of manslaughter, the court should define that offense, and instruct the jury accordingly.

Error to Saginaw. (Edget, J.) Argued June 22, 1893. Decided July 26, 1893.

Respondent was convicted of murder in the second degree, and sentenced to imprisonment in the State prison for 30 years. Judgment reversed, and a new trial ordered. The facts are stated in the opinion.

John E. Nolan (*George W. Weadock*, of counsel), for respondent.

A. A. Ellis, Attorney General, and *William R. Kendrick*, Prosecuting Attorney, for the people.

MONTGOMERY, J. The respondent was convicted of murder in the second degree. The offense charged was shooting and killing his brother. The testimony on the part of the people tended to show that on the day of the shooting the respondent and his brother had some words of dispute in a saloon; that the respondent left the saloon, deceased remaining there; that the respondent proceeded to arm himself with a double-barreled shot gun, and returned to the saloon. The deceased had in the mean time armed himself with a revolver. The respondent stepped up to the door of a screen which divided the front from the rear portion of the saloon, and called out to his brother: "Come up! Come up!" The deceased stepped forward, and the respondent fired, and the shot resulted in fatally wounding the deceased. There was testimony also tending to show that the deceased fired upon the respondent before the respondent fired at him. There was some testimony on the part of the respondent that he procured the shot-gun to go hunting; that he had no intention of using it against his brother; and that when he called out in the manner in which he did, "Come up! Come up!" he did so in a bantering way.

The charge of the learned circuit judge was, in the main,

unusually clear. One of the requests prepared by respondent's counsel, to which no reference was made by the charge, we think should have been given. There was evidence showing that deceased had made threats against the respondent; that he threatened to shoot him if he ever crossed his path. These were made by the deceased on the day of the shooting, and after he had armed himself with the revolver. Respondent's counsel asked an instruction as follows:

"In considering which of the brothers, Albert or William, was the aggressor, and the probable character of the assault, you should carefully weigh and consider the previous threats made by Albert, and the purchase and exhibition of the loaded revolver by him, as a person who has made threats against the life of another, and purchased and loaded a revolver a few minutes before, is more likely to make an assault than a person who has made no threats."

This request should have been given, or its substance covered by the general charge. *People v. Harris,* 95 Mich. 87, 90, in which case it was said:

"The testimony tending to show the *animus* or motive of the deceased was, in view of the conflict in the testimony upon that point, competent as bearing upon the question as to which was the assailant."

See, also, *Holler v. State,* 37 Ind. 57; *Stokes v. People,* 53 N. Y. 164.

We also think the court should have defined the offense of manslaughter, and instructed the jury that, if the testimony warranted it, they might convict of the lesser offense. See *Hurd v. People,* 25 Mich. 412; *Maher v. People,* 10 Id. 212; *Pond v. People,* 8 Id. 150. It is possible that the instruction of the circuit judge upon the subject of self-defense was so favorable to the respondent as that, were this the only question in the case, we might be able to say that no harm was done by the omission to define the offense of manslaughter; but, as the case is to

be reversed on other grounds, it is not necessary for us to determine this question. There was evidence from which the jury might have found that the respondent had no malice towards the deceased, but that, after being attacked by deceased, he, in the heat of passion, and in the excitement and confusion caused by the assault, fired the fatal shot, thus reducing the offense to manslaughter, even though the jury would be able to say that the assault did not execuse the homicide.

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

The other Justices concurred.

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THE PEOPLE v. JESSE CARTER.

Criminal law—Manslaughter—Joining in fight—Appeal—Assignments of error.

1. A third person, who espouses the cause of one of the parties to a fight, into which he enters to help whip the other party, is responsible for the death of such party, whether caused by a blow given by himself, or by a kick administered by the surviving party, or from both combined; and the intent of such volunteer may be inferred from his conduct.
2. Questions based upon the alleged failure of the court to give instructions, to which counsel deem they were entitled, on the subjects of self-defense and reasonable doubt, will not be considered on the hearing in the Supreme Court, where the attention of the court was not directed to the alleged omission by requests to charge, and error is not assigned thereon.

Error to Berrien. (O'Hara, J.) Argued June 22, 1893. Decided July 26, 1893.

Respondent was convicted of the crime of manslaughter, and sentenced to imprisonment in the State prison for 15

years. Judgment affirmed. The facts are stated in the opinion.

N. H. Bacon, George S. Clapp, and *Spafford Tryon,* for respondent.

A. A. Ellis, Attorney General, and *N. A. Hamilton,* Prosecuting Attorney, for the people.

HOOKER, C. J. The respondent appeals from a conviction of manslaughter. One McCoy was attacked by a man named Cousins, in a saloon, for wearing some kind of a political badge, obnoxious to Cousins. Blows followed words, Cousins being knocked down once or twice by McCoy, who acted upon the defensive. During the *melée,* Carter, the respondent, ran up and struck McCoy, knocking him down. According to one or more witnesses, Carter struck McCoy twice. There was conflicting evidence as to McCoy's being kicked by Cousins after he was down. At all events, the blow from Carter, or a kick immediately after by Cousins, dislocated the vertebræ of his neck, and killed him. There was no testimony showing preconcert of action upon the part of Cousins and Carter. In his charge, the trial judge instructed the jury as follows:

"If this claim be true, the respondent cannot be convicted unless the blow given by him was the direct cause of McCoy's death, and such blow was not inflicted under the belief that it was reasonably necessary to protect himself from bodily harm; but, gentlemen, if Cousins and McCoy were having an altercation, and Carter, while Cousins and McCoy were scuffling with each other, and knowing that the scuffle between the two had not ended, approached McCoy, and struck him without provocation, and so struck him for the purpose of assisting Cousins to whip McCoy, and if such blow knocked McCoy to the floor, and put McCoy's body in such a position that he was helpless to protect himself from Cousins, and if, while McCoy was in such helpless position, Cousins immediately kicked him, then, gentlemen, such act upon the respondent's part

was unlawful, and in such case he is guilty of manslaughter, if the direct cause of McCoy's death was either the blow given by the respondent, or the kick given by Cousins while McCoy was upon the floor, or both combined."

Error is assigned upon this instruction. We think the court committed no error in this. Had Cousins and Carter joined in any preconcerted effort to whip McCoy, each would have been accountable for the other's acts. If the circumstances show that, during the fight, Carter espoused Cousins' cause, and entered the fight to help him whip McCoy, he became responsible for what followed. It is not necessary that this intention should be shown by Carter's statements, but it may be inferred from his conduct. The question was one for the jury, and was fairly left to them.

Error is assigned upon the refusal to give several requests to charge. All were based upon the proposition that, if death resulted from Cousins' kick, instead of Carter's blow, the respondent should be acquitted, and, as already intimated, the court properly refused them.

In a supplemental brief, presented at the hearing, some questions are raised which have no assignments of error to support them. They are based upon an alleged failure of the trial judge to give instructions to which counsel for the respondent now conceive him to have been entitled, upon the subjects of self-defense and reasonable doubt. It is urged that a verdict should not be allowed to stand if the record shows that the judge did not fully explain to the jury the questions necessary to an understanding of the case. Counsel who tried this case did not deem it necessary to call the court's attention to these matters by requests to charge, nor did he assign error upon them. Both were alluded to in the charge, and the instructions were correct as far as they went. We think, however, that these questions are not entitled to consideration, because not raised by the record.

We find no error in the proceedings, and the same will be affirmed.

The other Justices concurred.

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The People v. Lewis Newton.

Criminal law—Evidence—Hearsay.

Two men were found in the house where a rape had been committed. One was captured, and convicted, and on the trial of another respondent, who was claimed to be the party who escaped, a witness was permitted to testify that, soon after the capture of the respondent who had been convicted, he stated, in the presence of the witness, that the respondent on trial brought him to the house where the crime was committed. And it is held that the testimony was hearsay, and not admissible as a part of the *res gestæ*.

Error to Oakland. (Moore, J.) Argued June 22, 1893. Decided July 26, 1893.

Respondent was convicted of the crime of rape, and sentenced to imprisonment in the State prison for seven years. Judgment reversed, and a new trial ordered. The facts are stated in the opinion.

Atkinson & Carpenter, for respondent.

A. A. Ellis, Attorney General, and *George W. Smith,* Prosecuting Attorney, for the people.

Hooker, C. J. The respondent appeals from a conviction of rape. William O'Brien was also charged with the same offense, and had pleaded guilty. The offense was perpetrated at the residence of complainant during the

absence of the family, and the men were in the house on the return of the family. O'Brien was captured and detained; the other broke away. Soon after, he came to the door, and threatened to shoot Judd Reading if he did not let his partner go. Judd stated that this man was the defendant, Newton. A Mrs. Smith was permitted to testify that a few minutes after the arrest of O'Brien, and after the other man had escaped, but before his return, O'Brien said:

"Mrs. Reading, how came I here? Oh, I know; Lewis Newton brought me here."

The tendency of this testimony was to establish Newton's identity. It was the statement of a confessed criminal that another had brought him to the place where the offense was committed. It was hearsay, and we think was not admissible upon the theory that it was a part of the *res gestæ*.

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

The other Justices concurred.

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JOHN W. EWING v. DANIEL B. AINGER AND CHARLES E. BAXTER.

Libel and slander—Ambiguous article—Question for jury—Member of board of supervisors—Compensation—Services on committee.

1. Where the language of an alleged libelous article is ambiguous, and capable of being understood in an innocent and harmless, as well as in an injurious, sense, its true interpretation is for the jury; citing *Lewis v. Chapman*, 16 N. Y. 371; *Edwards v. Chandler*, 14 Mich. 471.

2. How. Stat. § 502, which provides that each member of the board of supervisors of a county shall be allowed $3 per day for his services and expenses in attending the meetings of the board, and mileage as therein stated, and that said sum shall be in full for all services rendered and expenses incurred in attending the meetings of the board, and while acting upon any committee of the board during its session, and which makes it a misdemeanor to receive further or other compensation, fixes the maximum amount that the members can receive for services rendered the county, and the board has no power to extend it beyond the statutory limit.
3. It is unlawful for a supervisor to receive pay, as a member of a committee appointed by the board of supervisors, for services performed when the board is not in session.

Error to Eaton. (Hooker, J.) Argued June 23, 1893. Decided July 26, 1893.

Case for libel. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James M. Powers, for appellant.

Huggett & Smith, for defendants.

LONG, J. Defendants are the owners and publishers of the Charlotte Republican, a newspaper printed and published at Charlotte. This action is brought to recover damages for libel in the publication of two articles by the defendants in their paper. One was published July 24, 1891, and the other August 20 of the same year, and relate to the action of the plaintiff while a member of the board of supervisors of Eaton county. The first article, as set out in the declaration, is substantially as follows:

"ANOTHER CHAPTER ON JOHN EWING.

"*Editors Republican:*

"Some portions of the records and doings of the board of supervisors may be of interest to the tax-payers of the county.

"October session of 1884, several petitions were presented to the board to abolish the office of county drain commissioner. A committee of three was appointed to investigate and report. A majority reported as follows:

"'Would respectfully report that, in our opinion, such a course at this time would be inexpedient, and prejudicial to the best interests of the county.'

"Mr. Ewing moved that the majority report be adopted. Motion prevailed. Moved to proceed to the election of drain commissioner, the same man being elected by 11 votes.

"January 5, 1885, a committee of three appointed on drainage. Moved that all matters relating to drains and drainage, brought up at this session of the board, be referred to the committee, when appointed. Amended by adding the words—

"'And that the said committee be authorized to receive statements from persons in regard to reports in circulation respecting the action of the present drain commissioner in his duties as such commissioner.'

"Amendment prevailed, and original, as amended, carried; Mr. Ewing being appointed on the committee. January 8, moved that the board deem it inexpedient for the committee to visit the Milbourn extension drain. Motion prevailed. January 15, committee made a report, which is on file in the clerk's office, a part of which is as follows:

"'That there be a committee appointed from this board, whose duties it shall be to hear grievances from any parties, arising from any irregularities of said commissioner; and, if said charges seem to warrant the action of the board of supervisors before their next regular session, then it shall be the duty of said committee to have the board called together, that they may take action on said charges. And we do recommend, as we have not a satisfactory report from said commissioner, that he be requested to make, on or before the 18th of February next, to said committee, an itemized statement,' etc.

"—Which was done by said commissioner, and is now on file in the clerk's office. Not one word authorizing Reformer Ewing to spend so many days at $3 per day, and travel so many miles at 10 cents per mile.

"A claim for damages having been presented for certain acts of the drain commissioner, on October 18, 1885, Mr. Ewing, for the committee, submitted the following report:

"'Would report that we have carefully considered the same, and we do not believe the county is in any way responsible, and would refer you to Michigan Reports, vol. 49, page 479, which says: "A township is not responsible for the defaults and misconduct of its drain commissioner in the performance of his statutory duties." Your committee would report the said claim back to this body, with the recommendation that the same be disallowed.'

"Motion prevailed. Then he brings claim for $61.80, as stated last week by your correspondent. O consistency, thou art a jewel!

"He figures very liberally on his own claims, but reports a claim of Dr. E., and moves that it be allowed at $5—one-half the amount claimed. He also reports the claim of Dr. A., of $45, and moves

that it be allowed at $20. All this without regard to the value of the services performed. Many more such instances could be cited, but these are sufficient to convey an idea of his methods on the board. Oh, yes, he loves the tax-payer, as the following items will show: The total amount received by him from the tax-payers of Eaton county in the last eight years, so far as found, foots up at $848.62, and this does not include what he has received from his own town as supervisor. We even find that he has drawn from the county treasurer, for his services in caring for the poor of his township since November, 1883, the sum of $92.50, being $11.56 per year. We doubt if the poor families in the county, receiving help, will average as much for the same length of time; the supervisors of Benton, Bellevue, and Vermontville, combined, only drawing $121.74 for their services. We mention these towns, as each has a village. Economy for the tax-payer, you see, is his motto.

"We now present a tabulated statement of the amount drawn by him for services and mileage for the various sessions of the board, and the amounts to which he was lawfully entitled."

The tabulated statement is not set out here, but consists of a statement of the number of miles charged for traveling, and miles which it is claimed he was entitled to; days charged, and days he was entitled to; and the amount of claimed overcharge,—in each year from 1883 to and including the session of the board in 1891; making a total claimed overcharge for *per diem* and mileage of $200.82. Continuing, the article reads:

"Now, to be fair with Mr. Ewing, his attention is called to the above table, and he is invited to select out such items therein as he deems to be wrong, and state to the public wherein they are incorrect; and we ask Mr. Ewing to state, over his own signature, what the distance (by the nearest traveled route) is from his home to Charlotte. To be exact, is it not 13⅝ miles? Also we ask him what the statutory fee allowed members of the board of supervisors per mile is; and, again, to state the statute which allows him fees as supervisor for any work, except during the session of such board. When he does this, we have a long list of others to call his attention to; and, like Banquo's ghost, these inquiries will not down until they are answered, and until this modern reformer has himself reformed. Oh, yes, he loves the tax-payer, and is 'very careful of the people's money,' when he 'gets it.'

"ONE OF THE TAX-PAYERS."

The second article, as set out in the declaration, is as follows:

"We have waited patiently to hear Reformer John deny the charges made in the Charlotte Republican, of taking money from the treasury that did not belong to him, yet we have heard nothing drop. Let her drop, John."

The defendants, under their plea of the general issue, gave notice, among other matters of defense, that the statements contained in the articles were true. These articles were put in evidence on the trial. It was admitted by plaintiff that he received the several sums of money mentioned in the tabulated statement, but he claims he received them for services on committees at times when the board was not in session, and that at such times, and for such services, he could lawfully take this compensation. It was further insisted that the articles charged him with receiving such moneys at times when the board was in session.

The court below directed the jury that the first article charged the plaintiff with having taken this $200.82 unlawfully, and that it was libelous *per se*, and could be defended only by showing its truth. He also directed the jury that there was a controversy between counsel as to its meaning.

Counsel for plaintiff, it seems, contended in the court below, and he now contends here, that the article charged plaintiff with having received the money for mileage in attending sessions, and for services during such actual attendance for a greater number of days than the statute allows, and as extra compensation, which he had no right to take. On the other hand, it was claimed by defendants' counsel in the court below, and is now claimed, that the article simply charged the plaintiff with having received the money for work done when the board was not in session, and that money so received was unlawfully taken; and it was further claimed that this statement was

true. The court below left the question of the meaning of the article for the determination of the jury, saying:

"Does it mean, and does it convey the impression upon its face to the ordinary observer or reader, that the amounts and items charged here are for services and mileage performed in attending the sessions of the board, respectively, merely, or does it convey the impression that the items here include the amounts at other times, such as that mentioned in the proof,—for instance, work done upon committees at times when the board was not in session; mileage to and from one place or another, where it might be supposed to be necessary that such committee should work while the board was not in session? To determine this question, you are to take into consideration the entire article, and determine from that whether it will bear the latter construction. If it will, then, of course, evidence of money received, if unlawfully received, for such attendance upon committees, could be legitimately used to swell the aggregate to $200.82."

Of the second article, the court directed the jury that there could be no doubt of its meaning, and that it plainly charged that the plaintiff took money from the county treasury that did not belong to him; that the publication of the two articles was not denied, and unless the defendants had proved both substantially and wholly true, in the sense they should be read, the verdict should be for the plaintiff.

The court was not in error in leaving the meaning of the first article to the determination of the jury. It was for them to say whether one reading it would be led to believe that it charged, or intended to charge, the plaintiff with having taken this money for services while on the board, and for more days than the statute allows, or whether it was simply intended to charge by the article that he took it for services when the board was not in session. The article is ambiguous, and it became a question of fact, for the jury, to determine its meaning. The language does not necessarily imply that the money was taken while the board was in session. The article asks Mr. Ewing "to state the statute which allows him fees as supervisor for

any work, except during the session of such board." There is no doubt that where the language of an alleged libel is ambiguous, and capable of being understood in an innocent and harmless, as well as an injurious, sense, its true interpretation is for the jury. *Lewis v. Chapman*, 16 N. Y. 371; *Edwards v. Chandler*, 14 Mich. 471.

It was a very material question, on the trial of this case, what interpretation the court or jury might give the article. If it applied to moneys unlawfully received while the board was in session, there was grave doubt whether there was sufficient proof of its truth; while, on the other hand, it was admitted that plaintiff received the money for doing committee work when the board was not in session, and it was claimed by plaintiff, as matter of law, that he had a right to receive it. This claim raises the other important question in the case. The court below directed the jury that the board of supervisors had no authority to appoint such committees, and pay for services performed outside the session of the board, and that receiving money under such circumstances was unlawful.

How. Stat. § 502, provides:

"Each member of such board of supervisors shall be allowed a compensation of three dollars per day for his services and expenses in attending the meetings of said board, and six cents a mile for each mile necessarily traveled in going to and returning from the place of such meeting, to be audited by the board and paid by the county; which compensation of three dollars per day shall extend to and be allowed for the first twelve days only of any continuous regular session, and six days only for an adjourned session of said board, and for the first three days only of any special session of said board, of which special session there shall be no more than two in any one official year; which said amount shall be in full for all services rendered and expenses in attending the meetings of such board of supervisors, and for all services and expenses incurred while acting upon any committee of said

board of supervisors during the session of said board; and any supervisor receiving further or other compensation for such services shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars."

It is contended by counsel for plaintiff that the statute prohibits committees appointed by the board from receiving compensation only during the session of the board, and that any services rendered by a member while on a committee may be charged for and paid, if such services are rendered while the board is not in session.

It is evident from the reading of the statute that the Legislature intended to fix and establish the maximum amount that the members of the board of supervisors could receive for services rendered to the county, and not to leave it to the board to extend it beyond the limit fixed by this statute.

In *Kennedy v. Gies*, 25 Mich. 83, the statute of 1871, relative to the compensation of the board of auditors of Wayne county, came before this Court. That statute, after fixing the salary of the auditors, recited, "which sum shall be in full for all services and expenses and traveling fees in attending upon the duties of the office," and made it a misdemeanor for any auditor to receive further or other compensation. It was held that the statute was not void under article 10, § 10, of the Constitution. It was said in that case:

"It is true that statutes and constitutions have sometimes given express power to certain township, or county, or city officers, or boards, to audit and allow their own claims for services, though this, when given, has generally been from some supposed necessity, or when it could be of little moment, and subject to some restriction as to amount, or to review by some other tribunal. And it may, we think, be laid down as the sound and only safe rule

that such a power can only be given by express words or necessary implication, and should never be recognized when the language used, when interpreted by the light of the past legislative and judicial history of the State, will permit a reasonable and probable inference of a contrary intent."

If the statute were to be given the construction contended for by the plaintiff, it would be rendered wholly nugatory. Any member of a committee could be appointed by the board to act outside of, and beyond the session of, the board, and the absolute power would rest with the board to allow such member for any number of days and number of miles traveled, in its discretion. There would be no tribunal to review the action of the board, and it would leave the board judges of their claims, without any power of review. Clearly, it was not the intent of the Legislature to do this, but to fix the maximum amount which the members of the board might receive. The court below was correct in the construction of this statute.

Some other questions are raised. We have examined them, but do not deem it necessary to discuss them. The case was presented to the jury under a very full and fair charge, and the jury found in favor of the defendants.

Judgment affirmed.

McGRATH, GRANT, and MONTGOMERY, JJ., concurred. HOOKER, C. J., did not sit.

JULIAN NARCISSE MARQUET, BY HIS NEXT FRIEND, v. ANTON LA DUKE.

Negligence—Keeping savage animals—Evidence.

1. One who keeps an untamed and savage bear in grounds which he knows are frequented by citizens, with his acquiescence, is charged with a greater degree of care than if the locality were more private; and evidence of how the grounds are occupied and used is admissible, in a suit to recover for injuries received from being bitten by the bear, as bearing upon the question of the defendant's negligence, and the alleged public character of the place.
2. Evidence that a father orders and pays for supplies for a hotel, in which he keeps a saloon, and which he claims is run by his son, is admissible as tending to show the father's proprietorship of the hotel.
3. A witness who was shown a lease of a hotel from a father to his son cannot testify, in a suit in which the question of which is the proprietor is in issue, that they told him that the son ran the hotel.

Error to Menominee. (Stone, J.) Argued June 27, 1893. Decided July 26, 1893.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

J. M. Opsahl (*B. J. Brown,* of counsel), for appellant.

Sawyer & Waite, for plaintiff.

HOOKER, C. J. The defendant appeals from a verdict and judgment rendered against him, in favor of a child of six years of age, who was bitten by a bear alleged to have been kept by defendant.

The following is a copy of the declaration:

"Julian Narcisse Marquet, by his next friend, Narcisse Marquet, of the city of Menominee, in said county, plaintiff herein, by

Sawyer & Waite, his attorneys, complains of Anton La Duke, defendant herein, of a plea of trespass on the case, filing this declaration, entering rule to plead, etc., as commencement of suit.

"For that whereas, the defendant above named, on October 24, 1891, and for a long time previous thereto, had occupied and controlled the Eagle Hotel, a public house, situated in the city of Menominee, Mich.; that there were public grounds surrounding said hotel, to which the public was invited, and through which it (the public) was freely permitted to pass; that said Eagle Hotel, on said 24th day of October, was occupied as a public house of entertainment, and the grounds about the same were open as a place of recreation to people in a public way, and were uninclosed, free access being given to said grounds from Ogden avenue, a public street, on the south, and from Dunlap avenue, another public street, upon the north; that upon the said 24th day of October, and for a long time, to wit, for one month or more, previous thereto, the defendant kept two black bears in the grounds about said hotel, between it and Ogden avenue; that said bears were untamed, savage, and ferocious, which was well known to the defendant; that said bears were not confined or excluded from contact with people who passed through said grounds, save and except by a chain fastened to a collar about their necks, and connected to a post in the ground at the other end, said chain being 10 or 12 feet long; that there was a way or road leading from Ogden avenue to Dunlap avenue, aforesaid, through the grounds above mentioned, and near where the bears aforesaid were placed, along which way people—men, women, children—and vehicles were allowed and invited to pass by said defendant, in close proximity to said bears, so close that said bears could seize persons passing along the same; that on said 24th day of October, aforesaid, the plaintiff herein, a boy between five and six years of age, in company with other children, was passing through the grounds contiguous to said Eagle Hotel, near where said bears were chained, when, without any negligence on the part of the plaintiff, one of said bears so kept and owned by defendant as aforesaid seized plaintiff in a ferocious manner, with its paws and teeth, and lacerated, bit, bruised, and scratched him, making large wounds in his head and body with its claws and teeth, and otherwise lacerated and injured the plaintiff, whereby his under jaw was broken in three places, his left arm broken in two places, and his shoulder smashed in a frightful manner, and other injuries then and there did to the plaintiff, whereby he has suffered great physical pain and anguish, having to undergo painful surgical operations by reason thereof, being confined to his bed in a critical condition for a long time; that said injuries were caused solely on account of the negligence, carelessness, recklessness, and heedlessness of the defendant, who

was well aware and had full knowledge and notice of the ferocious and savage nature and ugly disposition of said bears; that said defendant was negligent, heedless, reckless, and careless in keeping said bears in a place so exposed, without providing a watch or guard over them, and without placing a fence or pen around them, and defendant was guilty of recklessness and negligence in keeping said bears in the open grounds, where people could come in contact with them; that it was heedless and reckless to keep said bears in such an exposed place, fastened with a chain as long as the one with which they were fastened on said day; that it was negligent in said defendant to keep said bears anywhere without having them securely guarded and protected, that children of tender years could not come in contact with them; that plaintiff suffered great damage by reason of the biting, scratching, wounding, bruising, breaking, and lacerating, as aforesaid, whereby he was caused great pain and suffering, and permanently disabled and crippled, to wit, to the amount of $10,000. Therefore the plaintiff demands judgment against the defendant for the sum of $10,000, together with the costs in and about this action incurred and expended."

Upon the argument it was contended that the proofs did not support the allegations of the declaration in the following particulars, viz.:

1. That the grounds where the child was bitten were public grounds, and open to the people in a public way.
2. That they were uninclosed.
3. That the driveway passed through them.
4. That the bears were so close to the driveway that they could seize persons upon it.
5. That the plaintiff was on the driveway without negligence when seized.

If it is to be held that the grounds must have been owned by the public to support the declaration, it must be admitted that the declaration was not supported by the proof. But the plain meaning of the declaration is that defendant occupied and controlled the premises where the bears were kept, and that he opened them to the general public. The statement that they were uninclosed is qualified by the explanation that free access was given from streets on the north and south. Proof that sustains this interpretation of the declaration is not wanting in the

record. There was also evidence tending to show that the road or driveway passed through the grounds as alleged. There was evidence that the driveway had no gate at one end, and that the driveway had been put there for the convenience of people passing through who wanted to go to the hotel, and that it was frequently used by persons, especially by footmen, going from one street to the other. We find no proof sustaining the allegation that the bears could seize people within the driveway, but it is immaterial, and may be treated as surplusage, as the declaration does not allege that the child was in the driveway when seized by the bear, but states that he was passing through the grounds contiguous to the hotel when seized. There being proof that the defendant was the keeper of the bear, that the place was public, in the sense mentioned, and that the plaintiff was bitten at the place stated, there was enough to go to the jury, and the trial court properly refused to direct a verdict for the defendant. This disposes of the 1st, 2d, 12th, and 13th assignments of error.

A point is raised over the admission of evidence tending to show how the grounds were occupied and used. We think, however, that this was admissible, as bearing upon the question of negligence. If defendant kept a bear in a place that he knew to be frequented by the citizens with his acquiescence, the degree of care required would be greater than it would be if the locality were more private. It also bore on the question of the alleged publicity of the place. This disposes of the 3d, 5th, and 6th assignments of error.

A number of witnesses testified to dealings with the defendant in relation to supplies furnished for the hotel, and, while we may not be impressed with the justice of the finding of the jury upon the subject, we must recognize the fact that evidence tending to show that defendant ordered and paid for such supplies tended to show his pro-

prietorship. The 4th and 9th assignments apply to evidence of this kind.

W. Reindl, a witness for the defendant, testified upon direct examination that he was a brewer, and sold beer to the defendant for the saloon that was kept on the premises. He stated that John La Duke, defendant's son, kept the hotel, and that defendant owned the saloon. He knew that defendant owned the saloon because he was his bondsman. On cross-examination he stated that he concluded that the son ran the hotel, and was in possession of the premises, because they showed him the lease from defendant to his son, and told him so. He said that was all the way he knew, whereupon the court struck out his answer, except as to his statement that he saw the lease. In so doing, the court committed no error, as the evidence was hearsay.

We find no error, and the judgment must be affirmed.

The other Justices concurred.

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HOMER A. DAY v. JAMES A. BUTTON, REGISTER OF DEEDS OF GENESEE COUNTY.

Public records—Right to examine—Abstracter of titles.

1. The right to examine the records and files in the office of the register of deeds, and to make *memoranda* therefrom, for the purpose of making a set of abstract books, is established by *Burton v. Tuite*, 78 Mich. 363, 80 Id. 218.

2. In exercising this right, the register of deeds cannot be unduly annoyed by a large force, or by work at unseasonable hours, or by a monopoly of furniture, office room, or records to the exclusion of other persons, and he has the right to prescribe a reasonable use of the same.

Mandamus. Argued June 27, 1893. Granted June 28, and opinion filed July 26, 1893.

Relator applied for *mandamus* to compel respondent to allow him access to the public records for the purpose of making a set of abstract books. The facts are stated in the opinion.

H. R. Lovell and *George H. Durand,* for relator.

Charles H. Wisner, for respondent.

PER CURIAM. The relator and several others, being engaged in making a set of abstract books of the titles to land in the county of Genesee, applied to the register of deeds for the privilege of access to the public records and files in his office. Several interviews were had and some letters passed between relator and the respondent in relation to the matter, which need not be set forth here. It is sufficient to say that relator asks the privilege of examining all records and files in the office, and of making *memoranda* therefrom, for the purpose of making a set of abstract books. The respondent refused this privilege on the ground that the public convenience would be interfered with thereby. He offered the privilege of making an abstract or search or of copying any instrument recorded, but declined to allow relator and his assistants to work continuously at the table provided for the use of the public, claiming that it was being monopolized by them to the exclusion of the public. Relator having in his hand one of the books of record of deeds, it was taken from him by respondent, and replaced in the vault, and its further use denied for the purpose mentioned. The answer of respondent sets forth the size of his office, and arrangement of the furniture therein, presumably to corroborate his claim that he cannot accommodate the relator and his clerks

without inconvenience to himself and the public. He further asserts that all such furniture is necessary for the general business of the office, and that it is impossible to accord the privileges demanded and perform the duties of the office.

The record seems to warrant the conclusion that respondent denies to relator the use of the records and a place to make *memoranda* for a set of abstract books, upon the ground that he has no legal right to the same. If the case of *Webber v. Townley*, 43 Mich. 534, justifies this contention, we think the decisions of this Court in the cases of *Burton v. Tuite*, 78 Mich. 363, 80 Id. 218, have overruled the case of *Webber v. Townley*, and established the right of a person to look at the records and make *memoranda* for a set of abstract books. This right does not permit the register to be unduly annoyed by a large force, or by work at unseasonable hours, or by the monopoly of furniture, office room, or records to the exclusion of other persons, or interfere with his right to prescribe a reasonable use of the same. It does, however, require that he recognize relator as one of the public, and accord to him reasonable privileges for the accomplishment of his purpose. We do not feel called upon to specify the number of persons that respondent must accommodate, or to prescribe the rules which he may require relator to observe. These should be made with reference to the circumstances, and with a view to the reasonable use by relator of books and office. We assume that, the question of the right to use the same being settled, the parties can adjust their differences.

The writ must issue as prayed, requiring the respondent to permit relator to have reasonable access to the records and files in his office for the purpose aforesaid.

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HOWARD L. MERRIMAN ET AL. v. ERASTUS PECK, CIRCUIT JUDGE OF JACKSON COUNTY

[See 95 Mich. 277.]

Appeal from probate court—Failure to file record—Dismissal—Allowance of new appeal—Laches.

1. How. Stat. § 6784, which provides that if any person aggrieved by any act of the judge of probate shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may allow an appeal to be taken and prosecuted with the same effect as if it had been seasonably done, gives the aggrieved party the right to petition for leave to appeal where he has failed either to claim or to prosecute an appeal.
2. The fact that an appeal has ceased to be of effect because of the failure of the appellant to file a copy of the proceedings appealed from in the circuit court within 30 days after the appeal was taken, as required by Act No. 174, Laws of 1887 (3 How. Stat. § 6782), will not prevent the circuit court from allowing an appeal to be taken and prosecuted under How. Stat. § 6784.
3. Where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect his appeal, he ought not to lose his right to an appeal through the neglect or oversight of the attorney, where justice requires a revision of the case.

Mandamus. Argued June 27, 1893. Denied July 26, 1893.

Relators applied for *mandamus* to compel respondent to vacate an order permitting an appeal to be taken from an order admitting a will to probate. The facts are stated in the opinion, and in 95 Mich. 277.

Barkworth & Blair, Smith & Ware, and *Austin Blair,* for relators.

Eugene Pringle and *Wilson & Cobb,* for respondent.

MONTGOMERY, J. This is an application for a *mandamus* to compel the respondent to vacate an order permitting an appeal to be made from an order admitting a will to probate, under section 6784, How. Stat. It appears that a previous appeal had been taken by the contestant, Dwight Merriman, and that by reason of his failure to file his record in the circuit court within the time allowed by section 6782, 3 How. Stat., the appeal was dismissed.[1] Section 6784 provides that—

"If any person aggrieved by any act of the judge of probate shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may, on the petition of the party aggrieved, and upon such terms as it shall deem reasonable, allow an appeal to be taken and prosecuted with the same effect as if it had been done seasonably."

It is contended by the relators that the words "or prosecute" must be construed to refer to the proceedings in the probate court; but we do not think the statute open to this construction. The appeal referred to is very plainly an appeal from the determination of the judge of probate, and we think the language susceptible of but one interpretation, so that by the very terms of section 6784 an aggrieved party has the right to petition for leave to appeal either where he has failed or omitted to claim an appeal, or has failed or omitted to prosecute his appeal.

A more serious question is whether section 6782 amends this section by implication, so as to take away the right to an appeal, upon a showing such as is required by section 6784, in all cases where the aggrieved party has once claimed a right to an appeal. Section 6782, as amended by Act No. 174, Laws of 1887, provides, in effect, that

[1] See *Merriman v. Circuit Judge,* 95 Mich. 277.

the party appealing shall file in the circuit court a certified copy of the proceedings within 30 days after an appeal is taken, and, in case of failure to do so,—

"Such appeal shall cease to be of effect, and the order or decree so appealed from shall stand as though such appeal had not been taken: * * * *Provided*, that the circuit court to which the appeal is taken shall have power, upon application within the first ten days of the term of court next succeeding the expiration of the said thirty days for filing said certified copy, to reinstate said appeal, when the party making the appeal has been prevented from perfecting the same by circumstances not under his control:"

It is urged that this proviso covers the whole ground covered by section 6784, and provides another and different method of procedure in case of neglect to prosecute the appeal. We think, however, that the two sections may stand together. The one, namely, section 6782, provides the manner of *reinstating* the appeal which the party has taken, and limits the right to *reinstate* such appeal to the first 10 days of the term next succeeding the expiration of the 30 days allowed for filing his record. It is to be noted that no showing of merits is required upon such an application. It is not even essential that the circuit judge shall determine that justice requires a revision of the case. The only question to be considered is the question of the default of the party in failing to follow his appeal within the time. If he fails to do so, or fails to excuse the default, then the appeal shall cease to be of effect, and the order appealed from shall stand *as though such appeal had not been taken.* If this is the attitude of the party in law, then section 6784 confers the right to a dilatory appeal, if he is able to bring himself within the provisions of this section. Under this section, something more than an excuse for his default is necessary, and that is that he has failed to claim or prosecute his appeal according to law without default on his

part, and that *justice requires a revision of the case.* Repeals by implication are not favored, and where, as in this case, the two statutes can be read together, and given a construction which will allow both to stand, such construction should be adopted.

The showing made before the respondent was sufficient to excuse the omission of Mr. Merriman, unless it be held that he is chargeable with the default of his attorney; but we think that where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect an appeal, he ought not to lose his right to an appeal, where justice requires a revision of the case, through the neglect or oversight of the attorney. *Loree v. Reeves,* 2 Mich. 133; *Capwell v. Baxter,* 58 Id. 571; *Babcock v. Perry,* 4 Wis. 31. We think that there was sufficient to call upon the circuit judge to exercise his discretion, and do not think that discretion has been abused.

The writ will be denied, with costs.

The other Justices concurred.

In the Matter of the Estate of James W. Sanborn, Deceased. John P. Sanborn v. Watson Beach, Circuit Judge.

Change of venue—Disqualification of judge—Statutes.

1. Where the showing made upon the hearing of an application for the transfer of a cause because of the disqualification of the circuit judge covers all of the statutory facts entitling the petitioner to such transfer, the officer to whom the application

is made, as a general rule, is required to make the order asked for.[1]

2. Act No. 30, Laws of 1891, which makes it the duty of the circuit judge of the sixteenth judicial circuit, as reorganized by said act, to aid and assist the judge of the thirty-first judicial circuit in transacting its business so far as he can without detriment to the business of his own circuit, does not purport, in terms, to give him the *right* to sit in the thirty-first circuit for the purpose of hearing cases in which the resident judge is disqualified, and does not suspend the operation of the general statute providing for the transfer of such cases.

3. Act No. 208, Laws of 1893, which purports to impose upon the circuit judge of the sixteenth judicial circuit the duty of holding court in the thirty-first judicial circuit whenever the resident judge is disqualified, and which prohibits the transfer of cases from either of said circuits on account of the disqualification of the judge thereof, unless both of said judges are disqualified or refuse or are unable to sit therein, does not apply to an application for a transfer which had been passed upon at the time of the passage of the act.

Certiorari to review proceedings resulting in an order refusing to transfer a cause from St. Clair to Wayne county. Argued June 27, 1893. Order reversed July 26, 1893. The facts are stated in the opinion.

Henry M. Duffield, for petitioner.

Stevens & Merriam and *D. N. Lowell,* for respondent.

MONTGOMERY, J. This is *certiorari* to Watson Beach, circuit judge, to review his decision refusing to make an order transferring the cause from St. Clair county to the county of Wayne for trial.

The showing for removal was complete. The findings of fact made by the circuit judge show that the circuit judge of St. Clair county is disqualified, and all the other facts entitling the petitioner to an order for removal. Under these circumstances it is the general

[1] See *Grostick v. Railroad Co.*, 96 Mich. 495, and note.

rule that the circuit judge has no discretion in the matter, but is required to make the order for removal. See *Grostick v. Railroad Co., ante,* 495, and cases there cited.

But it is contended by the defendant in *certiorari,* and the circuit judge so held, that Act No. 30, Laws of 1891, being an act to reorganize the sixteenth judicial circuit, should be given effect to suspend the operation of the general statute relating to transfer of causes depending in St. Clair county. It is urged that this statute provides a way in which parties having causes there depending may have them tried before a judge who is not disqualified, without a transfer, and that this is a remedy substituted in such cases for that furnished by the general statute, namely, a transfer of the cause. The provision of the statute imposing this duty upon the circuit judge of the sixteenth judicial circuit is as follows:

"It shall be the duty of the circuit judge of the sixteenth judicial circuit, as hereby reorganized, to aid and assist the judge of the said thirty-first judicial circuit in transacting the business of the last-named circuit so far as he can without detriment to the business of his own circuit, until January 1, A. D. 1894."

We do not think the general statute relating to transfer of causes was suspended by this provision. It will be observed that the judge of the sixteenth circuit was not at all events to sit in St. Clair county, but only when the business of his own circuit would permit him, and he was the judge of this. The statute does not purport, in terms, to give him the right to sit in St. Clair county for the *purpose* of hearing cases in which the resident judge is disqualified, but his authority is general; so that it cannot, we think, be said that the Legislature had in mind a substitute for the remedy by transfer, in imposing this duty upon the judge of the sixteenth circuit. Repeals or amendments by implication are not favored, and we think that there is no clear implication in the present case that

it was the legislative intent to suspend the general statute in St. Clair county. The order should have been made as prayed.

Since this case was pending in this Court another statute has been enacted by the Legislature, which was approved May 27, 1893. This statute is broader than Act No. 30, Laws of 1891, and purports to impose upon the circuit judge of the sixteenth circuit the duty of holding court in the thirty-first circuit whenever the judge of the latter court is disqualified. Section 3 of the act provides as follows:

"No cause shall be transferred or removed from either of said circuits on account of the disqualification of the judge thereof, except it be shown that the judges of both of said circuits are disqualified from sitting in said cause, or that they refuse or are unable to sit therein."

This act was given immediate effect.

It is the general rule that the rights of parties on appeal are to be determined by the *status* of the cause at the time the appeal is taken. We think that rule should not be departed from here. Section 3 of the act, we think, is prospective in its operation. It provides that no cause shall be transferred except it be shown that the judges of both of said circuits are disqualified from sitting in such cause. It is very clear that this provision is intended to relate to a showing *to be* made upon the application to transfer the cause, and not to one which *has already been made* to the proper authorities. The effect of the order in the present case, reversing the action of the circuit judge, would be to operate as a transfer of such cause from the date of the hearing of the application. We think this proceeding ought not to be arrested, and the petitioner remitted to his remedy by making a new showing on the application for a transfer of said cause, other and different from that which was required at the time his

application was properly made, containing all the statutory requisites.

The order of the circuit judge will be reversed, with costs against the estate.

The other Justices concurred.

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CHAUNCEY F. COOK v. MARTIN L. FOSTER, JANE FOSTER, AND RACHAEL G. PORTER.

Mortgage—Merger—Recording laws—Foreclosure—Notice of sale—Deed.

1. There can be no merger where the transaction is tainted with fraud on the part of the mortgagor and grantor, and the mortgagee and grantee has acted in good faith; citing *Bank v. Webb*, 56 Mich. 383.

   So *held*, where a mortgagor accepted a proposition from a second mortgagee to take a deed of the land, and purchase the first mortgage, and give the mortgagor the privilege of selling the land, and making all he could in excess of the mortgagee's claim, after which he executed and recorded a deed of the land to the mortgagee, in which he fraudulently inserted a clause by which the mortgagee assumed and agreed to pay the first mortgage, and also a third mortgage recorded the same day, and just prior to the recording of the deed, and of which the mortgagee had no knowledge, which deed was repudiated by the mortgagee as soon as she was informed of its contents, there having been no manual delivery of the deed, or change of possession of the land, or surrender of the mortgage and note, or discharge of the mortgage.

2. Purchasers, intervening mortgagees, and their assignees are not justified in relying upon the record of a deed of the mortgaged premises from the mortgagor to the mortgagee, as showing merger, where the mortgage has not been discharged of record, such fact being sufficient to put them upon inquiry.[1]

[1] See *Pritchard v. Kalamazoo College*, 82 Mich. 587.

3. The notice of sale on the statutory foreclosure of a mortgage need not be dated, and, if not dated, it will date from its first publication.
4. The statutory foreclosure of a mortgage will not be voided by including in the amount claimed to be due at the date of the notice of sale an installment maturing the following day, in the absence of evidence showing bad faith on the part of the mortgagee or actual injury to the mortgagor.
5. The execution of a deed on the statutory foreclosure of a mortgage by the under-sheriff, who made the sale, can be acknowledged before the sheriff, who is a notary public.

Appeal from Hillsdale. (Lane, J.) Argued June 28, 1893. Decided July 26, 1893.

Bill to set aside a sheriff's deed on foreclosure, and to foreclose a mortgage. Decree dismissing bill affirmed. The facts are stated in the opinion.

James S. Galloway, for complainant.

F. A. Lyon and *A. B. St. John,* for defendant Porter.

GRANT, J. Defendant Martin L. Foster was the owner of the land in controversy. At the date of his purchase it was subject to a mortgage of $600, dated October 15, 1881. Foster and his wife, who was the daughter of defendant Porter, executed to Mrs. Porter a mortgage for $1,419, October 6, 1883. September 12, 1884, they executed a third mortgage, for the sum of $700, to one Huff. October 11, 1886, the Huff mortgage was discharged. On the same day another mortgage was executed by Foster and his wife to one Knowles, for $761.25. The consideration for this mortgage was the payment of the Huff mortgage, and a small amount which Foster owed Knowles. This mortgage, while dated and acknowledged October 9, was not, in fact, executed until the 11th. On October 11, Foster and his wife executed a warranty deed to Mrs. Porter, the expressed consideration in which was $3,000. It was made subject

to the mortgage for $600, and also to the Knowles mortgage, and contained the statement that the grantee, Mrs. Porter, assumed and agreed to pay these mortgages. This deed and the Knowles mortgage were both recorded October 11, the former at 2:45 P. M., and the latter at 2:35 P. M.

A short time previous to the execution of this deed, Foster applied to Mrs. Porter for a further loan of money, which she refused. This request by Foster was for $42, with which to pay interest on the first mortgage. Mrs. Porter testified that she then proposed to him that she would buy the first mortgage if he would give her a deed of the land, and that she would enter into a contract with him, giving him the privilege of selling the farm, and making all he could over and above her claim. Foster, on the contrary, testified that her proposition was to pay the mortgages if he would deed to her, and give him the privilege of selling, and of making all he could over and above the mortgages. Foster finally accepted the proposition, and promised to make out the deed, and Mrs. Porter let him have the $42. Two days afterwards he wrote to Mrs. Porter that he had paid the $42 on the mortgage, and would make out the deed the next day. The deed was executed, and left by Foster with the register of deeds for record. Foster testified that he directed the register of deeds to send the deed by mail to Mrs. Porter. This, evidently, was not done, and when, some months afterwards, Mrs. Porter's husband went to the register of deeds, with Foster, to see about the matter, Foster produced the deed from his pocket, and handed it to Mr. Porter. Until this time, neither Mrs. Porter nor her husband had any knowledge of the contents of the deed, and all they knew about it was what Foster had told them. Mr. Porter was present at the conversation between his wife and Foster in regard to the deed. On receiving the deed from Foster, he immediately read it, and returned it to him, stating that it was not such a deed as was

agreed upon. He reported the fact to his wife, who thereupon repudiated the deed, and commenced a foreclosure of her mortgage by advertisement. The land was sold, bid in by Mrs. Porter, and a sheriff's deed executed to her. Mr. Porter, at the request of his wife, purchased the first mortgage. Mrs. Porter testified that she knew nothing about the Huff mortgage. Foster did not inform her that he intended to execute a new mortgage to Knowles, and make the deed subject to that. Foster remained in possession of the farm. Mrs. Porter's mortgage was not discharged, nor was it or the note surrendered or canceled.

Complainant purchased the Knowles mortgage in reliance upon the record, and in the belief that Mrs. Porter's mortgage was merged in the deed to her. Upon learning of the foreclosure proceedings, he filed the bill in this cause to set aside the sheriff's deed to defendant Porter, and to foreclose his mortgage. The court below entered a decree dismissing the bill.

1. The court below found that the deed from Foster to Mrs. Porter was fraudulent and void. The testimony was taken in open court, where the circuit judge had the opportunity to see the witnesses. It is conflicting, but we think that the conclusion of the learned circuit judge is fully justified by the evidence. It follows, therefore, that Mrs. Porter was justified, as against Foster, in repudiating the deed, and in foreclosing her mortgage. There can be no merger where the transaction is tainted with fraud on the part of the mortgagor and grantor, and where the mortgagee and grantee has acted in good faith. *Ann Arbor Savings Bank v. Webb,* 56 Mich. 383.

It is the well-established rule, in determining the question of merger, that the intent is the controlling consideration. If it be for the interest of him in whom the estates are united to keep the mortgage alive, the law will not imply an intent to merge. 4 Kent, Comm. 103; 15 Amer.

& Eng. Enc. Law, 324-327; *Stantons v. Thompson,* 49 N. H. 272; *Campbell v. Carter,* 14 Ill. 286; *Ann Arbor Savings Bank v. Webb, supra.* Where mortgaged premises were conveyed by a mortgagor to a mortgagee in satisfaction of the mortgage, and for the purpose of avoiding the expense of a foreclosure, and the notes and mortgage were surrendered, the conveyance was held not to operate a merger, where there was an intervening mortgage, of which the grantee was ignorant. *Brooks v. Rice,* 56 Cal. 428. See, also, *Fuller v. Lamar,* 53 Iowa, 477 (5 N. W. Rep. 606); *Richardson v. Hockenhull,* 85 Ill. 124.

In the well-considered case of *Stantons v. Thompson, supra,* after citing and commenting upon the authorities, the court say:

"We think it may be deduced from the authorities quoted that, when the estates of the mortgagee and mortgagor are united in the former, he has, in equity, an election to keep the mortgage title on foot, and that wherever it is for his interest, by reason of some intervening title or other cause, that the mortgage should be upheld as a source of title, it will not, at law, be regarded as merged."

It was well said in *Ann Arbor Savings Bank v. Webb, supra:*

"Few persons, unlearned in the law, are acquainted with the doctrine or effect of merger."

In the present case there was no change of possession of the mortgaged premises, no actual delivery of the deed, no knowledge of the intervening mortgage, no surrender of the mortgage or note, and there was a prompt repudiation of the fraudulent deed. Under these facts, it cannot be held that a merger was intended.

Campbell v. Carter, 14 Ill. 286, relied upon by complainant's counsel, does not support his contention. In that case the mortgagee had recovered judgment on both the notes and mortgage, and was endeavoring to enforce

satisfaction. The mortgage was not signed by the wife. The mortgagor proposed an absolute conveyance, with covenants of warranty and the release of dower, in satisfaction and discharge of the debt. The proposition was accepted, the deed executed, the judgment satisfied, and the mortgage discharged, and all evidence of indebtedness was canceled. The court held that there was no doubt as to the real intention of the mortgagee. The distinction between that case and the present one is apparent.

2. The logical result of this rule is that purchasers, intervening mortgagees, and their assignees are not justified in relying upon the record of the deed in the office of the register of deeds as showing merger, because this question of fact cannot be determined from the record of the deed alone. 1 Jones, Mortg. §§ 474, 872, and authorities there cited. The rule is founded in good sense. When mortgages are paid, it is common to discharge them of record. Had the mortgage in question been discharged of record, there would be much force in the contention that complainant had a right to rely upon the record, and that Mrs. Porter would thereby be estopped to deny the merger. But the mortgage was not discharged, and this was sufficient to put the complainant upon inquiry. *Aiken v. Railway Co.*, 37 Wis. 469.

3. It is contended that the foreclosure sale is void because—

1. The notice of foreclosure sale included more than was due at the date of the notice.
2. The execution of the sheriff's deed was not properly acknowledged.

The notice of sale was dated October 8, and included a sum which became due on the 9th. The notice was not published until the 18th, and the publication was continued for the proper time thereafter. The statute requires that the notice shall state the amount claimed to be due

thereon at the date of the notice. How. Stat. § 8500. It is not necessary that the notice be dated, in which case the time of the first publication will be taken as the date. 2 Jones, Mortg. § 1854; *Reading v. Waterman,* 46 Mich. 107, 111. But there is no evidence that the defendant Porter acted in bad faith in including the sum of $300 more than was actually due at the date of the notice, nor that any one was misled thereby. It is said in Jones on Mortgages (vol. 2, § 1855):

"The fact that the notice states a larger sum to be due than is actually due does not affect the validity of the sale, if no actual injury or fraudulent purpose is shown."

This rule is sustained by the following authorities: *Hamilton v. Lubukee,* 51 Ill. 415; *Klock v. Cronkhite,* 1 Hill, 107; *White v. McClellan,* 62 Md. 347; *Ramsey v. Merriam,* 6 Minn. 168.

The deed was executed by the under-sheriff, and the acknowledgment was taken by one Myron G. Wood, a notary public. Mr. Wood was at that time sheriff of the county. The statute provides that such sale shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under-sheriff, or deputy-sheriff of the county, and the deed executed by the officer or person making the sale. How. Stat. §§ 8501, 8505. Mr. Wood, in taking the acknowledgment, did not act as sheriff, but as a notary public. We think the acknowledgment valid.

Decree affirmed, with costs.

HOOKER, C. J., MCGRATH and MONTGOMERY, JJ., concurred. LONG, J., did not sit.

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PATRICK KENNEY v. FREDERICK T. RANNEY.

Trover—Action against receiver.

A receiver of mortgaged property should see to it that he sells none but the property covered by the mortgage, under an order of the court for its sale; and an action of trover may be brought against him for the value of other property held by the mortgagor as bailee, and delivered to the receiver, without demand and without leave of the court.

Error to Wayne. (Reilly, J.) Submitted on briefs June 28, 1893. Decided July 26, 1893.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Griffin & Warner, for appellant.

Durbin Newton, for plaintiff.

HOOKER, C. J. Ryan Bros., of Detroit, dealers in knit goods, were succeeded by the Peninsular Knitting Works, of which John T. Ryan was vice-president, which, becoming involved, on April 1, 1891, gave a mortgage upon its stock and property to one Balch to secure two notes, of $30,101.03 and $15,000, respectively. On April 9 proceedings were begun in chancery to foreclose this mortgage, and defendant was appointed receiver, and ultimately sold the property mortgaged, by order of court.

The plaintiff is a dealer in yarn at Chicago, and had an arrangement with Ryan Bros. to send them yarn subject to their approval, to be returned if they did not subsequently agree upon a price. Plaintiff, being ignorant of the change in the firm of Ryan Bros., sent them a bundle of yarn under the arrangement. It was received by the Peninsular

Knitting Works about a week before the foreclosure proceedings were begun, and was set aside by Ryan as plaintiff's property. It was subsequently sold with the other property by the receiver, and the plaintiff brings trover against him.

Defendant's counsel contend that his receivership protects him from an action, without leave of court first obtained; but this appears to be in conflict with the case of *Gutsch v. McIlhargey*, 69 Mich. 377, where it was held that an officer of court obtains no immunity from liability for a tort by reason of his office.

It is also claimed that the jury should have been instructed that if the receiver sold in ignorance of plaintiff's ownership, and turned over the money as directed by the court, before notice, he was not liable. The court did instruct the jury that if Ryan did not notify, or attempt to notify, defendant of plaintiff's ownership, a verdict should be rendered for the defendant. Under the proofs, this must have been understood by the jury as a direction that defendant could not be found guilty of the conversion if he acted in the belief that the yarn belonged to the Knitting Works, and was covered by the mortgage; and this was quite as favorable an instruction as the defendant was entitled to. We understand it to be the settled law that when one, by a trespass, takes the property of another, and sells it, he is liable for the conversion, and that no demand is necessary, and the question of good or bad faith is not necessarily involved. This doctrine is applied daily in cases against sheriffs and constables, where property is unlawfully seized and sold upon execution. The defendant wrongfully took property of the plaintiff, and sold it. It is not a defense to say, "I supposed I had authority to do so." He should have seen to it that he sold no property except that mortgaged. *Gibbons v. Farwell*, 63 Mich. 344; *Pingree v. Railroad Co.*, 66 Id. 148; *Allen v. Kinyon*, 41 Id. 281; *Scudder v. Ander-*

son, 54 Id. 122; *Hake v. Buell*, 50 Id. 89; *Daggett v. Davis*, 53 Id. 35.

We find no error in the record, and the judgment will be affirmed.

McGRATH, GRANT, and MONTGOMERY, JJ., concurred. LONG, J., did not sit.

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EMANUEL SCHLOSS ET AL. v. LYMAN FELTUS.

Sale—Fraud—Bona fide purchasers—Replevin.

1. Actual payment in good faith is necessary to complete a *bona fide* purchase.
2. A purchaser from a fraudulent vendee will only be protected to the extent of payments actually and in good faith made.[1]
3. The acceptance of goods sold from samples must be something more than the mere receipt of the goods, and involves some act on the part of the vendee after he has exercised, or had the means of exercising, his right of rejection.
4. A member of an insolvent firm ordered a bill of goods from samples, and upon credit, which he secured by misrepresenting the financial condition of the firm. Before examining the goods with reference to their acceptance, he sold them, as also the entire stock, to creditors at an agreed price, which was credited to the firm in account. The creditors then sold the goods and stock to a fourth party, and charged him with the purchase price, no part of which was paid until after the goods had been replevied from him by the vendors. And it is held that the defendant was not a *bona fide* purchaser, and that the creditors were not *bona fide* purchasers, as against the vendors.

Error to Chippewa. (Steere, J.) Argued June 28, 1893. Decided July 26, 1893.

[1] See *Zucker v. Karpeles*, 88 Mich. 413.

Replevin. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

H. M. Oren (*Julian G. Dickinson*, of counsel), for appellants.

McMahon & Yerkes (*M. C. Burch*, of counsel), for defendant.

McGRATH, J. This is replevin to recover merchandise from one claiming as purchaser from an alleged fraudulent vendee.

Smith & Hassock, in September, 1890, were carrying on a lumber business at Raber, Chippewa county, and kept a general store in connection therewith. Mueller & Raber, of Chicago, made advances to Smith & Hassock from time to time, and took their lumber product. On September 16, 1890, Smith was at Detroit, and gave a verbal order to plaintiffs for a quantity of merchandise. From Detroit, Smith went to Chicago, and saw Mueller & Raber; from Chicago, returned to Raber, arriving there on Saturday, September 27. Before reaching home, Smith had learned that Mueller & Raber had refused to accept certain drafts which Smith & Hassock had drawn upon them for further advances, and on his way to Raber, at St. Ignace, Smith met Mr. Raber, who was also on his way to Raber to investigate the affairs of Smith & Hassock, who were largely in arrears to the firm of Mueller & Raber. Learning of this condition of things, Smith telegraphed from St. Ignace to one Keliher, another creditor of the firm of Smith & Hassock, informing him that his account was in danger, and Keliher arrived at Raber on Sunday morning, and prepared to take out a writ of attachment on Monday morning. Mr. Raber also arrived at Raber on Saturday, the 27th. All of the parties sat up all night Sunday night, and on Monday morning, as early as 1 o'clock,

Keliher had attached, and Raber had secured a bill of sale of all the assets of the firm of Smith & Hassock, including the goods purchased from plaintiffs.

While *en route* to Raber, and at St. Ignace, presumably by appointment, Mr. Raber met defendant, who was a member of the firm of Lyman Feltus & Co., who were carrying on business in that vicinity, the firm being composed of Feltus, Mueller, and Raber, and informed him of the purpose of his visit to Raber. He says that he told Feltus that he was going down to investigate affairs, and, in case he decided not to continue the business there, he wanted him to go over there and buy the business; and "I asked him if he would consider that, and, if he did, that I would let him know when I had come to a conclusion, and, if so, to come over there, and he said he would." Feltus was on hand at Raber Tuesday morning, and Raber assigned to him the entire stock and assets received from Smith & Hassock. The goods were replevied October 6, 1890.

Mueller & Raber simply credited Smith & Hassock, upon their indebtedness, with the amount agreed upon as the value of the assets transferred; paid the amount of Keliher's attachment; and agreed with Smith to pay certain labor claims, none of which, however, were paid until November following, and the total amount of which was less than $2,300. Defendant was charged upon the books of Mueller & Raber with the value which they fixed upon the assets at the time of the transfer of the same to Feltus, and he paid nothing on the alleged purchase until after the goods had been replevied. Hassock had simply a working interest in the business. The goods had been bought on credit, and had been ordered from samples. They had arrived at Raber but a short time before Smith and Raber arrived there. Most of them were still in the original packages. When Smith arrived, he told Hassock that the goods

were to be sent back, and, before the transfer to Mueller & Raber, he told Raber that they ought to be sent back.

There was testimony tending to show that, when the goods were ordered, Smith misrepresented the financial status of the firm, and, when asked, withheld knowledge of the actual situation of affairs. It is clear, also, that before the transfer to Mueller & Raber, he had not examined the goods with reference to their acceptance. The evidence clearly tended to show that when Smith undertook, by the transfer of the goods, to exercise an act of ownership over them, he did so knowing that he could not continue the business.

Under this state of facts, defendant was not a *bona fide* purchaser, nor were Mueller & Raber, so far as plaintiffs' right of recovery was concerned. The stock of goods and other property transferred to them were valued at $10,000, the amount advanced to Keliher was $1,143.94, and the judgment for defendant in the court below was $1,120.92, leaving a margin still of $7,735.14. It is unimportant, therefore, whether the payment of Keliher's claim was or was not a part of the consideration for the transfer, or whether that payment would constitute Mueller & Raber *bona fide* purchasers to that extent. It is well settled that actual payment in good faith is needed to complete a *bona fide* purchase, and, in any event, a purchaser from a fraudulent vendee can only be protected to the extent of payments actually and in good faith made. *Dixon v. Hill*, 5 Mich. 404; *Kohl v. Lynn*, 34 Id. 360; *Webster v. Bailey*, 40 Id. 641; *McGraw v. Solomon*, 83 Id. 442.

If Smith, at the time that the order was given, misrepresented to plaintiffs the financial condition of the firm, and plaintiffs, in reliance upon the representations made, gave him credit, or if he, before he accepted the goods, knew that he could not continue the business, he was chargeable with accepting and transferring the goods

with an intent not to pay for them, and plaintiffs were entitled to recover. *Whitten v. Fitzwater*, 129 N. Y. 626 (29 N. E. Rep. 298). Smith was the only member of the firm who saw the samples, and who knew the kind and quality of the goods ordered. For the purpose of an acceptance of goods, the vendee must have had an opportunity of exercising his judgment with respect to the articles sent. The acceptance must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection. Benj. Sales, § 154.

In the case of *Nicholson v. Bower*, 1 El. & El. 172, 28 Law J. Q. B. 97, there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of a quantity of wheat by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and, after inspecting it, told him not to cart the wheat home at present. The purchasers were really in insolvent circumstances, and, immediately after the interview with the carman, determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. Held, that there had been no acceptance in fact, and a verdict in favor of the assignees of the purchasers was set aside.

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

HOOKER, C. J., and GRANT, J., concurred with MCGRATH, J. MONTGOMERY, J., concurred in the result. LONG, J., did not sit.

ANSON SCOTT v. ELMER B. WHELAN.

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Replevin—Taxes.

Where, after the conveyance by a father to his son of a portion of an unoccupied piece of land, the entire land is assessed to the father, who holds the record title, as one parcel, he cannot maintain replevin for property seized to satisfy the entire tax, on the refusal of the treasurer to accept a tender of his proportionate share.[1]

Case made from Eaton. (Hooker, J.) Submitted on briefs June 29, 1893. Decided July 26, 1893.

Replevin. Plaintiff assigns error. Affirmed. The facts are stated in the opinion.

Garry C. Fox, for appellant.

Huggett & Smith, for defendant.

MCGRATH, J. This is replevin for personal property seized by the defendant, a township treasurer, for the payment of taxes.

Unoccupied land, the title to a part of which was held by the son, by virtue of an unrecorded deed recently given by the father, was assessed as one parcel to the father, for a drain tax. After the seizure of the personal property, the father (plaintiff herein) tendered to defendant his proportionate share of the taxes, giving a notice in writing of the description of the parcel owned by him, and refused to pay the remaining tax upon the parcel owned by his son, and, upon refusal of defendant to accept, demanded the return of the property seized; and, being refused by defendant unless

[1] See *Whittaker v. Fuller*, 96 Mich. 141, and note to *Gray v. Finn*, Id. 62, for cases involving the right to replevy property seized by a tax collector.

he would pay the entire tax, the plaintiff brought replevin. The circuit judge held that, the authorities having jurisdiction to impose an assessment upon the plaintiff, and the same being in part valid, replevin would not lie for the property seized by the treasurer, and gave judgment against plaintiff for the amount of the tax.

The property was seized for the payment of a tax regular in form, and lawful on its face. Plaintiff was in no sense a stranger to the tax. *Hill v. Wright*, 49 Mich. 229.

The judgment is affirmed.

LONG, GRANT, and MONTGOMERY, JJ., concurred. HOOKER, C. J., took no part in the decision.

CALISTA EDWARDS v. THE COMMON COUNCIL OF THE VILLAGE OF THREE RIVERS.

Municipal corporations—Defective sidewalks—Evidence—Exhibition of injury to jury—Statements of counsel.

1. As showing the negligence of a village in permitting a sidewalk to be out of repair at the place where the plaintiff was injured, it is competent for the plaintiff to show by the president of the village that he knew of the defect before the accident, and that by 20 minutes' work it could be remedied, and that he communicated these facts to the village marshal; and the defendant cannot rebut the *effect* of this testimony by showing that the president did not give the like information to the chairman of the street committee.
2. The action of the court in permitting plaintiff to exhibit her injured limb to the jury as evidence of its *then* condition is sustained under *Langworthy v. Township of Green*, 95 Mich. 93, and *Graves v. City of Battle Creek*, Id. 266.
3. A physician who had examined plaintiff's limb some time before the trial was properly permitted to testify that, in his

opinion, a scar upon the other limb was the effect of the disease with which the injured limb was afflicted at the time of the trial, which disease the defendant claimed existed prior to the accident, and which plaintiff contended was the result of the injury complained of.

4. Counsel have the right, either before or after the testimony is given, to state so much of the law, as they claim it to be, as may enable them to convey to the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case; citing *Fosdick v. Van Arsdale*, 74 Mich. 305.[1]

Error to St. Joseph. (Loveridge, J.) Argued June 29, 1893. Decided July 26, 1893.

Negligence case. Defendant brings error. Reversed. The facts are stated in the opinion.

H. O. Bliss, Howell, Carr & Barnard, and *H. P. Stewart,* for appellant.

B. E. & L. F. Andrews, for plaintiff.

LONG, J. This action was brought to recover damages for an alleged injury to plaintiff on one of defendant's sidewalks, which, it was claimed, was so far out of repair that it was not reasonably safe and fit for travel. Plaintiff had verdict and judgment for $675.

It is claimed that plaintiff, while proceeding along this walk, stepped into a hole four or five inches deep, where a plank had been left out; that she was caught by her toes, which were turned up, and her foot and ankle sprained; that before this time she was a strong woman, but by reason of the injury the foot and ankle became swelled, and the skin from the toes to the ankle cracked open in fine cracks, developing into sores, from which she had not been able to be cured at the time of the trial, nearly two years after the injury. It is claimed that the defendant had

[1] See *Prentis v. Bates*, 93 Mich. 235.

notice of the defective condition of the walk before the accident, and neglected to repair it. On the trial the defense was that plaintiff's limb was diseased with eczema, and had been for many years prior to the injury, and that plaintiff was suffering from disease, and not from the injury. It was further claimed that immediately after the injury the limb was not properly treated, and its condition at the time of the trial was the result of such improper treatment. The defense was also interposed that defendant had no notice or knowledge that the walk was out of repair.

Several assignments of error relate to the admission of testimony. The president of the village was called as a witness for plaintiff. He testified that he knew of the bad condition of the walk before and at the time of the plaintiff's injury, and shortly before that time had called the attention of the village marshal to it; that he saw the loose plank, and noticed that one was gone; that on one occasion, before the plaintiff's injury, he stepped into a hole there, and his foot was caught; and that it would not have taken 20 minutes to fix this place. Error is assigned upon the ruling of the court in permitting the witness to state how long it would have taken to fix the walk. The chairman of the street committee was called as a witness, and asked by defendant's counsel if the president of the village called his attention to the condition of the walk. This was ruled out by the court. The court was not in error in its rulings upon these questions. It was proper to show the negligence of the village in permitting the walk to be out of repair. The president knew its condition, and that by 20 minutes' work it could be remedied; he communicated this fact to the village marshal, whose duty it may have to repair it; and these facts were properly permitted to be shown on the trial. Whether the president of the village called the attention of the chairman of the street committee to its condition or not could not matter. The

village had notice of the defect, and time to repair it, before the accident.

The court directed the jury that the burden of proof was upon the plaintiff to show the defective condition of the walk, notice to the village, and that after such notice the village had had time to repair it. On the question of damages, the court gave certain requests which the defendant tendered, and fully and fairly covered the grounds of defense claimed.

It is said, however, that the court erred in permitting the plaintiff to exhibit her limb to the jury. There was no error in this. It was claimed by her that the swelling of the limb and cracking of the skin was the result of the injury, and that this condition was continuous down to the time of the trial. She was asked to exhibit the limb, that the jury might see its then condition. It was for this purpose only that the limb was exhibited to the jury. This was not improper, under the ruling of this Court in *Langworthy v. Township of Green*, 95 Mich. 93; *Graves v. City of Battle Creek*, Id. 266.

Defendant introduced testimony of physicians tending to show that the condition of the limb at the time of the trial was due to a disease called "eczema," and not to the injury; and the plaintiff called other physicians, who gave their opinions that the condition was the result of the injury. The court directed the jury that if they believed the infirmity existed prior to the injury, and the disease was only aggravated by the injury, the plaintiff could not recover; that the burden was upon the plaintiff to show that her limb was sound and well at the time of the injury. Dr. Ikeler was called as a witness for defendant. He had examined the limb some time prior to the trial, and testified that the left or injured limb was covered from the ankle to the knee with inflammatory eczema and enlarged veins; that the right limb was dry about the middle of the leg, and that he found an old cicatrix, left

by some former ulceration in that limb. Counsel for plaintiff asked to have stricken out what the physician said about former ulceration of the right limb. The court then asked, "You only judge by the appearance, I suppose?" and was answered in the affirmative. The court then struck out the answer. Witness was then asked what was the cause of the scar. This was objected to, and ruled out by the court. This was error. It was the vital question in the case whether the plaintiff was suffering from the injury received, or from the effect of disease, with which it was claimed she had formerly been afflicted. Her own physician testified that she had eczema, and the defendant contended that she had it before the injury. Dr. Ikeler was of the opinion that the scar upon the right leg was the effect of that disease before the injury, and the court should have permitted the defendant to make such proof as it could. The theory of the declaration and the tendency of the plaintiff's proofs was that the condition of the limb at the time of the trial was wholly due to the injury, and not to disease; and the defendant had a right to rebut it. The answer given and proofs offered had a tendency to contradict the plaintiff's claim.

Counsel, in opening the defense to the jury, stated that "the law does not require the village of Three Rivers—" when he was interrupted by plaintiff's counsel with the remark that the jury must take the law from the court; and the court interposed and said, "You have no right to state what the law is." This ruling is assigned as error. The court was in error in confining counsel to a bare statement of facts. While counsel have no right to read law to the jury or to usurp the province of the court in this respect, they have the undoubted right to state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect,

and bearing of the testimony upon their case, either before or after the testimony is in the case. *Fosdick v. Van Arsdale,* 74 Mich. 305.

Some other errors are claimed, but we do not think they are likely to occur on another trial, and they will not be noticed.

For the errors pointed out the judgment must be reversed, and a new trial ordered.

HOOKER, C. J., MCGRATH and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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96 630
97 607

THE PEOPLE v. CHRISTOPHER O'BRIEN.

[See 92 Mich. 17.]

Criminal law—Trial—Conduct of prosecuting attorney.

1. It is prejudicial to the rights of a respondent for the prosecuting attorney to call upon the jurors to act as detectives, and for the court, when its attention is called to that kind of argument, to say to respondent's counsel, "Take an exception."
2. The conduct of a prosecuting attorney in repeating leading questions when objected to, and in criticising the witnesses for the defense in the presence of the jury, and asking one of them if he knew the penalty for perjury, is open to grave criticism.
3. Where, at the suggestion of the prosecuting attorney, it is agreed to submit a case without argument, the court should not permit that officer, on the pretense of answering the respondent's requests to charge, to argue the case upon the law and facts, against the protests of the counsel for the respondent.

Error and *certiorari* to the recorder's court of Detroit. (Chambers, J.) Argued June 29, 1893. Decided July 26, 1893.

Respondent was convicted of manslaughter, and sentenced to imprisonment in the State prison for 15 years. Judgment reversed, and a new trial ordered. The facts are stated in the opinion.

James H. Pound, for respondent.

A. A. Ellis, Attorney General, and *Samuel W. Burroughs*, ex-Prosecuting Attorney, for the people.

LONG, J. This case was in this Court at the April term, 1892, and is reported in 92 Mich. 17. Respondent had been convicted of murder in the second degree, and the case was reversed, and sent down for another trial. The second trial has been had, resulting in a conviction of manslaughter. The case comes up again upon a writ of error, aided by an ancillary writ of *certiorari*, which brings up the proceedings on the argument of the case before the jury and the rulings of the court thereon, which were not included in the bill of exceptions, but to which the court below now makes return.

It appears from the affidavit for the writ of *certiorari* and the return thereto that an agreement was made between the prosecuting attorney and counsel for respondent that the case should be submitted to the jury without argument. Counsel claims a violation of this agreement by the prosecuting attorney, to the prejudice of the respondent. After the testimony had closed, the prosecuting attorney voluntarily suggested to counsel for respondent that the case be submitted to the jury under the charge of the court, without argument. Counsel agreed to this, and the case was adjourned until the next day, when respondent's counsel presented certain requests for the court to charge, and read them to the court. The prosecuting attorney, in response to these requests, with a pretense of answering them, and against the protest of counsel for respondent, then addressed

himself to the court and jury, arguing the questions of fact to the jury. Counsel for respondent protested that the case was to be submitted without argument, and excepted to the ruling of the court in permitting this course to be taken. The prosecuting attorney, however, was permitted to proceed, and did proceed, with the argument upon the merits, in which he dwelt to some considerable extent upon the testimony of Dr. Siebert, arguing that his testimony showed conclusively that the respondent was guilty as charged. When this case was in this Court before, it was reversed, on the ground that the statements made by the deceased to Dr. Siebert, and to which Dr. Siebert was permitted to testify, were no part of the *res gestæ*, and incompetent. The people, in order to make this testimony competent, on the present trial claimed by the doctor that the deceased said he was about to die from his wounds, and the testimony of Dr. Siebert as to what deceased said was then admitted as a dying declaration. Dr. Siebert testified that deceased told him that—

"There had been a fight over at his saloon, and that he had been cut with a knife by the defendant, Mr. O'Brien."

The prosecuting attorney, in his further address, dwelt upon this part of the case. In speaking of the testimony of Dr. Siebert, as to the conversation with deceased, he stated that the deceased said:

"I got them from the hands of Chris. O'Brien. I got these mortal wounds from a knife in his hands."

Among other things, the prosecuting attorney said to the jury:

"Now, gentlemen of the jury, of course the defendant will claim self-defense, and I want you to aid us in the trial of this cause. Pay strict attention to all the testimony, both *pro* and *con*. Put yourselves in the manner of jurors and detectives."

Respondent's counsel called the attention of the court to

the use of this language, and said he would take an exception to the invitation to the jury to act as detectives, in addition to their other duties, when the court responded: "Take an exception." The prosecuting attorney thereupon qualified the statement by adding: "In detecting the evidence, it is your duty as jurors."

It is evident that the court permitted the prosecuting attorney to go over the merits of such parts of the case, and argue them fully to the jury. This argument, undoubtedly, had its effect upon the jury. It was a plea for the conviction of the respondent, and a statement that there could be no question of doubt as to the facts or the law. It was an undue advantage over the respondent, which the court should not have permitted. It was prejudicial to the rights of the respondent for the prosecuting officer of the county to call upon the jurors to act as detectives, and for the court, when its attention was called to that kind of argument, to say to counsel, "Take an exception." The duty of the jury was to listen to the testimony, the arguments of counsel, and the charge of the court, and, when they retired for deliberation, to give the respondent the benefit of every reasonable doubt.

Perhaps the line of argument indulged in by the prosecuting attorney would not have been as potent for conviction had it not been for his conduct throughout the trial, when his manner of conducting the examination of witnesses was open to grave criticism. His questions were leading, and, when objected to, were repeated, and the court itself, it seems, was unable many times to prevent it. The witnesses for the defense were criticised in the presence of the jury. John Luth was asked if he knew the penalty of perjury. The court instructed the prosecuting attorney that he must not say to the witnesses for the defense that they were committing perjury; if they were, he would have a right to contradict them by other testimony. The prosecuting attor-

ney responded that he would take that course, but he knew he was right. The conduct of the trial by the prosecuting attorney was well calculated to prejudice the jury against the respondent, and in the closing argument advantage was taken of it.

We do not think the respondent has had that fair and impartial trial which is guaranteed by the Constitution.

The conviction must be set aside, and a new trial granted.

HOOKER, C.J., MCGRATH and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

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ACTION.

A *bona fide* indorsee of a negotiable note, transferred before maturity and for value, cannot recover from a creditor of the payee the amount received by him from the maker under his disclosure as garnishee of the payee, as money had and received for the use and benefit of the indorsee. *Corey v. Webber*, 358.

See PARTNERSHIP (6, 7); REVIVOR.

ADULTERY—See FALSE IMPRISONMENT (5, 6).

ADVERSE POSSESSION.

1. The divestiture of title to land upon no better claim than occupancy can be justified only by clear and cogent proof upon each of the essential elements of adverse possession. *Judson v. Juffy*, 255.
2. It is the duty of courts to protect the rights of land-owners from the danger of capricious verdicts by refusing to allow a jury to consider the question of adverse possession until evidence sufficient to make a *prima facie* case under the rule laid

ADVERSE POSSESSION—Continued.

down in *Yelverton v. Steele*, 40 Mich. 538, has been introduced. *Id.*

3. Evidence that a defendant in ejectment entered into actual possession of the land in 1882, under a deed from the holder of void tax titles, and that his grantor, in 1861, arranged with a neighboring farmer to look after the land, and thereafter paid the taxes assessed thereon, and that the farmer drove his cattle to the land sometimes to pasture, and authorized others to cut grass thereon, it being wild and unfenced, and used by the cattle of the neighborhood as a common, and the grass being cut by any one who chose, without molestation, which supervision, such as it was, ended in 1876 or 1878, falls short of that "clear and cogent proof" necessary to divest the title to land by adverse possession. *Id.*

4. A holding cannot be adverse if the holder does not believe in his title. *Smeberg v. Cunningham*, 378.

5. Possession, in order to ripen into a title to land, must be actual, continuous, visible, notorious, and hostile to that of the real owner. *Id.*

6. An entry with intent to remain in possession until the real owner claims the land, or demands rent, is not hostile. *Id.*

7. Mere occupancy of land, in person or by tenants and boarders, or both, for the statutory period, without recognizing any one as landlord, and without paying rent to any one for the use of the land, is not such an adverse possession as is necessary to establish title in the occupant. *Id.*

See note, 378.

AMENDMENT.

1. It is error to refuse to allow a plaintiff in ejectment to amend his declaration, after issue is joined on the merits, by setting forth the estate which he claims in the land. *Lademan v. Hirth*, 17.

2. A declaration in a suit by a widow upon an insurance policy issued in her favor upon the life of her husband cannot be amended on the trial by joining his daughter, to whom an interest in the policy had been assigned prior to her father's death, as a co-plaintiff. *Wood v. Insurance Co.*, 437.

See EQUITY PRACTICE (3).

ANIMALS—See NEGLIGENCE (23).

APPEAL.

1. An appeal from an order for the hearing of claims generally, made after the appointment of a special and before the appointment of a general administrator, is the appropriate remedy by which to test the validity of such order, and of the allowance of claims thereunder. *Jenks v. Judge of Probate*, 122.
2. How. Stat. § 6784, which provides that if any person aggrieved by any act of the judge of probate shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may allow an appeal to be taken and prosecuted with the same effect as if it had been seasonably done, gives the aggrieved party the right to petition for leave to appeal where he has failed either to claim or to prosecute an appeal. *Merriman v. Circuit Judge*, 603.
3. The fact that an appeal has ceased to be of effect because of the failure of the appellant to file a copy of the proceedings appealed from in the circuit court within 30 days after the appeal was taken, as required by Act No. 174, Laws of 1887 (3 How. Stat. § 6782), will not prevent the circuit court from allowing an appeal to be taken and prosecuted under How. Stat. § 6784. *Id.*
4. Where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect his appeal, he ought not to lose his right to an appeal through the neglect or oversight of the attorney, where justice requires a revision of the case. *Id.*

See PRACTICE IN SUPREME COURT.

ARREST—See FALSE IMPRISONMENT.

ASSIGNMENT—See CONSIDERATION (1); MORTGAGE (5); PLEADING (1, 7).

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. The assignee of an insolvent debtor is entitled to the possession of the assigned property as the representative of creditors who became such, or who extended an existing credit, after the making and before the filing of a chattel

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

mortgage given by the assignor before making the assignment, without knowledge of its existence, in the absence of a tender by the mortgagee of the amount of their claims. *Kennedy v. Dawson*, 79.

2. On waiving a return in replevin by the mortgagee, the assignee is entitled to a judgment for the value of the property, less the lien of the mortgagee, to be ascertained by deducting the amount of said claims, and of the claims of any others who have been prejudiced by the delay in filing the mortgage, from the amount found due on the mortgage. *Id.*

3. The assignee of an insolvent debtor, who, by reason of not filing the required statutory bond, failed to acquire the legal title to the assigned property, is not in a position to defend against an action of trover brought by the assignee of a mortgage given by the debtor prior to the assignment, and valid as between the parties thereto, on the ground that he holds the money arising from the sale of the mortgaged property for the mortgagor's creditors, and for that reason may set up as defense that the mortgage was fraudulent as to them. *Abbott v. Chaffee*, 294.

ASSIGNMENTS OF ERROR—See PRACTICE IN SUPREME COURT (2-5).

ASSUMPSIT—See ACTION; STATUTE OF LIMITATIONS (4).

ATTACHMENT.

1. A writ of attachment may issue against a domestic corporation, in the county where its home office is located, in favor of a creditor who resides in that county, in the like cases as in suits between individuals. *Michigan Dairy Co. v. Runnels*, 109.

2. How. Stat. § 8137, as amended by Act No. 242, Laws of 1887, gives a remedy by attachment against domestic corporations, other than railroad and navigation companies, in all cases where the plaintiff resides in a county other than that in which the home office is located, in case property can be found liable to attachment therein. *Id.*

3. The true construction of How. Stat. § 7987, which provides, as one of the grounds for an attachment, that the defendant is a foreign corporation, is that while, as against foreign corporations, that fact alone is sufficient to authorize the

ATTACHMENT—Continued.

issuance of the writ, some other of the statutory grounds must be set out in the affidavit in the case of a domestic corporation. *Id.*

4. Rulings of a circuit judge on the admission of evidence, on a hearing upon a petition to dissolve an attachment, cannot be reviewed on *certiorari*. *Lord v. Wirt*, 415.

5. The finding of a circuit judge that a defendant in an attachment suit has not disposed of his property with intent to defraud his creditors is conclusive, if there is any evidence to support it. *Id.*

ATTORNEY AND CLIENT.

Where an appellant employs an attorney in regular standing, and does all that he is required by the advice of his attorney to do to perfect his appeal, he ought not to lose his right to an appeal through the neglect or oversight of the attorney, where justice requires a revision of the case. *Merriman v. Circuit Judge*, 603.

BAIL.

The *right* of special bail to surrender their principal expires eight days from the commencement of a suit upon the recognizance, after the timely and regular issuance, and return "not found," of a body execution against the defendant. *Lyman v. Giddey*, 401.

See FALSE IMPRISONMENT (9).

BAILMENT—See TROVER.

BANKS AND BANKING.

In an action by the receiver of an insolvent banking corporation organized under Act No. 205, Laws of 1887, against a debtor of the bank to recover a sum due at the date of the suspension of the bank, the defendant cannot set off a certificate of deposit, procured by him from a creditor of the bank after its suspension, and before an application for the appointment of a receiver was made. *Stone v. Dodge*, 514.

See PLEADING (8); PRINCIPAL AND AGENT (4).

BILLS AND NOTES.

A *bona fide* indorsee of a negotiable note, transferred before maturity and for value, cannot recover from a creditor of the

BILLS AND NOTES—Continued.

payee the amount received by him from the maker under his disclosure as garnishee of the payee, as money had and received for the use and benefit of the indorsee. *Corey v. Webber*, 358.

See GUARANTY OF COLLECTION; JUDGMENT (1, 2); LIEN (2); PRINCIPAL AND AGENT (3); SUNDAY LAW.

BOARD OF SUPERVISORS.

1. The board of supervisors of Wayne county have no power to examine the books and accounts of the treasurer and board of auditors of said county. *Clegg v. Board of Auditors*, 188.
2. How. Stat. § 502, which provides that each member of the board of supervisors of a county shall be allowed $3 per day for his services and expenses in attending the meetings of the board, and mileage as therein stated, and that said sum shall be in full for all services rendered and expenses incurred in attending the meetings of the board, and while acting upon any committee of the board during its session, and which makes it a misdemeanor to receive further or other compensation, fixes the maximum amount that the member can receive for services rendered the county, and the board has no power to extend it beyond the statutory limit. *Ewing v. Ainger*, 588.
3. It is unlawful for a supervisor to receive pay, as a member of a committee appointed by the board of supervisors, for services performed when the board is not in session. *Id.*

See ELECTION.

BONA FIDE PURCHASER.

A purchaser of land must ascertain at his peril whether a decree setting aside a prior mortgage was warranted or not, and he cannot claim immunity, as a *bona fide* purchaser, from the effect of a subsequent order setting aside the decree as unwarrantably entered. *Cook v. French*, 525.

See RECORDING LAWS (2); SALE (7, 8, 10).

BOND.

1. A recital in a *supersedeas* bond given by a log-owner on the rendition of judgment against the principal debtor, which is made a lien on the logs, that a personal judgment has been rendered against the log-owner, concludes him and

BOND—Continued.

his sureties in a suit on the bond as an admission of that fact. *Healy v. Newton*, 228.

2. Where, on the rendition of a judgment, a stay of proceedings is granted on condition that the defendant file a bond for the payment of the judgment, if not set aside or reversed, as provided in 3 How. Stat. § 7621*c*, and the defendant files with the clerk the usual *supersedeas* bond, conditioned for the prosecution of a writ of error to effect, and the payment of any judgment rendered by the Supreme Court, after which a bill of exceptions is settled, but no writ of error is ever sued out, the bond is valid as a common-law bond, independent of the statute. *Id.*

3. The plaintiff in such a case may move to have the order staying proceedings set aside, or he may rely upon the bond filed; and in a suit thereon, in which the breach alleged is the failure to take out and prosecute the writ of error to effect, the measure of damages is the amount of the judgment recited in the bond, with interest thereon. *Id.*

See LIQUOR TRAFFIC (14, 16, 17); REVIVOR.

BOUNDARIES—See EVIDENCE (6).

BREACH OF PROMISE OF MARRIAGE—See EVIDENCE (12, 13).

BURDEN OF PROOF—See CONTRACT (5).

CERTIFICATE.

The certificate of the Commissioner of the General Land Office that an annexed paper is a copy of a list of lands on file in his office, so far as the same applies to certain descriptions contained therein, makes the paper admissible in an action of ejectment involving the particular descriptions certified to, although not authenticated according to our statutes. *Tillotson v. Webber*, 145.

See TAXES (10).

CERTIORARI—See ATTACHMENT (4)

CHALLENGE FOR CAUSE—See CRIMINAL LAW (11); LIQUOR TRAFFIC (2).

CHANGE OF MASTERS—See CONTRACT (5–7).

CHANGE OF VENUE—See TRANSFER OF SUIT.

CHARGE TO JURY.

1. It will not be assumed that the jury were led to disregard an instruction on the subject of contributory negligence because it was not repeated in connection with the instructions upon the question of notice. *Alberts v. Village of Vernon*, 549
2. Error cannot be assigned on the ground that an instruction which is correct in substance was not made more specific, a more particular instruction not having been asked for, nor any exception taken to which the attention of the court could have been called by the omission. *Id.* 550
3. Where the language used in the general charge is substantially like that of a request to charge, the court has a right to assume that it covers the question from the standpoint of the counsel presenting the request. *Id.*

See ERROR WITHOUT PREJUDICE; PRACTICE IN CIRCUIT COURT (2).

CHATTEL MORTGAGE.

1. The assignee of an insolvent debtor is entitled to the possession of the assigned property as the representative of creditors who became such, or who extended an existing credit, after the making and before the filing of a chattel mortgage given by the assignor before making the assignment, without knowledge of its existence, in the absence of a tender by the mortgagee of the amount of their claims. *Kennedy v. Dawson*, 79.
2. On waiving a return in replevin by the mortgagee, the assignee is entitled to a judgment for the value of the property, less the lien of the mortgagee, to be ascertained by deducting the amount of said claims, and of the claims of any others who have been prejudiced by the delay in filing the mortgage, from the amount found due on the mortgage. *Id.*
3. A chattel mortgage given by one partner upon the partnership property in the firm name to secure or pay partnership debts is valid as against the exemptions provided for by How. Stat. § 7686, although some of the partners may not be aware of its execution. *Robards v. Waterman*, 233.
4. Vendors who sell goods to a merchant during the time a chattel mortgage is withheld from record, without actual notice of its existence, are not in *fact* defrauded, as their

CHATTEL MORTGAGE—Continued.

rights are in no way jeopardized by the giving of the mortgage. *Lord v. Wirt*, 415.

5. A receiver of mortgaged property should see to it that he sells none but the property covered by the mortgage, under an order of the court for its sale; and an action of trover may be brought against him for the value of other property held by the mortgagor as bailee, and delivered to the receiver, without demand and without leave of the court. *Kenney v. Ranney*, 617.

See ASSIGNMENT FOR BENEFIT OF CREDITORS (3); JUDGMENT (1, 2); NOVATION (2).

CIRCUIT JUDGE—See TRANSFER OF SUIT

CONDITIONAL SALE—See SALE (5, 6).

CONDONATION—See DIVORCE (4).

CONFLICT OF LAWS.

Notes made and delivered in Michigan on Sunday are void under How. Stat. § 2015, although payable in another state. *Arbuckle v. Reaume*, 243.

CONSIDERATION.

1. It is no defense to a suit by an assignee to foreclose a mortgage that the assignment was made in payment of a gaming debt due him from the mortgagee. *Reed v. Bond*, 134.
2. The agreement of an executor to discharge a mortgage bequeathed to the mortgagor, charged with the payment of a legacy, in consideration of the note of the mortgagor given on the surrender by the executor of notes held by him against the husband of the legatee, who receipts for the legacy, enters into the consideration of the mortgagor's note, and the executor cannot revive the mortgage, nor use his office to enforce the payment of the note by foreclosing the mortgage. *DeCoo v. Woodworth*, 362.

See CONTRACT (1); TAXES (4); VENDOR'S LIEN.

CONSTITUTIONAL LAW.

1. The evident purpose of section 135, Act No. 206, Laws of 1893, which forbids the recording of deeds and certain other instruments unless the certificate of the Auditor General, or treasurer of the proper county, is presented to the register

CONSTITUTIONAL LAW—Continued.

of deeds, showing whether there are any tax liens or titles held by the State, or any individual, against the land described in the instrument, and that all taxes due thereon have been paid for the five years preceding the date of such instrument, is to secure the collection of taxes, and, this being one of the general objects stated in the title to the act, the section is not void, under section 20, art. 4, of the Constitution, which provides that no law shall embrace more than one object, which shall be expressed in its title. *Van Husan v. Heames*, 504.

2. Act No. 71, Laws of 1883 (How. Stat. § 9122*a*), which makes it an offense to "assault another with intent to do great bodily harm, less than the crime of murder," is constitutional. *People v. Troy*, 530.

CONTRACT.

1. Where, upon the divorce of his parents, a minor son is emancipated by his father, and, at the request of his mother's brother, remains at home and aids in the support of his mother and minor brothers and sisters, upon the uncle's promise to pay him for his services, he can recover the value of the services so rendered of his uncle's estate. *Grimm v. Estate of Taylor*, 5.
2. Where, on the hearing of a claim filed by a son against the estate of his uncle for aiding in the support of his mother at the uncle's request, the only testimony tending to show an agreement by the uncle to pay a specified sum for such services is the statement of the deceased that he had hired the claimant, and intended when he died to leave him $1,000, it is error to submit that question to the jury. *Id.*
3. Material-men, by seeking to enforce their claim for materials by suit against the contractor and by garnishment proceedings, are not estopped from suing the owner of the building upon his agreement to pay them for materials thereafter furnished the contractor. *Bice v. Marquette Opera-House Building Co.*, 24.
4. Where, in a suit to enforce the specific performance of a contract for the sale of mineral lands, it appears that the contract was made by conversations between the parties, in which it was understood that the stone on the lands valuable for building purposes was to be reserved, and by after-

CONTRACT—Continued.

correspondence in which said reservation was referred to, the correspondence must be interpreted in the light of the conversations, evidence of which is admissible. *Butler v. Iron Cliffs Co.*, 70.

5. In a suit by miners for labor performed after a mining company had contracted with its former agent to take out the ore, proof of the employment of the plaintiffs by the agent for the company for an indefinite time, and at a given rate, prior to the letting of the contract, and of their continuous labor thereunder, and of the balance due them for the labor sued for, makes a *prima facie* case, and casts the burden upon the company of showing its non-liability by bringing home to the plaintiffs notice or knowledge of the contract. *Tousignant v. Iron Co.*, 87.

6. The same rule applies to boarding-house keepers who boarded the miners under an arrangement with the company by which they reported the amount of the board-bills, and the sum was charged up to the boarders in the time-slips given them, and credited to the boarding-house keepers, who relied upon this method, rather than upon the individual responsibility of the boarders. *Id.*

7. The same rule does not apply in a suit by miners who left the service of the company before the contract for taking out the ore was made, and were re-employed by the agent after he entered upon the performance of his contract, and who only show the nature of such re-employment by the testimony of the agent, who says that he made no contract in the name of the company after such letting to him, but there should be some evidence to repel the natural inference that the agent made the new contract in his own name, and to show that the plaintiffs supposed, at least, that they were dealing with the company, or that they relied upon the apparent authority of the agent, and gave credit to the company. *Id.*

8. A provision in a logging contract by which the contractor agrees to cut, under the direction of a scaler to be furnished by the log-owner, and haul and bank on a certain river, all of the timber on certain lands by April 1 of the following year, and deliver the logs into the main jam at the mouth of the river during the driving season of that year, does not give the log-owner the right to order the contractor to stop cutting logs when, in the opinion of the scaler, he has as

CONTRACT—Continued.

many cut as he can get out and deliver during said driving season. *McGregor v. Estate of Ross*, 103.

9. A mere *request* by the log-owner to the contractor to quit cutting logs, if acquiesced in by the contractor, does not amount to a breach of the contract on the part of the log-owner; but a *direction* by the log-owner to stop cutting, which the contractor obeys under protest, amounts to a breach, entitling the contractor to the consequent damages. *Id.*

10. If, after such direction, the contractor continues cutting timber, but is prevented from completing the same by reason of such breach, the log-owner, in a suit brought by the contractor upon the contract, can recoup the damages sustained by reason of the failure of the contractor to deliver the logs so cut, such failure not being occasioned by the prior breach by the log-owner. *Id.*

11. A broker who contracts in his own name to furnish a bill of lumber at an agreed price, and places the order with lumber dealers for whom he has no right to make such a contract, and from whom he is only entitled to receive a commission on such orders as they accept, cannot be said to have made the contract in their behalf or as their agent. *Peirce v. Closterhouse*, 124.

12. A contract for the purchase of building material, which specifies no time for the payment of the purchase price, will be construed as contemplating payment on delivery. *Lamont v. Le Fevre*, 175.

13. A party seeking to rescind an agreement on the ground of fraud or mistake must first place the other party *in statu quo*. *Galvin v. O'Brien*, 483.

See LIEN (1); SALE.

CONTRIBUTORY NEGLIGENCE—See EVIDENCE (4); NEGLIGENCE (2, 8–11, 13–15, 19).

CORPORATIONS.

1. A writ of attachment may issue against a domestic corporation, in the county where its home office is located, in favor of a creditor who resides in that county, in the like cases as in suits between individuals. *Mich. Dairy Co. v. Runnels*, 109.

2. Prior to the passage of Act No. 242, Laws of 1887, no substi-

CORPORATIONS—Continued.

tuted service of process could be made upon a domestic corporation in any county other than that in which its home office was located. *Id.*

3. How. Stat. § 8137, as amended by Act No. 242, Laws of 1887, gives a remedy by attachment against domestic corporations, other than railroad and navigation companies, in all cases where the plaintiff resides in a county other than that in which the home office is located, in case property can be found liable to attachment therein. *Id.*
4. The true construction of How. Stat. § 7987, which provides, as one of the grounds for an attachment, that the defendant is a foreign corporation, is that while, as against foreign corporations, that fact alone is sufficient to authorize the issuance of the writ, some other of the statutory grounds must be set out in the affidavit in the case of a domestic corporation. *Id.*
5. A corporation may be liable in tort, even though a malicious intent is necessary to be proven, the motive of its agent being imputable to the corporation. *Wachsmuth v. Merchants' Nat'l Bank*, 427.
6. The entry of a transfer of shares of stock upon the books of the corporation is not necessary to the validity of the transferee's title, which becomes absolute upon the delivery to him of the certificate, with an assignment of the shares indorsed thereon, signed by the owner. *McLean v. Medicine Co.*, 479.
7. A purchaser of shares of stock, upon the assignment and delivery of the certificate, becomes a stockholder, and is entitled to all of the rights of every other stockholder, notwithstanding the refusal of the president of the corporation to enter the transfer upon its books, and he may compel the making of such entry by the proper proceeding. *Id.*

See DAMAGES (4); EQUITY PRACTICE (1); ESTOPPEL (7); QUO WARRANTO.

CORRESPONDENCE—See CONTRACT (4).

COSTS.

Where a judgment in favor of a non-resident plaintiff, who has given security for costs, is reversed, and the case remanded for a new trial, costs cannot be awarded under How. Stat. § 7663, against the surety. *Wheeler v. Meyer*, 242.

See DAMAGES (5); DRAINS.

COUNTY-SEAT—See ELECTION.

CRIMINAL LAW.

1. An assault with intent to commit the crime of rape is necessarily included in the greater offense. *People v. Miller*, 119.
2. A respondent who is informed against for the crime of rape may be convicted of an assault with intent to commit that offense, upon testimony showing its actual commission. *Id.*
3. It is no defense to a prosecution under 3 How. Stat. § 9094, for unlawfully and carnally knowing and abusing a female child under the age of 14 years, that she had reached the age of puberty when the offense was committed. *Id.*
4. One who aids and assists another in committing the crime of rape is guilty of the main offense. *People v. Flynn*, 276.
5. The definition of a reasonable doubt, in language substantially like that used in *People v. Finley*, 38 Mich. 482, is approved. *Id.*
6. It is competent for the prosecution to ask the complaining witness in a rape case whether she believed that the respondent intended to kill her from threats which she has testified he made; also, whether the intercourse, which is admitted, but is claimed to have been voluntary on her part, caused her pain; also, why she did not struggle against the respondent when he subjected her to such intercourse. *Id.*
7. Soliciting a female, who is already a prostitute and in a house of ill fame, to go into another house of like character, is not an offense within the meaning of 3 How. Stat. § 9286, which makes it a felony to solicit a female to enter a house of ill fame, resorted to for the purpose of prostitution or lewdness, for the purpose of *becoming* a prostitute. *People v. Cook*, 368.
8. It is not a necessary element of the crime that the house should already have been resorted to for the purpose of prostitution by other females, the *gravamen* of the offense being the soliciting of females to enter a house of prostitution for the purpose of becoming prostitutes,—that is, a house designed and kept for that purpose, whether it had already been resorted to by others for the like purpose or not. *Id.*
9. The Court adhere to the rule laid down in *People v. Jenness*, 5 Mich. 305, and hold that evidence was properly admitted, in a prosecution for incest, of acts of sexual intercourse

CRIMINAL LAW—Continued.

between the parties at various times during a period of about eight years previous to the commission of the crime alleged, and of an act of familiarity, during that time, of such a character as to lead to the conclusion that its purpose was for such intercourse. *People v. Skutt*, 449.

10. Where several witnesses testify to such acts of intercourse, and the respondent introduces no evidence, and no attempt is made to impeach the people's witnesses, it is not error for the prosecuting attorney to state to the jury that the commission of such acts is an undisputed fact in the case. *Id.*
11. A juror who sat on the trial of a respondent for resisting an officer is subject to challenge for cause if called to sit on the trial, at the same term, of another respondent for an assault upon the same officer, with intent to do great bodily harm, less than the crime of murder, claimed to have been made while the other offense was being committed. *People v. Troy*, 530.
12. It is sufficient in an information under How. Stat. § 9306, which makes it an offense for any person to "be a party to or engage in a prize-fight," to follow the language of the statute in charging the offense. *People v. Taylor*, 576.
13. How. Stat. § 9306, in so far as it seeks to punish those who are parties to or engage in "any other fight in the nature of a prize-fight," is inoperative, the elements constituting such "other fight," etc., not being defined, and there being no source to which the court can go to ascertain the legislative intent. *Id.*
14. As to what constitutes prize-fighting is a question of law; but it is a term in common use, and the very employment of the word indicates what is meant. *Id.*
15. To constitute prize-fighting, under How. Stat. § 9306, there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, coupled with an intent to inflict upon such contestant some degree of bodily harm. *Id.*
16. Where the testimony in a homicide case shows that, on the day of the killing, the deceased exhibited a revolver with which he had armed himself, and threatened to shoot the respondent if he ever crossed his path, it is error to refuse to instruct the jury to consider the threats and the exhibition of the revolver in determining which party was the

CRIMINAL LAW—Continued.

aggressor, and the probable character of the assault. *People v. Palmer*, 580.

17. Where there is testimony in a homicide case which, if believed, would warrant a verdict of manslaughter, the court should define that offense, and instruct the jury accordingly. *Id.*

18. A third person, who espouses the cause of one of the parties to a fight, into which he enters to help whip the other party, is responsible for the death of such party, whether caused by a blow given by himself, or by a kick administered by the surviving party, or from both combined; and the intent of such volunteer may be inferred from his conduct. *People v. Carter*, 583.

19. Questions based upon the alleged failure of the court to give instructions, to which counsel deem they were entitled, on the subjects of self-defense and reasonable doubt, will not be considered on the hearing in the Supreme Court, where the attention of the court was not directed to the alleged omission by requests to charge, and error is not assigned thereon. *Id.*

20. Two men were found in the house where a rape had been committed. One was captured, and convicted, and on the trial of another respondent, who was claimed to be the party who escaped, a witness was permitted to testify that, soon after the capture of the respondent who had been convicted, he stated, in the presence of the witness, that the respondent on trial brought him to the house where the crime was committed. And it is held that the testimony was hearsay, and not admissible as a part of the *res gestæ*. *People v. Newton*, 586.

21. It is prejudicial to the rights of a respondent for the prosecuting attorney to call upon the jurors to act as detectives, and for the court, when its attention is called to that kind of argument, to say to respondent's counsel, "take an exception." *People v. O'Brien*, 630.

22. The conduct of a prosecuting attorney in repeating leading questions when objected to, and in criticising the witnesses for the defense in the presence of the jury, and asking one of them if he knew the penalty for perjury, is open to grave criticism. *Id.*

23. Where, at the suggestion of the prosecuting attorney, it is

CRIMINAL LAW—Continued.

agreed to submit a case without argument, the court should not permit that officer, on the pretense of answering the respondent's requests to charge, to argue the case upon the law and facts, against the protests of the counsel for the respondent. *Id.*

See CONSTITUTIONAL LAW (2); FALSE IMPRISONMENT; LIQUOR TRAFFIC; PLEADING (3).

DAMAGES.

1. Where an agent sells and delivers a machine without having a full settlement with the purchaser, and taking his notes for the purchase price, as required by the contract of agency and the instructions of the principal, the measure of damages, as against the purchaser, is the price of the machine, and, as against the agent, compensation for the injury sustained by his failure to perform his agreement and follow the instructions given. *Birdsell Manfg. Co. v. Brown*, 213.
2. The fact that a dog is committing a trespass at the time it is killed, and is, in the opinion of the person who kills it, about to destroy some of his property, will not justify the killing, nor in any way mitigate the actual damages which the owner of the dog is entitled to recover. *Ten Hopen v. Walker*, 236.
3. Where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable,—not as a punishment to the wrong-doer, but to compensate the injured party. *Id.*
4. In the absence of proof of special damages, a transferee of shares of stock, to whom the certificate is assigned and delivered by the owner, cannot recover more than nominal damages in an action against the corporation because of the refusal of the proper officer to enter the transfer upon its books. *McLean v. Medicine Co.*, 479.
5. A judgment that the plaintiff take nothing will not be reversed when a recovery could have been had for nominal damages only, the question of costs not being affected. *Id.* 480.

See CHATTEL MORTGAGE (2); CONTRACT (9, 10); EVIDENCE (10); NEGLIGENCE (12).

DEBTOR AND CREDITOR—See DEED (1).

DEED.

1. A deed given by a debtor to a creditor in satisfaction of the debt, in which provision is made for there purchase of the land, at the option of the grantor, within a specified time, and its conveyance to him by the grantee on payment of the purchase price and interest, will be treated as an absolute conveyance, with an option to repurchase. *Reed v. Bond*, 134.
2. The fact of the identity of the name of the grantor in a deed under which a plaintiff in ejectment claims title with that of the grantee in a prior deed of the same land, no intervening conveyance being shown, raises a presumption of the identity of the grantor and grantee. *Tillotson v. Webber*, 145.
3. The question of the delivery of a deed to take effect presently is one of intent, to be established by the proofs. *Burk v. Sproat*, 404.
4. The proofs in this case are held to show that the grantor never intended to place her deed to the complainant beyond recall, and that she did recall and destroy it before conveying the land to the defendant. *Id.*
5. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the Legislature, and the court cannot declare them void because they are harsh. *Van Husan v. Heames*, 505.
6. The recording of a deed is not necessary to pass title, such registry being only designed to record and preserve evidence of title, which passes upon the execution and delivery of the deed, and possession thereunder is notice to all of the rights of the grantee in possession. *Id.*
7. The question in this case is held to be not whether the complainant was mentally competent to execute the deed sought to be set aside, but whether she intended at the time of its execution to make a final disposition of the land conveyed to defendant, which latter question is answered in the negative. *Smith v. Cuddy*, 562.
8. The execution of a deed on the statutory foreclosure of a mortgage by the under-sheriff, who made the sale, can be acknowledged before the sheriff, who is a notary public. *Cook v. Foster*, 611.

DEED—Continued

See ESTOPPEL (6); EVIDENCE (6); HUSBAND AND WIFE; MORTGAGE (3).

DELIVERY—See DEED (3, 4).

DEMURRER—See EQUITY PRACTICE (3).

DIRECTING VERDICT.

The holding in *Demill v. Moffat*, 45 Mich. 410, and in other cases, that the trial judge should clearly state the question of law upon which he directs a verdict, must be restricted to reasonable limits, and will not prevent the Court from examining the facts in the record in an ejectment suit in which the defendant claims title under a tax deed, issued on a sale of the land for the taxes of several years, and on the trial of which the circuit judge held the tax proceedings for each year void, but failed to specify his reasons for so holding as to one of said years. *Tillotson v. Webber*, 146.

DISCHARGE—See MALICIOUS PROSECUTION.

DISSOLUTION OF ATTACHMENT—See ATTACHMENT (4, 5).

DIVORCE.

1. A second wife, who becomes such in reliance upon a decree of divorce granted her husband, is entitled to notice of a petition by the first wife to vacate the decree. *Carlisle v. Carlisle*, 128.
2. The court granting a decree of divorce has the power to set it aside for fraud in its procurement, or want of jurisdiction, on the application of the party against whom it was obtained, even though the other party may have remarried and children may have been begotten; but the decree cannot be avoided by the party guilty of the fraud; nor can the party obtaining the decree, and accepting its benefits, afterwards question the jurisdiction of the court granting it. *Id.*
3. The Court cannot declare the failure to change habits of frugality to habits of liberality, gross, wanton, or cruel. *Runkle v. Runkle*, 493.
4. The act of a husband in striking his wife with his open hand upon her cheek is condoned by the wife's seeking a reconciliation, and apparently living happily with her husband thereafter. *Id.*

DOGS.

Dogs have a value, and are the property of the owner, as much as any other animal which one may have or keep. *Ten Hopen v. Walker*, 236.

See DAMAGES (2).

DRAINS.

Where a county drain commissioner follows the description contained in an application for the deepening and straightening of a drain, and the jury determine that no public necessity exists for the improvement, the petitioners cannot avoid the liability imposed by 3 How. Stat. § 1740*b* 5, for the costs and expenses incurred, on the ground of the alleged insufficiency of the description of the line of the drain in the application. *Rosenstiel v. Miller*, 99.

EJECTMENT.

1. It is error to refuse to allow a plaintiff in ejectment to amend his declaration, after issue is joined on the merits, by setting forth the estate which he claims in the land. *Ludeman v. Hirth*, 17.
2. An agreement between three persons, reciting the purchase by one of them of certain lands for the joint benefit of all, for a specified sum paid by the one, and providing that all money advanced by each shall bear interest, and that each shall receive pay for all services rendered and expenses incurred in the matter of the purchase and sale of the lands, and that the one shall advance all moneys needed to pay all existing and future taxes thereon, and that whenever enough money shall have been received on sales made to repay the amounts advanced by the parties, with interest, the remaining lands shall be equally divided between them, creates only an equitable interest in the two, and, in the absence of proof of other right of possession in them, they are not proper co-plaintiffs with the one in an action of ejectment for the unsold land, which is wild and unoccupied. *Tillotson v. Webber*, 145.
3. Ejectment lies against one who pays for, procures, and causes to be recorded a tax deed, under which he claims title on the trial. *Id.* 146.
4. The owner of a lot abutting upon a public street in a city can recover in ejectment against one who ousts him of the

EJECTMENT—Continued.

use and possession of the land lying between his lot and the center of the street, under How. Stat. § 7790, which forbids a recovery unless the plaintiff has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established on the trial. *Smeberg v. Cunningham*, 379.

See note, 379.

ELECTION.

The action of the board of supervisors under How. Stat. § 491, in determining and entering upon their records the result of their canvass of the votes cast at an election regularly held upon the question of the removal of the county-seat of the county, is conclusive, and the removal cannot be defeated in the courts by a showing that the question was carried by an omission to return all of the votes cast against it. *Double v. McQueen*, 39.

See MANDAMUS (2, 3).

ELECTION OF COUNTS—See PLEADING (5).

EMANCIPATION—See CONTRACT (1).

ENTIRETIES—See HUSBAND AND WIFE (1, 3)

EQUITY PLEADING.

While a preliminary injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant, yet, if permitted to stand until the hearing, it should be perpetuated, if a basis for injunctive relief is established by the proofs. *Smith v. Blake*, 542.

See PARTIES.

EQUITY PRACTICE.

1. Where a stockholder asks leave to intervene, and defend a foreclosure suit brought against the corporation, in which it has allowed an order *pro confesso* to be entered, on the ground of alleged fraud and collusion between the holders of the bonds which the mortgage was given to secure and the corporation, and of their fraudulent issue, he should place before the court in support of his application the sworn statements of those who are cognizant of the facts, and who

EQUITY PRACTICE—Continued.

make their affidavits upon actual knowledge. *Stradley v. Circuit Judge*, 287.

2. *Ex parte* proceedings by a complainant, taken after the defendant has entered his appearance and demanded a copy of the bill, but without giving notice to the complainant's solicitor, and of which the defendant has no notice or knowledge until after a *pro confesso* decree has been taken for want of an appearance, are irregular and void. *Cook v. French*, 525.
3. The raising of technical questions after a hearing upon the merits is not favored, and a bill will not be dismissed upon a demurrer clause in the answer unless it is fatally defective, and past remedy by amendment. *Smith v. Blake*, 542.

ERROR WITHOUT PREJUDICE.

The giving of an erroneous instruction to the jury, which is rendered unimportant by their finding upon a special question of fact, is error without prejudice. *Cook v. Canny*, 399.

ESTATES OF DECEASED PERSONS.

1. The words, "aiding and supporting Ann Grimm and children," used in a claim filed against the estate of a deceased person, are broad enough to include aid and support by the contribution of money. *Grimm v. Estate of Taylor*, 5.
2. Where, upon the divorce of his parents, a minor son is emancipated by his father, and, at the request of his mother's brother, remains at home and aids in the support of his mother and minor brothers and sisters, upon the uncle's promise to pay him for his services, he can recover the value of the services so rendered of his uncle's estate. *Id.*
3. Where, on the hearing of a claim filed by a son against the estate of his uncle for aiding in the support of his mother at the uncle's request, the only testimony tending to show an agreement by the uncle to pay a specified sum for such services is the statement of the deceased that he had hired the claimant, and intended when he died to leave him $1,000, it is error to submit that question to the jury. *Id.*
4. An appeal from an order for the hearing of claims generally, made after the appointment of a special and before the appointment of a general administrator, is the appropriate remedy by which to test the validity of such order, and of

ESTATES OF DECEASED PERSONS—Continued.

the allowance of claims thereunder. *Jenks v. Judge of Probate*, 122.

5. Where heirs are estopped from questioning the validity of an order of the probate court, and of the proceedings had thereunder, the administrator is also estopped in a proceeding in which he represents only their interests. *Id.*
6. The position taken by the relators in *Comstock v. Circuit Judge*, 95 Mich. 48, is held to have been so inconsistent with the application in this case as to work an estoppel against their right to contest the action brought in question in this proceeding. *Id.*

See LIQUOR TRAFFIC (17); SALE (6).

ESTOPPEL.

1. Material-men, by seeking to enforce their claim for materials by suit against the contractor and by garnishment proceedings, are not estopped from suing the owner of the building upon his agreement to pay them for materials thereafter furnished the contractor. *Bice v. Marquette Opera-House Building Co.*, 24.
2. Where a county drain commissioner follows the description contained in an application for the deepening and straightening of a drain, and the jury determine that no public necessity exists for the improvement, the petitioners cannot avoid the liability imposed by 3 How. Stat. § 1740*b* 5, for the costs and expenses incurred, on the ground of the alleged insufficiency of the description of the line of the drain in the application. *Rosenstiel v. Miller*, 99.
3. Where heirs are estopped from questioning the validity of an order of the probate court, and of the proceedings had thereunder, the administrator is also estopped in a proceeding in which he represents only their interests. *Jenks v. Judge of Probate*, 122.
4. The position taken by the relators in *Comstock v. Circuit Judge*, 95 Mich. 48, is held to have been so inconsistent with the application in this case as to work an estoppel against their right to contest the action brought in question in this proceeding. *Id.*
5. Where the possessory rights of a subsequent grantee of mortgaged premises are not cut off by the foreclosure of the mortgage, a stipulation by the grantee that the foreclosure

ESTOPPEL—Continued.

proceedings are regular, made in a trespass suit brought for an unlawful entry by the mortgagee, will not give them that effect. *Thompson v. Smith*, 259.

6. A grantee is estopped from disputing his deed, in which, as also in all prior conveyances, the land is described as a part of "Block B" in a certain village, by showing that it is not a part of that block. *Id.*

7. Where a corporation defends a trover suit on the ground that it has a lien upon the property for material and work used in its construction, and that the plaintiff agreed that it might retain possession until its bill was paid, it cannot on appeal raise the question for the first time that the detention of the property by its president was without authority from the corporation, and that he alone is liable therefor. *Ruppel v. Manufacturing Co.*, 455.

8. A failure to act upon information which proves to have been erroneous, and for which reason any attempted action would have been futile, does not amount to an estoppel. *Anderson v. Crowley*, 457.

See BOND (1); JUDGMENT (1, 2); LIEN; PUBLIC OFFICERS; RES JUDICATA; SALE (3); TAXES (6).

EVIDENCE.

1. Where, in a suit to enforce the specific performance of a contract for the sale of mineral lands, it appears that the contract was made by conversations between the parties, in which it was understood that the stone on the lands valuable for building purposes was to be reserved, and by after-correspondence in which said reservation was referred to, the correspondence must be interpreted in the light of the conversations, evidence of which is admissible. *Butler v. Iron Cliffs Co.*, 70.

2. Such facts must be made to appear in order to dispense with the necessity for notice as will warrant a jury in believing that the party had actual knowledge. *Jones v. Shafer Iron Co.*, 98.

3. Evidence of a waiver of the exercise of "due diligence" is inadmissible in a suit upon a guaranty of collection, unless specially counted upon in the declaration. *Clark v. Kellogg*, 171.

EVIDENCE—Continued.

4. Where, in a suit to recover damages for selling spoiled meat, the plaintiff testifies that he noticed a peculiar odor and taste while eating it, it is a question for the jury whether he exercised due care in partaking of the meat. *Craft v. Parker, Webb & Co.*, 245.
5. The plaintiff, in a suit to recover damages for negligence in the sale of a piece of spoiled bacon, after fixing the time of the sale, and showing the keeping for sale by the defendant of spoiled meats at about that time, may show that the defendant kept other spoiled meats for sale prior to the time of the sale complained of. *Id.*
6. Where, on the trial of an action of trespass, the question of fact in issue is whether the land claimed to have been trespassed upon is actually included in a parcel of land described in a mortgage executed by the plaintiff's grantor to the defendant, it is not competent for the plaintiff to show by parol testimony that the mortgagor pointed out to the mortgagee the boundary lines of the lands to be included in the mortgage, and informed him that the land in controversy was not to be included therein. *Thompson v. Smith*, 258.
7. Where, in a suit for false imprisonment, the plaintiff, and the photograph upon the strength of which the arrest was made, are in court, it is error to permit the defendant to testify to the opinion of third persons, given after the arrest, as to the resemblance between the photograph and the plaintiff. *Filer v. Smith*, 348.
8. The advice of attorneys given after the arrest is no justification of the arrest, and, if admissible as bearing upon the question of subsequent detention, it should appear that it was predicated upon a full disclosure of all the facts, an examination of all the evidences of identification offered by the arrested party, and a disclosure of whatever suggestions were made by him regarding his identity. *Id.*
9. A plain, unvarnished account, published in a newspaper, of the fact of the plaintiff's arrest, is admissible as tending to show the publicity given to the arrest, and the consequent injury. *Id.*
10. Property is often the subject of legal valuation, concerning which no proof of value in the market can be given, because it is not brought into the course of trade, and it is incapable of any estimate in that mode; and, in such a case, the

EVIDENCE—Continued.

value is to be ascertained from such elements of value as are attainable, among which may be the cost of construction. *Ruppel v. Manufacturing Co.*, 455.

11. Where testimony is taken down by the official stenographer, the mere statement of a witness, who is sworn on a second trial, that he does not recollect giving certain testimony on the former trial, is not an impeachment of the stenographer's testimony, nor does it justify a court or jury in finding that the witness did not so testify. *Gillespie v. Beecher*, 486.

12. Where, in a suit for breach of promise of marriage, the defendant admits making an offer of marriage, which the plaintiff testifies she accepted, which is denied by the defendant, who testifies that she avoided a reply, the subsequent conduct of the parties is admissible as bearing upon the truth of their respective stories as to what occurred at the time the offer was made. *Rutter v. Collins*, 510.

13. The answer of the plaintiff to a letter from the defendant, in which he stated that she had never answered his proposition by giving her consent or otherwise, and that he had concluded that she did not wish his company, and that he should live single the rest of his life, such answer stating that she thought he knew his proposition was accepted, and would not have him think otherwise for the world, and inviting him to come up that evening, as she would like to have a talk with him, is admissible in evidence in behalf of the plaintiff as a part of the *res gestæ*. *Id.*

14. It is competent for the plaintiffs, who seek to recover for the use of screws which they claim they permitted, at the request of the defendant, to remain under a building which they had moved for him, to show the number of screws thus used, and the length of time they were allowed to remain under the building. *Curren v. Ampersee*, 553.

15. Where, in a suit to recover for moving a building, the defendant seeks to recoup damages for alleged injury to the building, the opinion of a third person, expressed to the plaintiffs before the removal, as to the proper method of guarding against such injury, is immaterial. *Id.*

16. Where, in such a case, the damages sought to be recouped are large, and the defendant testifies that the building was worth $400 or $500 when he bought it, it is competent to show on his

EVIDENCE—Continued.

cross-examination, as tending to discredit his statement of its value, that he only paid $85 for it. *Id.*

17. Where, upon the trial of an appeal case, a witness testifies that he was not present when the contract sued upon was made, he may be contradicted by showing that he testified to the contrary on the trial in justice's court, if a proper foundation is laid; but it is not competent to show that his testimony as to his presence was contradicted by that of other witnesses. *Id.* 554.
18. One who keeps an untamed and savage bear in grounds which he knows are frequented by citizens, with his acquiescence, is charged with a greater degree of care than if the locality were more private; and evidence of how the grounds are occupied and used is admissible, in a suit to recover for injuries received from being bitten by the bear, as bearing upon the question of the defendant's negligence, and the alleged public character of the place. *Marquet v. La Duke*, 596.
19. Evidence that a father orders and pays for supplies for a hotel in which he keeps a saloon, and which he claims is run by his son, is admissible as tending to show the father's proprietorship of the hotel. *Id.*
20. A witness who was shown a lease of a hotel from a father to his son cannot testify, in a suit in which the question of which is the proprietor is in issue, that they told him that the son ran the hotel. *Id.*

See ADVERSE POSSESSION; ATTACHMENT (4); CERTIFICATE; CRIMINAL LAW (3, 6, 9, 20); LIQUOR TRAFFIC (19); MALICIOUS PROSECUTION; NEGLIGENCE (22, 24–26); PARTNERSHIP (1); PUBLIC LANDS (2, 3).

EXECUTION.

1. An execution cannot be issued and a levy made after a right of action on the judgment is barred by the statute of limitations. *Ludeman v. Hirth*, 17.
2. A lien upon real estate by virtue of a levy under an execution is not lost by delay in proceeding to a sale, where no fraudulent purpose is shown on the part of the judgment creditor. *Id.*
3. Where proceedings for sale under an execution levy are instituted before a right of action on the judgment is barred

EXECUTION—Continued.

by the statute of limitations, a sale thereafter made in pursuance of such levy is valid. *Id.*

4. The filing of an affidavit for a transcript with a justice of the peace after the expiration of five days from the rendition of a judgment, and the filing of the transcript in the circuit court, divest the justice of jurisdiction of the cause, and prevent the judgment debtor from thereafter staying the issuance of an execution on the judgment. *Hitchcock v. Circuit Judge*, 297.

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEASED PERSONS; MORTGAGE (6).

EXEMPLIFICATION—See CERTIFICATE.

EXEMPTIONS.

A chattel mortgage given by one partner upon the partnership property in the firm name to secure or pay partnership debts is valid as against the exemptions provided for by How. Stat. § 7686, although some of the partners may not be aware of its execution. *Robards v. Waterman*, 233.

EX PARTE PROCEEDINGS—See EQUITY PRACTICE (2).

EXPERT TESTIMONY—See EVIDENCE (26).

FALSE IMPRISONMENT.

1. When the facts are conceded, probable cause is a question of law, which the court must determine. *White v. McQueen*, 249.
2. When an officer in arresting fugitives from justice, and those whom he honestly believes have been guilty of felony, has acted in good faith, and after such an investigation as the circumstances permitted him to make, he will be protected in his action, and relieved from the consequences of a false imprisonment. *Id.*
3. The defense that the defendant in a suit for false imprisonment, who arrested the plaintiff without a warrant, had probable cause to believe that he had been guilty of a felony, is inadmissible under the plea of the general issue without notice of such special matter of defense. *Id.*
4. A newspaper article which states that the plaintiff in a suit for false imprisonment, and his companions, were very drunk when they boarded a street car, refused to pay their fare,

FALSE IMPRISONMENT—Continued.

used vile language, which annoyed the passengers, refused to get off when requested, and showed fight when the conductor proceeded to put them off; that the motorman came to the conductor's rescue, and knocked one of the men from the car, and the conductor ejected another; that one of them jumped on again, and was bleeding profusely, and using vile and filthy language; that when he refused to get off the conductor knocked him from the car with a rock; that the passengers then commenced to jump from the car, one of whom, a lady, fortunately fell away from the car, and escaped death; and that the names of the men were not known to the police, but that they had a good description of them, and, unless they left the city, they would probably be identified,—does not show that the plaintiff and his companions had been guilty of a violation of How. Stat. §§ 9274, 9275 (which make it a crime for any person willfully and maliciously, by any act, or by means of intimidation, to impede or obstruct the regular operation and conduct of the business of any railroad company, etc., or for two or more persons willfully and maliciously to combine or conspire together for a like purpose), or of any felony whatever, and does not justify the arrest of the plaintiff without a warrant. *Id.*

5. Whether an officer is justified in making an arrest without a warrant, upon information that one has been issued for a respondent charged with adultery, whose photograph has been sent to the officer, and between which and the party arrested (who is found stopping at the same hotel where is a woman who is believed to answer the description of the one with whom the adultery is charged to have been committed) he discovers a resemblance, depends upon whether the resemblance is so striking as to be convincing to a man of ordinary prudence and good judgment, which question should be submitted to the jury. *Filer v. Smith*, 347.

6. A prosecution for adultery can only be instituted in this State by the husband or wife of one of the adulterers, and, whatever suspicions an officer may have, he has no right to make an arrest for adultery, of his own motion. *Id.*

7. An officer who, through an honest mistake, and after such an investigation into the facts and circumstances as the particular case enables him to make, arrests a party upon a charge of felony, having reasonable grounds to suppose him

FALSE IMPRISONMENT—Continued.

to be the guilty party, and the one named in his warrant, is not liable, if he proves to be innocent, for the damages suffered in consequence of the arrest. *Id.*

8. An officer who makes an arrest upon a warrant, or upon knowledge that a warrant is out, of one whose person is unknown to him, and who can only act, if he act at all, upon photograph or description, or both, should be excused if he acts honestly and prudently, making such inquiry and examination as the circumstances afford him an opportunity to make. *Id.* 348.

9. Where the affidavit upon which a circuit court commissioner indorses an order to hold to bail in a libel suit shows, upon its face, that the alleged libelous publication was, as a matter of law, absolutely privileged, the order is void, and affords no protection to the parties instituting the proceeding, procuring the order, and delivering the process to the sheriff for service. *Wachsmuth v. Merchants' Nat'l Bank*, 427.

See EVIDENCE (7-9).

FINDINGS OF FACT.

1. A finding, as a conclusion of law, that certain tax deeds introduced by the plaintiff are invalid, will not be regarded as a finding of fact. *Hecock v. Van Dusen*, 573.

2. A finding that certain tax deeds were offered in evidence, purporting to convey the land on account of delinquent taxes assessed thereon for certain specified years, for which the land was sold, and that there were certain irregularities in the proceedings to levy and collect the taxes on the land for said years, and that for several of said years the levy for township, highway, and school purposes was in excess of the amounts authorized by law, will be construed as finding that the land was sold for said unauthorized taxes. *Id.*

FIRE INSURANCE.

1. When a policy of insurance sent to an agent without an application by the insured therefor, but with the expectation that the agent will tender it to the insured in renewal of a policy which has expired, reaches the agent on Sunday, and after the destruction of the property on the previous day, and the agent who forwarded the policy telegraphs on Sunday to the agent to whom it was sent not to deliver it, to which he answers, "all right, will return," which facts he communicates

FIRE INSURANCE—Continued.

to an agent of the insured on the same day, who notifies the agent on the following day to hold the policy, which is not done, and on the fourth and fifth days thereafter the agent of the insured demands the policy, on which latter day the premium is for the first time tendered, no valid contract of insurance is made. *New York Lumber, etc., Co. v. Insurance Co.*, 20.

2. A failure to furnish proofs of loss within 60 days after the fire, as required by the Michigan standard fire insurance policy, will not prevent a recovery in a suit commenced within the 12 months limited by the policy, and after the proofs of loss are furnished. *Rynalski v. Insurance Co.*, 395.
3. Members of a mutual fire insurance company, if liable at all for assessments made by a receiver under Act No. 82, Laws of 1873, can be made so only by the contract existing between them and the corporation, which contract is evidenced by the application and the policy. *Wardle v. Hudson*, 432.
4. Any defense which a member of a mutual fire insurance company might make against an action brought by the company to recover an assessment made by the board of directors is equally available in an action by the receiver, upon whom the statute merely confers the authority to levy and collect such assessment. *Id.* 433.
5. Where, by reason of the refusal of an insurance company to pay a loss, a policy-holder becomes entitled to bring a suit, without furnishing proofs of loss, four months prior to the expiration of the time limited in the policy for commencing a suit thereon, and which is the earliest day at which he could have brought suit had he furnished such proofs, a suit thereafter brought is barred, unless the limitation clause has been waived by the company. *Lentz v. Insurance Co.*, 445.
6. A member of a mutual fire insurance company who surrenders his policy, under a clause of the charter providing therefor on the payment of his proportion of all assessments to which the company is *then* liable, remains liable to assessment for such obligations as might lawfully be made the subject of assessment at the time of such surrender, but not for losses arising subsequently from failures to collect, or from any other cause. *Ionia, etc., Ins. Co. v. Otto*, 558.

FIXTURES—See MORTGAGE (9).

FORECLOSURE—See MORTGAGE (3–7, 10–12).

FRAUD—See CONTRACT (13); MERGER.

FRAUDULENT CONVEYANCES—See ASSIGNMENT FOR BENEFIT OF CREDITORS (3); ATTACHMENT (5); CHATTEL MORTGAGE (4).

GAMING DEBT—See CONSIDERATION (1).

GARNISHMENT—See BILLS AND NOTES.

GIFT—See SALE (5, 6).

GROSS NEGLIGENCE—See NEGLIGENCE (18).

GUARANTY OF COLLECTION.

1. An agreement by which the assignor of a quantity of notes and accounts does guarantee, represent, and warrant that a specified sum shall be realized thereon, and which provides that the assignees shall use due diligence in their collection, amounts to a guaranty of collection. *Clark v. Kellogg*, 171.
2. In order to recover upon such guaranty, the assignees must show that each note and account has been put into judgment, and that an execution has been returned thereon unsatisfied. *Id.*
3. Evidence of a waiver of the exercise of "due diligence" is inadmissible in a suit upon a guaranty of collection, unless specially counted upon in the declaration. *Id.*

HIGHWAYS.

An abutting lot-owner in a city owns the fee of the land to the center of the street, with the right to its use, subject to the public easement, and may set out shade trees, construct a sidewalk, and exercise other acts of ownership and possession which do not interfere with the public use. *Smeberg v. Cunningham*, 379.

See EJECTMENT (4); NEGLIGENCE (3, 22, 24).

HOMESTEAD.

1. A homestead exemption may be claimed in land purchased for a homestead, and upon which a building is afterwards erected, and occupied by the owner for hotel purposes, and in which his family reside, they having no other residence or home. *Lamont v. LeFevre*, 175.

HOMESTEAD—Continued.

2. A lien attaches under the mechanic's lien law of 1885 to a homestead exceeding in value $1,500, subject to the statutory exemption; and, if the premises are incapable of division, they may be sold, as the only means of reaching the excess. *Id.*

HOMICIDE—See CRIMINAL LAW (16-18).

HUSBAND AND WIFE.

1. The doctrine that where land is conveyed to a husband and wife jointly they take by entireties, and on the death of either the survivor takes the entire estate, does not apply to a purchase-money mortgage given to them jointly on the sale of land owned by the husband. *McLeod v. Free*, 57.
2. Land conveyed to a wife by her husband after the execution by them of a power of attorney to their son to sell any and all real estate belonging to them, or either of them, in a designated county, cannot be said to have *belonged* to the wife when the power of attorney was executed, in such a sense as to authorize the son to sell the land after its conveyance to his mother. *Penfold v. Warner*, 179.
3. Neither a husband nor wife can convey the estate vested in them as tenants in the entirety by his or her sole deed, and any instrument by which either attempts to make such conveyance is void. *Naylor v. Minock*, 182.
4. The married woman's act of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. *Id.*

See DIVORCE; FALSE IMPRISONMENT (5, 6); LIQUOR TRAFFIC (18, 19).

IDENTITY—See DEED (2); FALSE IMPRISONMENT (5, 7, 8).

IMPEACHMENT—See EVIDENCE (11, 16, 17).

INCEST—See CRIMINAL LAW (9, 10).

INFANT—See CONTRACT (1).

INJUNCTION.

While a preliminary injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath

INJUNCTION—Continued.

of the complainant, yet, if permitted to stand until the hearing, it should be perpetuated, if a basis for injunctive relief is established by the proofs. *Smith v. Blake*, 542.

INSURANCE—See FIRE INSURANCE.

INTEREST—See JUDGMENT (3, 4); MORTGAGE (7).

JUDGMENT.

1. The recovery of a judgment by a mortgagee upon a chattel-mortgage note collateral to the mortgage, without satisfaction thereof, will not prevent him from bringing an action of replevin for the mortgaged property. *Bateman v. Railroad Co.*, 441.
2. Where, pending an action of replevin by a mortgagee for the mortgaged property, he recovers a judgment in justice's court upon the mortgage note, which is collateral to the mortgage, which judgment is not appealed from, nor pleaded in the replevin suit, and judgment is afterwards rendered therein in favor of the mortgagor on the ground that there was nothing due upon the mortgage debt in excess of the sum tendered when the suit was commenced, and the judgment is affirmed in the Supreme Court, the latter judgment is a bar to garnishment proceedings for the collection of the justice's judgment. *Id.*
3. The judgment in an action *ex contractu* may include interest on the amount of the verdict from the time of its rendition to the time of the entry of the judgment. *Wright v. Seeley*, 491.
4. It is error to enter judgment, after the discharge of the jury, upon their verdict for a certain sum "and interest," for an amount in excess of that sum and the interest accruing on the verdict up to the time of the entry of the judgment. *Id.*

See MALICIOUS PROSECUTION; STATUTE OF LIMITATIONS (1, 2).

JURY.

Where the language of an alleged libelous article is ambiguous, and capable of being understood in an innocent and harmless, as well as in an injurious, sense, its true interpretation is for the jury. *Ewing v. Ainger*, 587.

See CHARGE TO JURY; CRIMINAL LAW (11); LIQUOR TRAFFIC (2); SPECIAL QUESTIONS TO JURY.

JUSTICES' COURTS OF DETROIT.

The clerks of the justices' courts of Detroit has the absolute control of his deputies. It is not necessary that each certificate of appointment should be accompanied by a certificate of the justices of the necessity for such appointment, but if a certificate is filed that the necessity for so great a number as was named in the original certificate no longer exists, it is the duty of the clerk to conform to the new certificate as to the number of his deputies, but it rests with him as to what deputies shall be retained in office. *Seabury v. Board of Auditors*, 46.

JUSTICES OF THE PEACE—See EXECUTION (4); JUDGMENT (2).

LACHES—See ATTORNEY AND CLIENT.

LEASE—See SALE (5, 6); TAXES (5).

LIBEL AND SLANDER.

1. The law does not permit persons to publish that one has been guilty of criminal, infamous, or degrading acts, based upon public rumors or current belief. *People v. Jackman*, 269.
2. A resolution offered to the common council of a city by a member of the council, reciting the affirmance by the Supreme Court of the State of a decree against the principal surety on the bond of a bank as depository of the money of the city, and that the decree will in all probability compel the surety to pay at least $125,000, and that for this reason the council does not deem it entirely safe to leave the money on deposit in said bank without additional security, and directing the withdrawal of the money, and its deposit in the other city banks, until such additional security is given, is, as a matter of law, absolutely privileged. *Wachsmuth v. Merchants' Nat'l Bank*, 426.
3. Where the language of an alleged libelous article is ambiguous, and capable of being understood in an innocent and harmless, as well as in an injurious, sense, its true interpretation is for the jury. *Ewing v. Ainger*, 587.

See PLEADING (3, 5, 6, 8).

LICENSE—See LIQUOR TRAFFIC (6–11).

LIEN.

1. In the absence of a reservation in a sawing contract of the

LIEN—Continued.

right to ship the lumber before payment of the saw bill, the shipment of a portion of the lumber without protest will not prevent the contractor from claiming a lien upon the remainder for the whole saw bill. *Hughes v. Tanner*, 113.

2. The acceptance of time drafts on account of the amount due on a sawing contract will not operate to discharge the lien of the contractor unless received as payment, and then only *pro tanto*. *Id.*

3. Where the purchasers of a portion of the lumber covered by a sawing contract know that the lumber is in the possession of the contractor, and is being sawed by him, and the only knowledge he has of the sale is the fact that the initials of their names are placed upon certain piles of the lumber, and that he sees one of the purchasers at the mill while the sale is being negotiated, no such sale, delivery, transfer of title, or payment in the contractor's presence is shown as to make it his duty to assert his lien. *Id.*

See MECHANIC'S LIEN.

LIFE-TENANT—See TAXES (2, 3).

LIQUOR TRAFFIC.

1. A complaint alleging that the respondent was on a given day, and at a specified city in the county where the complaint is made, the proprietor of a place where spirituous and intoxicating liquors were by her kept to be sold, said place not being a drug-store, and that she did on the day named, being the first day of the week, commonly called "Sunday," keep her said place, where said liquors were by her kept as aforesaid, open, and did not keep her said place of business closed, as required by law, sufficiently charges the respondent with a violation of the Sunday closing statute. *People v. Wheeler*, 1.

2. A juror in a liquor case, who testifies on his *voir dire* examination that he thinks he has a prejudice against persons engaged in the liquor traffic, and that he has always been down on liquor selling, whether legal or illegal, and that such prejudice might extend to the respondent, and might not be removed, is subject to a challenge for cause, although after being prompted by the prosecuting attorney with the statement that he did not understand that the juror had a prejudice against the person, but the business, he states to the

LIQUOR TRAFFIC—Continued.

court that, if the rights of such a person came up to be adjudicated before him as a juror, he would not be prejudiced against him by reason of the fact that he was engaged in that business. *Id.*

3. No one possesses a natural, inalienable, or constitutional right to keep a saloon for the sale of intoxicating liquors. *Sherlock v. Stuart*, 193.
4. The principle upon which is based the regulation of the liquor traffic is found in the police power of the State. *Id.*
5. The restrictions and conditions which may be imposed upon the liquor traffic are entirely within the discretion of the people, acting through the Legislature, and they have the right to prohibit the low, the vicious, and the criminal from engaging in it. *Id.*
6. The fee required to be paid as a condition precedent to engaging in the business of selling intoxicating liquors is called a "tax," but there are other conditions precedent which are inconsistent with a purely tax system, and partake of the character of a license. *Id.*
7. The Legislature may confer upon municipalities the right to determine the places where saloons may be kept, and to determine that question upon each application; and may enact that only reputable persons shall be allowed in the business, and may authorize the municipal authorities to determine the question of fitness. *Id.*
8. Other considerations than the mere locality must often enter into the determination of the suitableness of the place for a saloon; and if the building be so arranged as to render violations of the law easy, or if the saloon is to be kept in connection with a house of prostitution, or if it be not situated upon a street or alley, or if it be in one of the upper stories of a building, or in a part of the city occupied for residence purposes only, or near a school, such conditions would certainly afford good reasons for the rejection of an application for a license. *Id.*
9. Under the charter of the city of Grand Rapids, which confers upon the common council power to enact such ordinances as it may deem desirable to restrain, license, and regulate saloons, and to regulate and prescribe the location thereof, the council may enact an ordinance requiring that all applications for license shall be made to the council, and

LIQUOR TRAFFIC—Continued.

prescribing the conditions precedent to their consideration. *Id.* 194.

10. An ordinance requiring all applications to be in writing, and to state the number or location of the proposed saloon, and that they be accompanied with the recommendation, signed by 12 reputable and respectable citizens of the city, certifying that the applicant is well known to them, and is of means, and qualified to keep a saloon, and is of good reputation, fame, and moral character, and is an orderly person; and requiring him to pay a specified sum for such license, and a fee for issuing the same, and to give a bond, to be approved by the council, conditioned that the applicant shall keep and maintain an orderly and well-regulated saloon during the continuance of his license, and pay all fines imposed according to law for a violation of any of the provisions of the ordinance; and providing that the license, when issued, shall state the number or location of the saloon, as designated in the application, and shall not be transferred to any other part of the city without the consent of the council,—is clearly authorized by the charter, and its plain intent is to confer upon the common council power to determine each individual application, so far as the location and suitableness of the place are concerned. *Id.*
11. When the mayor and common council have in good faith exercised the discretion conferred upon them by law, the courts cannot review such discretion; and the action of the mayor in vetoing a resolution of the council granting a license, on the ground of the unsuitableness of the place where the saloon is proposed to be located, can only be reviewed by the council. *Id.*
12. The question in *People v. Furman*, 85 Mich. 110, was whether the general liquor law of 1887 repealed all prior acts of the Legislature inconsistent therewith, general as well as local; and the power of the Legislature to confer, by subsequent legislation, upon municipal corporations, the right to deal with the liquor traffic in a manner not provided for in the general law, is too clear for argument. *Id.*
13. The liquor law of 1887 recognizes the fact that other lines of business are often carried on upon the same premises within which the liquor business is or is to be conducted, and makes a distinction between the *room* in which the

LIQUOR TRAFFIC—Continued.

liquors are kept for sale and the *place* where the business is carried on. *Courtright v. Common Council*, 290.

14. The bond required to be given by a person who engages in the sale of intoxicating liquors must contain a description, not of the room or rooms where the liquor is to be sold, but of the place where the business is to be carried on. *Id.* 291.
15. The statute imposes the tax to be paid by liquor dealers, not upon the amount of their business, nor upon each bar, but upon the *business* of selling liquor at the *place* of business designated. *Id.*
16. *Mandamus* will lie to compel the approval of a liquor bond in which the place where the business is to be carried on is designated by the name of a hotel owned and kept by the liquor seller, and in which he maintains two separate bars, one on the ground floor and one in the basement, the same having front entrances from the street, and rear entrances from the alley in the rear of the hotel, and being accessible from the hotel office. *Id.*
17. If a wife, as administratrix of her husband's estate, can continue to carry on the business of liquor selling, in which he was engaged at the time of his death (which is not decided), she cannot do so without first paying the tax and giving the bond required by the statute. *People v. Sykes*, 452.
18. The statute gives an absolute right of action to a wife against those who have caused or contributed to the intoxication of her husband which results in injury, and does not predicate her right of recovery upon knowledge on their part that he was a person in the habit of becoming intoxicated. *McMahon v. Dumas*, 467.
19. The questions whether the plaintiff's husband was intoxicated when he drank in defendant's saloon, and whether he was killed by a railroad train,—his body being found after daylight on the railroad track,—and by reason of intoxication, are held to have been properly left to the jury. *Id.*

LOGS AND LOGGING—See CONTRACT (8-10).

MALICIOUS PROSECUTION.

Where a respondent, who has taken an appeal from a conviction before a justice of the peace of the crime of larceny, appears in the circuit court, and is discharged on the ground

MALICIOUS PROSECUTION—Continued.

that the value of the property is alleged in the complaint at more than $25, and the clerk fails to enter the judgment of discharge, such judgment, entered *nunc pro tunc* pending the trial of a suit brought by the respondent for malicious prosecution after his discharge, is admissible on said trial as evidence of the actual termination of the criminal prosecution. *Holmes v. Horger*, 408.

MANDAMUS.

1. *Mandamus* will not lie where the person to whom it is addressed has no power to obey its mandate. *Corby v. Judge of Probate*, 11.
2. Where, in answer to an order to show cause why a *mandamus* should not issue to compel the board of supervisors of a county to reconvene and canvass the votes cast upon the question of the removal of the county-seat, the respondents state that they have not refused to make such canvass, but propose to make it on the day to which the board has adjourned, there is no necessity for issuing the writ. *Double v. McQueen*, 39.
3. Where, in such a case, the answer shows that the majority of the votes actually cast was against the removal, and that the inspectors of election in certain townships fraudulently omitted to make true and correct returns of the votes cast, and the respondents ask that said inspectors be compelled to make a return to the facts thus set up, the answer will be treated as a petition, and an order to show cause why they have not made such true and correct returns will issue against said inspectors. *Id.*
4. *Mandamus* is the proper remedy by which to compel the clerk of the justices' courts of Detroit to reduce the number of his deputies upon the filing with the board of auditors of a certificate that no necessity exists for retaining the number named in the original certificate of necessity. *Seabury v. Board of Auditors*, 46.
5. *Mandamus* will lie to compel the approval of a liquor bond in which the place where the business is to be carried on is designated by the name of a hotel owned and kept by the liquor seller, and in which he maintains two separate bars, one on the ground floor and one in the basement, the same hav-

MANDAMUS—Continued.

ing front entrances from the street, and rear entrances from the alley in the rear of the hotel, and being accessible from the hotel office. *Courtright v. Common Council*, 291.

6. *Mandamus* is not the proper proceeding by which to oust from office an acting officer, who is not a party thereto. *Pariseau v. Board of Education*, 302.

MARRIED WOMAN.

The married woman's act of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. *Naylor v. Minock*, 182.

MASTER AND SERVANT—See CONTRACT (5-7); NEGLIGENCE (21).

MEATS—See EVIDENCE (4, 5); NEGLIGENCE (6, 7).

MECHANIC'S LIEN.

1. Notice of the filing of a statement of lien, under the mechanic's lien law of 1885, need not be served upon the owner of the premises, where the contract out of which the claim arises was made with him. *Lamont v. Le Fevre*, 175.
2. A lien attaches under the mechanic's lien law of 1885 to a homestead exceeding in value $1,500, subject to the statutory exemption; and, if the premises are incapable of division, they may be sold, as the only means of reaching the excess. *Id.*

MERGER.

1. There can be no merger where the transaction is tainted with fraud on the part of the mortgagor and grantor, and the mortgagee and grantee has acted in good faith. *Cook v. Foster*, 610.
2. Purchasers, intervening mortgagees, and their assignees are not justified in relying upon the record of a deed of the mortgaged premises from the mortgagor to the mortgagee, as showing merger, where the mortgage has not been discharged of record, such fact being sufficient to put them upon inquiry. *Id.*

MONEY HAD AND RECEIVED—See ACTION.

MORTGAGE.

1. The doctrine that where land is conveyed to a husband and wife jointly they take by entireties, and on the death of either the survivor takes the entire estate, does not apply to a purchase-money mortgage given to them jointly on the sale of land owned by the husband. *McLeod v. Free*, 57.
2. A mortgage executed by a wife upon land owned by herself and husband as tenants in the entirety, to secure the repayment to their son of money expended in the defense of his father on a criminal charge, and to be expended in his maintenance at an asylum to which he was about to be sent on his acquittal on the ground of insanity, is invalid in its inception to convey any estate, and is ineffectual to convey the title acquired by the wife on the death of the husband. *Naylor v. Minock*, 182.
3. How. Stat. § 8506, which provides that a deed executed on the statutory foreclosure of a mortgage shall, in case of a failure to redeem, vest in the grantee all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, is to be read into mortgages executed since its enactment as a part of the contract. *Id.*
4. The right of possession of a subsequent grantee of mortgaged premises, whose deed is not recorded until after the filing of *lis pendens* in a suit brought to foreclose the mortgage, but who is in possession when the suit is commenced, will not be cut off by the foreclosure proceedings, nor by the entry of the mortgagee thereunder *Thompson v. Smith*, 259.
5. Where the assignee of a mortgage assigns it as security for a debt which is less than the amount due on the mortgage, he is entitled to the excess, and, in a suit by his assignee to foreclose the mortgage, the decree should provide for the payment to him of the surplus, if any, arising on a sale of the mortgaged premises, to the amount of his claim. *Moreland v. Houghton*, 346.
6. The agreement of an executor to discharge a mortgage bequeathed to the mortgagor, charged with the payment of a legacy, in consideration of the note of the mortgagor given on the surrender by the executor of notes held by him against the husband of the legatee, who receipts for the legacy, enters into the consideration of the mortgagor's note,

MORTGAGE—Continued.

and the executor cannot revive the mortgage, nor use his office to enforce the payment of the note by foreclosing the mortgage. *DeCoo v. Woodworth*, 362.

7. How. Stat. § 8498 (subd. 4), which provides for the foreclosure of mortgages for each installment due thereon, includes installments of interest as well as installments of principal. *Edgar v. Beck*, 419.
8. Where a grantee records his deed before a mortgage given by his grantor on the purchase of the land has been recorded, of which mortgage he has notice, his grantee, who receives his deed after the mortgage has been recorded, takes his title subject to the equities of the mortgagee. *Cook v. French*, 525.
9. Where the owner of land, upon which he has erected a foundry and machine shop, mortgages the land without mentioning the machinery in the building, which is owned by him, and, so far as necessary, fastened to the soil or building, and which is adapted to the business for which the building was erected, the mortgage will be held to cover the machinery, such being the intention of the parties, as shown by the preponderance of the proof. *Smith v. Blake*, 542.
10. The notice of sale on the statutory foreclosure of a mortgage need not be dated, and, if not dated, it will date from its first publication. *Cook v. Foster*, 611.
11. The statutory foreclosure of a mortgage will not be voided by including in the amount claimed to be due at the date of the notice of sale an installment maturing the following day, in the absence of evidence showing bad faith on the part of the mortgagee or actual injury to the mortgagor. *Id.*
12. The execution of a deed on the statutory foreclosure of a mortgage by the under-sheriff, who made the sale, can be acknowledged before the sheriff, who is a notary public. *Id.*

See CHATTEL MORTGAGE; CONSIDERATION (1); DEED (1); MERGER; TAXES (3).

MUNICIPAL CORPORATIONS.

A city is not liable for an accident caused by the formation of ice upon a sidewalk from natural causes, and without fault upon its part, from snow which fell in the adjoining highway. *Kannenberg v. City of Alpena*, 53.

MUNICIPAL CORPORATIONS—Continued.

See JUSTICES' COURTS OF DETROIT; LIQUOR TRAFFIC (7–11); NEGLIGENCE (22, 24); PRACTICE IN CIRCUIT COURT (1).

MUTUAL FIRE INSURANCE COMPANIES—See FIRE INSURANCE (3, 4, 6).

NAME—See DEED (2).

NEGLIGENCE.

1. A railroad company is not guilty of negligence in failing to place fences or screens along its tracks in its station grounds for the purpose of preventing the frightening of horses approaching its station. *Flagg v. Railway Co.*, 30.
2. The driver of a four-year-old colt who tries to hold him by the head after being backed up to the platform at a railway station, and after he has become restless and frightened at the noise of an approaching train, instead of driving away over a smooth driveway, and thus avoiding the threatened danger, is guilty of negligence. *Id.*
3. A city is not liable for an accident caused by the formation of ice upon a sidewalk from natural causes, and without fault upon its part, from snow which fell in the adjoining highway. *Kannenberg v. City of Alpena*, 53.
4. Where a street-car driver permits a seven-year-old boy, who was upon the front platform with him when the car started, to remain there and ride for some distance, he has no right to order the boy to get off without giving him an opportunity to obey the order with safety. *McCahill v. Railway Co.*, 156.
5. It is a question for the jury in such a case whether the driver was negligent if he ordered the boy to get off while the car was in motion, or whether he should have first stopped the car, and then given the order. *Id.*
6. A keeper of a meat-market is bound to use due care to see that the meats sold are fit for human consumption. *Craft v. Parker, Webb & Co.*, 245.
7. A dealer who sells food for consumption impliedly warrants that it is fit for the purpose for which it is sold; and, if he sells food that is dangerous to those who eat it, he is liable for the consequences, if he knew it to be dangerous, or, by proper care on his part, could have known of its condition. *Id.*

NEGLIGENCE—Continued.

8. Whether or not a traveler who is injured upon a railroad crossing in the open country on a dark night, by a train running without a headlight, is guilty of contributory negligence in failing to stop his team before entering upon the track, in order to listen for an approaching train, is at least a question for the jury, his view of the track being unobstructed other than by the darkness. *Van Auken v. Railway Co.*, 307.

9. In nearly all the states it has been held, under statutes quite similar to our Sunday statute, that a party traveling upon the highway upon the Sabbath, either from necessity or for pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the company for its negligence from the fact that the injury occurred on Sunday. *Id.*

10. Railway trains must run where the view is obstructed by cuts, embankments, trees, and other things; and he who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence. *Shufelt v. Railroad Co.*, 327.

11. The plaintiff's wife is held to have been guilty of such negligence in failing to stop her team, and look and listen for an approaching train, before attempting to cross defendant's track, as to bar a recovery, it appearing that had she done so she could have seen the train when she was at a distance of from 18 to 20 feet from the crossing. *Id.*

12. It is error to instruct the jury in a negligence case that the plaintiff is entitled to recover the money she may have expended in an attempt to be cured of her injuries, in the absence of any testimony tending to show such expenditure. *Cousins v. Railway Co.*, 386.

13. While it is *prima facie* negligent for a passenger to attempt to alight from or to board a moving train, it is not in all cases negligence *per se* to attempt to do so. *Id.*

14. If a passenger is, by the wrongful act of the carrier, placed in a position where, under a sudden impulse to save himself from serious inconvenience, he attempts to alight from a moving train, where the danger is not imminent, and where persons of ordinary care and caution would make the attempt, the question of his negligence in making the attempt is for the jury. *Id.*

NEGLIGENCE—Continued.

15. A request for an instruction in a negligence case, that the jury find a verdict for the plaintiff if they find that the defendant was negligent in a matter not the proximate cause of the accident, and which leaves out of consideration such proximate cause and the alleged contributory negligence of the plaintiff's servant, is properly refused. *St. Clair Mineral Springs Co. v. City of St. Clair*, 463.

16. It is a much better practice for the trial judge to draw the attention of the jury in a negligence case to the issues they are to determine, and inform them what facts, if found, will constitute negligence and render the defendant liable, than to give them a general definition of negligence. *Id.*

17. The mere fact that an engineer, at a distance of a mile or a mile and a quarter from a private crossing, sees a load of logs, to which horses are attached, standing on the track at the crossing, is not sufficient to warn him that the load is fast upon the track, and that the horses are unable to move it, and he is not called upon to check the speed of his train until signaled, or until near enough the crossing to see the danger for himself. *Frost v. Railroad Co.*, 470.

18. In order to convict a railroad company of willful and reckless conduct, or of gross negligence, in running a freight train into a load of logs, to which horses are attached, and which has become stalled on a private crossing, it must be shown that the engineer knew the situation at the crossing in ample time to stop his train, and that he ran on in spite of such knowledge, knowing the consequences which must ensue if he failed to stop the train before reaching the obstruction. *Id.*

19. Where, in such a case, the servants in charge of the logs and team see the smoke of the approaching engine while at a distance of a mile or a mile and a quarter from the crossing, and after they have abandoned their attempt to draw the logs off the track, and are preparing to unload them, it is their duty at once to unhitch the horses, and signal the approaching train. *Id.*

20. The general rule is that negligence cannot be presumed from the mere fact of an injury, and, though it may be inferred from facts proved, it cannot be based upon guesses or conjecture. *Redmond v. Lumber Co.*, 545.

21. The mere fact that a machine, which is shown to have per-

NEGLIGENCE—Continued.

formed its accustomed work properly both before and after an accident, failed so to work on that particular occasion, is not sufficient to justify the conclusion of negligence. *Id.*

22. It is competent for the plaintiff in a negligence case to show that another person was tripped by a loose board in the same sidewalk upon which plaintiff was injured in like manner some eight months thereafter, as tending to show a long continuance of the defective condition of the walk, from which notice to the defendant might be inferred; it appearing that the walk had not been repaired up to the time of the accident to the plaintiff. *Alberts v. Village of Vernon,* 549.

23. One who keeps an untamed and savage bear in grounds which he knows are frequented by citizens, with his acquiescence, is charged with a greater degree of care than if the locality were more private; and evidence of how the grounds are occupied and used is admissible, in a suit to recover for injuries received from being bitten by the bear, as bearing upon the question of the defendant's negligence, and the alleged public character of the place. *Marquet v. La Duke,* 596.

24. As showing the negligence of a village in permitting a sidewalk to be out of repair at the place where the plaintiff was injured, it is competent for the plaintiff to show by the president of the village that he knew of the defect before the accident, and that by 20 minutes' work it could be remedied, and that he communicated these facts to the village marshal; and the defendant cannot rebut the *effect* of this testimony by showing that the president did not give the like information to the chairman of the street committee. *Edwards v. Common Council,* 625.

25. The action of the court in permitting plaintiff to exhibit her injured limb to the jury as evidence of its *then* condition is sustained under *Langworthy v. Township of Green,* 95 Mich. 93, and *Graves v. City of Battle Creek,* Id. 266. *Id.*

26. A physician who had examined plaintiff's limb some time before the trial was properly permitted to testify that, in his opinion, a scar upon the other limb was the effect of the disease with which the injured limb was afflicted at the time of the trial, which disease the defendant claimed existed

NEGLIGENCE—Continued.

prior to the accident, and which plaintiff contended was the result of the injury complained of. *Id.*

See CHARGE TO JURY (1); EVIDENCE (4, 5); PRACTICE IN CIRCUIT COURT (1).

NONSUIT.

Where a plaintiff in ejectment has been denied the right to amend his declaration by setting forth the estate he claims in the land, it is error to refuse to permit him to submit to a nonsuit. *Ludeman v. Hirth*, 17.

NOTICE.

1. Actual knowledge, however acquired, dispenses with the necessity for notice. *Jones v. Iron Co.*, 98.
2. Such facts must be made to appear in order to dispense with the necessity for notice as will warrant a jury in believing that the party had actual knowledge. *Id.*

See BONA FIDE PURCHASER; DEED (6); DIVORCE (1); EQUITY PRACTICE (2); MECHANIC'S LIEN (1); MERGER (2); MORTGAGE (10–12); NEGLIGENCE (22, 24); NUISANCE; PLEADING (2, 8); RECORDING LAWS (2).

NOVATION.

1. Where there is some evidence justifying a finding that a novation has taken place, whereby the defendant has been released from liability, it is not error to submit that question to the jury. *Mulgrew v. Cocharen*, 422.
2. Where the owner of a vessel, after mortgaging it to secure the payment of his note, sells it to a third party subject to the mortgage, and the purchaser agrees to pay the note and mortgage as a part of the purchase price, and that the mortgagor shall be released from all further liability thereon, all of which is assented to by the mortgagee, a complete novation is effected. *Id.* 423.

NUISANCE.

1. Branches of trees standing upon land adjoining the right of way of a railroad company, which overhang the right of way to such an extent as to obscure the view of its engineers when their duties require them to lean out of their cabs for the purpose of maintaining a lookout, are a nuisance, which may be abated by the company by trimming the branches

NUISANCE—Continued.

off up to the line of the division fence, without notice to the land-owner, who has knowledge of the fact that the company claims they are a nuisance, and desires their removal. *Hickey v. Railroad Co.*, 498.

2. The fact that the road-master of the railroad company offers the land-owner $10 to remove the trees, which he refuses to accept, will not confer upon him the right to exact further notice before the removal of the overhanging branches by the railroad company. *Id.*

NUNC PRO TUNC JUDGMENT—See MALICIOUS PROSECUTION.

OPTION—See DEED (1); SALE (5, 6).

ORDER TO HOLD TO BAIL—See FALSE IMPRISONMENT (9).

PARTIES.

The contractor is a necessary party to a bill filed by tax-payers against the president, clerk, treasurer, and trustees of a village, to restrain the payment of moneys under a contract entered into by the village council for furnishing a water supply. *Hoppock v. Chambers*, 509.

See AMENDMENT (2); DIVORCE (1); EJECTMENT (2).

PARTITION.

A husband who purchases an interest in the life-estate of his wife in land of which she is in possession, and an undivided interest in the reversion, cannot maintain a bill for the partition of the land as against the other reversioners. *Metcalfe v. Miller*, 459.

PARTNERSHIP.

1. All of the authorities agree that profit sharing is evidence tending to show a partnership. *Dutcher v. Buck*, 160.
2. To constitute one a partner as to third persons, it is not necessary that he should agree to share in the losses of the business. *Id.*
3. Community of property, interest, and profits in a venture launched for the benefit of two persons makes them both principals, and whatever is done for their mutual benefit must be deemed to have been done by authority of both. *Id.*
4. One partner has the right to execute a chattel mortgage upon the partnership property in the firm name for the pur-

PARTNERSHIP—Continued.

pose of securing or paying partnership debts. *Robards v. Waterman*, 233.

5. Such a mortgage is valid as against the exemptions provided for by How. Stat. § 7686, although some of the partners may not be aware of its execution. *Id.*

6. A partner can maintain an action at law upon the agreement of his copartner, contained in the articles of partnership, to pay a certain sum for an interest in a patent which is to form the basis of their subsequent partnership relations and dealings. *Cook v. Canny*, 398.

7. An agreement by a retiring partner to pay one of the remaining partners, who form a new firm, one-half of the sum realized on a mortgage owned by him, in consideration of the agreement of said partner to pay to him one-half of his share of the profits and property realized from the new venture, will not make them partners *inter sese* as to the mortgage and the interest of the partner in the new firm, and an action at law can be maintained by the partner on said agreement. *Marsh v. Mueller*, 488.

PAYMENT.

A contract for the purchase of building material, which specifies no time for the payment of the purchase price, will be construed as contemplating payment on delivery. *Lamont v. LeFevre*, 175.

See LIEN (2); SALE (7, 8); TAXES (2, 3, 10).

PLEADING.

1. An assignee of an open account cannot recover thereon under a common-count declaration in which the assignment is not averred. *Peirce v. Closterhouse*, 124.

2. The defense that the defendant in a suit for false imprisonment, who arrested the plaintiff without a warrant, had probable cause to believe that he had been guilty of a felony, is inadmissible under the plea of the general issue, without notice of such special matter of defense. *White v. McQueen*, 249.

3. A complaint for criminal libel in publishing three newspaper articles, which charges that the first article was intended to charge that the complainant had had an arm broken under dishonorable and disgraceful circumstances; that the second article was intended to charge that the complainant bore

PLEADING—Continued.

upon his person the marks of adventures at institutions of a disreputable character; and that the third article meant that the statement made by a certain doctor at a public meeting, that complainant's arm was broken while he was being ejected from a house of prostitution, was true,—is bad for duplicity. *People v. Jackman*, 269.

4. A plaintiff may join all of his causes of action in one declaration, if, in separate suits, he could recover on each in the same form of action. *Randall v. Circuit Judge*, 284.
5. Where, in a libel suit for the publication of several articles on different days, the plaintiff counts separately upon each article, he cannot be compelled to elect upon which count he will proceed to trial. *Id.*
6. Where several alleged libelous articles are declared upon in one count, which is demurred to for that reason, and by leave of the court an amended declaration is filed, in which a portion of the articles are set forth, one in each count, the amended declaration is a continuation of the original suit, and an objection that some of the articles were barred by the statute of limitations at the time the amended declaration was filed is untenable, the statute not having run against them when the original declaration was filed. *Id.*
7. An agent cannot recover in his own name upon an order given to him in his individual character to procure a machine of his principal, to whom the purchase price is to be paid, and whose warranty he countersigns as agent, and delivers to the orderer, without averring an assignment of the contract. *Weston v. Card*, 375.
8. In order to authorize a bank to show the want of authority of its cashier to institute a libel suit by *capias* in its name, in a suit brought by the defendant for false imprisonment, such alleged want of authority should be specially pleaded. *Wachsmuth v. Merchants' Nat'l Bank*, 427.
9. A declaration in a suit by a widow upon an insurance policy issued in her favor upon the life of her husband cannot be amended on the trial by joining his daughter, to whom an interest in the policy had been assigned prior to her father's death, as a co-plaintiff. *Wood v. Insurance Co.*, 437.

See AMENDMENT (1); CRIMINAL LAW (12); EVIDENCE (3); LIQUOR TRAFFIC (1).

POWER OF ATTORNEY.

1. A power of attorney to sell and convey land will be strictly construed, and cannot be enlarged by construction. *Penfold v. Warner*, 179.
2. The power granted in a power of attorney to sell any and all real estate, belonging to the parties executing it, in a designated county, only covers lands *then* owned by them in that county. *Id.*
3. Land conveyed to a wife by her husband after the execution by them of a power of attorney to their son to sell any and all real estate belonging to them, or either of them, in a designated county, cannot be said to have *belonged* to the wife when the power of attorney was executed, in such a sense as to authorize the son to sell the land after its conveyance to his mother. *Id.*

PRACTICE IN CIRCUIT COURT.

1. Where the attorney for the plaintiff in a negligence case against a city, in his closing argument to the jury, in answer to a statement of the counsel for the defendant that the jury should not allow larger damages than the plaintiff had demanded in the claim presented to the common council, states that the city counselor had recommended to the council that a larger sum be paid, which statement is objected and excepted to, and is wholly unsupported by any evidence in the case, it is reversible error. *Ross v. City of Detroit*, 447.
2. Where concessions and statements of counsel are recited in the charge to the jury, they will be presumed to have been made, unless the record shows that before the jury retired the attention of the court was called to the matter, and an opportunity given for correction. *People v. Skutt*, 449.
3. Counsel have the right, either before or after the testimony is given, to state so much of the law, as they claim it to be, as may enable them to convey to the jury an intelligent idea of the force, effect, and bearing of the testimony upon their case. *Edwards v. Common Council*, 626.

See CHARGE TO JURY; DIRECTING VERDICT; JUDGMENT (4); NEGLIGENCE (25); SPECIAL QUESTIONS TO JURY.

PRACTICE IN SUPREME COURT.

1. A judgment that the plaintiff take nothing will not be

PRACTICE IN SUPREME COURT—Continued.

reversed when a recovery could have been had for nominal damages only, the question of costs not being affected. *McLean v. Medicine Co.*, 480.

2. An assignment of error based upon the refusal of the court to give the request, "In this case, your verdict will be for the defendant," and in the same language, is not sufficient, under Supreme Court Rule No. 12, which requires assignments of error to be special. *Alberts v. Village of Vernon*, 549.

3. An assignment of error, "that the court erred in rendering judgment for the defendants," is not sufficiently specific to meet the requirements of Supreme Court Rule No. 12. *Hecock v. Van Dusen*, 573.

4. A finding, as a conclusion of law, that certain tax deeds introduced by the plaintiff are invalid, will not be regarded as a finding of fact; and an assignment of error that "the court erred in finding plaintiff's tax deeds, or any one of them, void," based upon an exception to said finding, will not entitle the plaintiff to a review of the facts upon which the conclusion is based. *Id.*

5. Questions based upon the alleged failure of the court to give instructions, to which counsel deem they were entitled, on the subjects of self-defense and reasonable doubt, will not be considered on the hearing in the Supreme Court, where the attention of the court was not directed to the alleged omission by requests to charge, and error is not assigned thereon. *People v. Carter*, 583.

See COSTS; MANDAMUS; REVIVOR (2).

PRINCIPAL AND AGENT.

1. A broker who contracts in his own name to furnish a bill of lumber at an agreed price, and places the order with lumber dealers for whom he has no right to make such a contract, and from whom he is only entitled to receive a commission on such orders as they accept, cannot be said to have made the contract in their behalf or as their agent. *Peirce v. Closterhouse*, 124.

2. The relation of principal and agent is not changed as between the parties, nor as between the principal and a third person, by the failure of the agent to observe secret instructions given him by the principal. *Birdsell Manfg. Co. v. Brown*, 213.

PRINCIPAL AND AGENT—Continued.

3. An agent cannot be held as an indorser upon a mere promise to indorse, but, if the promise is made upon a sufficient consideration, an action may be maintained for its breach. *Id.*

4. A cashier of a bank will be presumed, *prima facie*, to have had authority to direct the commencement of a suit for libel, where, in the affidavit upon which the order to hold to bail is made, he avers his official character and authority to make the affidavit for and on behalf of the plaintiff bank, and the regular attorneys for the bank act as attorneys for the plaintiff, and are employed and paid by the bank, one of whom is a director therein, and the bank applies for a *mandamus* to compel the circuit court to set aside an order quashing the *capias*, and pays the expenses of that proceeding. *Wachsmuth v. Merchants' Nat'l Bank*, 427.

See CONTRACT (5–7); DAMAGES (1); PLEADING (7).

PRINCIPAL AND SURETY—See BOND; REVIVOR.

PRIZE-FIGHTING—See CRIMINAL LAW (12, 15).

PROBABLE CAUSE—See FALSE IMPRISONMENT (1–8).

PROBATE COURTS.

The probate court has no power to vacate an order admitting a will to probate. *Corby v. Judge of Probate*, 11.

See APPEAL.

PROCURER—See CRIMINAL LAW (7, 8).

PROOFS OF LOSS—See FIRE INSURANCE (2, 5).

PROSECUTING ATTORNEY—See CRIMINAL LAW (21–23).

PUBLIC LANDS.

1. The effect of the act of Congress of June 3, 1856, granting certain lands to the State of Michigan to aid in the construction of a railroad from Amboy, *via* Hillsdale and Lansing, to some point on or near Traverse Bay, and of the acceptance of the grant by the State, and of Act No. 126, Laws of 1857, granting said lands to the Amboy, Lansing & Traverse Bay Railroad Company, has been settled by this Court, so far, at least, as to determine that the title of the United States to the lands was divested, and that, when earned, the rail-

PUBLIC LANDS—Continued.

road company might select any land within the prescribed limit of 6 miles, if not 15 miles. *Tillotson v. Webber*, 144.

2. The appointment by the Governor of the agent nominated by the railroad company to select its lands, the filing of the list of lands so selected with the Commissioner of the State Land Office, the certification of the same by the commissioner to the Secretary of the Interior, and the approval by that officer of such selection, are, in the absence of any proof to the contrary, *prima facie* evidence of the compliance by the railroad company with the statutory requirements to the satisfaction of the Federal and State governments. *Id.* 145.
3. The act did not expressly require the preservation or filing with the State or Federal departments of any selection or report of the agent appointed to select lands for the company, and the lands described in the list filed by the company with the State Land Commissioner, certified by him to be a true and correct list of the lands selected by the agent, and approved by the Secretary of the Interior, may be assumed to have been properly selected. *Id.*
4. By asserting title in himself under a tax deed, the grantee asserts that the United States has parted with its title to the land. *Id.*

PUBLIC OFFICERS.

Where a member of the board of education of a city places his resignation in the hands of the president of the board just prior to the charter election, after which he accepts a nomination for alderman in a caucus which places in nomination a candidate to fill the vacancy supposed to have been created by such resignation, both of whom are voted for at the election, and a nominee to fill such vacancy is declared elected on a canvass of the votes by the common council, to which such resignation should have been tendered, and which alone had power to accept it, and the board of education admits said nominee to a seat in its body, said member is not in a position to question the validity of such action on the ground that the board alone had the power to fill the vacancy, if one existed, and that he never tendered his resignation to the common council, for which reason no

PUBLIC OFFICERS—Continued.

vacancy existed, to be filled by election or otherwise. *Pariseau v. Board of Education*, 302.

See MAMDAMUS (6).

PUBLIC RECORDS.

1. The right to examine the records and files in the office of the register of deeds, and to make *memoranda* therefrom, for the purpose of making a set of abstract books, is established by *Burton v. Tuite*, 78 Mich. 363, 80 Id. 218. *Day v. Button*, 600.
2. In exercising this right, the register of deeds cannot be unduly annoyed by a large force, or by work at unseasonable hours, or by a monopoly of furniture, office-room, or records to the exclusion of other persons, and he has the right to prescribe a reasonable use of the same. *Id.*

QUO WARRANTO.

The fact that a street-railway company has constructed and is operating its road, *within the term of its corporate life*, upon a township highway, without objection from the township or any of its inhabitants, under and in full compliance with a *perpetual* grant of the right so do do, made by the township under How. Stat. § 3548, does not establish a case of such public interest as to justify the institution of a proceeding by *quo warranto* against the company to test the validity of such grant. *Attorney General v. Railway Co.*, 65.

RAILROAD COMPANIES—See FALSE IMPRISONMENT (4); NEGLIGENCE (1, 2, 4, 5, 8–14, 17–19); NUISANCE; PUBLIC LANDS (1–3); QUO WARRANTO.

RAPE—See CRIMINAL LAW (1-4, 6, 20).

RECEIVER.

1. The appointment of a receiver of the rents and profits of land, on default of a life-tenant to pay the taxes due thereon, is not the proper remedy. *Jenks v. Horton*, 13.
2. A receiver of mortgaged property should see to it that he sells none but the property covered by the mortgage, under an order of the court for its sale; and an action of trover may be brought against him for the value of other property

RECEIVER—Continued.

held by the mortgagor as bailee, and delivered to the receiver, without demand and without leave of the court. *Kenney v. Ranney*, 617.

See FIRE INSURANCE (3, 4); SET-OFF.

RECORDING LAWS.

1. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the Legislature, and the court cannot declare them void because they are harsh. *Van Husan v. Heames*, 505.
2. Where a grantee records his deed before a mortgage given by his grantor on the purchase of the land has been recorded, of which mortgage he has notice, his grantee, who receives his deed after the mortgage has been recorded, takes his title subject to the equities of the mortgagee. *Cook v. French*, 525.

See DEED (6); MERGER (2).

RECOUPMENT—See CONTRACT (10).

REMOVAL OF COUNTY SEAT—See ELECTION.

REPLEVIN—See CHATTEL MORTGAGE (2); JUDGMENT (1, 2); TAXES (4, 5, 11).

REQUESTS TO CHARGE—See CHARGE TO JURY (3).

RESCISSION—See CONTRACT (13).

RES JUDICATA.

Where in a suit planted upon the theory that the complainant's title to the land in controversy is valid, and that the title claimed by defendant is void, and creates a cloud upon that of the complainant, the reverse of said claim is found by the court, and a decree is made accordingly, that question is *res judicata* in an action of ejectment brought by the defendant against the complainant's grantees, who purchased the land after the making of said decree. *People's Savings Bank v. Eberts*, 396.

See JUDGMENT (1, 2).

REVIVOR.

1. Where, after the trial of a suit against the principal and

REVIVOR—Continued.

sureties in a bond, the principal dies, the case should proceed against the surviving defendants. *Healy v. Newton*, 228.

2. Where in such a case an order is entered, without objection, reviving the suit against the administrator of the deceased defendant, and judgment is rendered in favor of the surviving defendants and the administrator, on its reversal in the Supreme Court the writ of error will be dismissed as to the administrator, and the judgment entered will run against the surviving defendants. *Id.*

SALE.

1. Where a contract for the sale of standing timber, after reciting that the vendor owns the timber, and has the right to cut and remove it during the times thereinafter mentioned, provides for its sale to the vendee, and to his heirs and assigns, forever, and gives him such right as the vendor then has, during the term of one year as to a portion of the timber and five years as to the remainder, *and no longer*, to enter upon the land and cut and remove the timber, the vendee loses all interest in the timber which remains standing at the expiration of the times limited for its removal. *Prentiss v. Estate of Ross*, 83.
2. Where an agent sells and delivers a machine without having a full 'settlement with the purchaser, and taking his notes for the purchase price, as required by the contract of agency and the instructions of the principal, the measure of damages, as against the purchaser, is the price of the machine, and, as against the agent, compensation for the injury sustained by his failure to perform his agreement and follow the instructions given. *Birdsell Manfg. Co. v. Brown*, 213.
3. A warranty of a harvesting machine provided for notice to the warrantor of its failure to work as warranted, and for a second trial in the presence of the agent of the warrantor, and, if it still failed to work, that it might be returned by the purchaser, and that *continued use* of the machine should be considered conclusive proof that it filled the warranty. An agent of the warrantor started the machine, and it failed to work. On the next day, two of the warrantor's agents made a second trial, with a like result. On the third day, three of the agents and the purchaser worked all day with

SALE—Continued.

the machine, after which one of the agents demanded a settlement, claiming that the machine worked as warranted, which the purchaser denied, and refused to settle for it. On the fourth day the purchaser tried the machine alone, and on the fifth day he notified the agent that it would not work, and was informed that it was his machine, and that he must pay for it; whereupon, and on the same day, he returned it to the agent from whom he purchased it. Suit was brought to recover the value of the machine, and a verdict was directed in favor of the plaintiff on the ground that the defendant made the machine his own by using it on the fourth day. And, in reversing the judgment entered on the verdict, LONG and GRANT, JJ., hold that such use was not such a *continuous use* as to estop the defendant from claiming that the machine did not fill the warranty; in which reversal HOOKER, C. J., and MONTGOMERY, J., concur, on the ground that the question whether the defendant continued the use of the machine with the intention of accepting it, as answering to the terms of the warranty, should have been submitted to the jury. *Weston v. Card*, 373.

4. The question whether a machine fills the warranty under which it is sold, if in dispute, is one of fact for the jury. *Id.*
5. An agreement for the leasing of a piano at an agreed monthly rental, and for its sale to the lessee at the expiration of the term of the lease upon payment to the lessor of a specified sum, merely gives the lessee the right to the use of the instrument on payment of the rent, with an option to purchase it on the terms stated. *Powell v. Eckler*, 538.
6. Where, in such a case, the administrator of the estate of the lessee pays the balance of the rent and the sum required to be paid to purchase the piano, and receives a bill of sale from the lessor, he can maintain replevin against the widow of the lessee, who claims the instrument as a gift from her husband. *Id.*
7. Actual payment in good faith is necessary to complete a *bona fide* purchase. *Schloss v. Feltus*, 619.
8. A purchaser from a fraudulent vendee will only be protected to the extent of payments actually and in good faith made. *Id.*
9. The acceptance of goods sold from samples must be some-

SALE—Continued.

thing more than the mere receipt of the goods, and involves some act on the part of the vendee after he has exercised, or had the means of exercising, his right of rejection. *Id.*

10. A member of an insolvent firm ordered a bill of goods from samples, and upon credit, which he secured by misrepresenting the financial condition of the firm. Before examining the goods with reference to their acceptance, he sold them, as also the entire stock, to creditors at an agreed price, which was credited to the firm in account. The creditors then sold the goods and stock to a fourth party, and charged him with the purchase price, no part of which was paid until after the goods had been replevied from him by the vendors. And it is held that the defendant was not a *bona fide* purchaser, and that the creditors were not *bona fide* purchasers, as against the vendors. *Id.*

See CHATTEL MORTGAGE (4); LIEN (3); PAYMENT.

See Note, 374.

SECURITY FOR COSTS—See COSTS.

SET-OFF.

In an action by the receiver of an insolvent banking corporation organized under Act No. 205, Laws of 1887, against a debtor of the bank to recover a sum due at the date of the suspension of the bank, the defendant cannot set off a certificate of deposit, procured by him from a creditor of the bank after its suspension, and before an application for the appointment of a receiver was made. *Stone v. Dodge*, 514.

SPECIAL BAIL—See BAIL.

SPECIAL QUESTIONS TO JURY.

1. Where, under the evidence, there can be but one answer to a special question, it is not error for the court to direct the jury to give that answer. *Van Auken v. Railway Co.*, 307.
2. It is not the duty of the court to submit mere questions of evidence to the jury for special findings, but the questions must be so framed as to call for an answer which may be controlling on the main issue. *Cousins v. Railway Co.*, 386.

See note, 386.

SPECIALTY BY STATUTE.

"Specialty by statute" means some right or cause of action given by statute which does not exist at common law, and

SPECIALTY BY STATUTE—Continued.

the nature or cause of action does not depend in such a case, in any degree, upon any contract relation. *Wardle v. Hudson*, 432.

SPECIFIC PERFORMANCE—See CONTRACT (4).

STATUTE OF FRAUDS.

1. Where at the request of contractors who are unable to procure the materials called for by their contract, which provides that in case they neglect to supply such materials the owner of the building to be erected may do so, and deduct the cost of the same from any moneys due or to become due the contractors, the owner of the building agrees to pay the material-men for all materials thereafter furnished, his agreement is not within the statute of frauds. *Bice v. Marquette Opera-House Building Co.*, 24.
2. The verbal promise of the sureties on the bond of a public contractor given to secure the payment of labor and material claims, to repay to a third person the money realized from the discount of the contractor's note on the strength of the third person's indorsement, which money the sureties receive, and agree to apply in payment of said claims, is not within the statute of frauds. *Sweet v. Colleton*, 391.

STATUTE OF LIMITATIONS.

1. An execution cannot be issued and a levy made after a right of action on the judgment is barred by the statute of limitations. *Ludeman v. Hirth*, 17.
2. Where proceedings for sale under an execution levy are instituted before a right of action on the judgment is barred by the statute of limitations, a sale thereafter made in pursuance of such levy is valid. *Id.*
3. Where several alleged libelous articles are declared upon in one count, which is demurred to for that reason, and by leave of the court an amended declaration is filed, in which a portion of the articles are set forth, one in each count, the amended declaration is a continuation of the original suit, and an objection that some of the articles were barred by the statute of limitations at the time the amended declaration was filed is untenable, the statute not having run against them when the original declaration was filed. *Randall v. Circuit Judge*, 284.

STATUTE OF LIMITATIONS—Continued.

4. An action of *assumpsit* brought by the receiver of a mutual fire insurance company under section 17 of Act No. 82, Laws of 1873 (How. Stat. § 4263), to recover an assessment made by him as receiver, is barred by the statute of limitations unless commenced within six years next after the assessment is due and payable. *Wardle v. Hudson*, 432.

5. The statute of limitations does not begin to run on a deposit note given by a member of a mutual fire insurance company, whereby he agrees to pay a sum certain, or any part thereof, when required, and which, by its terms, is part of the absolute funds of the company, until an assessment is laid. *Id.*

STATUTES CONSTRUED.

1. The action of the board of supervisors under How. Stat. § 491, in determining and entering upon their records the result of their canvass of the votes cast at an election regularly held upon the question of the removal of the county-seat of the county, is conclusive, and the removal cannot be defeated in the courts by a showing that the question was carried by an omission to return all of the votes cast against it. *Double v. McQueen*, 39.

2. How. Stat. § 7091*g*, as amended by Act No. 253, Local Acts of 1893, which gives the clerk of the justices' courts of Detroit power to appoint one or more deputies when the necessity therefor shall be certified by the justices to the board of auditors, to hold office during his pleasure, is construed as follows:

a—The act places the deputies under the absolute control of the clerk.

b—It was not contemplated that each certificate of appointment should be accompanied by a certificate of necessity.

c—If, after filing a certificate of necessity, a majority of the justices, in the ordinary course, file a certificate that the necessity for so great a number of deputies no longer exists, it is the duty of the clerk to reduce the number to that fixed by the new certificate of necessity, but in so doing he has the choice as to what deputies shall be retained in office. *Seabury v. Board of Auditors*, 46.

3. Where a county drain commissioner follows the description contained in an application for the deepening and straightening of a drain, and the jury determine that no public

STATUTES CONSTRUED—Continued.

necessity exists for the improvement, the petitioners cannot avoid the liability imposed by 3 How. Stat. § 1740*b* 5, for the costs and expenses incurred, on the ground of the alleged insufficiency of the description of the line of the drain in the application. *Rosenstiel v. Miller*, 99.

4. How. Stat. § 8137, as amended by Act No. 242, Laws of 1887, gives a remedy by attachment against domestic corporations, other than railroad and navigation companies, in all cases where the plaintiff resides in a county other than that in which the home office is located, in case property can be found liable to attachment therein. *Michigan Dairy Co. v. Runnels*, 109.

5. The true construction of How. Stat. § 7987, which provides, as one of the grounds for an attachment, that the defendant is a foreign corporation, is that while, as against foreign corporations, that fact alone is sufficient to authorize the issuance of the writ, some other of the statutory grounds must be set out in the affidavit in the case of a domestic corporation. *Id.*

6. It is no defense to a prosecution under 3 How. Stat. § 9094, for unlawfully and carnally knowing and abusing a female child under the age of 14 years, that she had reached the age of puberty when the offense was committed. *People v. Miller*, 119.

7. Notice of the filing of a statement of lien, under the mechanic's lien law of 1885, need not be served upon the owner of the premises, where the contract out of which the claim arises was made with him. *Lamont v. LeFevre*, 175.

8. A homestead exemption may be claimed in land purchased for a homestead, and upon which a building is afterwards erected, and occupied by the owner for hotel purposes, and in which his family reside, they having no other residence or home. *Id.*

9. A lien attaches under the mechanic's lien law of 1885 to a homestead exceeding in value $1,500, subject to the statutory exemption; and, if the premises are incapable of division, they may be sold, as the only means of reaching the excess. *Id.*

10. How. Stat. § 8506, which provides that a deed executed on the statutory foreclosure of a mortgage shall, in case of a failure to redeem, vest in the grantee all the right, title, and

STATUTES CONSTRUED—Continued.

interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, is to be read into mortgages executed since its enactment as a part of the contract. *Naylor v. Minock*, 182.

11. The married woman's act of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. *Id.*

12. Where a judgment in favor of a non-resident plaintiff, who has given security for costs, is reversed, and the case remanded for a new trial, costs cannot be awarded under How. Stat. § 7663, against the surety. *Wheeler v. Meyer*, 242.

13. Notes made and delivered in Michigan on Sunday are void under How. Stat. § 2015, although payable in another state. *Arbuckle v. Reaume*, 243.

14. Soliciting a female, who is already a prostitute and in a house of ill fame, to go into another house of like character, is not an offense within the meaning of 3 How. Stat. § 9286, which makes it a felony to solicit a female to enter a house of ill fame, resorted to for the purpose of prostitution or lewdness, for the purpose of *becoming* a prostitute. *People v. Cook*, 368.

15. It is not a necessary element of the crime that the house should already have been resorted to for the purpose of prostitution by other females, the *gravamen* of the offense being the soliciting of females to enter a house of prostitution for the purpose of becoming prostitutes,—that is, a house designed and kept for that purpose, whether it had already been resorted to by others for the like purpose or not. *Id.*

16. The owner of a lot abutting upon a public street in a city can recover in ejectment against one who ousts him of the use and possession of the land lying between his lot and the center of the street, under How. Stat. § 7790, which forbids a recovery unless the plaintiff has, at the time of commencing the action, a valid, subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established on the trial. *Smeberg v. Cunningham*, 379.

17. How. Stat. § 8498 (subd. 4), which provides for the fore-

STATUTES CONSTRUED—Continued.

closure of mortgages for each installment due thereon, includes installments of interest as well as installments of principal. *Edgar v. Beck*, 419.

18. An action of *assumpsit* brought by the receiver of a mutual fire insurance company under section 17 of Act No. 82, Laws of 1873 (How. Stat. § 4263), to recover an assessment made by him as receiver, is barred by the statute of limitations unless commenced within six years next after the assessment is due and payable. *Wardle v. Hudson*, 432.

19. The statute (How. Stat. § 6495 *et seq.*) does not require that the application for the transfer of a suit, on account of the disqualification of the circuit judge, shall be verified, nor that it shall set forth that the judge of the circuit to which the suit is to be transferred is qualified to sit. *Grostick v. Railroad Co.*, 495.

20. The fact that another circuit judge is expected to hold a term of court in the county where the suit is pending does not affect the right or duty of the circuit court commissioner to act upon the application. *Id.*

21. The only matter left to the discretion of the commissioner, where the application sets forth a proper cause for removal, which is established by the proofs, is the circuit and county to which the cause shall be transferred. *Id.*

22. Section 135 of the tax law of 1893 is construed as follows:

a—The expression "that all taxes due thereon have been paid for the five years preceding to the date of such instrument" refers only to the taxes appearing upon the records kept by the Auditor General and county treasurer, and their certificate must be made from the facts shown by such records.

b—The instrument is entitled to record, unless the certificate shows that all taxes have not been paid for the five years previous to its date; and the sale of the land to individuals at the annual tax sales is payment of the taxes for which it is sold.

c—The certificate need not specify the unpaid taxes, nor the outstanding tax titles and liens.

d—The provisions of the section do not constitute an unwarrantable infringement of property rights, mere inconvenience, however great, not being enough to defeat a law. *Van Husan v. Heames*, 504.

STATUTES CONSTRUED—Continued.

23. How. Stat. § 9306, in so far as it seeks to punish those who are parties to or engage in "any other fight in the nature of a prize-fight," is inoperative, the elements constituting such "other fight," etc., not being defined, and there being no source to which the court can go to ascertain the legislative intent. *People v. Taylor*, 576.

24. To constitute prize-fighting, under How. Stat. § 9306, there must be an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, coupled with an intent to inflict upon such contestant some degree of bodily harm. *Id.*

25. How. Stat. § 502, which provides that each member of the board of supervisors of a county shall be allowed $3 per day for his services and expenses in attending the meetings of the board, and mileage as therein stated, and that said sum shall be in full for all services rendered and expenses incurred in attending the meetings of the board, and while acting upon any committee of the board during its session, and which makes it a misdemeanor to receive further or other compensation, fixes the maximum amount that the members can receive for services rendered the county, and the board has no power to extend it beyond the statutory limit. *Ewing v. Ainger*, 588.

26. How. Stat. § 6784, which provides that if any person aggrieved by any act of the judge of probate shall, from any cause, without default on his part, have omitted to claim or prosecute his appeal according to law, the circuit court, if it shall appear that justice requires a revision of the case, may allow an appeal to be taken and prosecuted with the same effect as if it had been seasonably done, gives the aggrieved party the right to petition for leave to appeal where he has failed either to claim or to prosecute an appeal. *Merriman v. Circuit Judge*, 603.

27. The fact that an appeal has ceased to be of effect because of the failure of the appellant to file a copy of the proceedings appealed from in the circuit court within 30 days after the appeal was taken, as required by Act No. 174, Laws of 1887 (3 How. Stat. § 6782), will not prevent the circuit court from allowing an appeal to be taken and prosecuted under How. Stat. § 6784. *Id.*

28. Act No. 30, Laws of 1891, which makes it the duty of the

STATUTES CONSTRUED—Continued.

circuit judge of the sixteenth judicial circuit, as reorganized by said act, to aid and assist the judge of the thirty-first judicial circuit in transacting its business so far as he can without detriment to the business of his own circuit, does not purport, in terms, to give him the *right* to sit in the thirty-first circuit for the purpose of hearing cases in which the resident judge is disqualified, and does not suspend the operation of the general statute providing for the transfer of such cases. *In re Estate of Sanborn*, 607.

29. Act No. 208, Laws of 1893, which purports to impose upon the circuit judge of the sixteenth judicial circuit the duty of holding court in the thirty-first judicial circuit whenever the resident judge is disqualified, and which prohibits the transfer of cases from either of said circuits on account of the disqualification of the judge thereof, unless both of said judges are disqualified or refuse or are unable to sit therein, does not apply to an application for a transfer which had been passed upon at the time of the passage of the act. *Id.*

STAY OF PROCEEDINGS—See BOND (2, 3); EXECUTION (4).

STENOGRAPHER'S MINUTES—See EVIDENCE (11).

STREET RAILWAYS—See NEGLIGENCE (4, 5); QUO WARRANTO.

STREETS—See HIGHWAYS.

SUBROGATION.

A purchaser of a reversion, either by mortgage or absolute conveyance, is subrogated to all of the rights of the original reversioner as against a life-tenant. *Jenks v. Horton*, 13.

See MORTGAGE (6).

SUNDAY LAW.

Notes made and delivered in Michigan on Sunday are void under How. Stat. § 2015, although payable in another state. *Arbuckle v. Reaume*, 243.

See FIRE INSURANCE (1); NEGLIGENCE (9).

SUPERSEDEAS BOND—See BOND (2, 3).

SUPERVISORS—See BOARD OF SUPERVISORS.

SURRENDER OF POLICY—See FIRE INSURANCE (6).

SURRENDER OF PRINCIPAL—See BAIL.

TAXES.

1. The appointment of a receiver of the rents and profits of land, on default of a life-tenant to pay the taxes due thereon, is not the proper remedy. *Jenks v. Horton*, 13.
2. The law imposes upon a life-tenant the duty of paying the taxes assessed upon the land. *Id.*
3. The agreement by a reversioner, in a mortgage of his reversionary interest, to pay the taxes assessed on the land, is not of itself a release of the life-tenant from the duty of making such payment. *Id.*
4. A vendee who claims under a pretended sale, made without consideration, and for the express purpose of defeating the collection of a tax from the vendor, cannot maintain replevin for the property, the possession of which has been retained by the vendor, against a tax collector who has seized it to satisfy the tax. *Gray v. Finn*, 62.
5. The lessee of personal property, if entitled to its possession, can maintain replevin against a township treasurer who seizes it in satisfaction of a tax assessed against the lessor. *Whittaker v. Fuller*, 141.
6. By asserting title in himself under a tax deed, the grantee asserts that the United States has parted with its title to the land. *Tillotson v. Webber*, 145.
7. If any portion of the taxes is void, a sale based thereon is void. *Id.* 146.
8. The power of the township board to raise money for the contingent and poor funds of the township depends upon the neglect or refusal of the electors to vote to raise the same at the annual township meeting, who cannot be held to have refused or neglected so to do if the proposition to raise the money was not submitted to them. *Id.*
9. Where the amount charged against a parcel of land in the column headed "Township tax" can be accounted for only by assuming that the general highway tax is included therein, contrary to law, a tax deed issued on the sale of the land to satisfy the taxes thus blended is void. *Id.*
10. Section 135 of the tax law of 1893 is construed as follows:

a—The expression "that all taxes due thereon have been paid for the five years preceding to the date of such instrument"

TAXES—Continued.

refers only to the taxes appearing upon the records kept by the Auditor General and county treasurer, and their certificate must be made from the facts shown by such records.

b—The instrument is entitled to record, unless the certificate shows that all taxes have not been paid for the five years previous to its date; and the sale of the land to individuals at the annual tax sales is payment of the taxes for which it is sold.

c—The certificate need not specify the unpaid taxes, nor the outstanding tax titles and liens.

d—The provisions of the section do not constitute an unwarrantable infringement of property rights, mere inconvenience, however great, not being enough to defeat a law. *Van Husan v. Heames*, 504.

11. Where, after the conveyance by a father to his son of a portion of an unoccupied piece of land, the entire land is assessed to the father, who holds the record title, as one parcel, he cannot maintain replevin for property seized to satisfy the entire tax, on the refusal of the treasurer to accept a tender of his proportionate share. *Scott v. Whelan*, 624.

See ADVERSE POSSESSION (3); CONSTITUTIONAL LAW (1); EJECTMENT (3); FINDINGS OF FACT.

TIMBER—See SALE (1).

TORT—See CORPORATIONS (5).

TRANSCRIPT OF JUDGMENT.

The filing of an affidavit for a transcript with a justice of the peace after the expiration of five days from the rendition of a judgment, and the filing of the transcript in the circuit court, divest the justice of jurisdiction of the cause, and prevent the judgment debtor from thereafter staying the issuance of an execution on the judgment. *Hitchcock v. Circuit Judge*, 297.

TRANSFER OF STOCK—See CORPORATIONS (6, 7).

TRANSFER OF SUIT.

1. The statute (How. Stat. § 6495 *et seq.*) does not require that the application for the transfer of a suit, on account of the disqualification of the circuit judge, shall be verified, nor that it shall set forth that the judge of the circuit to which

TRANSFER OF SUIT—Continued.

the suit is to be transferred is qualified to sit. *Grostick v. Railroad Co.*, 495.

2. The fact that another circuit judge is expected to hold a term of court in the county where the suit is pending does not affect the right or duty of the circuit court commissioner to act upon the application. *Id.*
3. The only matter left to the discretion of the commissioner, where the application sets forth a proper cause for removal, which is established by the proofs, is the circuit and county to which the cause shall be transferred. *Id.*
4. Such discretion cannot be said to have been abused by transferring the suit to a county in which the attorneys for both parties reside, instead of to an adjoining county, through which the defendant's railroad runs, and which can be more conveniently reached by the witnesses who reside in the county from which the transfer is made. *Id.*
5. Where the showing made upon the hearing of an application for the transfer of a cause because of the disqualification of the circuit judge covers all of the statutory facts entitling the petitioner to such transfer, the officer to whom the application is made, as a general rule, is required to make the order asked for. *In re Estate of Sanborn*, 606.
6. Act No. 30, Laws of 1891, which makes it the duty of the circuit judge of the sixteenth judicial circuit, as reorganized by said act, to aid and assist the judge of the thirty-first judicial circuit in transacting its business so far as he can without detriment to the business of his own circuit, does not purport, in terms, to give him the *right* to sit in the thirty-first circuit for the purpose of hearing cases in which the resident judge is disqualified, and does not suspend the operation of the general statute providing for the transfer of such cases. *Id.* 607.
7. Act No. 208, Laws of 1893, which purports to impose upon the circuit judge of the sixteenth judicial circuit the duty of holding court in the thirty-first judicial circuit whenever the resident judge is disqualified, and which prohibits the transfer of cases from either of said circuits on account of the disqualification of the judge thereof, unless both of said judges are disqualified or refuse or are unable to sit therein, does not apply to an application for a transfer which had been passed upon at the time of the passage of the act. *Id.*

TRIAL—See PRACTICE IN CIRCUIT COURT.

TROVER.

A receiver of mortgaged property should see to it that he sells none but the property covered by the mortgage, under an order of the court for its sale; and an action of trover may be brought against him for the value of other property held by the mortgagor as bailee, and delivered to the receiver, without demand, and without leave of the court. *Kenney v. Ranney*, 617.

See ASSIGNMENT FOR BENEFIT OF CREDITORS (3).

VENDOR AND VENDEE—See BONA FIDE PURCHASER; RECORDING LAWS (2); SALE.

VENDOR'S LIEN.

Complainant filed a bill to establish and foreclose a vendor's lien upon land conveyed by his mother to her daughter's husband, with whom she thereafter lived until her death; which lien is held not to have been established, the evidence showing no intention on her part to retain it, and the amount paid her, and her after-support, constituting a full consideration for the deed. *Huston v. Waldron*, 49.

VERDICT—See DIRECTING VERDICT.

WARRANTY—See SALE (3, 4).

WILL—See PROBATE COURTS.

WITNESSES—See EVIDENCE (11, 16, 17).

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