MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JUNE 22, 1888 TO OCTOBER 19, 1888.

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STATE JUDICIAL DIRECTORY

For 1890.

SUPREME COURT.*

JOHN W. CHAMPLIN (CHIEF JUSTICE), . . GRAND RAPIDS.
[TERM EXPIRES DECEMBER 31, 1891.]

ASSOCIATE JUSTICES:

		TERM EXPIRES.
ALLEN B. MORSE, . . .	IONIA, ...	Dec. 31, 1893.
†EDWARD CAHILL, . . .	LANSING, ...	. . . . .
CHARLES D. LONG, . . .	FLINT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . . .	Dec. 31, 1899.

COURT OFFICERS:

CHARLES C. HOPKINS, .	CLERK, ...	LANSING.
MOSES R. TAYLOR, . . .	CRIER, ...	LANSING.
††BENJAMIN W. HUSTON,	ATTORNEY GENERAL, . .	VASSAR.

*For composition of Court during period covered by Vol. 71, see Vol. 68, page iii.
†Appointed to fill vacancy caused by the death of Mr. Justice CAMPBELL.
††Appointed to fill vacancy caused by the resignation of S. V. R. Trowbridge.

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,	DETROIT.
4.	ERASTUS PECK,	JACKSON.
5.	FRANK A. HOOKER,	CHARLOTTE.
6.	JOSEPH B. MOORE,	LAPEER.
7.	WILLIAM NEWTON,	FLINT.
8.	VERNON H. SMITH,	IONIA.
9.	GEORGE M. BUCK,	KALAMAZOO.
10.	CHAUNCEY H. GAGE,	SAGINAW.
	JOHN A. EDGET,	EAST 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, MARSDEN C. BURCH,	GRAND RAPIDS.
18.	GEORGE P. COBB,	BAY CITY.
19.	J. BYRON JUDKINS,	REED CITY.
20.	DAN. J. ARNOLD,	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,	HOUGHTON.
26.	ROBERT J. KELLEY,	ALPENA.
27.	JOHN H. PALMER,	BIG RAPIDS.
28.	FRED H. ALDRICH,	CADILLAC.
29.	SHERMAN B. DABOLL,	ST. JOHNS.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT. . . . . F. H. CHAMBERS.

(Jan. 1, Mar. 5, May 7, July 2, Sep. 3, Nov. 5, 1890.)

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

(Mar. 10, May 12, Sep. 8, Dec. 8, 1890.)

ERRATA.

Head-note *h* at page 17, line 3, mortgag*or* should read mortgag*ee;* also page 27, paragraph 2, line 3, the same correction should be made.

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JUNE TERM, 1888.*

CHARLES GANONG v. WILLIAM GREEN AND ELMER N HOLLAND.

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[See 64 Mich. 488.]

Chattel mortgages—Execution against mortgagor's interest—Sale—Trover by mortgagee—Measure of damages—Evidence—Fraudulent conveyances—Exemptions.[1]

1. Under How. Stat. § 7682, the interest of a mortgagor in personal property is subject to levy and sale on execution at any time before the *actual* foreclosure of the mortgage; but such sale cannot be in parcels, but must be of the mortgagor's interest in the *whole* property. *Worthington v. Hanna*, 23 Mich. 530; *Harvey v. McAdams*, 32 Id. 472; *King v. Hubbell*, 42 Id. 597.
2. The measure of damages in trover by a mortgagee for the *wrongful* sale of chattel-mortgaged property *in parcels* is the amount remaining unpaid for principal and interest on the mortgage, not exceeding the value of the property so wrongfully sold, which amount may be contested by the defendant, and to this end he may show the value of other property taken by the mortgagee on the mortgage.
3. On the trial of an action of trover for the value of mortgaged property seized on execution against the mortgagor on his premises, an agreement between the mortgagor and mortgagee by which the latter was entitled to the immediate possession of the property, with the right to hold it until the mortgage debt was due or paid, is admissible.
4. On the cross-examination of a mortgagee who sues for the value of a portion of the mortgaged property sold on execution against the mortgagor, he may be inquired of fully as to other

* Continued from Vol. 70.
[1] For full digest of points decided, see *Table of Cases Reported.*

portions of the property released to the mortgagor, or appropriated by the mortgagee under his mortgage.

5. An execution debtor need not select mortgaged property for his exemptions. *Baldwin v. Talbot*, 43 Mich. 11.

6. Where, in a suit by a mortgagee for the value of a portion of the property sold on an execution against the mortgagor, a witness for the plaintiff, who had assisted in transacting the business culminating in the execution of the mortgage, denied on cross-examination having stated to a third party that he had counseled the mortgagor as to what disposition he could make of his property so as to cover it up, the defendant is bound by his answer, and the testimony of such third party that he did so state, not in the presence of the plaintiff, is inadmissible, even for the purpose of impeaching said witness

7. Where, in a suit involving the validity of a chattel mortgage as to creditors, the value of the property is out of all proportion to the mortgage debt, this is a circumstance to be considered by the jury in determining the *good faith* of the transaction. *Loomis v. Smith*, 37 Mich. 595; *Allen v. Kinyon*, 41 Id. 281; *Olmstead v. Mattison*, 45 Id. 617.

8. Where two chattel mortgages were executed on the same day, and by an arrangement between the mortgagor and the mortgagees in one of the mortgages the amount of their lien was fixed at a sum less than that shown by the mortgage, of which fact the other mortgagee had knowledge, and purchases the mortgage for the sum so fixed, he can only claim a lien thereunder, as against the creditors of the mortgagor, for the sum so paid and interest thereon.

Error to Eaton. (Hooker, J.) Argued April 19, 1888. Decided June 22, 1888.

Trover. Defendants bring error. Reversed. The facts are stated in the opinion.

Dean & McCall and *P. T. Van Zile*, for appellants, contended as stated in the opinion.

James M. Powers, for plaintiff, contended:

1. A mortgagee of chattels, whether in or out of possession, may sue for any unlawful damage done to his security, and is not obliged to first look to the personal responsibility of his debtor,

or show his insolvency; citing *Worthington v. Hanna*, 23 Mich. 530.

2. A mortgagee having the right to the possession of the mortgaged property may sue in trover for its conversion; citing *Worthington v. Hanna*, 23 Mich. 530; *Harvey v. McAdams*, 32 Id. 472; and an agreement between the mortgagor and mortgagee regarding its possession can afford no protection against its unlawful conversion; citing last-named case.

3. The possession of a mortgagor is in law that of the mortgagee, who may maintain trover, trespass, or replevin for any unlawful intermeddling with it by a third party; citing *Tannahill v. Tuttle*, 3 Mich. 104.

4. The proper measure of damages in trover where the plaintiff has only a special interest in the property is the value of such interest at date of conversion, with interest, not exceeding the value of the property; citing *Burk v. Webb*, 32 Mich. 173.

LONG, J. This is an action of trover brought by the plaintiff to recover certain property described in and covered by two chattel mortgages executed by Thaddeus Ganong, on November 12, 1884,—one to the plaintiff, and the other to Evans & Hunsiker, merchants at Bellevue, Mich., which was subsequently assigned to Charles Ganong, the plaintiff. The consideration mentioned in the mortgage to Charles Ganong was $150, and in the one to Evans & Hunsiker was $103.50.

November 6, 1884, defendant William Green commenced an action of *assumpsit* against Thaddeus Ganong, the father of plaintiff, on a promissory note dated June 18, 1879, and on November 15 recovered judgment in justice's court for $183.92 damages, and $3.10 costs. November 21, 1884, execution issued, and was placed in the hands of Elmer Holland, the other defendant, then a constable, and also a deputy sheriff of Eaton county. November 21, defendant Holland levied upon the property of Thaddeus Ganong. He selected his exemptions; the property levied upon being owned by, and in the possession, use, and control of, Thaddeus Ganong before and

at the time of the levy. November 26, defendant Holland advertised the property levied on for sale, and on December 2, 1884, sold the same under the execution.

After the levy had been made, and the exemptions set out, the son, Charles Ganong, plaintiff, executed to his father a release from his mortgage of the exemptions, and the father executed to Charles a further instrument in writing giving to Charles immediate possession and right of possession of all the property levied upon and not levied upon, which, so far as he could, Charles took possession of, and, except as it has been sold by himself or his father, he still has possession of.

The property is described in the mortgage to Charles Ganong as—

"Eight acres of wheat now growing on my farm in Walton; 100 bushels of corn; 100 bushels of oats; 1 brown mare, 4 years old; 1 sorrel mare, with white stripe in the face; 1 bay gelding, 3 years old; 3 cows; 2 calves; 1 reaper; 1 mower; 1 two-horse cultivator; 1 plow; 2 two-shovel plows; 2 five-tooth cultivators; 1 sulky rake; 1 single top buggy and harness; 6 hogs; 1 platform buggy; 1 lumber wagon; 1 double harness; 1 corn-sheller; 1 single cutter; and all the hay now on my farm."

The Evans & Hunsiker mortgage covered the same property, except the 6 hogs, the top buggy, and the hay. The Charles Ganong mortgage was made expressly subject to that. These two mortgages were filed in the town clerk's office on the day they were given.

The property levied upon by the defendant Holland was—

"Eight acres of wheat on the ground, 1 cow, 2 heifer calves, 1 two-year-old colt, 10 tons of hay, 1 single top carriage, 1 mowing-machine, 1 grain-drill, 1 reaper, 100 bushels of oats, 1 single harness, 200 bushels of corn, 1 corn-sheller, 1 cutter, 1 fanning-mill, 1 30-tooth square drag, 1 walking-plow, 1 five-tooth cultivator, 1 lumber wagon, 1 two-horse cultivator, 1 single-shovel plow, 1

double-shovel plow, 1 hay-rake, 3 stacks of corn-stalks, 1 platform wagon, 1 brown mare, 1 sorrel mare, 1 double-team harness."

Out of this property Thaddeus Ganong selected as his exemptions the brown mare, 4 years old; the bay gelding, 3 years old; the single top buggy and single harness; and the property not selected was sold by defendant Holland in separate parcels, and to a number of different individuals.

On the day of the sale the property levied upon and covered by the mortgages was demanded by the plaintiff of both defendants while it was in their possession and control, and they refused to deliver it to the plaintiff.

At the time the sale was commenced, and before any of the property had been sold, the plaintiff, by his attorney, informed the defendants that he held a mortgage for $150 on the property, and that he also owned the Evans & Hunsiker mortgage for $103.50, and that they must either sell the property all together subject to these two mortgages, or else satisfy the mortgages, and then sell in parcels if they wished. Defendants refused to recognize the plaintiff's rights under the mortgages, and proceeded and sold the property in parcels. The plaintiff then brought this action in trover, and upon the trial recovered a verdict and judgment for the sum of $297.12. Defendants bring the case into this Court by writ of error.

The case has once been before this Court, and the judgment of the court below reversed and a new trial ordered, and is found reported in 64 Mich. 488 (31 N. W. Rep. 461).

The defendants' claim on the former trial, as in this, was that the mortgages were void. The court in the former trial held that the defendants had no standing to contest the plaintiff's title, because of a void sale, for the reason that the notice was defective and void, inasmuch

as it did not state the names of the parties in the suit upon which the execution issued, and instructed the jury to find a verdict for the plaintiff.

This Court held the notice of sale valid, and that the defendants had a right to go to the jury upon the question of the validity of plaintiff's mortgage lien, and Mr. Justice MORSE, delivering the opinion of this Court in that case, said:

"If his mortgages, or one of them, were valid, the sale of the property in parcels is void, and he can recover. If his mortgages were fraudulent, or had been paid, the sale cannot be questioned by him in this suit."

As shown by the record in the present case, the property sold in parcels was the platform wagon, 2 cutters, harrow, hay-rake, corn-huller, harness, fanning-mill, mowing-machine, cultivator, 5 tons of hay, 20 bags of oats, reaper, 2 calves, sorrel mare, 1 cow, and 5 acres of wheat, —the sale amounting to the sum of $171.15; and, after deducting the officer's fees and expenses of sale of $32.78, the balance of $138.37 was applied upon the execution, leaving a balance still unpaid of $49.29.

The record contains 28 assignments of error. The plaintiff's sole claim for recovery was under the two mortgages before mentioned. The defendants' contention on the trial was that the mortgage given to Charles Ganong was fraudulent and void as to the creditors of Thaddeus Ganong, and that the other mortgage, called the "Evans & Hunsiker Mortgage," had been paid by one Dolph, a son-in-law of Thaddeus Ganong. Defendants claimed, further, that Charles Ganong, the plaintiff, had taken, sold, and appropriated to his own use sufficient of the mortgaged property to more than pay his pretended claim, and that not only was his mortgage fraudulent and void, and the Evans & Hunsiker mortgage

paid, but that in plaintiff's hands both had been fully satisfied.

As the facts are presented upon this record, there can be no justification for the sale of this property in separate parcels if one or both of the mortgages held by plaintiff were valid and subsisting liens at the time of the levy and sale under the execution. Under such circumstances he must so sell as to keep intact the mortgagee's liens. Under section 7682, How. Stat., the interest of the mortgagor is, in this State, subject to seizure upon attachment, and to levy and sale on execution, at any time before actual foreclosure of the mortgage; and the officer may take possession of the property from the mortgagors, and advertise and sell such interest. The officer cannot, however, sell in parcels, but must sell the mortgaged interest in the whole property. *Harvey v. McAdams*, 32 Mich. 472; *Worthington v. Hanna*, 23 Id. 530; *King v. Hubbell*, 42 Id. 597 (4 N. W. Rep. 440).

In an action of trover by the mortgagee under a valid mortgage against one for the wrongful sale of the property in parcels under an execution, the amount of the recovery must be limited to the amount remaining unpaid upon the mortgage for principal and interest, not exceeding the value of the property so wrongfully sold, so that upon the trial the amount owing and remaining unpaid upon the mortgage may be contested by the execution creditor under a valid execution, although the sale may have been made in parcels.

Among the property taken by the plaintiff on his mortgage from Thaddeus Ganong was 3 acres of wheat then growing, which afterwards ripened and was harvested, and estimated at 90 bushels. This, the defendants claimed, ought to be credited on the mortgage as so much paid, as it would, if the jury found the mortgage a valid and subsisting lien, be so much paid upon the

mortgage. The question was asked Thaddeus Ganong by defendants' counsel on cross-examination: "What was it [the wheat] worth a bushel?" To this the plaintiff objected, and it was ruled out by the court. Defendants base their first assignment of error upon this ruling. The witness did, however, subsequently answer this question, upon his further cross-examination, that it was worth from 80 to 90 cents per bushel. The court, in his instructions to the jury upon this branch of the case, said:

"He would have the right to sue for and recover as damages the value of the property which has been sold upon the execution, not exceeding the amount which was due, with interest, and not exceeding the value of the property. Of course the amount of your verdict in case you find for the plaintiff would be the value of the property sold at the sale, with interest from that time until to-day, but not exceeding the amount due upon the mortgage or mortgages which you may find to be due, with the interest which they properly bear."

We find no error in this. The court limited the amount of the recovery to the amount due on the mortgages, if the jury found such mortgage or mortgages valid; and the jury must have understood that the court in speaking of the amount due on the mortgages meant the amount remaining unpaid. It would, however, be a legitimate subject of inquiry as to what was done with the property taken by Charles, and how much the mortgages were reduced by the property taken, as fixing the amount remaining unpaid.

Error is also assigned upon the ruling of the court in admitting in evidence the two writings passing between plaintiff and his father shortly after the levy of the execution, by the terms of which the plaintiff released from the operation of his mortgage all the property selected by Thaddeus Ganong as exempt property, and Thaddeus

gave to plaintiff the right to take immediate possession of all the property described in the two mortgages. This did not in any manner prejudice the defendants' rights, especially as the court afterwards in his charge to the jury expressly stated that—

"The other writing—the third one which I alluded to at the outset—cut no great figure in the case so far as giving any right to possession, for it was at most an attempt by Thaddeus Ganong to give a right which already existed under the mortgage, if valid, and which conferred no right whatever if not valid."

This same question was discussed by Mr. Justice MORSE on the former hearing of this case in this Court, in which it was said:

"When taken upon the execution, the property was in possession of the mortgagor, Thaddeus Ganong; but plaintiff claimed that he was entitled to the immediate possession of the goods by agreement with his father, and had the right to hold the same until the mortgages were due or paid. We think the evidence of such an arrangement was admissible."

We see no reason for changing the conclusion arrived at on the former hearing.

The eighth assignment of error relates to the ruling of the court in excluding the answer to the question put to the plaintiff on his cross-examination, as follows:

"Tell the jury why, with all this degree of business ability, you have not looked after that property, and secured what was due you."

The answer to this question was objected to, and excluded by the court. The plaintiff was being cross-examined as to certain property which he had released from his mortgages, his reasons for doing so; also as to property which he took into his possession after the time of the levy. This property was not involved in the controversy in this suit. It was no part of that sold under the execution

for the value of which the plaintiff was seeking to recover. The broadest latitude should be allowed on cross-examination where fraud is charged; and, while this inquiry was not directed to the property in controversy, yet it was a material inquiry as to what Charles had done with that part of the property not set out as exemptions to Thaddeus; and the defendants had the right to show Charles' appropriation of it in reducing the amount of his mortgage. The court erred in not permitting the defendants to go fully into the inquiry on the cross-examination of Charles as to this part of the property, and his dealings with his father in relation to it.

The plaintiff had the right, however, to release that part selected as exemptions by Thaddeus from his mortgage, and the creditor was bound to set it out as exemptions; and even if this part of the property had not been covered by the mortgages, the debtor would have had the right to select it. An execution debtor need not select mortgaged property for his exemptions. *Baldwin v. Talbot*, 43 Mich. 11 (4 N. W. Rep. 547).

The sixteenth assignment of error is based upon the following question to witness Hunsiker:

"Did he [Powers] tell you in that conversation that he had counseled Thaddeus Ganong as to what disposition he could make of his property so as to cover it up?"

Defendants were attempting to show that the mortgage to the plaintiff was fraudulent. Powers had done the business for the Ganongs, and was witness for the plaintiff on the trial; and while on the stand had been asked about this matter, and denied so telling Hunsiker. The answer to this question was properly excluded. It is not claimed that the plaintiff was present during this talk between witness and Powers, and whatever Powers might have said about it could in no manner affect his rights. Witness Powers having denied giving any such advice,

the defendants were bound by this answer, and the question would not be admissible even for the purpose of impeaching the witness Powers, and it was wholly immaterial.

At the close of the testimony the defendants asked the court in their first request to charge the jury—

"If you find that the value of the property upon which the mortgage was given by Thaddeus Ganong to Charles Ganong, the plaintiff in this case, was largely out of proportion to the debt secured, then, and in that case, I instruct you that this is a circumstance from which you may infer the fraudulent intent on the part of Charles Ganong, which would render that mortgage invalid against the creditors of Thaddeus Ganong"

The court charged the jury upon this branch of the case:

"Now, it is true that there was a large amount of property included in these mortgages, and largely in excess of plaintiff's debt, but that does not make any difference with the plaintiff. As long as he has not collected his debt, and not foreclosed his mortgages and got his pay, he has a right to all his security, and he may proceed to collect his debt out of any part of the property; and for that reason he would have the right to sue for and recover as damages the value of the property which has been sold upon the execution, not exceeding the amount which was due, with interest, and not exceeding the value of the property."

In this the court was in error. The value of the property may be out of all proportion to the debt secured, and this would be a circumstance which could be considered by the jury, and from which, with other facts, they might find that the creditor's intention was not in good faith to secure himself, but to hinder, delay, or defraud others. *Olmstead v. Mattison*, 45 Mich. 617 (8 N. W. Rep. 555); *Allen v. Kinyon*, 41 Id. 281 (1 N. W. Rep. 863); *Loomis v. Smith*, 37 Id. 595. It appears from the record that the property covered by the mortgages and

not taken under the execution amounted to from $450 to $550, and, adding to this the amount levied upon, nearly the value of the whole property covered by the mortgages would be $600 to $700. The court should have submitted this question to the jury as a circumstance which, with other facts shown on the trial, might have led the jury to a different conclusion than that reached by them. At least we cannot say that it did not influence their verdict. The court was laboring under the conviction that by reason of the fact that plaintiff had not collected his debt, and had not foreclosed his mortgage and got his pay, he had a right to hold all the property as security.

The question raised, however, is one relating to the *bona fides* of the parties in taking and giving the mortgage. It was claimed by the defendants that no consideration was given by the plaintiff to his father for the mortgage, and that it was given as a cover, and to hinder, delay, or defraud creditors; and as bearing upon that question the court should have instructed the jury that they should take into consideration the amount of property covered by the mortgage as a circumstance taken in connection with other facts in determining those questions. It may be true that this circumstance standing alone would not justify the jury in finding fraud and an intent to hinder, delay, or defraud creditors, yet there were other circumstances in the case, claimed by defendants to have been proven on the trial, to which the court called the attention of the jury as bearing upon this question. The court said:

"It is claimed it was given to secure an indebtedness of $150 due to the plaintiff from his father. This the defendants dispute. It is a question of fact for you to determine whether the first mortgage was given for an indebtedness due from the father to the son, and whether the plaintiff furnished the money and property alleged to his father with the understanding it should be repaid.

If he didn't, the mortgage cannot be sustained against the creditors. * * * * * * * * * *

"This naturally presents the question of plaintiff's minority. A minor may be the recipient of personal property by gift, or he may own property raised by himself, although it was raised on the farm of his parent by his consent or sufferance. * * * If you find that the plaintiff did furnish his father such money and property as claimed, but that instead of it being his own property it belonged to his father as his of right, and was not a loan by the son to the father, it would not be a sufficient consideration for the mortgage, which in that event would be void against creditors."

No question is raised upon this part of the charge. It was properly given. But it shows that the defendants were contesting the *bona fides* of the transaction; and in this connection the court should have charged the jury that they should take into consideration the fact also that the mortgage covered a large amount of property, and, if they found that it was largely in excess of an amount sufficient to meet the amount claimed in the mortgage, they should consider this as a circumstance, with other facts proven, as bearing upon the *bona fides* of the parties, and it was error to charge that this could make no difference.

Counsel for defendants also contend that, while the mortgage given to Evans & Hunsiker was for the sum of $103.50, yet the agreement was between Thaddeus Ganong and the mortgagees that upon the payment of $39 they would discharge the mortgage, and that the mortgage was really given to secure the debt of Frank Dolph. It appears that, before the time of the sale of the property on the execution, Frank Dolph paid to Evans & Hunsiker between $30 and $40, and took an assignment of the mortgage to himself, and subsequently assigned it to the plaintiff. Some testimony is also given showing that Dolph actually made the purchase for the plaintiff, to whom he was

indebted, and the amount paid by him was turned on this account.

It is also contended that, the mortgage being given to secure the payment of a debt of Frank Dolph, when he, Dolph, paid the $30 or $40, and satisfied Evans & Hunsiker for their debt, although he took an assignment of the mortgage to himself, it operated as a full discharge and satisfaction of the mortgage, and his subsequent assignment to plaintiff would not revive it. This last question, however, was fairly submitted to the jury, in which the court said:

"If this was a debt which Dolph was legally and primarily liable to pay, and for which Thaddeus Ganong was surety, it was a payment by him unless he did so in behalf of Charles Ganong; but if it was Frank Dolph's debt, and he went to Evans & Hunsiker and paid it with his own money, although he took an assignment, it was an extinguishment of the debt, and any subsequent transfer to the plaintiff would not renew its life. It would be an end of the mortgage so far as this case was concerned."

It is contended, however, by defendants, that, even if Dolph purchased the mortgage for Charles Ganong, and he himself was not liable for the debt which the mortgage was given to secure, yet, it being conceded that the arrangement was made between Thaddeus Ganong and Evans & Hunsiker that upon the payment of $39 they would discharge the mortgage, and the plaintiff having purchased it at from $30 to $40, he could only make claim in this action for the amount so actually paid by him, so far as this mortgage is concerned. The court charged the jury upon that part of the case, among other matters, as follows:

"On the other hand, if the plaintiff chooses to send to Hunsiker and buy this mortgage, and provided the money, or made an arrangement with Frank Dolph that he should buy it for him, for which he became responsible, or to apply it on what Dolph owed him, and this was actually

done in good faith and from his money, that would make him the owner when the proper assignments were made, whether one or two were given; and any agreement of Hunsiker with Thaddeus Ganong not to transfer, or to accept a portion of the debt as payment in full, would make no difference, and the whole amount of the mortgage would be due him."

In this the court was in error, and we do not think the following words, added by the court, cured such error, although the court was correct in that part of its charge:

"If, however, this was a mere subterfuge of Thaddeus Ganong to take up his mortgage and yet keep it alive by having it appear to be a purchase by his son, when in fact it was in reality a payment by himself or Dolph, if Dolph was the primary debtor, the plaintiff cannot set up this mortgage as the basis of his claim."

That is, even though the jury find that Charles Ganong only paid $39 for the mortgage, he may set it up in this action, and make claim to the whole amount of the $103.50 for which it was given.

If Charles Ganong, the plaintiff, had knowledge of the arrangement between his father and Evans & Hunsiker at the time the mortgage was given,—that upon the payment of $39 they would discharge the mortgage,—and Charles took his mortgage subject to this Evans & Hunsiker mortgage, with the understanding that it was only for the sum of $39, and that was all the lien Evans & Hunsiker claimed upon the property, and with full knowledge of this fact purchased in the mortgage and took the assignment upon the payment of $39, he cannot be permitted, as against a creditor of Thaddeus Ganong, to set the mortgage up for any greater amount than that paid by him, and interest thereon. *Stewart v. Brown*, 48 Mich. 383 (12 N. W. Rep. 499).

We have discussed all the assignments of error which

we deem material, and need not pursue the subject further.

For the errors pointed out, the judgment of the court below will be reversed, with costs, and a new trial ordered.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

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MOSES TAGGART, ATTORNEY GENERAL, v. THE BOARD OF SUPERVISORS OF SANILAC COUNTY.

Taxes—Constitutional law—Title of act—Mortgage-reporting law—Assessment—Double taxation.

1. Act No. 262, Laws of 1887, providing for the reporting by registers of deeds of mortgages for assessment purposes, is not unconstitutional.

2. The following propositions are summarized from the opinion of Mr. Justice CHAMPLIN, with whom Justices MORSE and LONG concur:

a—The object of the Legislature was to provide a method whereby values represented by mortgage securities could be brought to the attention of the assessing officer for the purposes of taxation.

b—The act in question does not separate mortgages from other personal property, and require the taxing officer to list and assess them as mortgages at the amount they purport to secure.

c—It is competent for the Legislature to assess and tax securities representing values. Whether it is the best plan to adopt, or whether it is expedient to do so, is not a judicial but a political question, resting solely with the Legislature.

d—The constitutional rule of uniformity forbids that taxation should be double. No person can be twice assessed upon the cash value of the same property, to defray a public burden.

e—The general taxing law requires all property to be assessed for taxation at its true cash value. It does not, therefore, follow that the assessing officer is authorized to assess a mortgage security at the amount it purports to secure, but he must ascertain, according to his best information, its true cash value.

f—There may have been payments made upon the mortgage, which the record does not disclose, or it may have been taken merely as an indemnity, or to secure the performance of some act other than the payment of money. The land may not be worth the face of the mortgage. There may be prior mortgages, and many other contingencies which affect the true cash value. All these the assessing officer may consider, and it is his duty to ascertain, from inquiry of the person to be assessed, and other sources, in order to ascertain the true cash value of the mortgage.

g—For the purposes of assessment, the note or bond, and the mortgage that secures it, is considered as one value or property.

h—The requirement that the register of deeds shall not record any mortgage which does not state the name and residence of the mortgagor is an *essential* part of the scheme for affording information to the assessing officer, and to prevent an evasion of the law.

Mandamus. Submitted May 9, 1888. Granted June 22, 1888.

Relator applies for *mandamus* to compel respondents to obey Act No. 262, Laws of 1887, providing for reporting mortgages for assessment purposes. The facts are stated in the opinion of SHERWOOD, C. J.

Moses Taggart, Attorney General (*M. C. Burch,* of counsel), for relator.

Marston, Cowles & Jerome, for respondents.

[The points of counsel and authorities cited will be found in the opinions.—REPORTER.]

SHERWOOD, C. J. The Legislature of 1887 passed an act, before its final adjournment on June 29 of that year, entitled:

"An act to provide for reporting all mortgages, by the several registers of deeds of this State, to the supervisors and assessing officers of their respective counties, and to the registers of deeds of other counties wherein the mortgagee resides, for assessment purposes, and providing blank form-books therefor; also prescribing the duties of registers of deeds relative to the recording of mortgages,"—

And which is Act No. 262, and was approved by the Governor on June 27, 1887. The act went into effect on September 28, 1887.

On September 30, 1887, the executive department addressed the following letter to the clerk of Sanilac county:

"MICHIGAN DEPARTMENT OF STATE.

"OFFICE OF SECRETARY, LANSING, September 30, 1887.

"*To the County Clerk, Sanilac Center, Mich.* DEAR SIR: Appended hereto is the text of an act of the Legislature of 1887 relative to the assessment of mortgages. A careful perusal of sections one and two of this act will acquaint you with the duties of the boards of supervisors in connection therewith. Please bring the matter to the attention of the board at their October session, and have them take action with regard to the necessary books, as required by section 2 of the act.

"Very respectfully, G. R. OSMUN,

"Secretary of State."

The county clerk did as requested, and the board of supervisors, on October 18, 1887, took the subject of the requirements of said act of the Legislature under consideration, and finally passed a resolution in which they decided that they would take no action required of them by the provisions of the act in question, and have since adhered strictly to such resolution.

The relator, therefore, at the last January term of this Court, filed a petition for an order against the respondents, requiring them to show cause why a *mandamus*

should not issue against said board of supervisors commanding them—

"To perform their duty, in accordance with the provisions of said sections one and two of said act of 1887, and commanding and requiring them to ascertain the number of assessment districts in their county, and to determine the number of books necessary for their own county, as in and by said sections one and two they are required to do, and commanding and requiring them to report in detail, as a part of their proceedings, and commanding and requiring them to instruct the register of deeds of said Sanilac county to make an order for said books upon the Secretary of State, and to accompany said order by a certified copy of the report adopted by said board, in accordance with the provisions of said section two of said act, as they are required to do."

Respondents filed a demurrer to relator's petition, and upon the issue thus framed the matter was heard. Counsel for respondents, to sustain their demurrer, make the following points against the law of 1887 in question:

"1. The law in force at the time this act was passed, and at the present time, does not provide for assessing mortgages.

"2. This act is in clear violation of section 12, Art. 14, of our Constitution.

"3. Double taxation cannot be avoided under this act.

"4. This act is in violation of section 20, Art. 4, of the Constitution, as it embraces more than one object."

There is nothing to the first point. Included among the property to be taxed, specifically mentioned, are "notes and mortgages." See section 13, subd. 2, Laws of 1885, p. 179. See, also, section 2, p. 175, Laws of 1885. Section 1 of the act of 1885 says that—

"All property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

And section 2 says that personal property shall include—

"All indebtedness due to inhabitants of this State, whether such indebtedness is due from individuals or from

corporations, public or private, and whether such debtors reside within or without the State."

Mortgages are nowhere excepted out of the taxable property. It was evidently the intention of the Legislature, under our tax laws as they now are, to make personal property bear its just proportion of the burdens of taxation, and I find no constitutional objection to this being done. Article 14, § 11, provides that—

"The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

And section 12 of the same article provides that—

"All assessments hereafter authorized shall be on property at its cash value."

It has long been the policy of our tax laws to make all property, except as exempted by the Constitution, taxable; and I have yet failed to discover why the rule is not a just one, and why the law of 1885 does not include mortgages. Evidently, the Legislature supposed it had made such property taxable when it passed the law of 1887, now under consideration. The assessor is required, under it, to list and assess all the taxable property to be found in the township of every individual, including mortgages. See sections 12–16, Laws of 1885, pp. 178–181. The language of the statute is too plain to be mistaken or misunderstood.

The respondents' second point is not well taken,—that the law is in violation of the provision of the Constitution which says—

"All assessments hereafter authorized shall be on property at its cash value."

I know of no reason why property in real-estate mortgages cannot be assessed at its cash value, as well as any

other personal property. Such property is very largely dealt in by nearly all classes of business men, and the various kinds have a rated value according to the extent of the security and personal responsibility of the party whose obligation is secured, if any; and I know of no reason why the assessing officer may not as well ascertain that value as any other business man. The law of 1887 certainly contains nothing depriving him of the means of investigation, or the use of his reason, judgment, and experience, in determining the cash value of a mortgage, any more than fixing such value upon any other kind of property. I can find nothing in the law in violation of either the letter or spirit of the provision of the Constitution last referred to. The assessment is required to be made according to law, and at the cash value of the property.

The claim that double taxation cannot be avoided under the act cannot be sustained. This is the respondents' third point, and much is claimed for it; but I cannot take the view so earnestly urged as controlling in the case by the learned counsel for the respondents. I do not think the law provides for double taxation. In order to have double taxation, the same property must be taxed twice, when it should be taxed but once. The law of 1887 creates no such injustice. When an indebtedness is secured by mortgage on real estate, and the mortgage becomes property more valuable and desirable than the land itself, there is not, nor can be, any good reason why the mortgage should not be taxed to assist in bearing the public burden; and any course of reasoning which would exempt the property in the mortgage, and make the land bear the burden of taxation which should be shared by the holder of the mortgage, would not only be unequal and unjust, but would, I think, be getting about as near double taxation as can be reached without

having it pure and simple. The land has not only its own tax to pay, but shares in the payment of the amount the mortgage should bear.

Taxation of credits is not unjust taxation; and it has been decided in several states not double taxation. *People v. Rhodes,* 15 Ill. 305; *People v. Whartenby,* 38 Cal. 461; *People v. McCreery,* 34 Id. 461; *Lick v. Austin,* 43 Id. 590; *People v. Eddy,* Id. 331. Double taxation—

"Is against the spirit of our laws, and no statute will be construed to impose double taxation unless required by express words or necessary implication. Yet, when it contravenes no constitutional provision, the court cannot declare it illegal. The fact that the same value is twice taxed does not render it void." Burroughs, Tax'n, § 49; Cooley, Tax'n, 158; *Mayes v. Erwin,* 8 Humph. 290; *Yuba Co. v. Adams,* 7 Cal. 35; *Society v. Yard,* 9 Penn. St. 359; *Coite v. Society,* 32 Conn. 173; *Bridge Co. v. Osborn,* 35 Id. 7.

"Where property is taxed in one state on account of the residence of the decedent, and in another because the evidences of debt in the hands of the anciliary administrator are in the latter state, the fact that it will be thus subject to double taxation is not weighed at all by the courts of the latter state. Such taxation may be unjust, but the court cannot disregard the law because it has that effect."

It comes of the two different jurisdictions; neither having influence and control in the other. The act does not violate the provision of the Constitution that taxation must be uniform. All mortgages are made taxable, if the assessor can find them, at their cash value, the same as any other taxable property. I hardly think the act subject to the criticism made by the counsel for the respondents in this regard.

The respondents' fourth point is that the act is in violation of the Constitution, "as it embraces more than one object," and both are expressed in its title. It is claimed by counsel that one object is "to provide for

reporting mortgages for assessment purposes," and the other is, "prescribing the duties of the registers of deeds relative to the recording of mortgages." I cannot regard the title as obnoxious to the clause of the Constitution referred to (Article 4, § 20). The object of this act, and the only object, is to bring property in mortgages on real estate to the knowledge and attention of the assessor. This, of course, is for the purpose of listing it, that it may be valued in the assessment roll. This constitutes but a single object; and anything germane to this object, and necessary to its accomplishment, may be contained in an act having this object expressed in its title. The object expressed and intended in this title is certainly beyond cavil or question. It is to bring into the assessment roll mortgage property for taxation; and, if all the means by which it was to be done were expressed in its title, the object could not be obliterated and obscured, nor would it be adding a new object.

The law prescribes that the register of deeds shall not record a mortgage unless it contains a statement of the place of residence of the grantee. This is of very great importance in carrying out the object of the act, and the services of the register and the books of his office are very largely used in carrying the law into effect. And the statement in the title, that the act is to prescribe "the duties of registers of deeds relative to the recording of mortgages," does no more than state a part of the means by which the object of the act is to be carried out, and is not subject to the objection made to it.

"None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in its title." *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219.

Two distinct and separate objects having no connection

with each other, or relating to the same subject, would, if incorporated in a title, render the act invalid; and a statute cannot operate beyond the purposes expressed in its title. *Bates v. Nelson,* 49 Mich. 460 (13 N. W. Rep. 817).

The views of this Court upon the subject of the requirements of the Constitution under the section we are now considering have frequently been expressed, and no case which I have been able to find goes to the length of sustaining the doctrine contended for by counsel for respondents. I refer to a few of them. *People v. Mahaney,* 13 Mich. 481; *Inkster v. Carver,* 16 Id. 484; *Ryerson v. Utley,* Id. 270; *People v. Denahy,* 20 Id. 349; *Conn., etc., Ins. Co. v. Treasurer,* 31 Id. 6; *Kurtz v. People,* 33 Id. 279; *Continental Improvement Co. v. Phelps,* 47 Id. 299 (11 N. W. Rep. 167); *People v. Wands,* 23 Id. 385. The act in question is not as perfect as it might be, but it is certainly not so imperfect as to be incapable of enforcement; and, so long as such is the case, it cannot be declared unconstitutional because of its imperfections.

I am not able to agree with the learned counsel for respondents that the interest in a mortgage is not property. The value of land and all tangible personal property is measured, for the purpose of taxation, as well as for all other purposes, by the unit of value; and the value of property or the interest in a mortgage is measured by the same standard, and in the same way. The mortgage, at the present time, claims and constitutes nearly or quite one-third of all the property in the country, and is regarded as the most desirable property to possess and hold. If there is any reason why a mortgage interest, so long as it continues, should not be regarded as property, and its possessor assessed for the same, for the maintenance of the government and the support of our educational and benevolent institutions, I have yet failed to dis-

cover it. The reasons for assessing this class of property are cogent and sound. Justice between citizens owning property requires it; and I know of no principle or policy forbidding it, consistent with the prosperity of the people.

I think the law is constitutional, and no sufficient reason exists why the respondents should not comply with its requirements, so far as they have duties to perform under it; and the writ of *mandamus* should be granted, as prayed. No costs will be given.

CHAMPLIN, J. The object of the Legislature, in the enactment under consideration, was to provide a method whereby values represented by mortgage securities could be brought to the attention of the assessing officer for the purpose of taxation. It does not segregate mortgages from other personal property, and require the taxing officer to list and assess them as mortgages at the amount they purport to secure. The personal property of an individual, consisting of the various kinds mentioned in the general laws for taxation, is assessed as "personal," in one item. In this respect, the act in question has in no wise altered the existing law.

When the mortgages are brought to the attention of the assessing officer by the method proposed by this law, he is required to assess them in the same manner as other personal property, so that no change was designed in the mode of assessment. Before this law was enacted, there was nothing that prevented the assessing officer from going to the office of the register of deeds for his county, and ascertaining who, in his taxing district, held mortgages; and this information, thus obtained, he could use in assessing those liable to be assessed in his district as the owners of personal property.

The law then and now authorized the supervisors to require a sworn statement from any person, containing a list of real and personal property liable to taxation; and

this list included all notes, bonds, and mortgages. This requirement being of an inquisitorial nature, and very distasteful to the tax-payer, and resting entirely in the discretion of the supervisor, was seldom resorted to; and the consequence was that but very little of this kind of personal property was listed or taxed; or, if assessed, it was not done uniformly, but generally the burden was laid upon those who were honest enough to disclose to the supervisor the securities they held which were taxable, while the greater number did not so disclose their taxable property, and thus escaped the burden of taxation altogether.

The object of this law was to place all alike before the taxing officer, that each may bear his just proportion of the public taxes; and, so long as credits or securities are taxed, I can see no objection to making such taxation as uniform as it is possible to do. I think it is competent for the Legislature to assess and tax securities representing values. Whether it is the best plan to adopt, or whether it is expedient to do so, is not a judicial but a political question, resting solely with the Legislature.

The power of the Legislature over the subject of taxation is plenary. The Constitution provides that—

"The Legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law. All assessments hereafter authorized shall be on property at its cash value." Article 14, §§ 11, 12.

The rule of uniformity forbids that taxation should be double. No person can be twice assessed upon the cash value of the same property, to defray a public burden. The general law relative to the assessment of property, and the levy and collection of taxes thereon (Laws of 1885, p. 175), provides that all property within the jurisdiction of this State, not expressly exempted, shall be subject to

taxation. It then prescribes what shall be considered and assessed as real estate, and what personal property, for the purpose of taxation, and among personal property is included "all indebtedness due to inhabitants of this State"

The general taxing law requires all property to be assessed for taxation at its true cash value. It does not, therefore, follow that the assessing officer is authorized to assess a mortgage security at the amount it purports to secure. He must ascertain, according to his best information, the true cash value of the mortgage. There may have been payments made upon it, which the record does not disclose. It may have been taken merely as an indemnity, or to secure the performance of some act other than the payment of money. The land may not be worth the face of the mortgage. There may be prior mortgages, and many other contingencies which affect the true cash value. All these the assessing officer may consider, and it is his duty to ascertain, from inquiry of the person to be assessed; and other sources, in order to ascertain the true cash value of the mortgage. For the purpose of assessment, the note or bond, and the mortgage that secures it, is considered as one value or property.

The requirement that the register of deeds shall not record any mortgage which does not state the name and residence of the mortgagor is an essential part of the scheme for affording information to the assessing officer, and to prevent an evasion of the law.

I do not perceive anything in Act No. 262, nor in its title, when rightly construed, to carry out the intent of the Legislature that is in conflict with the Constitution.

MORSE and LONG, JJ., concur with CHAMPLIN, J., by signing his opinion

MORSE, J. I think the law as it now stands, taxing the land to its full value, and at the same time taxing a mortgage upon it at its full cash value, is open to the complaint of double taxation. But the land-owner has an equal right to complain of this double taxation as well as the holder of the mortgage; and the taxation of the land, and of the mortgage upon it, being provided for in the same statute, if this double taxation is unconstitutional, and therefore void, I can see no reason why the taxation of the amount of the value of the land mortgaged to the land-owner should not be held invalid, as well as the tax upon the mortgage. If one shall escape taxation because of double taxation, which one is it to be, and why one species of property more than the other? If one tax is void, the other must be for the same reason, and the value of mortgaged property must escape taxation altogether.

But double taxation is not necessarily unconstitutional. There must be more or less of double taxation under the best scheme that can be devised by human ingenuity; and while injustice in some cases must always be done, if the main purpose and effect of the methods of taxation are in the interest of fairness, equality, and justice, such taxation will be upheld and sustained by the courts.

"No conclusive case is made against a tax when it is shown that it reaches twice the same property for the same purpose. This may have been intended, and, in many cases at least, is admissible." Cooley, Tax'n, 162, 163.

It would not be permissible, under our Constitution, to require one person to be so taxed that he would directly contribute twice to the same burden, while others were required to contribute but once. But that is not this case.

If it were in my power, I think I could find a way to

remedy this double taxation, and so perfect the law as to tax mortgages without directly taxing the value of the mortgaged premises also. Whether this would be good policy, or whether the law as it now stands is for the best interest of the people, is no concern of the courts. Whatever may be our opinion as individuals, it remains for us only to declare the law as we find it, let the result to the people be as it may.

If this policy of taxing mortgages, inaugurated by the Legislature, shall be of evil consequences to the people of this State, as foretold in the argument for the respondents in this Court, the people will, no doubt, through the proper channel,—the Legislature of their own choosing,—remedy such evil. At least, we are powerless. We are not here to act upon our ideas of what the result of this law may be. If it does not encroach upon the constitutional rights of the tax-payer, and neither the title nor the body of the act is in conflict with the Constitution, it must stand, as far as the courts are concerned. We can neither alter nor abrogate it to suit our notions of its policy or results.

The writ should be granted.

CHAMPLIN and LONG, JJ., concur with MORSE, J., by signing his opinion.

CAMPBELL, J., (*dissenting*). Relator asks a *mandamus* to compel respondents to direct the register of deeds of Sanilac county to order from the Secretary of State a set of blank books for reporting mortgages for assessment purposes, under Act No. 262 of the Laws of 1887. Respondents deny their obligation to do so, basing the denial on the legal insufficiency of that statute to impose such an obligation on them.

The title of this act, as well as the body of it, includes a provision entirely distinct from any duty of county reg-

isters in preparing the books for assessment purposes, which is intended to be an amendment of the registry laws, and which declares that mortgages not setting out the residence of the mortgagee shall not be recorded. This is a very important provision, which no one would ever think of looking for except in the recording laws, and ignorance of which may practically defeat honest mortgages. I do not think it competent to include in one statute every possible subject which may incidentally become important in connection with its subject-matter. If this could be done, the constitutional safe-guards against duplicity in statutes would be of no use. There are very few subjects concerning property which do not come into consideration in taxation. The persons to be taxed, the property to be taxed, and the locality of taxation may and do involve the laws of inheritance and of administration, as well as many others; but certainly it would not be competent in a tax law to change any of these rules or conditions. The formalities of mortgages are chiefly to provide means of perpetuating, in the local records, notice of the rights of the respective parties, to warn buyers and subsequent incumbrancers, and to preserve evidences of title. A failure to comply with any requisite of the recording laws may destroy the validity of the record; and non-resident mortgagees, at least, are not bound to look at our taxing laws for any purpose outside of the land tax. It seems to me incompetent to make an essential change in the recording laws in an obscure section, in a law relating only to purposes of taxation.

But I think the law, in its bearing on mortgages as distinct subjects of taxation, is not a valid exercise of the taxing power. I do not doubt the right of the State to tax such interests as depend upon its jurisdiction and protection. But our State Constitution itself has regulated this matter on sound and correct principles, and this law

is a distinct departure from the constitutional provisions on the subject.

A mortgage, under our legislation, conveys no legal or equitable estate in land. It is no more and no less than a collateral security upon land, which has no value in itself, but depends entirely on some outside obligation, from which it is inseparable. If it is given to secure a debt, it belongs to the owner of that debt, and passes with it to any lawful holder without assignment. If the debt is negotiable, it passes to any one to whom the paper belongs. If it is given to secure several debts or several installments, it belongs ratably to as many persons as there are owners of these. It may be given by way of indemnity, and in that case it may never have any money value. It may be given for a debt amply secured by other mortgages on other property; or it may be on property already so heavily incumbered as to make it no security at all. So the mortgagee may be a mere trustee, with no interest himself in it.

This law provides for certifying, by the county register of any county, to the various assessors in his own county, or to the registers of other counties, for similar information to their local assessors, the date, amount, and parties, and other ear-marks of all mortgages appearing in his books. It gives him no means of ascertaining the amounts due, and it does not require him to report the times or conditions of payment, the condition of the property as to other incumbrances, or the value of the land. It may be entirely paid, or paid in part; it may be on property of no value, or incumbered already up to its value; and the mortgage may be one which the mortgagee has assigned to some one who has not recorded his assignment, or which he has discharged.

The mortgage, thus certified by its original amount, and in the name of the original mortgagee, whether for

indemnity or security, and whether valuable or worthless, is in due course to be assessed from the book by each assessing officer, under peril of punishment for misdemeanor.

This statute does not undertake to assess the creditor for his credits secured by the mortgage, and to the amount actually due on such credits; but it treats the mortgage as an interest in land taxable at its face as such, without reference to the value of the land, or the nature or value of the debt. It furnishes no means to the assessor in one county of estimating the value of the land, and it gives no protection to the supposed mortgagee against the worst kind of injustice. If we assume that our Constitution provides for the taxation of every kind of value,—which I think it does not do in the way claimed,—that instrument is express that taxation must be uniform, and must be on an assessment based exclusively on its cash value, or else it must be a specific charge or tax, which must also be uniform.

No tax law can be valid which does not provide for securing such uniformity. Of course, it is not necessary to attempt impossibilities. Uniformity, as well as value, may involve some exercise of opinion or discretion, and cannot be absolute. But a law which does not provide directly for satisfying these conditions as far as practicable cannot be a valid exercise of the taxing power, and cannot be upheld as conforming to the Constitution.

The law in question is bad for violating both of these conditions. If a mortgage can be treated as a direct interest in lands, there seems to be no reason why the residence of the mortgagee should make any difference. But this law does not treat residents and non-residents alike; and it was held by the United States Supreme Court, in the case of the *State Tax on Foreign-held Bonds*, 15 Wall. 300, that a state could not tax the securities of

non-residents, and that mortgages were no more than securities, and not subject to local jurisdiction. Moreover, there is a lack of uniformity arising out of the fact that, under this law, land not incumbered can only be taxed up to the single value of the property; whereas land mortgaged is taxed for the additional amount of the mortgage, when it cannot possibly be worth any more on that account. It has already been pointed out that the law furnishes no means whatever for getting at the cash value of the mortgage interest. And, furthermore, if the same debt or liability is secured by different mortgages, in the same or different counties, the danger of double taxation and of excessive valuation is multiplied.

It cannot be possible to have double taxation valid under our Constitution. It not only destroys uniformity of burdens, but in so doing involves the other considerations referred to.

Under our laws, from the beginning of the territorial and State organizations, land has always been taxed as land, upon its valuation as such. In levying taxes, they are made to cover all the combined interests which exist in it, whether legal or equitable, freehold or not freehold, present and vested, or future and contingent. If the land tax is not paid, the whole aggregation of interests will be divested by a tax sale. This law does not enable the mortgagee who pays taxes on his mortgage interest to hold it discharged in case of a sale for taxes. He has no protection whatever out of his payment. And, on the other hand, if he does not pay it, the law gives the State no lien upon it for the non-payment of mortgage taxes where the land tax is paid. Any attempt to do this would have brought attention at once to the fallacy of the whole scheme. If the mortgage interest is taxable separately, then nothing else remains

taxable but the legal title subject to the lien known as the equity of redemption. All the value that the landowner has in mortgaged land is this residue beyond the mortgage; and even that is fallacious, for, on the one hand, the debt may be so secure as to need no recourse to the land, while, on the other hand, the mortgagor may have no hope of redeeming, and no object in it. By taxing the land as land, to its full unincumbered value, the public get taxes on all it can be worth to all parties interested, and there is no other way in which this exact measure is attainable.

I think that this idea was in the mind of the framers of the Constitution when they required taxes to be assessed (except in the case of specific taxes) on property, and at its cash value. Although there is value in things in action, and they may, in a certain sense, be regarded as property, such is not their appropriate designation. Even under our present tax law, they are treated as something distinct from either realty or personalty. It is very certain that there is no wealth in a state that does not ultimately result in one or the other. A personal debt is only valuable because payment of it can be enforced out of property; and it is so enforced, not by creating new values, but by transfer of the same property from one person to another. There is nothing but tangible property out of which taxes can usually be enforced. If all persons were to pay their debts at once, it could only be done by reliance on such property. It is evident that a man who owes more than he can pay cannot fairly be taxed for the ownership of anything; but, if property is taxed as such, it can make no difference to the State who owns it, so long as but one tax is laid upon it. But if every man is taxed for what his neighbor owes him, with no regard to what he owes himself, a capital of a thousand dollars

may stand, among a borrowing community, as the basis of as many thousands as there are borrowers. Such is not the meaning of our Constitution.

In my opinion, this law cannot be sustained on any principle, and respondents should not be required to obey it.

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MATILDA LAFFERTY v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Railroad companies—Neglect to fence right of way—Stock killing—Costs—Attorney fee.

In this case the judgment of the justice is affirmed, except as to the attorney fee of $25 allowed the plaintiff, the evidence disclosing defendant's failure to fence its road, as required by law, at the place where the animal entered upon its premises.

Error to Newaygo. (Fuller, J.) Argued May 10, 1888. Decided June 22, 1888.

Negligence case. Defendant brings error. Judgment of circuit court reversed, and justice's judgment affirmed except as to attorney fee of $25 allowed plaintiff. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for appellant.

John Harwood, for plaintiff.

LONG, J. The defendant is a corporation owning and operating the Big Rapids Branch of the Chicago & West Michigan Railway, running through the unincorporated village of Alleyton, where defendant has a station on its said road. Said railroad is crossed, at that point, by a

single highway only, and said station-house is situated immediately at said crossing, and there are no fences or cattle-guards at that point, and no fences on either side of the railroad for a long distance either way from said highway crossing.

This action was brought in justice's court of Newaygo county to recover damages for the negligence of the defendant in killing a cow of the plaintiff. On the trial before the justice, the plaintiff obtained a judgment for $30 damages, and the justice taxed plaintiff's costs at the sum of $30.06, which included an attorney fee of $25. The cause was removed by the defendant, by *certiorari*, to the circuit court for said county, and the following errors alleged in the affidavit for the writ:

"1. That the testimony introduced on the trial of said cause did not show any cause of action in favor of said plaintiff, and against said defendant.

"2. That no testimony was introduced in said cause tending to show any liability on the part of defendant, as set forth in plaintiff's declaration in said cause.

"3. That said justice erroneously included in the costs of said suit said attorney fee of $25."

This judgment was affirmed in the circuit court, and the cause removed to this Court by writ of error.

The evidence taken before the justice is fully set forth in his return. On the trial the defendant admitted plaintiff was owner of the cow, and that it was killed by defendant's cars, and that defendant was a corporation doing business within this State. It was shown upon the trial that at the village of Alleyton, through which said railroad passes, the said railroad is practically unfenced for nearly two-thirds of a mile, and is without any cattle-guards along the whole distance; that plaintiff's cow got upon defendant's right of way at a point somewhere within this unfenced portion of defendant's

railway, when she was struck by defendant's cars, and received the injury complained of.

The statute requires such corporation to erect and maintain fences on each side of the right of way of its road, and prescribes the kind and height of the fence that shall be built, and that connecting fences and cattle-guards shall be constructed at all highway crossings, etc.; and until such fences and cattle-guards shall be duly constructed, the company or corporation owning or operating such road shall be liable for all damages done to cattle or other animals thereon, which may result from the neglect of such company or corporation owning or operating such road to construct and maintain in repair such fences and cattle-guards aforesaid, to be recovered by the owner of such cattle, in a civil action, before any court of competent jurisdiction, together with an attorney fee of $25, to be taxed as costs against the defendant in case of a recovery in such action.

The testimony given by the plaintiff shows that the station and highway crossing are so situated that said railway could be fenced along both sides of that portion of the line up to said highway, and cattle-guards put in and maintained at said crossing, without interference with the mutual convenience of the defendant and the public in transacting their business with each other, and there was no attempt on the part of the defendant to contradict the testimony on this point. We think there was sufficient evidence to warrant the giving of the judgment in the case.

The other error alleged in the affidavit for the writ relates to the taxation of an attorney fee of $25 before the justice. This question was settled by this Court in *Wilder v. Railway Co.*, 70 Mich. 382 (38 N. W. Rep. 289), in which it was held that no such attorney fee could be recovered; and this case must be ruled by it.

It follows that the judgment of the circuit court must be reversed and set aside, and the judgment of the justice affirmed as to damages and costs, excepting as to the $25 attorney fee, which is reversed and vacated. Costs of this Court to defendant, and of the circuit court and the justice's court to plaintiff, except such attorney fee.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred with LONG, J.

SHERWOOD, C. J. I concur in the result.

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GEORGE F. ROBISON, PROSECUTING ATTORNEY, v. EDMUND HAUG, POLICE JUSTICE.

Constitutional law—Liquor law of 1887—Removal of screens, etc.

1. Section 31 of Act No. 313, Laws of 1887, requiring the removal of screens, etc., during the time when by the provisions of the act places where liquor is sold are required to be closed, is not in conflict with section 26, Art. 6, of the Constitution of Michigan, securing "the persons, houses, papers, and possessions of every person from unreasonable searches and seizures," nor with the fourteenth amendment to the Constitution of the United States, declaring that "No person shall be deprived of life, liberty, or property without due process of law."

2. The following propositions are summarized from the opinion of Mr. Justice LONG:

a—The business of selling intoxicating liquors is one which the Legislature have an undoubted right to regulate or prohibit, and may therefore impose such conditions and restrictions upon the sale as in their judgment may seem wise, where such restrictions are applied to all alike or to the same class alike.

b—The business of selling intoxicating liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor; and it does not stand upon the same plane of utility and morality with many useful arts, trades, and professions.

Mandamus. Submitted May 15, 1888. Granted June 22, 1888.

Relator applies for *mandamus* to compel respondent to entertain a complaint for a violation of section 31 of the liquor law of 1887. The facts are stated in the opinion.

George F. Robison, in *pro. per.,* for relator.

F. A. Baker, for respondent.

LONG, J. Petition for *mandamus.*

The petitioner is prosecuting attorney of Wayne county, and represents in his petition that among other provisions of Act No. 313, Laws of 1887, commonly known as the "Liquor Law," is that contained in section 31, as follows:

"During the time when by the provisions of this act places where liquor is sold or kept for sale must be closed, all curtains, screens, partitions, and other things that obstruct the view from the sidewalk, street, alley, or road in front of or at the side or end of said building, of the bar or place in said room where said liquors are sold or kept for sale, shall be removed."

That on April 9, 1888, petitioner, as required by said act, presented to Edmund Haug, one of the police justices of the city of Detroit, James Johnson, who was then and there ready to make oath to a complaint against one James Fleurimont, charging—

"That on the 8th day of April, 1888, that being the first day of the week, commonly called 'Sunday,' at the city of Detroit, county aforesaid, James Fleurimont was proprietor of and kept a saloon where intoxicating liquors were sold at retail in a room at No. 12 Catherine street in said city; that on said last-named day, that being a day when by the provisions of Act No. 313, Laws of 1887, said saloon was required to be closed, the curtains, screens, partitions, and other things that obstructed the view from the sidewalk and street, in front of the building in which

said saloon was, of the bar and place in said room where said liquors were sold and kept for sale, were not removed, but, on the contrary thereof, said James Fleurimont did then and there, as aforesaid, obstruct the view from said sidewalk and street in front of the building in which said saloon and room were, by not removing said curtains, screens, partitions, and other things that then and there obstructed the view so as aforesaid."

That thereupon said police justice stated to said petitioner that question had been raised as to the validity of that section of said act, and, for the purpose of having the Supreme Court pass upon its validity, he would decline to take that complaint or any complaint charging a person with violating that section of said law, and that said police justice then and there refused to take said complaint.

Petitioner prays the writ of *mandamus* to be directed to said police justice, commanding him forthwith to take such complaint, issue his warrant for the arrest of said James Fleurimont, to the end that said James Fleurimont may be duly examined in said police court, and, if probable cause to believe him guilty shall be found, that he may be held for trial in the recorder's court for said city. An order to show cause was made by this Court during the April term, and the return of said justice filed in this Court, which admits the facts stated in said petition. The respondent is represented by counsel, who claims that section 31 of the act above cited is unconstitutional; that it is in conflict with section 26, Art. 6, of the Constitution of this State, which provides that—

"The persons, houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures."

That it is also in conflict with the provisions of our State Constitution, and of the fourteenth amendment of the Constitution of the United States, that—

"No person shall be deprived of life, liberty, or property without due process of law."

The claim made by counsel is that compelling a party to remove screens and other obstructions so as not to obstruct the view from the sidewalk and street in front of the building in which said saloon and room is, is an unwarrantable interference with the houses and possessions of the people, and—

"That you cannot enter one's premises with your eyes without consent any more than you can with your person."

That it is in fact a species of search, and the very purpose for which it was passed was to secure evidence on the part of the government upon which might be based prosecutions for violations of the act; that the right to construct a building without windows, or with stained windows, or with curtained windows, is one of the uses the owner has a right to make of his property; that the section does not apply to the premises when business is actually being carried on, but only when business is stopped, or is required to be stopped; and that it is not a regulation of the methods of doing business.

We do not think this section open to the objections raised, but that it must stand as a part of the act. The position of counsel for the respondent would undoubtedly be correct were the provisions of such a statute sought to be applied to one's dwelling, or to any place where any useful business, profession, trade, or occupation is carried on; but the business of selling intoxicating liquors is one which the Legislature have an undoubted right to regulate or prohibit, and they have therefore the power to impose such conditions and restrictions upon the sale as in their judgment may seem wise, where such restrictions are applied to all alike or to the same class alike. It is within the power of the legislative branch of the

State government, and is a part of the police regulations, such as the State may make in respect to the sale of intoxicating liquors for the prevention of intemperance, pauperism, and crime. It is not for the courts to determine its expediency, or, as said by Mr. Cooley in his work on Constitutional Lmitations,—

"To run a race of right, reason, and expediency with the legislative branch of the state government."

If the Legislature may altogether prohibit the liquor traffic, they may make such conditions if it is permitted to be continued, and place its sale under such restrictions, as will make it easy to detect any violations of law; and it is not easy to see how one who chooses to engage in a business which requires special regulations to prevent a violation of the law, can claim that this provision violates those provisions of the Constitution. It is neither a search of his premises, nor a seizure of his property, nor does it deprive him of his property.

The business of selling intoxicating liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor; and it does not stand upon the same plane of utility and morality with many useful arts, trades, and professions.

This legislation is not new. In *Com. v. Costello,* 133 Mass. 192, and *Com. v. Casey,* 134 Id. 194, a regulation like the one in question, but even broader, covering the period in which the saloon keeper is authorized to do business, was sustained; and if one may be compelled to conduct the sale in open view of the public, without violating the principles for which the counsel contends, then no good reason exists for holding that such principles would be violated by an act compelling the seller to expose the interior of his building where sales are made at all times when forbidden by the law to make sales.

It is necessary to the public peace that saloons shall be kept closed Sundays and holidays, and at late hours at night. Under this provision it is easy for an officer or other person to determine whether a saloon is open contrary to law. This section of the act must be held valid.

Mandamus will issue to Edmund Haug, police justice, directing that proper complaint be entertained for violations of this section of the act.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred with LONG, J.

CAMPBELL, J. I think it competent for the Legislature in regulating the liquor traffic to adopt regulations conducing to the full publicity of sales, and to require places of sale not to be shut out from view by putting up blinds and screens or other things intended to obstruct the view of the transactions which may go on at any hour in the sales-rooms. If a complaint is made setting forth on oath such specific facts as are required to justify a criminal warrant, I think respondent should entertain it. The complaint in question is not a good one, but the refusal of the justice to entertain jurisdiction at all renders it proper to give him directions to do so on a proper showing. I therefore concur in the result for the reasons I have mentioned, and do not deem it necessary to consider any others. It is possible this statute may contain some imperfections, but with a fair construction I think it is valid.

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HENRY W. OSTROM v. ALBERTSON POTTER AND FRANK POTTER.

Justices of the peace—Trespass—Title to lands—Certifying case to circuit.

1. A verbal notice under How. Stat. § 6890, that the title to lands will come in question, given by a defendant in an action of trespass to lands in justice's court, unaccompanied with the required statutory bond, is properly disregarded by the justice.
2. A title, or claim of title, is not in question unless it is in issue in the case; and it is not in issue unless the title, or claim of title, is essential to the plaintiff's right of recovery, or to defeat a recovery in the action.
3. Where, in an action of trespass in justice's court, the declaration made no claim of title, and the defendant pleaded the general issue, and it appeared that the acts complained of were committed in that half of a public highway adjoining the land described in the declaration, thus necessitating proof of title, actual or constructive, on the part of the plaintiff in order to a recovery, which he sought to furnish by testifying to his occupancy and ownership of the land, such testimony brought him within the provisions of How. Stat. § 6895, and the justice should have certified the case to the circuit court, defendant not admitting said title.
4. It was not the design of the Legislature to confer upon justices' courts jurisdiction to try titles to lands, and they have provided a way, in actions for trespass or other actions where the damages claimed fall within the jurisdiction of the court, where the title to land may be involved, for a trial before the justice, namely, where the title claimed is *admitted.* In such cases the *title* is not tried.

Error to Oakland. (Stickney, J.) Argued May 16, 1888. Decided June 22, 1888.

Trespass to lands. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Augustus C. Baldwin, for appellant.

J. Ten Eyck, for defendants.

CHAMPLIN, J. This case originated in justice's court, and was brought to recover damage for digging and carrying away three loads of dirt, worth 20 cents a load. The action is trespass, and the *locus in quo* was shown to be in a public highway, between the center thereof and the plaintiff's inclosure. The declaration, omitting the formal parts, is as follows:

"The plaintiff, Henry W. Ostrom, in this cause complains of the defendants herein in a plea of trespass, for that the defendants, on, to wit, the 4th day of June, 1885, with force and arms the close of said plaintiff, situate in town of Avon, described as follows, being 16 acres of land in south-west corner of south-east quarter of section 16, said town of Avon, Oakland county, did dig and remove the soil and dirt, and thereby leave a dangerous excavation on his said above farm, and they (the said defendants) did break and enter, and with their feet in walking, and with horses, trod down and trampled upon and destroyed the grass of said plaintiff, to the damage of said plaintiff in the sum of $100."

The defendants pleaded orally the general issue, and gave notice as follows:

"That the *locus in quo* stated in the declaration where the trespass is claimed to have been committed was a public highway, and that whatever was done there by the defendants was done for the purpose of improving said highway."

As this notice was not reduced to writing, as the statute requires, nor was a bond tendered the justice for the purpose of removing the case to the circuit court for trial, the notice was therefore a nullity, and was rightly disregarded by the justice.

The cause was tried, and resulted in a judgment for the plaintiff. The defendants removed the case to the circuit court by writ of *certiorari*. On the trial before the justice, the plaintiff testified, as a witness in his own

behalf, that he was the owner of, and then occupied and resided on, the premises described in the declaration. The defendants' attorney objected to the testimony, and asked to have it stricken out for the following reasons:

1. That, if proof of ownership was necessary, then the title deed of plaintiff was the best evidence.

2. That there is no averment in the declaration that plaintiff was the owner of the premises described in the declaration.

3. That title to land cannot be tried in a justice's court.

The objections were overruled, and plaintiff further gave testimony that defendants came upon his premises, and dug up and took away three loads of dirt from the north side of the highway, which runs upon the south side of his premises; that it was taken inside of the highway, about 12 feet from the center of the traveled part of the road; that the road was a public highway, and no part of the trespass was committed outside of the highway, or on any part of his said premises outside of the highway.

The defendants' attorney stated to the justice that they did not admit that the plaintiff "had the title to the *locus in quo*," and moved the court to certify the proceedings to the circuit court for Oakland county, without further proceedings in the justice's court, for the reason that the title to the place where the trespass was committed came in question on plaintiff's own showing.

The circuit court reversed the judgment, and the case is brought here by writ of error.

The statute provides:

"If it appear on the trial, from the plaintiff's own showing, that the title to lands is in question, which title shall not be admitted by the defendant, the justice shall, without further proceeding, certify the cause and paper to the circuit court of the county, where the same shall be tried." How. Stat. § 6895.

It is claimed by the counsel for defendants that the plaintiff could not recover for injuries done in the highway to his premises, without proving his title to the land over which the highway is laid, because such highway is open to the common use of the public, and is not in the actual possession of the plaintiff.

In *Whiting v. Dudley*, 19 Wend. 373, Mr. Justice Cowen said:

"It is very difficult to separate the trial of a right of public way from that of a right to land. * * * But an action of trespass between party and party, or any other action involving an inquiry as to the existence or extent of a highway through the party's land, respects the nature of his title, as whether it be absolute or qualified. The statute is that a justice cannot try a cause where the *title* to lands shall *in anywise come in question;* and if this appear on the plaintiff's own showing, and be disputed, the justice shall dismiss the case."

Willoughby v. Jenks, 20 Wend. 96, was a case where the plaintiff brought trespass for digging up the soil, and destroying the grass and herbage of plaintiff. On the trial, he proved that the defendant had caused to be dug up and removed the ground in a street called "Willoughby Street," opposite two lots owned and occupied by him. The defendant moved to dismiss the cause for want of jurisdiction in the court to proceed, on the grounds—

1. That plaintiff had failed to show possession in himself of the *locus in quo.*
2. That, by the plaintiff's own showing, it appeared that the title to land was in question.

Mr. Justice Cowen, in deciding the case, pointed out very clearly the reason why the title to land necessarily came in question by the plaintiff's own showing in the case at bar. He said:

"But there are cases in which the plaintiff cannot maintain an action at all without showing a *title;* these arise where he has no actual possession at the time when

the trespass is committed. In such case he must make out a constructive possession by showing an *actual title.* He must do so where the land is entirely wild, vacant, or common; indeed, in all cases where a *pedis possessio* cannot be shown. That is emphatically so where land is traveled and used as a public highway. It is open and common to all the world,—apparently as much so as the plaintiff himself. To make out a constructive title, he may prove himself in actual possession of land adjoining the highway. The law then presumes that he is the owner of the soil *usque filium viæ.*"

See, also, *Little v. Denn,* 34 N. Y. 452; *Adams v. Rivers,* 11 Barb. 390.

In the case under consideration it was impossible for the plaintiff to prove his cause of action without bringing the title of land in question. He was not in the actual possession of the highway. This being so, he could only recover in trespass by proving title, actual or constructive. He proved a constructive title by showing actual occupancy of the adjoining lands. But he did more. He testified that he was the owner of the adjoining premises. This testimony of the ownership and occupancy of the adjoining premises for the purpose of raising a presumption of title in the highway brought him within the section of the statute above quoted, and the justice should have certified the cause to the circuit court.

It was not the design of the Legislature to confer upon justices' courts jurisdiction to try titles to lands, and they have provided a way, in actions for trespass or other actions where the damages claimed fall within the jurisdiction of the court, where the title to land may be involved, for a trial to be had before the justice, namely, where the title claimed is admitted. In such cases the title is not tried. The statute provides that when the claim of title is made in the declaration, and the defendant pleads thereto the general issue, and does not tender

a bond to remove the case to the circuit court, the justice shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded in his defense from all evidence drawing in question the title to the lands, and any claim of title to lands made by the plaintiff in his declaration, and therein described, shall be deemed to be admitted by the defendant.

The statute is framed upon the theory that the plaintiff knows, when he plants his action, whether his case involves a claim of title to lands, and, if so, he should set it forth in his declaration. The defendant is then at liberty to admit, and go to trial before the justice; or, if he does not wish to do so, he can file his bond, and pay the costs thus far incurred, and the justice his fees, and have the cause removed. If no claim of title appears in the declaration, and he cannot make out his defense without proving title, he may give notice that the title of land will come in question, and tender his bond, and have the cause removed.

If the declaration is so framed, as it was in this case, to avoid the claim of title, then if it appear on the trial, from the plaintiff's own showing, that the title of lands is in question, which shall not be admitted by the defendant, it becomes the duty of the justice to certify the cause to the circuit court.

It may be remarked that a title, or claim of title, is not in question unless it is in issue in the case; and it is not in issue unless the title, or claim of title, is essential to the plaintiff's right of recovery, or to defeat a recovery in the action. This case illustrates the principle. When it appeared, from plaintiff's showing, that the place where the trespass was committed was in the public highway, he showed that it was in a place where he had no actual possession. The injury, therefore, was not to his pos-

session, but to his freehold; and it became necessary for him to show his title in order to show his injury.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

71	50
76	185
71	50
81	38
71	50
93	231
71	50
99	482
71	50
f122	85
71	50
124	222
71	50
140	1460
71	50
146	3185

MARTHA F. STEWART v. ROLLIN C. SPRAGUE AND SAMUEL W. GILLIS.

[See 76 Mich. 184.]

Landlord and tenant—Lease—Surrender—Pleading—Debt—Assumpsit—Statute of limitations.

1. To show a surrender of a lease, a mutual agreement between the lessor and the original lessee that the lease is terminated must be clearly proved, which surrender releases the original tenant from further liability.
2. How. Stat. § 8713 (subd. 3), bars an action of *assumpsit* or debt for rent due on a *parol* lease in six years after the action accrues.
3. An action of *debt* for rent due on a lease under *seal* may be brought at any time within *ten* years after the action accrues, being governed by How. Stat. § 8719; but an action of *assumpsit* under How. Stat. § 7778, for such rent, is barred in *six* years, the *form* and not the *cause* of action fixing the bar.

Error to Wayne. (Gartner, J.) Argued May 18, 1888. Decided June 22, 1888.

Debt for rent on sealed lease. Plaintiff brings error. Reversed. The facts are stated in the opinion.

James H. Pound, for appellant, contended:

1. This is not an action for rent so called, but of debt on a sealed instrument to recover damages for a breach of its covenants, and falls within How. Stat. § 8719; citing *Goodrich v. Leland,* 18 Mich. 110; *Post v. Campau,* 42 Id. 94.

2. The only surrender is that shown by the plaintiff, which was not one in fact because not in writing; citing How. Stat. § 6179; and it could not be a surrender in law, it not being shown that the defendants agreed to anything; citing *Lyon v. Reed*, 13 Mees. & W. 285.
3. In all cases of leasing, to show a surrender, a mutual agreement between the lessor and the original lessee that the lease is terminated must be shown; citing *Bedford v. Terhune*, 30 N. Y. 453.
4. The question of whether there has been a surrender is for the jury; citing *Nickells v. Atherstone*, 59 E. C. L. 944.

William J. Gray, for defendant Sprague, contended:

1. Defendants had practically left the premises vacant, and plaintiff had assumed possession, and, in the absence of the notice claimed to have been given them, they were practically ousted. It was not incumbent on them to assert their right of possession, but they might assent to the virtual expulsion; citing *Dyett v. Pendleton*, 8 Cow. 727; *Dobbins v. Duquid*, 65 Ill. 464.
2. After eviction the tenant is not liable for rent; citing *Marsh v. Butterworth*, 4 Mich. 575.
3. How. Stat. § 6179, requires that a surrender must be in writing, unless it be by act or operation of law.
4. The surrender must be by the person holding the term; citing Wood, L. and T. § 487.
5. The action is barred under the statute, excepting as to the last installment of rent. [This point is fully discussed in the opinion.—REPORTER.]

LONG, J. This is an action of debt, brought to recover damages claimed by reason of the failure of defendants to pay rent of certain premises described in a written lease signed by the parties. The action was commenced on March 31, 1886. The facts in the case are practically agreed on, and the questions involved raise an issue of law.

In the spring of 1877 the two defendants were partners, doing business under the name of Gillis & Sprague, and leased a store building from plaintiff for the three years ensuing April 1, 1877, upon a specified rental, pay-

able monthly. The last monthly installment of rent under the lease fell due March 31, 1880. The rent was payable as follows: The sum of $3,600 at the times and in the manner following, viz.: The sum of $83.35 on the first day of each of the months of April and May, and the sum of $83.33 on the last day of each of the remaining months of the year ending April 1, 1878; the sum of $100 on the last day of each of the months of the year ending April 1, 1879; the sum of $116.70 on the last day of the first two months, and the sum of $116.66 the last day of each of the remaining months, of the year ending April 1, 1880.

On September 6, 1877, the defendants made a common-law assignment to F. G. Russell, who took possession of the store. On the 11th of the same month, the defendants filed a voluntary petition in bankruptcy under the national bankrupt law, and were adjudicated bankrupts, and Henry A. Harmon was appointed as assignee, who took possession of the store, October 2, and occupied it for one month. All of the rent to November 1, 1877, was paid by the defendants and Russell and Harmon, each paying for the period of his own occupation. On or about November 1, 1877, the assignee, Harmon, gave up possession of the store, and tendered the keys to plaintiff's agent, who accepted them from Harmon upon the condition of holding the defendants under the lease. The plaintiff refused to accept the keys upon any other theory or condition than that the defendants should be holden under the lease, and that the plaintiff should do the best she could to procure another tenant, and hold the defendants liable for any deficiency. It is claimed by the defendants that they knew nothing of this surrender made by Harmon. Plaintiff took possession of the store, and made efforts to re-rent it. In the following January plaintiff rented the property to Fales & Co. for five years;

$700 for the first year, $1,000 for the second, third, and fourth years each, and $1,300 for the fifth year. Fales & Co. received possession of the store from plaintiff in January.

On November 7, 1877, plaintiff mailed to each of the defendants a notice of the conditions attached to her acceptance of possession, and that she should hold them under the lease. Plaintiff produced no other or further proof of service of such notice than such mailing, except a letter offered in evidence, and rejected by the court, sent by Mr. Clark, attorney for the defendants in their bankruptcy matters. This letter, received from Mr. Clark, was addressed to S. Wightman Stewart, the agent of plaintiff, in whose name the notice was given to the defendants as above stated, and reads as follows:

"LAW OFFICE OF FRED W. CLARK,
"Rooms 32 & 33 Moffat Block,
"DETROIT, November 10, 1877.

"S. WIGHTMAN STEWART, ESQ.,

"*Dear Sir:* We were much surprised this morning, in view of the fact that we have turned over to our creditors everything we possess, to receive a letter from you stating that you had a claim for rent against us, which, while we are perfectly satisfied is a provable debt in bankruptcy against us, you nevertheless neglect to prove, and endeavor to hold us responsible for. We will simply call your attention to sections 5067, 5068, 5069, and 5071 of the bankrupt law; and if you, in view of the fact that under this law your claim is provable, neglect to prove it, you must take the consequences. We hereby notify you that we intend to apply for a discharge of all our debts, of which this is one, and that we shall not consider ourselves legally or morally holden on your pretended claim, and suggest to you that you had better do as other creditors have done,—prove up your claim, and get your dividend.

"Yours truly,
"GILLIS & SPRAGUE,
"By Fred W. Clark, their Attorney."

Defendant Sprague was called as a witness in behalf of

defendants, and testified that he did not receive the notice from the plaintiff before referred to, and the first he ever saw of it was on the trial of this cause, and the first he ever heard of it was about the time the summons was served as commencement of this suit. Defendant also testified that Mr. Clark, who signed the letters as attorney for Gillis & Sprague, and herein set forth, was not the lawyer of defendants except in the bankruptcy proceedings.

Mr. S. W. Stewart, called by the plaintiff, testified as follows:

"*Q.* What is the fact as to whether you have ever asked either Mr. Sprague or Mr. Gillis for the balance of the rent?

"*A.* Well, I don't know as I ever asked them specifically for the rent, but I have met them both at times; and, in conversation about it, they claimed they were not liable under the lease, and did not propose to pay anything.

"*Q.* Was that since the sending of these notices?

"*A.* I am not sure about that; but it was after the bankruptcy proceedings."

Mr. Sprague was then recalled by plaintiff, and testified that he never had a talk with Mr. S. W. Stewart since the time defendants gave up possession of the store, but that he did not know what talk Mr. Gillis may have had.

Mr. Stewart, being then recalled, testified that he had a talk with both Sprague and Gillis about the rent. This was all the testimony given as to the notice sent by the plaintiff to defendants, and all the testimony given as to the knowledge of defendants that plaintiff claimed in 1877 to hold them liable for any deficiency in the rent.

Error is assigned upon the ruling of the court in excluding this letter from Mr. Clark. The letter was properly excluded. While it may be said the inference is very strong that the defendants, or one of them, received

the notice to which the Clark letter was apparently an answer, yet no competent evidence was given to warrant the court in receiving it in evidence. As we view the case, this matter was wholly immaterial. The record does not show, and it is not claimed, that the plaintiff ever accepted either Russell or Harmon as tenants, and agreed to release the defendants from the covenants of their lease. While Russell and Harmon paid some rent to the plaintiff, they did it as their assignees, and the defendants still remained liable for the amount. When Harmon finally abandoned the building, it was for the benefit of the lessees that the plaintiff re-rented the premises to Fales & Co., and this act did not release the defendants from the payment of any deficiency that might arise.

Error is also assigned upon the ruling of the court in excluding the following question put to Mr. Stewart by plaintiff's counsel:

"What is the fact as to whether, acting upon the suggestion contained in this letter, you attempted to make proof of the deficiency in the bankruptcy court?"

We do not think this ruling prejudiced the plaintiff's case. It was admitted upon the trial that an effort was made to prove the claim in bankruptcy, and the claim was excluded, and no claim is now made that the bankruptcy proceedings in any manner affect the rights of the plaintiff in this action.

The plea is the general issue, and the notice under it is as follows:

"Take notice that upon the trial of this cause the defendant Sprague will show in his defense, under the general issue above pleaded, that the said several supposed causes of action did not, nor did any or either of them, accrue to the said plaintiff at any time within six years before the commencement of this suit."

At the close of the testimony the court directed a verdict in favor of the defendants, and plaintiff brings the case into this Court by writ of error.

The only remaining assignment of error is that the court erred in directing a verdict for defendants. This raises the principal questions in the case. It was admitted by the defendants that the court was in error in directing the verdict for the defendants, and that the plaintiff was entitled to a judgment for the last month's rent due on the lease, with interest. The defendants claim, however, that the other installments of the rent are barred by the statute within six years from the time when they each became due, the action being debt for rent; while the contention of the plaintiff is that the installments would not be barred until the lapse of ten years from the time each became due, and that, consequently, she is entitled to recover for any deficiency found due between the rent to be paid under the defendants' lease and what the premises were actually rented for to Fales & Co., with interest upon such deficiency.

It is claimed by defendants that the situation attendant upon the possession taken by the plaintiff operated either as an eviction or as an unconditional surrender by operation of law,—in neither case did rent accrue thereafter; that such eviction or surrender dated from November 2, 1877, when the keys were accepted; and that, at most, it could not be later than January, 1878, when Fales & Co. took possession.

The uncontradicted testimony in the case shows conclusively that there was neither an eviction nor an unconditional surrender. The defendants were in possession, by themselves and their assignees, to November 1, 1877, when the building was voluntarily abandoned and surrendered by them and their assignees. The plaintiff made no agreement to receive the building from them, and release them

from their obligation on the lease; and no claim of this kind is made, except from their claim that they had no notice that the plaintiff intended to hold them for the rent. As we have before stated, the leasing to Fales & Co. was for the benefit of the defendants themselves, and it did not amount in law to a release of the plaintiff's claim against them. In all cases of a leasing, to show a surrender, a mutual agreement between the lessor and the original lessee that the lease is terminated must be shown. It is absolutely essential that it should be clearly proved that the original lessee assented to the termination of the term, and that the lessor and lessee mutually agreed to a surrender of the term; and, that proven, the original tenant is no longer liable. *Lyon v. Reed,* 13 Mees. & W. 285.

The remaining question arises under the statute of limitations. How. Stat. § 8713 provides:

"The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards; that is to say:

"1. All actions of debt founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States.

"2. All actions upon judgments rendered in any court other than those above excepted.

"3. All actions for arrears of rent," etc.

Plaintiff's counsel contends, however, that this action is one for debt on a sealed instrument, and is not affected by the provisions of the statute above cited, but may be maintained at any time within 10 years, under the provisions of section 8719, How Stat., which provides:

"All personal actions on any contract not limited by the foregoing sections, or by any law of this State, shall be brought within ten years after the accruing of the cause of action, and not afterwards."

In support of this proposition, counsel cites *Goodrich v. Leland,* 18 Mich. 110, and *Post v. Campau,* 42 Id. 94 (3 N. W. Rep. 272).

In *Goodrich v. Leland, supra,* the action was debt upon a note or contract under seal. This note or contract was given with a certain indenture of mortgage. The premises had been sold under the mortgage, and, after the death of the maker, the note or contract was presented to the commissioners on claims on his estate. More than six years had elapsed from the time it became due, and claim was made that it was barred by the six-years statute. It was held that, the action being debt on a sealed instrument, this statute (section 8713; section 5361, Comp. Laws of 1857) did not apply, and that the action could be maintained if brought within ten years, under the provisions of section 8719, How. Stat. (section 5367, Comp. Laws of 1857), and that section 7778, How. Stat. (section 4550, Comp. Laws of 1857) does not compel a party to resort to an action of *assumpsit* upon a sealed instrument. This section 7778 provides:

"In all cases arising upon contracts under seal, or upon judgments, when an action of covenant or of debt may be maintained, an action of *assumpsit* may be brought and maintained in the same manner in all respects as upon contracts without seal."

In *Post v. Campau, supra,* the action was brought to recover damages for the breach of covenant in a deed against incumbrances, under section 8719 (section 7154, Comp. Laws of 1871), above cited.

In *Dalton v. Laudahn,,* 30 Mich. 350, it was held that section 7778, above cited, applies to leases under seal; that they fall within the meaning of the word "contract.'

In *Hogsett v. Ellis,* 17 Mich. 359, it was held that this statute authorizes, in actions of *assumpsit,* the joinder of

the common counts with special counts upon judgments, a count for use and occupation, a count upon a special contract to pay rent, and a special contract to purchase a house and lot.

In *Christy v. Farlin,* 49 Mich. 319 (13 N. W. Rep. 607), it was held that this section permits *assumpsit* to be brought where covenant might be maintained, but that section 8713 bars any action of *assumpsit* after six years; that it is the *form* and not the cause of action which fixes the bar, and the remedy elected is governed by the limitation appropriate to itself; and that a declaration in *assumpsit* upon the covenants of a deed cannot be treated as a declaration in covenant.

It is evident that subdivision 3, § 8713, How. Stat., is only intended to bar, within the six years, those actions for rent which are brought on leases by parol. A lease by indenture being equal to a specialty, action thereon, being contract under seal, would be governed by section 8719, and only barred by a period of ten years. See *Hodsden v. Harridge,* 2 Saund. 66.

In *Davis v. Shoemaker,* 1 Rawle, 140, the court, speaking of a similar statute, says:

"And this construction is, no doubt, in accordance with the actual intent of the legislature; for it would have been nugatory to protect the lessee from an action of debt, and leave him exposed to an action of covenant, clearly maintainable on the indenture, to which the statute does not extend."

Debt may be maintained upon contracts under seal whenever the demand is for a sum certain, or one which is capable of being readily reduced to a certainty. 1 Chit. Pl. (16th Amer. ed.) *121, note *p.* Debt and covenant are concurrent remedies for the recovery of any demand where there is an express or implied contract in an instrument under seal to pay it. 1 Chit. Pl. (16th Amer. ed.) *132, *133; *Hooper v. Shepherd,* 2 Strange, 1089.

It is contended by the counsel for defendants that, under the ruling of this Court in *Sigler v. Platt*, 16 Mich. 206, this subdivision of the statute cannot be limited to actions on parol leases. In the case above cited the action was brought in *assumpsit* to charge the defendant individually under a sealed instrument whereby he agreed to hold himself personally liable upon certain partnership demands. This Court held that the action, being in *assumpsit* upon an express agreement, is included within subdivision 4 of the section requiring all actions of *assumpsit* to be brought within six years. This principle is again laid down in *Goodrich v. Leland*, 18 Mich. 118, and *Christy v. Farlin*, 49 Mich. 319, it being the *form* of action, and not the cause of action, that fixes the bar.

Such a construction must be given these two statutes (subdivision 3, § 8713, and section 8719) that both may have force; and we think the intent of the Legislature was that all actions for rent under a parol lease must be brought, whether in *assumpsit* or debt, within six years from the time the action accrues; and that under section 8719 action might be brought in debt for rent upon indenture of lease at any time within ten years from the time such rent accrued. If, however, the action was brought in *assumpsit* for rent upon an indenture of lease, as permitted by section 7778, then the action would be barred in six years, as the form and not the cause of the action would fix the bar.

It follows that the judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

ISABELLA McDONELL v. THE RIFLE BOOM CO.

71	61
f137	2654

71	61
138	2371

Master and servant—Negligence—Independent contractor—Liability of contractee—Logs and logging—Charge to jury—Interest of witness.

1. Where a boom company, having full control and management of a stream and the dams thereon, contracts for driving logs therein, the reasonable performance of which contract *obliges* the contractor to so run and manage the logs and water as to damage riparian owners, such damage is legally attributable to the company, and may be recovered of it.
2. The interest of a witness is to be always weighed and considered by the jury, and when referred to by counsel, as they have a right to do, it is not error for the court to instruct the jury that, if the interest or employment of such witness has impaired or biased his judgment, such fact may be considered by them in weighing the value of his testimony.

Error to Arenac. (Green, J.) Argued May 17 and 18, 1888. Decided June 22, 1888.

Case for flooding plaintiff's land. Defendant brings error. Affirmed. The facts are stated in the opinion.

Shepard & Lyon, for appellant, contended:

1. When work is performed by a contractor, and no control is reserved over the work or the workmen by the party for whom the work is done, the relation of master and servant does not exist, and the contractee is not liable for the negligence and improper performance of the work by the contractor; citing *DeForrest v. Wright,* 2 Mich. 368; *Moore v. Sanborne,* Id. 529; *Gardner v. Smith,* 7 Id. 421; *McCafferty v. Railroad Co.,* 61 N. Y. 178; *Eaton v. Railway Co.,* 59 Me. 520.

Simonson, Gillett & Courtright, for plaintiff.

MORSE, J. The plaintiff is owner of 40 acres of land upon the Rifle river, and about 12 miles up the stream from its mouth. She purchased this land for farming

purposes, in 1872, and has since owned and up to 1884 been in actual occupation of the same.

The defendant is a corporation organized under the laws of this State, and operating upon the Rifle river, running and booming logs.

Plaintiff sues for damages sustained, as she claims, in the years 1876, '77, '78, '79, '80, and '81, by the overflow of her lands by water caused by the operations of the defendant in running and driving logs down said river. In the circuit court for the county of Arenac she recovered a verdict for $625, and judgment was entered upon the same. The defendant brings error. Its complaint is directed entirely against the charge of the court.

There does not seem to have been, on the trial, any very serious dispute as to the damage done plaintiff by the running of logs upon the river in all, or at least some, of these years. The main controversy turned upon the question, who was responsible for it? The defendant did not run or drive these logs directly by its own employés, but the same was done under contract; and it claims that the control of the river, the dams upon it, and the logs while they were being run or driven each year, was by the defendant turned over to the contractor or contractors. The defendant contends that it did not direct or control the mode in which the river should be driven by the contractors, and exercised no control over them or the men in their employ relative to the driving of the logs in the river or the management of the dams thereon, and that, consequently, it was not responsible for the action of said contractors or their employés.

There is a small stream called the "Dead Branch," running through plaintiff's land, and emptying into the Rifle river. The boom company controls the Rifle for from 60 to 80 miles above its mouth. It owns two upper dams on the river, and leases what is known as the

"Lower Dam," which is located some three or four miles above the plaintiff's premises. The company runs out of the river each year from 60 to 110 million feet of logs. These dams are used to collect and hold the water until such times as they choose to let it out and flood the stream for the purposes of floating. It is claimed that the lower dam is also used for sorting purposes, and that, every time the water is let out of this dam for either driving or sorting purposes, the Rifle is raised so high that the water backs up the Dead Branch, and overflows the lands of the plaintiff.

At the mouth of the river the company maintained a large boom, and it has driven piles in the stream 40 or 50 rods from its mouth across the full width of it, leaving a small space or channel in the center. Seventy or eighty rods above this first row of piles is another, driven in the same manner, and eighty rods above this another lot of piles are driven in the center of the stream, called "Jam Piles." Boom sticks are stretched across the spaces left in the river, which boom sticks are fastened to piles driven in the river or on the shore, completely obstructing the river when desired. The company constructed dredge cuts on either side of the river near its mouth, small cuts, 25 or 30 feet wide, dredged out from the river, and leading into Saginaw bay. These cuts are used for sorting purposes. The company stops, stores, and sorts in the river all logs. The logs are stopped at the jam piles as they come down the stream, by means of the boom sticks stretched from such piles to the shore, and the logs are held in the stream until sorted and passed through the dredge cuts to the bay.

It is admitted that these logs cannot be sorted successfully in this manner without keeping, during the driving season, a jam in some portion of the river all the time. Logs cannot be sorted without stopping them, and

the business cannot be done without creating a jam in the river, and this jam must necessarily be above the sorting ground. It is claimed that this jam would often be several miles in length up the stream, causing the water to be more or less obstructed in its flow, and setting it back up into the Dead Branch, overflowing plaintiff's land. The injuries resulted from this cause and the letting off water from the lower dam, as heretofore stated.

The contracts of the boom company with the persons who were to drive the logs provided that they should drive and deliver to the company,—

"To solid jam at or below the prairie, so called, about two and one-half miles above the mouth of said river, being the first bend below the point where the telegraph line strikes the bank of said river. * * * No logs shall be left from the forks down, either in the stream or on the banks, and the logs are to be driven in below said bend in the prairie as fast as space is made therefor by the removal of logs below by said company; and said first party [the contractor] shall not at any time suffer any space next below said bend in the prairie to remain unfilled with logs for more than twelve hours until the whole of said logs shall be delivered below said point."

It will thus be seen that the contractors were required by the boom company to keep during the driving season, and until the whole of the logs were run down, a jam of logs two and one-half miles above the mouth of the river, so as to keep the space below and between said jam and the sorting grounds filled with logs as fast as the company wanted to use them.

The court below charged the jury in substance that if, in order to fulfill this contract or contracts, which were all substantially alike, it was necessary that such quantities of logs should be kept below the lower dam as would cause a solid jam of several miles in length, and by so doing the water was backed upon plaintiff's land, the defendant was liable.

This proposition was correct; and it needs no argument to sustain it. The defendant had exclusive control and management of this river, in the first place, and if, in turning over its control to a contractor, it burdened such contractor with conditions which, if complied with, necessarily caused damage to plaintiff, it became responsible for such damage. The question was left to the jury to say whether or not this contract could have been performed by the contractor without damage to the plaintiff, and they were instructed that, if they found it could have been so performed, then the contractor, and not the company, would be liable for the injuries done plaintiff.

The jury were also instructed as to the letting out of water from the lower dam, and the injuries resulting therefrom. They were told, in effect, as in relation to the jams, that if it was necessary, in order to fulfill their contract with the company, to so flood the river as to damage plaintiff, then the company must settle for such damage; but if it was not necessary, the contractor must be the one to recompense the plaintiff. These instructions were in accordance with the well-settled general principles of the law as applied to contractors, and were as favorable to the defendant as it could ask.

If, in order to properly and reasonably perform these contracts, the provisions of which were dictated by the company, who, previous to the making of the same, had full control and management of this stream and the dams thereon, the contractors were obliged to so run and manage the logs and water in the river as to damage plaintiff, such damage is legitimately attributable to the company, and the defendant is beyond doubt responsible for it. In such case it cannot properly be said that the company reserves no control over the work, and the relation of master and servant does not exist. The contract

controls and directs the action which causes the injury, and the contractor, in following the contract, becomes the agent or servant of the company. It is by no means certain that the boom company could escape responsibility in any event; but, as this point was not raised upon the argument, we pass it.

It is further contended that the court erred in directing the jury as follows:

"Now, it is said that some of these witnesses are interested in or in the employ of the boom company, and you are to consider that circumstance in weighing your testimony. You have a right to do that, gentlemen, and if you think that any circumstance of that kind has operated upon their judgment, so that they have not been able to form an impartial judgment, you must consider their testimony for what it is worth."

The court further stated, which is not complained of, immediately in the same connection, as follows:

"You will consider also that men and women may be operated upon by their sympathies one way or another. The sympathies of people come out sometimes very strongly in favor of the weaker party, or the female sex, or the poor man when he is in controversy with the rich man; but jurors have no right to act upon any prejudice or any sympathy of that kind. You are to try to do exact justice between the parties, just as though they were two individuals standing upon perfect equality in all respects. Their rights are the same, and your duties are the same, and they are not to be evaded."

It is apparent, from the reading of this part of the charge, that reference had been made upon the trial to the interest or bias of these witnesses, and also that some appeal had been made to the prejudice of the jury in favor of the plaintiff, or that something had been said in deprecation of the influence of such prejudice or of sympathy in her behalf.

It seems to me that the court stated the law correctly

in both of the quotations above noticed. The interest of a witness is to be always weighed and considered by the jury, and there could be no harm or impropriety, under the circumstances of this case, in what the circuit judge said. When counsel have referred to this interest, as they had the right to do, and when the jury may consider it, it certainly is not error for the court to instruct the jury, as he did in this case, that, if the interest or employment of a witness has impaired or biased his judgment, such fact may be considered by them in weighing the value of his testimony.

The cases of *Marquette, etc., R. R. Co. v. Kirkwood,* 45 Mich. 51 (7 N. W. Rep. 209), and *Cronkhite v. Dickerson,* 51 Id. 177 (16 N. W. Rep. 371), are not in point. In the first case the circuit judge told the jury that, if they found it necessary to consider the testimony given by the agents or employés of the railroad, "they should bear in mind the interest" such agents and employés have in protecting their company, and shielding themselves. It was properly held in such case by this Court that the judge erred in thus suggesting to the jury that suspicion attached to the testimony of these persons. But that is not this case. Nothing of this character was suggested by the court below, but the jury were properly advised of their right to take notice of the interest or employment of a witness, if such interest or employment had in any wise affected the credibility of their testimony. The other case has no bearing whatever, as the objectionable remark of the court was made during the trial, and did not relate to any bias or interest of a witness.

It is strenuously urged that the defendant was, by the charge of the court, held liable for all the damage the plaintiff sustained by floods coming down upon the jam, and causing the water to overflow her lands; that it did

not limit the liability in any manner to floods caused by an unreasonable flooding of the river on account of the maintenance of the jams provided for in the contract, but fastened upon the defendant a liability for all damage caused by floods from the dams that came down upon the jam, and set back upon plaintiff's land; that the question of the necessity of letting off floods from the dams in order to carry out the contract was not submitted to the jury, but, if the jams were necessary to fulfill the contract, the jury were, in effect, told that the defendant was liable for all the damages caused both by the jams and the floods from the dams, thus treating in such case both the jams and floods as necessary to the performance of the contract.

We do not think the charge of the court is open to this claim against it. The jury were plainly informed that no matter what control the company may have had over the dams, if it did not exercise such control, or if it turned it over to the contractor, so far as the running of logs was concerned, and did not interfere with it at all, then the act of flooding for the purpose of running the logs would be the act of the contractor. If the contractor could have run the logs according to the contract without flooding the plaintiff's premises, the jury were told that he alone would be responsible for the damage.

"But if you shall find that, in order to fulfill this contract, it was necessary to place such quantities of logs below the lower dam *as that the flooding which was used* caused the overflow, then I say that the boom company would be liable."

This certainly made the defendant responsible only for such flooding from the dams as was rendered necessary in the performance of the contract.

The judgment is affirmed.

The other Justices concurred.

NORMAN WEAVER v. PHŒBE VAN AKIN ET AL.[1]

71 69
77 594

Trusts—Power to incumber estates—Equitable mortgage—Foreclosure—Equity.

A testatrix devised a farm in trust, to be conveyed by the trustee to a mother and daughter when the daughter reached full age, and after the discharge of such dues as should then be against her estate. The trustee accepted the trust, and was appointed executor of the will, but never settled the estate, nor rendered any account to the probate court, nor conveyed the farm to the beneficiaries. While yet a minor the daughter quitclaimed her interest in the farm to her mother, who, after her daughter became of age, at the request of the trustee, and on his representation that the money was needed to pay off the claims of certain heirs upon the land, executed a mortgage on the farm to secure a loan for that alleged purpose, the trustee representing to the mortgagee that the mother was then the sole owner of the mortgaged premises.

This was done with the knowledge and acquiescence of the daughter, to whom the mother soon after reconveyed the interest deeded to her, and the next day conveyed to the daughter her own interest, subject to the mortgage, which the daughter assumed and agreed to pay. The mortgage was foreclosed by advertisement, and the land bid in by the mortgagee, and was not redeemed from such sale.

A party claiming through the mortgagee filed a bill to have the mortgage declared to be in effect one made by the daughter and her mother and the trustee, and to foreclose it as such, and to hold all three for any deficiency arising on a sale under such foreclosure decree. A general demurrer was interposed, which was sustained by the court on the hearing below, and on appeal in the Supreme Court, for reasons stated in the opinion, to which reference is had.

Appeal from Lenawee. (Watts, J.) Argued June 6, 1888. Decided June 22, 1888.

Bill filed for purposes stated in head-note. Complainant appeals. Decree affirmed. The facts are stated in the opinion.

[1] See 43 N. W. Rep. 1081, for a second report of this case.

W. A. Underwood (A. Howell, of counsel*),* for complainant.

A. L. Millard and *John Whitbeck,* for defendants.

[The points of counsel are stated in the opinion.—REPORTER.]

SHERWOOD, C. J. The bill of complaint in this case is filed to obtain a decree to declare a mortgage made by defendant Caroline Weaver, wife of the complainant, to Elihu L. Clark, to be in effect a mortgage made by all the defendants, and to foreclose it as such, and to make all the defendants liable for any deficiency that may arise after a sale of the mortgaged premises to pay the mortgage debt.

The property was originally owned by Paulina Fish, and known as the "Hudson Farm." Before she died, she devised and bequeathed all of her estate to the defendant Edwin Hadley, in trust for the following purposes:

1. To pay debts and funeral expenses.
2. To attend to and manage the affairs and interests of the estate during the trusteeship.
3. To receive and apply, during his trusteeship, the rents and profits of the Hudson farm, or so much thereof as should be required for that purpose, to the support of her sister, Betsy A. Vining.
4. To raise and advance, from any part of the estate, the necessary sums to relieve the wants and necessities of Caroline Hertzler and Phœbe Fish (nieces of the testatrix), and to invest any balance remaining until said Phœbe (who is the daughter of said Caroline) should become of age.
5. And when said Phœbe should become twenty-one, and after the discharge of such just dues as should then be against the estate, to convey all, with said Hudson farm, to said Caroline and Phœbe, in equal shares.

Upon the death of the testatrix, in 1872, the will was probated, and the administration of the estate was com-

mitted to said Hadley, who entered at once upon the execution of his trusts as such administrator, and as trustee under the will; but no debts were ever proved against the estate of said Paulina, nor is it known that there were any. After probate of the will, and prior to the time when said Phœbe became of age, Hadley paid a considerable amount out of the estate to said Phœbe and Caroline, and also paid a considerable amount of the rents received by him from said farm to said Betsy A. during her lifetime; but he never settled said estate in the probate court, nor did he ever report to said court any of his proceedings in the administration of the estate, nor render any account, as trustee under said will, to any one, nor has he made any settlement of said trusts, but the same remain open and unsettled; and he has never conveyed the legal title to said farm to said Caroline and Phœbe, or either of them, or to any other person.

May 11, 1875, said Phœbe, while yet a minor, but in contemplation of marriage, made a voluntary conveyance of her interest in said Hudson farm to said Caroline, her mother, and in October, 1875, Phœbe attained her majority. November 24, 1875, Hadley represented to Caroline and Phœbe that it was necessary to raise $2,250 by mortgage upon said farm, to pay off the claims of certain heirs upon the land; and they, believing such loan and mortgage to be necessary for that purpose, consented thereto. Said Hadley then borrowed the money of one Clark, to be secured by Caroline's mortgage on the farm, upon his representation to Clark that, by said will and the deed from Phœbe, the said Caroline was then the sole owner of the premises; and thereupon, for the purpose of securing said loan, the said Caroline, on November 24, 1875, by the procurement of said Hadley, and with the full knowledge and concurrence of said Phœbe, gave her note and a mortgage for $2,250 upon said farm to said Clark, the execution of

which mortgage by said Caroline was in the presence of said Phœbe and said Hadley, who were the subscribing witnesses thereto, and the same was delivered by Hadley to Clark.

February 2, 1877, Caroline reconveyed to Phœbe, by quitclaim deed, the undivided half of the farm previously conveyed by Phœbe to her, and on February 3, 1877, sold and conveyed her own undivided half of the farm to said Phœbe, subject to said mortgage to Clark, which mortgage the said Phœbe, in the agreement of purchase and in and by the deed of conveyance to her, assumed and agreed to pay.

December, 1879, the said mortgage being wholly unpaid, a foreclosure thereof by advertisement was commenced by Clark, and on March 13, 1880, the farm was purchased by and conveyed to said Clark, upon the foreclosure sale, for $3,409.71. April 29, 1880, Clark died; and by his will, which was duly proved, his interest in said mortgaged premises, and in said note and mortgage, were vested in his widow, Isabella T. Clark. The farm was never redeemed from said sale, nor has said mortgage ever been paid or discharged, except through said foreclosure. Complainant has purchased, and by quitclaim deeds of May 3 and November 9, 1881, has received a conveyance, from Mrs. Clark, of all the interest acquired by her husband, Clark, under said mortgage in said farm.

Said Phœbe has been in possession of the whole of said premises ever since the execution to her of said deed of February 3, 1877, and still keeps and retains the same, and refuses to pay the said debt secured by said mortgage to said Clark; and, because of her infancy at the time of the execution of her deed of May 11, 1875, denies that it conveyed any interest in said farm to said Caroline; denies that the mortgage to Clark covered any more than Caroline's half of the farm; and denies that complainant has acquired any title to said farm by virtue of said

deeds from Mrs. Isabella T. Clark, or any interest in said mortgage, or the debt secured thereby.

The theory of the case set up in the bill is that the will of Paulina Fish vested in Hadley an absolute legal title in fee-simple to the Hudson farm, and at the same time vested the equitable title in the nieces, Caroline and Phœbe; that the legal title to the land still remains in Hadley, for the reasons—

1. That the trusts of the will have not been closed.
2. That the legal estate has never passed from him in the manner provided by the will,—that is, by a deed of conveyance.
3. That the legal estate vested in him was such that it could be divested by him only by a conveyance in writing.

That Phœbe's deed of May 11, 1875, conveyed her equitable interest in the farm to Caroline, and, when Caroline executed the mortgage to Clark, she held the equitable title to the whole, while the legal title to the land remained vested in Hadley, hence, as to her, it was an equitable mortgage merely; that it was an equitable mortgage on the part of Hadley, because he assented to it, procured it to be executed, delivered it, represented to Clark that Caroline was the owner of the land, and had the right to make it, procured the loan of money upon it, and intended it as a security for the loan; that, if Phœbe then had any interest in the farm, it was an equitable mortgage on her part, because she assented to it, and assisted in its execution by witnessing it, and thereby held out to Clark that Caroline was the owner of the farm, and had the right to mortgage it; that, being an equitable mortgage merely, it could be foreclosed only in chancery, and Clark's attempted foreclosure at law was ineffectual to bar the equity of redemption; but his statutory foreclosure and purchase at the sale, and the subsequent deed of the farm to complainant, operated as an assign-

ment of the debt and equitable mortgage to him, with all of Clark's rights to foreclose the same, and that he has a right to bring this bill for that purpose.

Such are the material averments of the bill, and the theory upon which complainant relies for relief. The defendant Phœbe Van Akin interposed a general demurrer. The other defendants did not appear. On the hearing at the circuit, Judge Watts sustained the demurrer, and dismissed complainant's bill.

It is the contention of the complainant that, at the time of the execution of the mortgage, Hadley had the legal title to the premises, and that the equitable title was in the mortgagor, Caroline, or in her and Phœbe; and it is further contended by complainant that Hadley having negotiated the loan and procured the execution of the mortgage, and represented to Clark, the mortgagee, that Caroline held the entire title, he is estopped from denying its validity; and that Phœbe, having assented to the making of said loan and mortgage, and having subscribed the mortgage as a witness, is also estopped from denying its validity; and that Phœbe and Caroline should in this suit be held as joint makers of the mortgage.

We do not think this position can be maintained. They were the *cestuis que trustent;* and, as such, they, nor either of them, had any title, either legal or equitable. The whole estate, both legal and equitable, is vested in the trustee, under our statute. The person for whose benefit the trust is created takes no estate or interest in the land, but may enforce the trust. How. Stat. § 5578; *Noyes v. Blakeman,* 6 N. Y. 567. The *cestui que trust* possesses no power, and has no right, to charge the trust property with anything. Neither can the trustee himself do so, unless expressly authorized by the statute, and then the charges must be strictly confined to the objects for which the

authority was given. *L'Amoureux v. Van Rensselaer,* 1 Barb. Ch. 34.

This mortgage was not made to carry into effect any of the purposes of the trusts contained in the will, nor is there any fraud charged in the bill against Caroline or Phœbe; neither is there any claim that either of them received any benefit from the loan for which the mortgage was given; and Hadley's act in giving the mortgage was absolutely void by the terms of the statute, under the circumstances. See How. Stat. § 5583. It therefore appears that neither of the defendants had any power, under the will, to make the mortgage. Hadley certainly had none, and the only interest Caroline and Phœbe had was the right to enforce the trust; and this they could not assign, dispose of, or incumber. *Noyes v. Blakeman, supra; Learned v. Tallmadge,* 26 Barb. 443; *Gott v. Cook,* 7 Paige, 521.

At the time this mortgage was made, the trust had not been fully executed, and the legal title, therefore, remained in the trustee, as did the equitable, under the statute. It is only when a party has a title, legal or equitable, in fact or of record, that he can give a valid mortgage upon land; and it not being shown that either Caroline or Phœbe had either at the time the mortgage in suit was given, and that the mortgagee and his assignee had such notice as the law requires of the actual situation of the title at the time, and of the fact that the trust of Hadley was not yet executed, it is difficult to see how the complainant can maintain his bill or how, under all the circumstances, Phœbe can be estopped from making the defense she now interposes.

The mortgage given by Caroline being void, no promise to pay it by Phœbe can give it validity. Neither can it create an equity in favor of the mortgagee or his assignee, requiring her to pay it. The complainant's whole theory is based upon the assumption that Caroline and Phœbe

had the equitable title and interest in the property; and, such not being the case, the argument of the learned counsel for complainant, based thereon, necessarily fails.

It is quite manifest that Phœbe cannot be held to have ratified the deed of another, of lands, which she herself could not have made, by signing such deed as a witness, even though she consented to the making of the same; and her assumption of the payment of such mortgage in the deed she received from Caroline subsequently could not bind her if such deed were void. And this is the most she did, upon which the estoppel is claimed.

There is no view which we have been able to take of the case that will sustain the complainant's bill. The decree sustaining the demurrer must be affirmed, with costs.

LONG, J., concurred with SHERWOOD, C. J.

CAMPBELL, J. I am not prepared to say that, after Phœbe came of age, she and her mother had not interests in the land which they could convey. But her mother's interest—whatever its character may have been—was purely equitable; and the mortgagee, who dealt with the trustee, could be in no better position than the trustee himself, in dealings which inured to the advantage of the trustee. The mortgagee had no right to advance money to the trustee at the expense of the beneficiary. If he wished to deal with the beneficiary for her own account, he was bound to see that she got the money, and was bound to know that fiduciary relations prevented the trustee from getting benefits at the expense of the *cestui que trust*. Had the mortgage been valid as an equitable charge, I doubt whether it would have been capable of statutory foreclosure, as there could be no legal power of sale. The doctrine that an irregular statutory foreclosure passes the mortgage to the purchaser is based on the idea that there

was a mortgage capable of such foreclosure. I concur in holding that complainant has no case.

CHAMPLIN, J., concurred with CAMPBELL, J.

MORSE, J. I concur in the result.

FRANK FORD v. NELSON DANIELLS ET AL.

Equity—Reformation of mortgage—Homestead.

A husband and wife, intending to mortgage their farm of 160 acres, by mistake included only 40 acres in the mortgage, after which they conveyed the whole farm, subject to the mortgage, their grantees having knowledge of the facts, who sold 80 acres of the *non-mortgaged* land, including the homestead 40 acres, to a party having like knowledge, and who intended to defraud the holder of the mortgage by such purchase. A bill was filed to reform the mortgage, and the purchaser of the homestead contended that the court could not grant such relief as to said homestead, as the wife of the mortgagor had never signed a mortgage covering the same. In granting the relief prayed for, the Court held that said grantees must be considered as having reformed and corrected the description, so far as they are concerned, by the circumstances of their purchase and ownership of the premises; and as the default of the wife had been entered for want of an appearance, a decision of the question of the power of the court to so reform the mortgage as to her was not required.

Appeal from Clinton. (Smith, J.) Argued June 6, 1888. Decided June 22, 1888.

Bill to reform a mortgage so as to cover the whole land intended to be mortgaged. Defendant Daniells appeals. Decree affirmed. The facts are stated in the opinion.

Daboll & Brunson, for complainant.

H. J. Patterson and *O. L. Spaulding,* for appellant.

[The points of counsel are stated in the opinion.—REPORTER.]

MORSE, J. November 14, 1882, the defendants George Rose and Addie M. Rose, husband and wife, executed a mortgage to Elizabeth B. Ford upon lands owned by George Rose in the county of Clinton, to secure a loan for $3,000. The intention of the parties to this mortgage was to execute it upon all the land then owned by George Rose, the said premises being described as the N. W. ¼ of section 6, in township 5 N., range 3 W., and containing 160 acres. But by a mistake of the scrivener, Loyal W. Hill, the land was described in the mortgage as the N. W. ¼ of the N. W. ¼. The bill in this case is filed to reform said mortgage, and declare it a valid lien upon the whole premises, as intended by the parties when it was executed and delivered. A decree in compliance with the prayer of the bill was entered in the court below. The defendant Nelson Daniells alone appeals to this Court.

The defendants Brisbin and Cooley are the married daughters of the defendant Daniells, and purchased the premises, subject to this mortgage, October 1, 1885. They conveyed the east half of the land to Daniells November 7 in the same year. Elizabeth B. Ford died May 1, 1884, without knowledge of the mistake in the description of the mortgage. The complainant is her husband, and was also ignorant of the mistake until a short time before the filing of his bill of complaint.

It is alleged in the bill that, before the purchase of the premises by them, the said Brisbin and Cooley were informed of the fact that there was a mortgage of $3,000 to Mrs. Ford upon the land owned by Rose, and that

they supposed and acted upon the supposition in such purchase that said mortgage covered the whole premises, and that Daniells was also informed that the mortgage embraced the entire land, and knew that such was the intention of the parties to its execution; that Daniells, at the time of the deed to him of the east 80 acres, had notice and full knowledge of the mistake in the description, and that the conveyance from Brisbin and Cooley to him was not real and *bona fide*, but a sham, and made with intent to defraud the complainant.

We do not consider it necessary to discuss the evidence. The allegations of the bill are amply supported by the proofs, and the complainant is entitled to the relief granted by the lower court. It is insisted, however, that the mortgage cannot be reformed as to the north 40 acres of the land conveyed to Daniells, for the reason that, at the time of the conveyance by Rose and wife to Brisbin and Cooley, they were living upon this 40 as their homestead; that Mrs. Rose has never signed and acknowledged any mortgage upon the same; and although it be conceded that she intended to do so, and supposed she had done so, yet, not having executed the same, a court of equity has no power to treat the instrument as made by her, or, in other words, to affix her signature to a mortgage not signed by her, or to write above her signature in the mortgage before us a description of the homestead premises, the same not being contained therein when she wrote such signature; and that the objection which the wife might make to the reformation of this mortgage, as far as the homestead is concerned, is open to Daniells in this suit.

Under the circumstances of this case, I doubt if Daniells is entitled to make a plea of this kind. Mrs. Rose was made a party to this suit, and permitted the bill to be taken as confessed against her. When Brisbin and Cooley purchased the land, they bought it subject to this

mortgage, and paid for the premises with the amount of such mortgage deducted from its value. They could not equitably claim that any part of the premises should be released from said mortgage, if the whole was necessary to pay or discharge its lien.

Daniells is in no better position than they are, because, knowing of the true condition of affairs, he purchased with the intent of defrauding complainant.

The sale to Daniells has more the appearance of a sham than a real transaction. He knew that Rose and complainant both supposed that the mortgage covered all the land, but, ascertaining that it did not, he at once purchased the east 80, and the terms of his purchase are so arranged that he will lose nothing if he fails to hold the land released from the mortgage. He gave to Brisbin and Cooley, as he claims, in payment of the land, notes that he held against them for about $800, and gave his note for the balance, about $1,200. The note has not been paid.

We are satisfied that the complainant has the same equity against Daniells that he has against Brisbin and Cooley. These defendants must be considered as having reformed and corrected the description of this mortgage, as far as they are concerned, by the circumstances of their purchase and ownership of the premises. And Mrs. Rose has been concluded by her default and failure to appeal. We do not therefore deem it necessary to discuss the point raised as to the power of the court of chancery to reform and correct the mortgage as against Mrs. Rose. Equity will certainly grant the relief as against the others, for the reasons above stated. It will not give to Brisbin and Cooley, or their grantees with knowledge of the fraud, any greater interest in the premises than they purchased and paid for.

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

The other Justices concurred.

HARRIET H. STONE v. THE STANDARD LIFE & ACCIDENT INSURANCE COMPANY.

Negligence—Evidence—Refreshing recollection of witness—Statements made at time of observation of premises—Appearance of premises subsequent to time of accident.

1. For the purpose of refreshing the recollection of a witness who testifies for the plaintiff in a negligence case to the surroundings of the accident as observed by him, his attention may be called to his statements made before the coroner's jury on the same subject.
2. As bearing upon the question of the exercise of due diligence for his personal safety by an insured person who was killed by falling into an excavation under a sidewalk, which had been partly covered, and so as to resemble, under an electric light, a continuation of the sidewalk, it is competent for the plaintiff to show the appearance of the walk on the succeeding night, under like circumstances and surroundings, by witnesses who took observations, and whose testimony was similar to that of witnesses who observed such appearance on the night of the accident.

Error to Wayne. (Gartner, J.) Argued June 6 and 7, 1888. Decided June 22, 1888.

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

James T. Keena (*Edwin F. Conely*, of counsel), for appellant.

Dickinson, Thurber & Stevenson, for plaintiff.

CHAMPLIN, J. Mrs. Stone, as the beneficiary named in a policy of insurance issued by defendant, brought suit, alleging the death of her husband, who was the assured, "through external, violent, and accidental means," on July 29, 1886.

The defendant's contention was as follows:

1. The death of Hamilton Stone (the assured), and the injuries occasioning the same, happened *in consequence* of his being under the influence of intoxicating drinks.

2. That his death happened *while he was* under the influence of intoxicating drinks.

3. That it happened through his failure to use due diligence for his own personal safety and protection.

The defendant's denial of the plaintiff's right of recovery is based upon the following conditions of the policy, viz.:

"1. And no claim shall be made under this policy * * * when the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks.

"2. The insured is required to use due diligence for personal safety and protection."

Testimony was introduced upon these issues, and the defendant's counsel submitted to the jury the following questions:

"1. Was Hamilton Stone, when he fell into the cellar or excavation in question, and received his fatal injury, in any wise under the influence of intoxicating drinks?

"2. Did the death of Hamilton Stone happen in consequence of his having been under the influence of intoxicating drinks?

"3. Did Stone use due diligence for his own safety and protection?

"4. Could Stone, by the exercise of that degree of care and watchfulness which ordinarily prudent people exercise concerning their own personal safety and protection, have avoided falling into the cellar or excavation in question?"

The jury answered the first, second, and fourth questions in the negative, and the third in the affirmative.

The testimony introduced warranted special findings of the jury, and the facts thus found are conclusive against the defense relied on by defendant to defeat a recovery.

The assured met his death at about 1 o'clock on the morning of July 29, by falling into an excavation made in the sidewalk of Grand River avenue, in the city of Detroit, where the Young Men's Christian Association building was in process of erection. This excavation extended nearly or quite across the width of the sidewalk to the depth of 12 feet or more. On the night named he was walking along the sidewalk of Grand River avenue from the direction of Woodward avenue. The sidewalk was composed of flagging stone of a gray color. From the end of the excavation opposite that towards which Stone was approaching, there had been constructed a scaffold, the covering of which was plank, upon which lime and stone had been deposited, and which was nearly on a line with the sidewalk, and had very much the same appearance as the flagging stone at that time of night.

There was a space between this scaffold and the edge of the excavation towards which Stone was approaching, of about 15 or 20 feet uncovered. A barricade across the sidewalk had been placed close to the edge of this excavation, consisting of sewer crocks from 25 to 30 inches in height, and one foot in diameter,—one placed at the outer edge of the sidewalk, and one near the center. An abutment of stone of about the same height was standing near the line of the inner edge of the walk. Plank was placed on top of these crocks and the abutment, lapping on the center crock, and upon these heavy stones were placed. An electric light some distance off cast its rays upon the scene of the accident brilliantly enough to deter-

mine the time of night upon the dial of an ordinary watch.

Richard H. Lansing was coroner, and was immediately summoned to the scene, and made observations of the surroundings, and he was produced as a witness by the plaintiff, and gave his testimony respecting the situation.

He testified:

"There was no barricade except these planks laid on top of these crocks. Evidently the barricade had broken in when Mr. Stone fell into the cellar, and further on the barricade was still up. This barricade was simply boards or planks laid on the top of the sewer crocks.

"*Q.* On that night did you step back from the edge of the excavation about ten feet, and look up Grand River avenue to the west?

"*A.* I do not know the number of feet, but I certainly looked up from Grand River avenue in the direction of the excavation along the line of what would be the sidewalk if it was continued through to Griswold. * * *

"*Q.* How close to the excavation were you when you took that observation?

"*A.* That would be impossible to tell. I know I noticed at that time what might be a seeming delusion as to the trestle-work along by the wall on a level with the sidewalk, on an exact line with where the sidewalk would be if it was in position, and the reflection of the electric light over in another direction coming as it did, it occurred to me that it might be a sort of delusion, looked as though there was a real sidewalk in existence there. That idea struck me on the spot, by going out to several different points, and noticing the similarity in appearance of the grayish color of the planking on the top of the trestles, and comparing it with the appearance of the flag sidewalk.

"*Q.* Was that appearance as though it was a continuation of the sidewalk?

"*A.* Yes, sir, for a part of the way it was.

"*Q.* Well, at what point did it not appear so?

"*A.* Certainly where the end of the trestle-work and the end of the wall stopped it presented a broken appearance.

"*Q.* That is, when you got on to the edge and looked down?

"*A.* Not necessarily.

"*Q.* Did you not make this statement to the coroner's jury: 'In walking up Grand River avenue'"—

Counsel for defendant here objected to the introduction either in the form of a question or anything else of that statement, for the reason that it was not legitimate or proper, nor did the witness need it.

The court directed the question to be asked, and counsel for defendant excepted to the ruling. The counsel then asked the question as follows:

"*Q.* After making that observation on Grand River avenue that night, did you not make this statement before the coroner's jury: 'In walking up Grand River avenue on this side, when you got within ten feet of this excavation, by reason of the stone wall and mason's platform built out on the Grand River side beyond the walk, consisting of horses and plank laid across, as it was last night, as a person approached it, the appearance would be exactly that of a stone sidewalk?'"

To which he answered:

"I cannot recollect the exact words. My impression is, as I told you a moment ago, that with the reflection of the electric light it gave to it the appearance of a sidewalk, that is, taking in the line away up to Griswold street."

Counsel for defendant have assigned error upon the ruling of the court in permitting the question. We do not perceive any error in the ruling. Apparently, the counsel for plaintiff wished to ascertain from the witness the distance he was from the excavation when the sidewalk appeared continuous. The witness was unable to state. For the purpose of refreshing his recollection, it was not improper to call his attention to statements made by him at or about the time he made his observations.

Counsel for plaintiff, however, did not place his privilege to ask the question upon this ground, but because the witness was an unwilling witness. We see nothing

in the character of the testimony given by the witness that shows that he was unwilling to state all the facts which he recollected, although the testimony shows that he had been employed by defendant to procure the attendance of some of its witnesses. We cannot reverse the case upon this assignment, since the answer to the question shows that no prejudice was done to defendant's case. What he stated before the coroner's jury was substantially what he stated in his testimony before the trial jury.

The plaintiff introduced witnesses to show the appearance of the walk at night under like circumstances and surroundings on the night succeeding the accident, who gave testimony similar to those who observed the appearance on the night of the accident.

Counsel for defendant objected to the introduction of such testimony, because it was subsequent to the time of the accident, and he now insists that such testimony was held to be improper in *Klanowski v. Railway Co.*, 64 Mich. 279 (31 N. W. Rep. 275).

There is no parallel between the two cases. That was testimony as to an experiment involving several assumed factors to produce a given result. Here the testimony was of a fact relative to the appearance which the sidewalk and the excavation covered with plank presented to a person passing along in the night under exactly similar circumstances and surroundings. The testimony was admissible as bearing upon the issue whether the deceased was in the exercise of due diligence for his personal safety and protection.

The charge as to the preponderance of testimony we think was not misleading to the jury.

The judgment is affirmed.

The other Justices concurred.

GEORGE W. BRIGGS v. MARSHALL BORDEN, ANSEL N. CLARK, AND GEORGE M. FIELD, BOARD OF SCHOOL INSPECTORS OF THE TOWNSHIP OF GREEN OAK.

Schools and school-districts — Township inspectors — Dissolution of district—Consent of tax-payers—Equity—Injunction.

1. How. Stat. § 5041, requires the consent of a majority of the resident tax-payers of a school-district to its division into two or more districts, and, in case of the consolidation of two or more districts into one, the consent of a majority of the resident tax-payers of each district is required.
2. The words "dissolve" and "disband" are of similar import, and a vote taken to *disband* a school-district is supported by a notice of a meeting to be held to vote upon a proposition to *dissolve* the district.
3. A resident tax-payer of a school-district which the township board of school inspectors, acting without jurisdiction, have attempted to divide into other districts, may file a bill to restrain the sale of the school-house and other property of the original district.
4. In this case it is held that the consent of a majority of the resident tax-payers of the district was not obtained to its destruction by division, and the action of the school inspectors is decreed to be null and void.

Appeal from Livingston. (Newton, J.) Argued June 8, 1888. Decided June 22, 1888.

Bill to restrain the sale of school-district property. Complainant appeals. Decree dismissing bill reversed, and one entered granting relief prayed for. The facts are stated in the opinion.

B. T. O. Clark and *L. S. Montague,* for complainant.

D. Shields, for defendants.

[The decision upon the points decided is so conclusive

that a summary of the briefs of counsel is omitted.—REPORTER.]

MORSE, J. The complainant is a resident and tax-payer of fractional school district No. 6 and 7 of the townships of Brighton and Green Oak, and files his bill against the school inspectors of Green Oak, in which township the school-house of said district is located, to restrain them from selling the said school-house and the school-site, and also the wood and furniture, belonging to said district. The property had been advertised for sale by said inspectors, who claim that the school-district has been disbanded and destroyed by the vote of the electors of the district, and the action of the joint boards of school inspectors of the two townships. It appears from the record that, pursuant to a notice for a special school-district meeting to vote upon a proposition to "dissolve" the district, and attach its territory to surrounding districts, the electors of the district met on May 10, 1887, and voted by ballot, 18 to 9, to "disband" the district. June 7, 1887, the boards of school inspectors of Brighton and Green Oak met, and upon a petition presented for that purpose, and upon the reading of the minutes of the school-district meeting, showing the vote as aforesaid, resolved to grant the request of said petitioners, and attach the property of said district, after giving notice of a meeting to be held for that purpose, to several other districts. The boards again met in joint session, June 30, 1887, and proceeded to divide up the territory of the district, and attach it to five other districts in Green Oak and Brighton.

The complainant alleges that this action was illegal and unauthorized, and that the district, in law, still exists the same as if no action looking to its dissolution had ever been taken. His averments to support his claim of illegality are:

1. That the school-district meeting was held without authority of law; that the electors at such meeting had no authority to *disband* said district; and that at said meeting many persons voted upon the motion to disband who were not resident tax-payers of the district; and that the vote was taken without proper or legal form, and that two ballots were taken, the results of said ballots materially differing.

2. That the boards of school inspectors had no authority to disband said school-district without the consent of a majority of the resident tax-payers of the school-district, which they did not have; and that the apportionment of the territory to the other school-districts was without the consent of a majority of the resident tax-payers of said school-districts, and therefore null and void.

The defendants in their answer defend their proposed selling of the property, upon the ground that their action in detaching the lands comprising said school-district, and attaching the same to other districts, was legal and proper, and that the consent of the tax-payers of that district, or any of the districts, was not necessary, but deny that a majority of the resident tax-payers of the disbanded district did not consent. They admit that they are proceeding to sell said school-site, school-house, and other school property, and claim that they have the right to do so, because of the legal dissolution of the said district.

A demurrer clause is contained in the answer, and they claim the benefit of this defense as if they had demurred to the bill. The demurrer is general, and denies that a case has been made by the bill. Upon hearing on pleadings and proofs, the court below dismissed complainant's bill. He appeals to this Court.

The power of the boards of school inspectors to destroy this district, by dividing it into two or more districts, is found in the statute. See How. Stat. §§ 5033, 5041. In such case the board of school inspectors cannot act

without the consent of a majority of the resident tax-payers of the district, nor can two or more districts be consolidated into one without the consent of a majority of the resident tax-payers of each district to be so consolidated. Id. § 5041. The school inspectors have power to alter boundaries of districts, and attach or detach persons, or the property of any person or persons, to or from any district; but no power is anywhere granted them to disband, dissolve, or destroy a district save as restricted under section 5041, above referred to. As intimated in *Doxey v. Inspectors*, 67 Mich. 601, 604 (35 N. W. Rep. 170, 172), the school inspectors have no authority to divide up the district, and destroy it, without the consent of a majority of the resident tax-payers; nor can they destroy it by cutting it up into pieces, as in this case, and attaching all the territory to other districts, without such consent.

The complainant claims that the action of the school-district in voting to "disband" the district was illegal, because there was no proper notice given and posted of such meeting. We think the words "dissolve" and "disband" are of similar import, and that a vote taken to disband is supported by a notice of a meeting to be held to vote upon a proposition to dissolve the district.

But we are satisfied of the truth of the allegation, in the bill of complaint, that the consent of a majority of the resident tax-payers to the dissolution of the district was not obtained. At the school meeting a list of the persons voting was kept. The vote was by ballot. There were 27 votes cast in all; 18 for the proposition to disband, and 9 against it. Every person present who had any of the qualifications of a voter at any school meeting, as named in the school laws, seems to have voted, without reference to sex, or whether he or she was a tax-payer resident in the district. Eleven women voted.

From 10 to 15 persons who were not resident tax-payers voted, and most of them voted for the proposition to disband. Some of the legal voters of the district were not present, and some went away without voting. It is plain to us that the consent of a majority of the resident tax-payers of the district to this destruction of the district has never been obtained. In view of this fact, it is not necessary to determine whether proper notices were given and posted of the meetings, or whether, under our Constitution as it now is, women could legally vote at the school meeting.[1]

We have no doubt of the right of the complainant to file this bill. The action of the school inspectors was void, and entirely without jurisdiction, and they were proceeding to sell the property of the district without authority. The complainant is a resident tax-payer of the district, and interested in such property; and, if the school inspectors are permitted to take this last step in the destruction of the district, the mischief and damage to him may be irreparable.

The decree of the court below dismissing the bill will be reversed, and a decree granted complainant in this Court restoring said district, and declaring the proceedings of the said inspectors to dissolve or disband said district null and void, and perpetually restraining them from selling any of said district property under or by virtue of such proceedings, or any other, save those that may be legally taken hereafter to that end. Costs of both courts to complainant.

The other Justices concurred.

[1] See *Belles v. Burr*, 76 Mich. 1, as to right of women to vote at school-meetings.

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MOSES TAGGART, ATTORNEY GENERAL, v. THE CITY OF DETROIT.

Municipal corporations—Public franchises—Action by Attorney General to prevent destruction—Markets—Detroit city charter.

1. That holding a public market is an important public franchise is an elementary principle of law.
2. There can be no doubt of the right and duty of the Attorney General to intervene and prevent franchises of a public nature from usurpation or from destruction.
3. All franchises are given for the purpose of securing some advantage to the public, and, when once exercised, the public have very generally a right to complain of their relinquishment.
4. Markets are as old as civilization, and public market places have in many countries been identified with the most important events in their history.
5. The purpose of markets has always been to secure to all persons the privileges and conveniences arising from a general concourse of buyers and sellers, one main object being to enable producers to meet consumers of the usual necessaries of life directly, and without the interference of middle-men.
6. In this case the defendant is enjoined from interrupting the use of the market property, or any part of it, or any of the buildings heretofore used for market purposes, and directed to continue to maintain the market as such, and collect and apply the income for the purposes required by the statute of 1875, as amended by the law of 1881, and in no other way.

Appeal from Wayne. (Hosmer, J.) Argued June 8 and 12, 1888. Decided June 22, 1888.

Information in the nature of a bill in equity to restrain the city of Detroit from discontinuing the Central public market in that city. Complainant appeals. Decree reversed, and one entered granting relief prayed for. The facts are stated in the opinion.

John J. Speed (*F. A. Baker,* of counsel), for complainant.

John W. McGrath, for defendant.

CAMPBELL, J. The Attorney General filed his information in the nature of a bill in equity to restrain the city of Detroit from discontinuing the Central public market in that city. The court below, upon an answer not controverting anything material in the information, dismissed the bill, but we are not informed whether this was done for a supposed lack of authority in the Attorney General, or for want of equity. Both of those questions were argued. The Attorney General appeals.

There can be no doubt of the right and duty of the Attorney General to intervene and prevent franchises of a public nature from usurpation or from destruction. That holding a public market is an important public franchise is an elementary principle of law. In *Rex v. Marsden,* 3 Burrows, 1812, it was doubted whether an information ought to be granted in favor of a private owner of such a franchise against usurpation by another private person, because there were other sufficient remedies; but it was recognized that the public interests might be protected by that process. And in *Rex v. Starkey,* 7 Adol. & E. 95, it was held an offense punishable criminally to remove a market to the detriment of the public, as it may be actionable to do so in some other cases. *Ellis v. Bridgnorth,* 15 C. B. (N. S.) 52. The nature of these public interests will be considered presently. There is no doubt of the right of the Attorney General to intervene.

The remaining questions relate to the mischief that is sought to be prevented and redressed. The most convenient method of explaining this will be to give the legal history,—of which we must take judicial notice,—in connection with the facts which explain it.

From the time of the first city charter in 1806—and perhaps still earlier—there has never been a time when the city of Detroit has not been at least authorized, if not required, to maintain public markets. For a large part of this period the appointment or election of market clerks has been obligatory, from which we might be bound to infer, what this record shows, that one or more public markets existed from the earliest period. Prior to 1833 the public market place, which included also a market building, is known historically, and probably from various public uses to which it was put may be known judicially, as having been situated between Jefferson avenue and Detroit river, on Woodward avenue. At least one other market was described by territorial legislation, which need not now be referred to

In 1833—no doubt from the necessity of more space—the question of the location of the Central market was submitted to a vote of the citizens of Detroit at a regularly called citizens' meeting. The selection of a location was between Woodward avenue, below where it then was, and Michigan Grand avenue (lately renamed Cadillac square), where it now is. Inasmuch as these streets are described in our statutes, we know that Woodward avenue was 80 feet narrower than Michigan Grand avenue, and it appears that the extent of the latter made much more room for a market than the other would have furnished. It was decided at that meeting to have the market on Michigan Grand avenue. A building was erected, fronting on the Campus Martius, at the head of that avenue, for the combined uses of a city hall and market, extending along the middle of the avenue originally about 100 feet. The lower story was used for meat-stalls. Vegetables were sold in an open building not much sheltered except by a roof extending back in the avenue from the brick building, and the country wagons for the sale of

market products were gathered along the avenue for some distance further. In process of time the buildings, both open and closed, were carried along so as to occupy the central part of the avenue to Randolph street, except as crossed by Bates street. In this way the whole of the avenue along its middle portion was made a market place, sometimes called the "City Hall Market," and sometimes the "Central Market."

From the repeated litigation which has come into this Court, we may infer that it was to avoid vexation from adverse interests that in 1848 it was deemed desirable to formally vacate the middle 50 feet of Michigan Grand avenue through its entire length, and, in addition to action by the council, to obtain a condemnation under the right of eminent domain, and the jury of inquest rendered a verdict in favor of such vacating. From that time to the present the city has occupied and claimed the whole space by title in fee, and used it for market purposes. Whether the fee then really belonged to the city ceased to be a practical question after the lapse of time, which was sufficient to bar any adverse right.

In *Cooper v. Detroit,* 42 Mich. 584 (4 N. W. Rep 262), when the city of Detroit proposed to build the Central market building referred to in the pleadings before us, as a part of the Central market system, it was claimed by the bordering land-owners, who desired to prevent it, that this long occupancy for market purposes was not proprietary, and was not, therefore, effective. But it was held by this Court that such an occupation was proprietary, and therefore protected by the statute of limitations. It was urged on the argument of the present case that, when we declared the right to be proprietary, we in effect held that the city could do as it should choose to do with its property. But under the common law it was the general doctrine that no one could hold a market that did not

own the freehold of the land, and, if the public have any rights in the matter, we think the fact of city ownership cannot be of any importance in limiting them. While there may be a great deal of property owned in fee by a city, and its rights may be proprietary, yet all these rights belong to the municipality as a public corporation; and it is by no means inconsistent with the title that there may be trusts or obligations in regard to them.

It appears from the bill that in 1872 the city took down the brick buildings fronting on the Campus Martius, and left the whole space open from that place to Bates street. The whole strip from the Campus to the other end of the avenue had been, in 1848, declared by the council to have been vacated for market purposes, and designated and set apart as a public market to be known as the "City Hall Market." No attempt was ever made to put an end to that designation of uses, although it is quite possible that the delay in rebuilding may have been in part owing to a desire—such as is now manifested—to turn the market into something else. But the chief reason was, no doubt, the large expenditure for a new city hall in place of the old market building.

In 1875 authority was obtained from the Legislature by special act to raise money for a new market building by borrowing money on market bonds. As the immediate occasion of a part of this complaint arises out of an alleged violation by the city of the conditions then imposed by the Legislature, it will be necessary to refer to it particularly. The act not only imposed condition on the loan, but also directed what use should be made of the building when completed. Laws of 1875 (Local), p. 537. By this statute the common council received authority to borrow not more than a hundred thousand dollars, on bonds pledging the faith of the city. These bonds were to be denominated "Central Public Market Stock of the City

of Detroit."' They were to be in sums not less than $500 each, to bear not more than 7 per cent. interest, and not be sold at less than par. They were to be payable not more than 20 years from date, and their proceeds were to be credited to the "Central Public Market Fund" and—

"Applied exclusively to the purposes of erecting a Central public market in the city of Detroit."

The law further provided that "the rents, fees, and profits derived from the said Central public market" shall be applied—

1. To payment of interest coupons, and to establish a sinking fund to provide for the payment of the bonds, for which purpose $5,000 should be annually invested in the said sinking fund.
2. To market expenses and repairs.
3. The bonds were to be made payable $5,000 in each year from issue, "and the same shall be paid from the money provided for in said sinking fund."

The law then declared in regard to the use of the building that one story should be set apart as a free public hall and for city offices. In 1881 the law was so amended as to substitute court-rooms for the public hall. Law of April 21, 1881.

No subsequent action has been taken by the State Legislature on the subject. There is no force in the suggestion that the new or amended charter contains room for a different financial scheme. The frequent and careless revision and re-enactment of charters for Detroit has led to a good deal of confusion, but it cannot be assumed that the re-enactment or modification of charter provisions is intended to affect special legislation outside of the charter without a very manifest indication of such an intent. This is especially true where such an interpretation would affect important rights, and diminish funds set apart for specific uses.

Under this enabling act of 1875, the city built the new building on the site of the old market building known as the "City Hall," and issued bonds, of which between twenty and thirty thousand dollars have not yet matured, but have been purchased for the city, and placed in its general sinking fund. The city seems to have failed in its duty to keep up a separate market sinking fund.

On March 6, 1888, the common council accepted a committee report, subsequently put into resolutions and ordinances, abolishing the Central market, vacating the market buildings and open spaces as used for market purposes, and directing the disuse for such purposes after July 1, 1888, and providing for the use of the new building for general city purposes. This is the action which the Attorney General has brought to our attention, and which he asks us to restrain and set aside.

On the argument for the city an attempt was made to treat this building as the entire market, and to claim that it was insignificant for market purposes. And in the same line of argument it was insisted that for market purposes the income would be insignificant, and that, being the private property of the city, there was no reason why the city should not treat these sinking fund bonds as paid, and use the building as it chooses. The other property was referred to as having no part in this controversy, and as not protected.

Whether the building stands alone or not, there can be no doubt that the law positively requires it to be paid for out of market revenues, and not by taxation. It may be true that the city would be obliged at maturity to pay the bonds at all events, whether receiving income enough or not. But it is equally true that it would be a fraud on the tax-payers, and a violation of the act of the Legislature, to relinquish the fund set apart for that

purpose, which was made a trust fund, and charge its value as a general city charge. The power to pay these bonds by taxation was not meant to be granted unless the other means failed; and if it should become necessary to resort to it, that necessity can only arise from the direct breach of duty of the council, which has no right to squander or throw away the public funds. The argument that the bonds are actually paid is fallacious. The city sinking fund is in law a fund which has value in securities, and the market bonds are as much property as if they were government bonds. They can only be exchanged for actual money equivalents. A cancellation of these bonds would be a withdrawal for market purposes of the same amount of funds belonging to other purposes. The fact that the city has not in fact kept the market sinking fund distinct can make no difference. It is bound to keep it untouched, and, if funds have been diverted, the city is bound to restore them where they belong. Until the Legislature shall see fit to provide otherwise, there can be no step taken to use the trust property for other purposes, without a direct violation of legal duty, and it cannot be allowed.

It may be further noted that the Legislature has provided expressly for the occupation of the whole building, which would not have been done had there been any design of leaving the city liberty to use it at discretion. In the original act the upper stories were allowed to be used for a public hall and city offices. In 1881 the use was modified so as to substitute court-rooms for the hall. This, of itself, shows the city was intended to have no discretion about the market uses.

But it is manifest that this building was not designed to be separated from its surroundings. It would be little, if any, short of absurdity to suppose that this legislation contemplated nothing more extensive than a small meat-

shop. While that might in some cases be treated as a market, it would be a very narrow use of that word, and on so small a scale would involve nothing of a real public character. It is probably true, as counsel suggested, that the entire range of stalls apart from their surroundings, would not rent for enough to justify the outlay in building. And it is also reasonably certain that they would not be of much public convenience.

But this building was placed by the city, and was no doubt understood by the Legislature, as headquarters of a large existing public market, which would be somewhat imperfect without meat-stalls, while meat-stalls would be of little profit aside from the ordinary market customers. The city, until the recent action, has always kept them identified, and they cannot be dealt with separately without violating good sense, as well as destroying the essentials of a public market.

It has already been suggested that a market is an important public franchise. Perhaps if the city had never kept up a market, there might be some doubt whether a court could by civil proceedings interfere to compel it. But the charter contains many provisions not suited to a city without markets, and requires some officers to be chosen who, in such a case, would have no duties. And the city has had the benefits of this franchise for three-fourths of a century, and continually acted under it.

All franchises are given for the purpose of securing some advantage to the public, and, when once exercised, the public have very generally a right to complain of their relinquishment; and reference has already been made to the criminal quality of a destruction of such public interests. Markets are as old as civilization, and public market places have in many countries been identified with the most important events in their history. The purpose of markets has always been to secure to all persons the

privileges and conveniences arising from a general concourse of buyers and sellers. One main object is to enable producers to meet consumers of the usual necessaries of life directly, and without the interference of middle-men. The charter of Detroit has always contained authority to prevent forestalling and regrating, and the city has always had ordinances on that subject, which have no place in the absence of market facilities. Freedom of access to farmers and gardeners and all other persons having provisions and the like to sell, so that purchasers may get supplies directly from them, as well as find all the different varieties of supplies in the same place, is regarded as an important legal right which should not be interferred with. The other chief value of markets is the facility of regulation and inspection, which cannot exist very perfectly, if at all, where there is no central place of concourse for buying and selling. The acceptance of the franchise involves the duty of using it to the public welfare and utility; and, when the rights of the public have once become vested in such a franchise, something more than municipal caprice must exist to change or destroy it.

In a market the producer of articles, however small in value, can find a chance to sell them for all that they are worth; and those whose products would not justify them in setting up places of business can have the same liberty of trading as any one else. The destruction of a market means the destruction of many of the small producers, who have no other means of gain or livelihood. Courts have nothing to do with the theories of economists. The law of the land has always favored, and probably always will favor, the protection of both buyers and sellers against such practices as will prevent either from escaping the mischiefs of monopolizing provisions. Public markets have always served this purpose, when properly managed; and

they are the only means whereby small dealers in such articles can dispose of them to full advantage. This, as before stated, is legally recognized as such a public right that, when once vested, it cannot be capriciously destroyed. There are few cities in the United States that do not owe much of their business prosperity, and much of their enterprise, to the energy and thrift of citizens who began and have sometimes kept up their active career in the public markets. The city of Detroit is greatly indebted to men and women who have been connected with this very Central market. A large share of the magnificent endowment of Harper hospital came from the invested earnings of a vegetable stand there, where the keen, honest face of Nancy Martin was seen daily until age and infirmity withdrew it.

In the case before us the law has expressly saved this market from being meddled with until the bonds have all been paid in due course of maturity out of the sinking fund set apart for them. The duty of maintaining the market out of the revenue not set apart for the sinking fund is quite as explicit as the other. And the market contemplated to be kept up is the market as an entirety, and not the meat-shops, which form but a part of it.

That a city may change the location of markets, where it will not injuriously affect public rights, is very generally accepted. That it cannot capriciously destroy them, unless the charter gives distinct power to do so, seems to be a necessary inference from the general rules governing the use of franchises, which are seldom, and in cases of public enjoyment are never, given as mere sources of revenue without regard to the public convenience. We are saved the necessity of considering these questions by the terms of the city charter, and by the law under which this market fund was authorized, and which created specific duties which appertain to the conditions of the

loan, as well as to the immunity of citizens from taxation to meet the payments on the loan, when it can be met out of the income of the market.

There is not very much American law on the subject of markets. Their general conditions have so generally remained unchanged that the old usages have been followed without controversy. There are few, if any, popular institutions so universally retained, and few that have served a better purpose. The law, as found in the standard text-books and digests of the older authorities, stands practically unaltered in any feature of public utility. See Bac. Abr. "Fairs and Markets;" Com. Dig. "Markets;" 1 Bl. Comm. 274; 3 Bl. Comm. 218; 2 Co. Inst. 220, c 31; *Townend v. Woodruff*, 5 Exch. 506; Toml. Law Dict. "Market;" *Rex v. Burdett*, 1 Ld. Raym. 149.

Since the argument our attention has been called to a very recent decision in the case of *Fazende v. City of Houston*, 34 Fed. Rep. 95, in which the facts were almost literally identical with those before us, except that the suit was brought by a private bondholder; and the court held as we hold, that the city could not change the use of the property, or divert the income of the fund.

It does not appear, as no testimony has been taken, why the common council was induced to resort to the measures complained of. They involve a complete throwing away of valuable income yielding property, and a plain violation of the vital conditions imposed by the law authorizing the market loan. The Attorney General has only done his duty, and the mischief threatened must be stopped. The decree below must be reversed, with costs of both courts, and defendant must be enjoined from interrupting the use of the market property, or any part of it, or any of the buildings heretofore used for market purposes, and directed to continue to maintain

the market as such, and collect and apply the income for the purposes required by the statute of 1875, as amended by the law of 1881, and in no other way.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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THE WATERMAN REAL ESTATE EXCHANGE (A CORPORATION) v. ALBERT L. STEPHENS, ADMINISTRATOR, ETC.

Statute of frauds—Agreement for payment of commission on sale of real estate—Evidence—Corporation officers—Testimony as to facts equally within knowledge of deceased person.

1. Agreements for the payment of commissions on the sale of real estate do not come within any provision of the statute of frauds.
2. While the testimony of the officers of a corporation as to their personal dealings with a deceased defendant in creating a contract for the sale of real estate on commission may be objectionable as calling for matters equally within his knowledge, such objection cannot apply to all of the services rendered in making such sale.
3. In such a case the testimony of persons who dealt with and were introduced by the corporation agents to the deceased, who recognized in their presence the employment claimed by the corporation, is admissible in support of such claim.

Error to Wayne. (Look, J.) Submitted on briefs June 12, 1888. Decided June 22, 1888.

Assumpsit. Plaintiff bring error. Reversed. The facts are stated in the opinion.

Edwin F. Conely, for appellant.

Marston, Cowles & Jerome, for defendant.

CAMPBELL, J. Plaintiff, a business corporation, acting as a real-estate broker, sued Henry Stephens for com-

missions on the sale of his property on Woodward avenue, Detroit. Pending the suit, he died, and his personal representative appeared and defended. On the trial the circuit court for Wayne county shut out all the testimony offered, and ordered judgment for defendant, and from the record we are somewhat in doubt how far the rulings were based on any supposed disability of the witnesses, and how far on something else. One objection made to proof by officers of the company was that the matters were equally within the knowledge of the deceased, an objection which may have applied to their personal dealings in creating the contract, but could not apply to all of the services rendered. It does not very clearly appear whether all the witnesses in plaintiff's employ were personally interested or not. But the court excluded in the same way the testimony of persons who dealt with and were introduced by plaintiff's agents to Stephens, who recognized in their presence the relations relied on, and this testimony was not open to any question of personal disability.

The court ruled out all testimony, this as well as the rest, by holding that there could be no recovery except on a written contract. For this ruling no authority was cited, and there is no principle which sustains it. Agreements for such services do not come within any provision of the statute of frauds. Had the testimony of the witnesses, not corporation agents, been allowed to be given, and to stand, the plaintiff would undoubtedly have recovered, as it made out a sufficient case of employment, and plaintiff could have at least recovered on a *quantum meruit*, if the precise terms of the contract were shut out. This testimony should not have been ruled out, and what was admitted should have stood.

As there is no likelihood that, on a new trial, there can be any serious difficulty, we do not think it desirable,

under the very doubtful condition of the record as to the grounds of the ruling, to attempt to construe the statute relating to corporation witnesses. The object of the law was evidently to remove the common-law disabilities generally, and to provide in some cases for retaining them. Whether there was any purpose of creating new disabilities, or whether it could be done to such an extent as to impair the obligation of contracts, are questions which may or may not have been maturely considered and decided below. All statutes should be construed reasonably, and not in any extreme or impracticable way, and we prefer to reserve our views until it is necessary to express them, which is not now the case, as it is quite manifest that plaintiff has sufficient proof outside of the statute. The pleadings are not printed, and we are not informed of any defect in them; but plaintiff can amend if thought desirable.

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

The other Justices concurred.

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GEORGE E. DOLE v. THOMAS H. MCGRAW.

[See 63 Mich. 1.]

Trover and conversion—Measure of damages—Set-off—Lien—Equity.

1. A defendant in a trover suit cannot set off against the value of the property he has wrongfully converted a debt due him from the plaintiff, to secure which he has a lien on the same property which is only enforcible in equity.
2. In an accounting in chancery, in order that the whole controversy may be settled and adjusted, equity will sometimes per-

mit a judgment, though obtained in an action for a wrong, to be made an item, in favor of the party holding it, in the account to be taken.

Error to Bay. (Green, J.) Argued June 12, 1888. Decided June 22, 1888.

Trover. Plaintiff brings error. Reversed. The facts are stated in the opinion, and in the case of *McGraw v. Dole*, 63 Mich. 1.

Tarsney & Weadock, for appellant.

Hatch & Cooley (*Isaac Marston*, of counsel), for defendant.

[See foot-note to opinion for authorities cited.—REPORTER.]

SHERWOOD, C. J. Plaintiff brought trover in the circuit court for the county of Bay to recover the value of a lot of personal property, consisting mostly of lumbermen's camp supplies and equipage, of the alleged value of $20,000. The plea is the general issue. No question arises upon the pleadings.

This matter was before us at the October term, 1886. The case was then in equity, and involved partnership dealings; the defendant having then filed his bill to restrain the prosecution of this suit, and for an accounting. McGraw took the property and converted it, claiming an equitable lien upon it at the time, and this suit was brought by Dole to recover the value thereof. This Court, on the hearing in the chancery case, reversed the decree made at the circuit, which sustained the injunction, and allowed the plaintiff to proceed in this suit to final judgment; and further directed that, after such judgment was obtained, a further accounting should be had, in which the amount found due to Dole as damages

in this suit, if any, should be allowed to him as a credit in his favor upon such accounting, and subject to such further directions and decree as the circuit judge might see fit to make, and to the right of appeal by either party; and allowed the plaintiff herein to recover his costs in that suit upon the appeal. See *McGraw v. Dole*, 63 Mich. 1 (29 N. W. Rep. 477).

The facts, as found by the circuit judge, are as follows:

"1. A written contract was entered into between George E. Dole and Thomas H. McGraw & Co., composed of Thomas H. McGraw and Charles Watrous, on the 8th day of May, 1880, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this finding.[1]

"2. That afterwards, and on the 4th day of April, 1881, Thomas H. McGraw & Co. purchased from William F. Jones and wife, of New York, certain lands, and received a warranty deed therefor, and that the lands so acquired were purchased pursuant to the said agreement made with said Dole.

"3. That a written agreement was entered into between said George E. Dole and said Thomas H. McGraw & Co., upon the 13th day of September, 1880, a copy of which is hereto attached, marked 'Exhibit C,' and made a part of this finding; and that afterwards the said Charles Watrous, one of the said firm of Thomas H. McGraw & Co., assigned and conveyed all his interest in said lands and under said contracts to Thomas H. McGraw, who thereafter became entitled to all the rights and subject to all obligations of said firm thereunder.

"4. That all the money paid to said Jones for lands in said conveyance was paid by said Thomas H. McGraw, and that no part of the same was or has been paid by the said George E. Dole.

"5. That, after said contract had been entered into, said Dole commenced operations thereunder; that he purchased a logging railroad which had been previously operated for some time by one Gordon, about five miles from the lands in question, took, removed, and relaid the same in order to reach the timber upon said lands, and pur-

[1] Exhibits A and C will be found in the former opinion, reported in 63 Mich. 4, 5.

chased iron locomotives, teams, and other things necessary to enable him to carry on such logging operations under said contract; all of which were purchased in the name of said McGraw, in accordance with the terms of said contract; and that the moneys paid therefor were advanced by said McGraw, in accordance with the terms of said contract; and that up to and including the 25th day of May, 1881, the said McGraw had advanced to said Dole, in the purchase of said railroad, lumbering outfit, etc., in accordance with such contract, the sum of $38,043.04.

"6. That, up to and including the said 25th day of May, the said Dole had cut and banked 3,625,091 feet of saw-logs from off said lands; that he had cut and skidded 2,250,000 feet; and had cut, but not skidded, 227,130 feet, —which entitled him to a credit therefor, according to the terms of said contract of $15,247.39; that the said Dole was also entitled to a credit arising from a previous contract existing between himself and the said McGraw, referred to in said contract, of $2,207.53,—making a total credit to said Dole of $17,454.92, thus leaving a balance owing McGraw for advances made, as already stated, $20,588,02; and that for the payment of the said balance of $20,588.02 said McGraw had a lien, in accordance with the terms of said contract, upon the said railroad, locomotives, cars, and lumbering outfit, used by said Dole in such work, and that the said property upon which he had such lien is the same property described in the plaintiff's declaration in this cause.

"7. That on the 25th day of May, 1881, said defendant, McGraw, wrongfully took possession of the property described in the plaintiff's declaration, for the purpose of completing the lumbering operations upon said lands, and afterwards, and on the 13th day of October, 1881, after duly advertising the said railroad and property for sale as upon a chattel mortgage foreclosure, sold the same for the sum of $7,039.00 to said Thomas H. McGraw, and afterwards, and on the 14th day of October, 1881, said McGraw sold all the property to Turner & Co. for the sum of $8,229.07.

"8. That the value of said property described in the plaintiff's declaration, on May 25, 1881, and at the time of its conversion and sale by the said Thomas H. McGraw to said Turner & Co., was $8,229.07; and that, at the time said McGraw took possession of said property, May 25, 1881, the said Dole was owing the said McGraw, for

advances under said contract, and for which said McGraw had a lien upon said property as security, the sum of $20,588.02, which indebtedness remained unpaid and owing up to, at, and after the said 14th day of October, 1881.

"From the facts so found, the court finds, as a conclusion of law, that the measure of damages, and the amount for which the plaintiff in this action is entitled to recover, is the value of the property so found as aforesaid, at the time of its conversion, with interest thereon from that date, less the amount of the debt owing by said Dole to said McGraw for such advances, with interest from said 25th day of May, 1881, and for which the said McGraw had security; and that, as the amount of such indebtedness exceeds the value of the property, the said plaintiff is only entitled to recover nominal damages. Judgment will therefore be rendered in favor of the plaintiff for six (6) cents damages, together with costs of suit."

It will be seen that the only question in this case is, what judgment was the plaintiff entitled to under these findings? The plaintiff claims that it should have been for the value of the property taken as found by the circuit judge, while the defendant's counsel claims that the judgment entered is correct.

It is true, as claimed by defendant's counsel, that, in assessing damages in actions of trover, it should be done on equitable principles,[1] and this may be claimed as well in all other actions; but this does not allow the defendant to make the set-off in his favor. This is not the form of action in which such a counter-claim can be considered. The rule stated only applies to claims for which damages may be assessed

In a suit in chancery for the purpose of an accounting, in order that the whole controversy may be settled and adjusted, equity will sometimes permit a judgment,

[1] Defendant's counsel cited *Probate Court v. Bates*, 10 Vt. 285; *Pierce v. Benjamin*, 14 Pick. 356; *Wright v. Spencer*, 1 Stew. 576; *Curtis v. Ward*, 20 Conn. 204; 1 Suth. Dam. 240, 241; 3 Id. 528, 533; *Cooper v. Newman*, 45 N. H. 339; *Brink v. Treoff*, 40 Mich. 614, 44 Id. 69.

though obtained in an action for a wrong, to be made an item, in favor of the party holding it, in the account to be taken; and it was for this very purpose that this Court gave direction, in the other suit, to allow the claim of Dole in this suit to be prosecuted to judgment, that the amount, when judgment was rendered, might be used as an item in his account in the chancery case against the claim of McGraw

Before this could be done, however, such amount could only be ascertained by trial and judgment; and, the form of the action being trover, only such claims could be litigated therein as the rules governing that form of action would permit.

The position taken by counsel for plaintiff was correct. Judgment should have been taken at the circuit for the full amount he was entitled to recover. This was not done; and it seems very doubtful, at least, if the findings would give the plaintiff the amount of damages to which he is entitled. Under such circumstances, I think the judgment entered should be reversed, and a new trial granted; and that upon such trial the plaintiff, if found entitled to prevail, should be allowed the full value of the property converted, without any deductions, and all the damages to which he is entitled for the wrongful acts complained of, and properly recoverable in this form of action.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

EDWIN F. PLATT v. LOUIS NEWMAN.

Land contract—Performance by vendor—Action for purchase price —Title—Covenants—Will—Interest of devisee—Easements.

1. The fact that the title to real estate was in a testator will not necessarily make an indefeasible title in his devisees.
2. Until an estate is settled, it can never be known how far land devised can be affected by debts or charges.
3. A land contract providing for a title which shall be *perfect* calls for more than a warranty deed, and the vendee is not bound to rest upon covenants.
4. In this case it is held that the contract for the sale of the store does not merely provide that the vendee shall be saved against merely legal interference, the language being "legal or *otherwise*," and that he is entitled to some assurance against disturbance beyond the contingencies of a lawsuit.

Error to Berrien. (O'Hara, J.) Argued June 13, 1888. Decided June 22, 1888.

Assumpsit on land contract to recover purchase price on tender of deed, etc. Defendant brings error. Reversed, without a new trial. The facts are stated in the opinion.

Edward Bacon and *George F. Edwards*, for appellant, contended:

1. Unless the deed tendered would in fact and truth have conveyed all the title and all the rights that the contract called for, plaintiff cannot recover; citing *Allen v. Atkinson*, 21 Mich. 361; *Hammond v. Hannin*, Id. 385; *McCreery v. Green*, 38 Id. 181, 182; *Fletcher v. Button*, 4 Coms. 396; *Burwell v. Jackson*, 9 N. Y. 539; *Story v. Conger*, 36 Id. 673; *Gormley v. Kyle*, 137 Mass. 189.
2. The title was not sufficient if it was likely to be in litigation or contention as to the right to remove the stairs; citing *Scadin v. Sherwood*, 67 Mich. 230; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

Clapp & Bridgman, for plaintiff, contended:

1. The title tendered was merchantable, originating in a patent, and coming to the testator by mesne conveyances in 1842, who occupied thereunder until his death; citing *Brown v. Witter*, 10 Ohio, 142; Bingham, Real Prop. 707, 708.
2. The property in question was devised to plaintiff as a specific legacy, and he had the right to take his estate as of the death of the testator; citing *Richards v. Pierce*, 44 Mich. 445.
3. The probate of the will established the before perfect title of the plaintiff, and the will when probated was a conveyance of all his father's title; citing How. Stat. §§ 5821, 5822; *Proctor v. Robinson*, 35 Mich. 290; *Eberstein v. Camp*, 37 Id. 176; *Richards v. Pierce*, 44 Id. 445.
4. In support of the denial of the existence of any easement growing out of the *use* of the stairway, counsel cited 3 Kent, Com. 419; Washb. Easem. 5, 6, 18; *Morgan v. Meuth*, 60 Mich. 238; *Tabor v. Bradley*, 18 N. Y. 112; *Nichols v. Luce*, 24 Pick. 103, 104; *Tracy v. Atherton*, 36 Vt. 503.
5. On the question of how rights of private way may be acquired, counsel cited 3 Kent, Com. 419; 2 Blackstone, Com. 35; 2 Washb. Real Prop. 51; *Parsons v. Johnson*, 68 N. Y. 62; *Mitchell v. Siepel*, 36 Am. Rep. 404; *Edson v. Munsell*, 10 Allen, 557; How. Stat. §§ 8698, 8705.
6. In support of the denial of any private way of *necessity*, and as to what is necessary to create it, counsel cited Washb. Easem. 162-165; *M'Donald v. Lindall*, 3 Rawle, 492; *Morgan v. Meuth*, 60 Mich. 252.
7. Distinct occupations indicate distinct methods of access, which must have been contemplated as probable at some time. The temporary use of the stairway in connection with the west store did not give permanent rights; citing *Scott v. Palms*, 48 Mich. 509; *Morgan v. Meuth*, 60 Id. 252; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Simmons v. Clooman*, 81 N. Y. 566; *Lampman v. Milks*, 21 Id. 516; *Parsons v. Johnson*, 68 Id. 62.

CAMPBELL, J. On July 14, 1887, the plaintiff agreed to sell to defendant a brick store and appurtenances in Niles, described as—

"Being the same devised to him by his father, and being the store next west to the store owned by William E. Platt, and which is now being repaired,"—

for the sum of $4,125 cash down.

Plaintiff further covenanted—

"To furnish an abstract of said property and premises, and to give a good and sufficient warranty deed of the same, and to convey the same to said Newman free and clear of all incumbrances."

It was further agreed that Newman should have one-half of the east and west party-wall, and the whole west wall if plaintiff owned it. It was further agreed that the contract should not be binding on Newman—

"Unless said Platt shall convey the indefeasible right, and said Newman shall acquire the same from said Platt by this purchase, to take out and remove wholly the front stairway now in said building, and shall be, as the owner of said store and premises, or otherwise, under no restraint or obligation, legal or otherwise, to maintain any stairway in or about said store or premises."

Plaintiff was to perform, and defendant to pay thereupon, within 30 days. Plaintiff furnished an abstract, and tendered a deed, within that time. Defendant refused to accept the conveyance as not a sufficient performance of the contract, and plaintiff sues.

The questions are not numerous. The plaintiff's father owned an entire block of three stores, including the one in question, and built a stairway in that store, which was used in connection with upper rooms in the other stores, and this is the stairway referred to in the contract. The father died early in 1887, and his will was admitted to probate in March, 1887. This contract was made in July. No letters testamentary, or bonds or inventory had been made out, and no further steps had been taken in the estate then or afterwards. These stores were specifically devised, one to plaintiff, one to another son, and the third in trust for a daughter and her children. There were specific bequests or devises of other property, and the children surviving testator were made residuary legatees.

After testator's death, the devisees took possession of the stores, and a claim was set up by the brother to the use of the stairway for his upper rooms. There was testimony that this use had been continuous, and that new stairs would have to be built on the adjoining premises if these were destroyed. The upper rooms had been rented for dwelling and office purposes, and other business uses.

The court below held that the stairway belonged exclusively to plaintiff's store, and that there was no other right in it; and the charge upon the other question was such as to authorize a recovery.

The fact that the title was in the testator would not necessarily make an indefeasible title in his devisees. Until an estate is settled, it can never be known how far land devised may be affected by debts or charges. The statute provides that residuary legatees may give bonds, and thereby render further administration needless; but there is no other way in which such a result can be produced. The contract calls for more than a warranty deed. It provides for a title which shall be perfect. Defendant was not bound to rest upon covenants. It is also evident that there is at least reason to expect trouble about the stairs. Any interference with their use would involve lawsuits; and, whatever may be the presumptions, it is very clear that the rights of the other parties could not be settled in this suit, to which they are strangers. The contract does not merely provide that defendant shall be saved against merely legal interference. The language is, "legal or otherwise." The reference in the contract to this stairway shows that there was some question about it in the minds of the parties, and we think defendant is entitled to some assurance against disturbance beyond the contingencies of a lawsuit.

We think, therefore, that plaintiff showed no right of action.

The judgment must be reversed, with costs of both courts. A new trial would be of no use.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

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SAMUEL R. SANFORD v. MINNIE I. HAINES ET AL.

Equity—Bill of review—Laches.

1. A bill in the nature of a bill of review, not verified or accompanied by any sworn showing, should be dismissed by the court.
2. Under the rules, a bill of review should be filed within the time allowed for appealing, unless on newly-discovered evidence, or when there has been some reason that is satisfactory for the delay.

Appeal from Montcalm. (Smith, J.) Argued June 14, 1888. Decided June 22, 1888.

Bill in the nature of a bill of review. Defendants appeal. Decree reversed and bill dismissed. The facts are stated in the opinion.

F. W. Cook, for complainant.

H. B. Fallass, for defendants.

CAMPBELL, J. This is a bill the object of which is to get rid of a foreclosure decree, and of the sale under it, and to open the case on its merits, and allow complainant to redeem. It is in effect a bill in the nature of a bill of review, filed without leave and without security, as required by rule 101, and filed after a long delay. The bill is not sworn to, and is not accompanied by any sworn showing, without which no leave could properly be granted.

These would be sufficient reasons why it should not be sustained, and why the court below should have dismissed it. But on the facts alleged it is not sustainable.

It shows a mortgage executed in 1875, and foreclosed by chancery proceedings in 1876, when a decree was made, which is now claimed to have been for $50 too much. That amount would not, as a separate grievance, be enough to give chancery jurisdiction. It is claimed that this decree, although the parties all appeared, was taken without proper notice. But, as already stated, even this is not sworn to, and is not presumable. But, furthermore, this complainant knew of the decree soon after, and made no objection to it, and made or claims to have made a number of payments on it. In 1883 a chancery sale was made, and complainant claims that this was also without any notice except that usual on sales. No other personal notice is required by our practice.

The sale was confirmed, leaving a balance unpaid. No personal judgment has been sought for this balance, and none can be rendered without bringing him in directly, when he can set up any defenses which he has not forfeited.

He knew of this sale about a year after it was made, but does not claim to have made any objection to any one, or to have applied to the court for relief. This bill was not filed till April, 1886, about three years after the sale.

Under the rules, a bill of review should be filed within the time allowed for appealing, unless on newly-discovered evidence, or when there has been some reason that is satisfactory for the delay. Here the decree was acquiesced in six years, and that cannot fairly be disturbed. Two years elapsed after complainant knew of the sale, and no reason is given why he did not apply for relief within a reasonable time after he found it out. The time for

appealing might be a reasonable one, perhaps, within which to apply on facts as well known then as now. But this bill was not filed until that period had passed several times over. And not only is no excuse given, but no fact is sworn to at all.

The case has no foundation, and should have been dismissed, which is now done, with costs of both courts; the decree being reversed.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

JOHN F. TALBOT ET AL. v. THE MAYOR AND COMMON COUNCIL OF BAY CITY.

Municipal corporations—Paving orders—Interest.

Mandamus requiring the respondent to pay interest on paving orders payable out of a particular fund, the principal of which had been paid and accepted, and which contain no promise to pay interest, is denied, there being no statute or authority for such payment.

Mandamus. Submitted June 26, 1888. Denied July 10, 1888.

Relators apply for *mandamus* to compel the payment of interest on paving orders. The facts are stated in the opinion.

Holmes & Collins, for relators.

PER CURIAM. Relators ask that an order issue requiring the city of Bay City to show cause why *mandamus* should not issue compelling it to pay interest on certain

orders given for work done in paving in 1883 upon contracts made in 1882.

The amount for which the orders were given has been paid, and accepted by relators. The orders contain no promise to pay interest, and were payable out of a particular fund. We find no statute or authority for the payment of such interest. The order must be denied.

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SILAS IRELAND ET AL. v. HIRAM K. MILLER ET AL.

Executors and administrators—Will—Sale of real estate to pay debts and legacies—Order of sale—Equity jurisdiction.

1. Under How. Stat. § 6037, lands remaining in the hands of heirs or devisees must be sold to pay debts or legacies before resorting to those sold by them to third parties, and equity has jurisdiction to restrain the sale by executors of such lands in any other order.
2. Under the facts stated in the opinion, the jurisdiction of equity having attached to enjoin the attempted sale, the court may take sufficient cognizance of the whole matter to declare for what specific purpose a sale may be ordered.

Appeal from Cass. (Smith, J.) Argued January 27, 1888. Decided July 11, 1888.

Bill to enjoin an executor's sale. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Spafford Tryon and *O. W. Coolidge,* for complainants.

F. J. Atwell (*Austin Blair,* of counsel), for defendants.

MORSE, J. Jacob Miller died on or about August 31, 1872, leaving a widow, Mary E. Miller, and five children, to wit, Mary J., Christopher, Abijah B., James S., and

Francis O. He made a will, May 15, 1872, which was duly probated. The defendants Hiram K. Miller, a brother of testator, and James S. Miller, his son, are his executors under said will. By this will he gave to his wife certain personal property absolutely, and the use of 80 acres of land during her life or until she married again. In case of her remarriage, the land reverted to the estate, and the executors were to pay her $1,000 in *lieu* thereof. He gave his son Christopher $1,000, to be paid in one year from his death. He bequeathed to his daughter, Mary Jane, $2,000, and directed that his executors should loan the same on bonds and mortgages, in trust for her, on real estate in Michigan or New York, until she became 21 years of age, at which time they were to pay her the said $2,000, with all interest that may have accrued from such sum, except such sums as they may have paid out as they deemed necessary for her education and support. He also gave her a piano, two beds, and bedding. One-third of all the residue of his estate he devised to his son Abijah B. Miller, and directed his executors to keep and hold the same in trust, loaned out on bond and mortgage, the interest to be used for his support, or such portion of it as, in the judgment of the executors, might be sufficient for that purpose; the balance of the interest, if any, to be paid to his sons James S. and Francis O. Miller. The balance of his estate was willed to James S. and Francis O. Miller in equal shares. Upon the death of Abijah B. Miller the will directed that the portion of the estate devised to him should be divided equally between James S. and Francis O. Miller.

The inventory of the personal property of the deceased, as appraised, amounted to $9,589.21. One of the items of this inventory was a note secured by mortgage on property known as the "Eureka Mills." This note was appraised at $6,600. The mortgage was being foreclosed

at the time of his death, and had progressed to a sale of the premises described therein; the land being bid in, upon such sale, by the deceased in his life-time at the sum of $6,622. The time for redemption had not expired at the date of his death. Another note secured by mortgage was inventoried and appraised at $1,100. This mortgage was also in process of foreclosure at the time of Jacob Miller's death. The land covered by the mortgage had also been bid in by Miller on foreclosure sale, before his death, for $322.02. This land was never redeemed. The balance of the personal estate, as inventoried, amounted to $1,889.21. He left a farm of 213 acres, in Cass county, Mich., appraised at $10,000, and a house and lots in Dowagiac, appraised at $1,000.

May 12, 1873, James S. Miller, one of the heirs, and also one of the executors of the will of Jacob Miller, together with Francis O. Miller and Abijah B. Miller, their wives joining, executed a warranty deed of the Eureka Mills property to Thomas H. Jones and Edward Badger. Jones and Badger went into possession of the premises the same year. The complainant Silas Ireland came into the possession of the same premises in 1878, under purchase at a foreclosure sale of the property by virtue of a mortgage executed upon the land by Jones and Badger. He has been in possession ever since.

April 7, 1876, Francis O. Miller and Abijah B. Miller executed a warranty deed of the house and lots in Dowagiac to one Conkright. Conkright conveyed the same premises in 1878 to the complainant Elizabeth Defendorf. Possession of the lots has been continuous in Conkright and Mrs. Defendorf since 1876.

The complainants filed their bill in the circuit court for the county of Cass, in chancery, in July, 1886, alleging the ownership and possession of the Eureka Mills property in Silas Ireland, as heretofore stated, the ownership and

possession of the house and lots in Dowagiac in Mrs. Defendorf, as hereinbefore set forth, and that Annie Miller, the other complainant, had been the owner and occupant of certain other lands belonging to Jacob Miller at the date of his death, since April 20, 1881. It is averred that the said Annie Miller acquired her title to the premises occupied by her as follows: Francis O. Miller, April 15, 1878, obtained a loan from Spafford Tryon of $250, and, to secure the payment of the same, executed a mortgage to him upon said premises. This mortgage was afterwards duly foreclosed, and the said Annie Miller purchased the same at the foreclosure sale for $390.79, and received a deed, under which she went into possession of the land.

It is further averred in the bill that the executors of the will of Jacob Miller, to wit, Hiram K. Miller and James S. Miller, entered upon the duties of their trust, and possessed themselves of the personal estate of the deceased, which was more than sufficient to pay the debts and legacies and testamentary expenses; that such executors refused to come to an accounting as to their disposition of said personal estate, although often requested so to do; that they have never rendered any account of their administration to the probate court of Cass county, nor has the time for rendering such account ever been extended by said probate court.

The complainant Ireland alleges that the Eureka Mills property was conveyed to Jones and Badger in exchange for property in New York or New Jersey, which property, or the proceeds thereof, was appropriated by the said executors, and has never been accounted for by them; that he bought the property without any knowledge of the will of said Jacob Miller, or the terms and conditions of the same; that he has expended, since his purchase, over $4,000 in repairs and improvements upon said mill property.

The bill avers, further, that said executors, at the time

letters testamentary were granted them, did not live in Michigan, Hiram K. Miller then and now residing in the city of New York, and James S. Miller at Orange, in the State of New Jersey; that no commissioners were ever appointed to examine and allow claims, but the claims against the estate were heard and adjusted by the probate court in March and October, 1873; that all the debts against said estate have been paid. No proceedings of any kind were, after October, 1873, taken in said estate until in the spring of 1885, when the said executors obtained a license from said probate court to sell the lands occupied and claimed by Ireland. No action was taken, however, under said license. On March 20, 1886, said executors filed another petition in said court, praying for a license to sell the lands held by the complainants to pay the legacies mentioned in the will of said Jacob Miller, upon which petition the judge of probate granted an order of hearing, and, upon such hearing, April 20, 1886, granted the prayer of said petition, and licensed said executors to sell said lands, with other real estate. Acting under such license, the executors gave notice of sale.

The complainants further show the amount of personal property left by Jacob Miller as appraised, to be $9,589.21, and aver that all the just debts did not exceed the sum of $2,500, and that the executors, from the sale and disposition of said personal property, secured more than sufficient money to pay such debts and the legacies to be paid under the will.

Complainants further aver that such order of sale is without lawful right or authority; that the petition (a copy of which is attached to the bill), is defective, and not in compliance with the statute, and gave the court no jurisdiction to grant a license; and that the payment of the legacies, by the terms of the will, are made dependent upon certain contingencies and survivorships, and that

such payment by said executors is no part of their executorial duties, but pertains to their duties as trustees under said will, and that, therefore, said executors, under their petition, have no legal standing in said probate court, and no authority to proceed therein; that there is still remaining unsold real estate belonging to the estate of said Jacob Miller more than sufficient to pay all legacies. And the complainants pray a restraint of said executors' sale, and a confirmation of their title to the lands held and occupied by them, respectively.

The defendants answered, in substance, admitting the conveyances of the parcels of land claimed by complainants by Francis O. Miller, James S. Miller, and Abijah B. Miller, and their wives, but aver that such conveyances were made by said heirs for the benefit of themselves individually, and deny that any of the said lands were sold or disposed of for the benefit of the estate of Jacob Miller, or that any of said conveyances change or legally incumber said estate, or in justice or equity should hinder or delay said defendants in their duties as executors of the same. They admit that the personal estate inventoried $9,589.21, but aver that the notes and mortgages foreclosed, as heretofore stated, amounted to $7,700, which were converted by such foreclosures into real estate, thus reducing the personal property to $1,889.21, which has been exhausted in paying debts; and that a large amount of debts yet remain unpaid. They deny that there was sufficient personal estate to pay the debts and legacies, and deny all other averments of the bill, except that they have petitioned for and been granted a license to sell the real estate of said deceased.

Upon pleadings and proofs the court below decreed that there was due to Mary Jane Miller, as legatee, the sum of $2,000, and that the executors should be empowered and authorized to sell a portion of the lands of said

Jacob Miller, deceased, to pay the same; that the probate court had no right, under the petition, to authorize the sale of said lands for any other purpose than the payment of this legacy; and ordered that the said lands be sold by the executors for this purpose in a certain manner, dividing said lands into eight parcels, to be sold separately, the lands owned or claimed by Mrs. Defendorf to be sold seventh, and the premises claimed and occupied by Ireland lastly, of the series. The defendants appeal.

For the purposes of determining this appeal, we do not consider it necessary to decide or discuss many of the points raised upon the argument touching the validity of the probate proceedings. The complainants have not appealed, and must be considered as standing before us satisfied with the decree of the court below. That decree does not interfere with the jurisdiction of the probate court over the estate of the deceased, or deny the right of the probate judge to order a sale of the lands of the decedent to pay the legacy due to Mary Jane Miller; but, on the contrary, affirms such right. But it changes the order of sale, and directs that the lands claimed by complainants shall not be sold until after the sale of the lands devised and descended which have not been conveyed by the heirs or devisees.

The proofs show that the executors, under the license or order of the probate court, were proceeding to sell, and had advertised the lands for sale, in such order that the lands of Ireland and Mrs. Defendorf would be sold first. This was a clear violation of the statute, which provides that,—

"If any lands devised or descended have been sold by the heirs or devisees, then the lands in their hands remaining unsold shall be ordered to be first sold." How. Stat. § 6037.

It is undisputed that Mrs. Defendorf and Ireland hold the titles as stated in the bill of complaint. The executors were proceeding to sell the lands claimed by them, in direct violation of law, and without authority, in so far, at least, as they were attempting to sell these lands before the other lands belonging to the decedent were sold, as directed by the statute. The complainants were not obliged to appeal from the order of the probate court. When the executors commenced proceedings to execute the license granted them in the manner they did, they were acting without authority of law, to the injury of complainants, who had the right to appeal to a court of equity for relief. In moving so far, the court of chancery does not interfere with the settlement of the estate by the probate court. It does not enter into any accounting between the executors and the estate, or assume jurisdiction thereof. Nor does it meddle with the right of the probate court to order the sale of the real estate of the deceased to pay debts and legacies. But when the executors undertake to divest the complainants of their rights in the lands which they have purchased of the heirs and devisees, it reaches out its restraining hand, and prevents such executors from proceeding to do so, in positive violation of law, and decrees that the lands in which complainants are interested shall not be touched until the other lands are sold. There can be no question of the right of a court of equity to do this.

But the court has gone further. Not content with directing that the lands shall be sold in the order prescribed by the statute in such cases, the decree goes further, and declares that the—

"Probate court had no right or authority to order a sale for the payment of anything else than the payment of the said legacy mentioned in said will as going to said

Mary Jane Miller, and that the order of sale provided for by the probate court, and set forth in the notice of sale of the lands so licensed to be sold by the probate court, was erroneous and unjust."

It is contended by the defendants that the petition to the probate court, and the account of the executors in that court, show that said executors have expended, over and above the moneys received by them, the sum of $1,282.76, and that the probate court has the right, with which right a court of chancery cannot interfere, to order a sale of the lands of decedent to pay this balance and other expenses of the settlement of the estate. The complainants, however, claim that the record shows no debts existing against the estate, and that there was no showing by the executors that there was not an ample sufficiency of personal property in their hands with which to pay the debts and legacies; and that no accounting was made by the executors until 1884, some 12 years after their appointment, and that on such accounting no vouchers were produced, nor was the account ever allowed and approved by the court. To this the defendants reply that chancery has no jurisdiction over the accounting of the executors, and that the settlement of the same is the exclusive province of the probate court, under the decisions of this Court.

An examination of the record shows that the defendants introduced no testimony in the court below; and there is really but little light thrown upon the true condition of the estate, or the doings of the executors, in the whole proofs. But there is enough to show that, if the estate had been properly administered, there would have been no necessity for resorting to a sale of any of the real estate to pay this legacy, or the debts of the deceased; and it does not appear clear to us that the executors, at this late hour, have any right to sell the

lands claimed and occupied by the complainants Ireland and Defendorf.

We are satisfied of the jurisdiction of equity to enjoin this attempted sale by the executors under the order of the probate court; and, having jurisdiction to that end, the court of chancery may take sufficient cognizance of the whole matter to justify the decree in the court below. This decree will be affirmed, as, the complainants not having appealed, we can go no further. The costs of both courts will be granted to complainants.

We do not consider it necessary to discuss or decide the other points mooted upon the argument, as, in the condition the cause is brought here, we cannot determine the sufficiency of the title of complainants, as claimed by them, against the heirs, executors, or others claiming interest in the lands under Jacob Miller. This decree will therefore operate as without prejudice against any other proceeding to settle their title to the lands claimed by them.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred.

71 128
80 111

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114 544

71 128
120 538

71 128
137 [6]515

71 128
140 [3]123

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144 563

71 128
148 [7]342
148 [2]542

71 128
153 [2]639

JAMES M. TURNER ET AL. v. ARTHUR N. HART ET AL.

Waters and water-courses — Flooding lands—Prescriptive right—Equity—Injunction—Evidence.

1. In a suit to enjoin the flooding of complainants' lands by the maintenance of a dam at an unlawful height, actual tests by observation and experience afford the most satisfactory testimony upon which to rely in determining the *results* from such obstruction, and are controlling when brought in conflict with instrumental measurements, however accurately and carefully taken. *Mill Co. v. Greer*, 58 Iowa, 86; *Brown v. Bush*, 45 Penn. St. 61.

2. Where a right by prescription to flow land is relied upon, the burden of proof is upon the claimant to show its exercise for at least 15 years to the height complained of and established by the proofs, and that *such* use of the land has been adverse uninterrupted, peaceable, open, and notorious.
3. Title or rights in land founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest therein, so held adversely.
4. No one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine, and hence the statute of limitations requires that an action shall be brought within 15 years after the right first accrues or the adverse entry.
5. Several land-owners injured by the maintenance of a dam at an unlawful height may join in a bill filed *solely* for *injunctive* relief.
6. It is not always a matter of course to grant relief in a court of equity against the maintenance of a private nuisance, when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative values of the properties affected, and other considerations which may present themselves under the varying circumstances, ought to be duly weighed, and relief afforded or withheld, as equity and good conscience require. *Gilbert v. Showerman*, 23 Mich. 448; *Robinson v. Baugh*, 31 Id. 290; *Edwards v. Mining Co.*, 38 Id. 46; *Hall v. Hood*, 40 Id. 46; *Cobb v. Slimmer*, 45 Id. 176.
7. In a case where the continued maintenance of a dam at an unlawful height involves the practical destruction of 300 acres of land, or over, be its value what it may, and the consequent, and weekly, and perhaps daily, recurring injury to each of the several owners, for which each would have a right of action, causing a multiplicity of suits and vexatious litigation, it is held to be just and equitable to abate the nuisance by injunction.

Appeal from Ingham. (Gridley, J.) Argued April 3, 1888. Decided July 11, 1888.

Bill to enjoin the flooding of land by the maintenance of a dam at an unlawful height. Complainants appeal. Decree reversed, and the cause remanded, with instructions

to enter a decree in accordance with the opinion. The facts are stated in the opinion.

Cahill & Ostrander, for complainants, contended:

1. The question is, not how long has the dam been built, but how long has it injured complainants' lands by flooding; citing Gould, Wat. §§ 343, 344; Angell, Wat. § 219; *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335.
2. Any material change in the dam, increasing the burden to complainants' lands unlawfully, will give a right of action; citing Angell, Wat. §§ 378, 380, 381; *Stiles v. Hooker*, 7 Cow. 266; *Russell v. Scott*, 9 Id. 279.
3. The burden of proof is upon him who claims a prescriptive right to flow lands to show its continuous enjoyment for the required period; citing *Hammond v. Zehner*, 23 Barb. 473.

Hammond & Lee (*Isaac Marston,* of counsel), for defendants, contended:

1. In order that complainants may join in a suit to abate a private nuisance, the injury must be to all, it must be a matter of one nature, and like relief must be sought by all of the complainants; citing *Reid v. Gifford*, Hopk. Ch. 419, 420.
2. A party injured by a nuisance can only ask for the abatement of that which causes the nuisance; citing *Dyer v. Depui*, 5 Whart. 589; *Greenslade v. Halliday*, 6 Bing. 379; *Wright v. Moore*, 38 Ala. 598; Angell, Wat. §§ 390, 391; *Welch v. Stowell*, 2 Doug. 332; *Moffett v. Brewer*, 1 Green, 348; *Hill v. Sayles*, 12 Cush. 454, 457.
3. Complainants have no joint cause of action, and the proofs show no such circumstances as make their joinder proper; citing *Kerr v. Lansing*, 17 Mich. 34; *Youngblood v. Sexton*, 32 Id. 406; *Ronayne v. Loranger*, 66 Id. 373; *Ryan v. Shawneetown*, 14 Ill. 20; *Supervisors v. State's Attorney*, 31 Id. 74; *Burnett v. Lester*, 53 Id. 325.
4. Complainants have not made such a case as entitles them to equitable relief; citing Hilliard, Inj. 304; Angell, Wat. § 444; *Attorney General v. Ins. Co.*, 2 Johns. Ch. 370, 379; *Van Bergen v. Van Bergen*, 3 Id. 282; *Reid v. Gifford*, 6 Id. 19; *Gilbert v. Showerman*, 23 Mich. 448; *Prentiss v. Larnard*, 11 Vt. 135.
5. It is rather the duty of the court to protect acknowledged rights than to establish new ones; citing *Roath v. Driscoll*, 20 Conn. 533.

6. Equity jurisdiction in cases of a private nuisance rests upon an undoubted right to the enjoyment of the subject in question; citing *Fisk v. Wilber*, 7 Barb. 395; and, if the claim is doubtful, the right must first be established at law; citing *White v. Forbes*, Walk. Ch. 112.

7. The purpose of an injunction is to prevent irreparable mischief; citing *Edwards v. Mining Co.*, 38 Mich. 46, 49; *Gilbert v. Showerman*, 23 Id. 448.

8. In cases where the matter complained of is not *ipso facto* a nuisance, but may be so according to circumstances, these must be ascertained by the verdict of a jury before equity will interfere by injunction; citing Hilliard, Inj. 305; 2 Eden, Inj. 273; *Kirkman v. Handy*, 11 Humph. 406; and where a lawful business affects property injuriously by reason of the manner in which it is conducted, and the injured party has an adequate remedy at law, he must establish his right to relief at law before equity will interfere by injunction; citing *Goodall v. Crofton*, 33 Ohio, St. 271.

9. The constant invasion of complainants' rights for 20 years has established a right of flowage in defendants, though exercised without injury up to the time of the commencement of this suit; citing Washb. Easem. 90; *Mfg. Co. v. Mfg. Co.*, 16 Pick. 241; *Hall v. Augsbury*, 46 N. Y. 622; *Parker v. Foote*, 19 Wend. 309, 314.

10. Flash-boards may be so constantly used as to become a part of the dam; citing Gould, Wat. § 337; *Pierce v. Travers*, 97 Mass. 306; *Marcly v. Shults*, 29 N. Y. 346; *Hall v. Augsbury*, 46 Id. 622; *Carlisle v. Cooper*, 21 N. J. Eq. 596.

CHAMPLIN, J. The bill of complaint in this cause was filed October 14, 1884, to enjoin defendants from damming or obstructing the waters of the Grand river to the extent that it will set back the waters of the Grand and Cedar rivers so as to overflow their banks, and flood complainants' lands, and prevent the natural flowing off and subsidence of the waters of said rivers in the season of high water, and to compel the defendants to remove and abate their dam across Grand river and to so construct and maintain the same as not to flood complainants' lands, or any part thereof.

The bill sets forth that complainants are the owners in severalty of the lands therein specifically described as

belonging to each of said owners, and that they lie along and adjacent to the Cedar river, so called; that the defendants are the owners of a dam across Grand river, in the city of Lansing, and usually known as the "North Lansing Dam," and which they have maintained for three years and upwards, and are now maintaining, at a head of 10 feet, causing the waters of the river to rise to a great height, and set back into the Cedar river, an affluent of the Grand river, and to overflow the banks of the Cedar river, so that large portions of complainants' lands have been for three years overflowed, and are being again threatened with being overflowed and completely submerged whenever the waters of said rivers are at their usual and ordinary height, to the great injury and detriment of complainants.

The bill further alleges—

"That but for the maintenance of said dam no part of your orators' or your oratrix's lands would be overflowed or submerged by the waters of said Cedar river, except small portions thereof, and for brief periods, during unusual floods and high water, but by reason of said dam the waters of said river are impeded and held back, and have been and are caused to stand for long periods of time—that is to say, during the seasons of 1882 and 1883, during the months of March, April, May, June, and July, in each year, and during the season of 1884, during the months of March, April, May, and June—over your orators' and your oratrix's lands hereinafter described, whereby they have wholly lost and continue to lose the rents, issues, and profits of said lands, to their great damage; that your orators' and your oratrix's lands are all tillable lands, fit for cultivation, except for the flooding of the same as aforesaid, but by the reason of the maintenance of said dam, and the flooding in consequence thereof, the said lands are rendered untillable and useless for the purpose of cultivation."

The bill also sets forth the particular portions of land belonging to the complainants which are flooded.

Nine of the defendants answered, and admitted the exist-

ence of the dam as stated in the bill, and that they were owners thereof, and as such interested in the water-power created by such dam. They aver that the dam was constructed over 40 years ago in pursuance of lawful right and authority for that purpose duly acquired from the State of Michigan, and has ever since that time been kept up and maintained to the same height that it is now kept up and maintained; that complainants acquired their land long after the erection of the dam, and subject to the rights of the owners thereof, and their grantees, and deny that they have kept up a dam at a height of 10 feet, or any other height which is unlawful or contrary to the rights of complainants, and they deny that the lands of complainants are overflowed by reason of said dam, and they deny that they have injured complainants, or threaten any injury to them, by reason of maintaining such dam. A demurrer clause is added, praying the same benefit as if they had demurred for want of equity.

The only authority granted by the State for building a dam across Grand river at or near where this dam is located, is that conferred by Act No. 98, Laws of 1843, in which John W. Burchard, his heirs and assigns, were authorized to build a dam across the Grand River, in Ingham county, on section No. 9, township 4 N., range 2 W., "not exceeding eight feet in height." It was provided in that act that—

"Nothing herein contained shall authorize the person or persons above mentioned, or their heirs or assigns, to enter upon or flow or injure the lands of any other person, without the consent of such person."

The defendants did not attempt to deduce their rights from Burchard, or from the grant by the State to him. It was wholly immaterial for them to do so, since the complainants do not deny the right of defendants to maintain a dam across Grand river, but deny their right

so to construct or maintain it as to cause the water to set back and overflow their lands. The State did not authorize them to do this without the consent of the owners.

There was testimony which tended to show that a dam has been maintained at the point where the present dam is located since the fall of 1843; that in 1875 the greater portion of it was swept away, and it was that year rebuilt to a height of 7½ feet; that after that date, and until 1881, the owners had been in the habit of increasing the head of water afforded by the dam, by the use of flash-boards, from 12 to 18 inches in height. It was shown that flash-boards had always been used during certain seasons of the year upon the old dam prior to the year 1875. In 1881, repairs were made upon the dam by increasing its permanent height 12 inches, intending thereby to do away with the use of flash-boards. The effect of this has been to hold the water more uniformly than it was by the use of flash-boards. The dam was also made generally tighter, and less loss occasioned by leakage.

The testimony shows that the complainants had owned the several parcels of land described in the bill as belonging to each individual from 8 to 20 years; that they had made improvements thereon, and brought the land under cultivation, and raised crops thereon, had put down drains by which the waters were drained into Cedar river, and had experienced no difficulty from high water, or flooding or overflow, until the repairs were made upon the dam in 1881; and from that time the water has been set back upon their lands, causing a loss of crops, the killing of native trees, and the destruction of the land for agricultural purposes. The proof is ample and convincing that, since the repairs made in 1881, the water has been, on an average, a foot higher in Cedar river

along complainants' lands than it was before, destroying the drainage, and causing the water to set back and soak up the soil of complainants' lands, and rendering them wholly unfit for cultivation.

Testimony was introduced of levels taken of the dam up the Grand and Cedar rivers for the purpose of showing that the waters in Cedar river were not affected and raised as far up the river, nor to such height, as claimed by the complainants. Owing to the impossibility of arriving at precisely accurate results by the use of instruments, running over a line six miles in extent, involving a great number of stations, and the adjustment, taking, and registering of levels thereat, and the many different circumstances, explainable and unexplainable, which affect the action of water when obstructed and ponded in running streams, actual tests by observation and experience afford the most satisfactory testimony upon which to rely in determining the results from such obstruction. *Mill Co. v. Greer*, 58 Iowa, 86 (12 N. W. Rep. 128); *Brown v. Bush*, 45 Penn. St. 61.

Every author treating upon the subject of hydrodynamics acknowledges and points out the difference between theoretical and actual tests, and, in advancing practical rules, modifies the theoretical to correspond as nearly as possible to actual observation and experience. We think the observation and experience of the witnesses introduced by complainants is controlling when brought in conflict with instrumental measurements, however accurately and carefully taken.

Testimony was also introduced showing that the actual structure of the dam in the river varied from 7 to 16 feet in height, and also that, as at present constructed, it is not so high as the dam was prior to 1881, including the flash-boards. Notwithstanding all this, the proof is positive that complainants' lands were not injured by the

dam, which included the flash-boards, prior to the year 1881.

The defendants sought to account for this upon two hypotheses:

1. By the clearing up of the country, and by the construction of drains, the waters, draining large tracts of country, flowed off into the Cedar and Grand rivers more quickly, and thus the water was raised to a greater height than had hitherto been ordinary by natural causes.

2. That the average rain-fall had been very much greater since 1881 than before, and this caused naturally a higher stage of water.

Testimony was offered in support of both these propositions, but I do not think either of them was established by the testimony introduced. Experience has shown, what would naturally be expected to follow, that as the country is cleared up, improved, and drained, the streams, which are the natural conduits for surface drainage, become materially lessened in volume, owing partly to the greater facility for conducting the surface water into them after rain-fall, and partly from the greater quantity evaporated, and also the greater quantity taken up and absorbed by the dryer soil, caused by drainage.

The average rain-fall, as shown by the table introduced in evidence of measurements taken by Prof. Kedzie at the Agricultural College, has been greater since 1879 than previously. The dam was rebuilt in 1875. From that date to 1880, inclusive, the average rain-fall, for the six years, was 33.15 inches. The succeeding six years shows an average of 35.81 inches.

Witnesses introduced on the part of defendants also testified, from their observation, to there being a greater volume of water flowing in Grand river since 1881 than before; but to what extent the volume was increased from natural causes, and whether such increased flow had any effect in setting the water back upon complainants' lands,

was not shown, and was left to conjecture; while the evidence is positive that during the week, when the mills at North Lansing were using the water from the dam, after Monday the water was drawn down in the Cedar river materially, and by Saturday night it set back no higher than it did prior to 1881; but while the gates were shut from Saturday night to Monday morning, their lands were again flooded, the difference in water level being about one foot, and in summer time, when there was low water, the variation would be as great as two or three feet.

No grant of the right of flowage of the lands of complainants is claimed. The defense rests upon rights acquired by prescription; and in such case the burden of proof is upon the defendants to show that they have, for a period of 15 years at least, each year flowed complainants' lands to the height complained of and established by their proofs, and that such use of complainants' lands by flowage has been adverse, uninterrupted, peaceable, open, and notorious. No testimony was introduced to show that the effect of the old dam, with or without the flash-boards, was to set the water back and to flow over complainants' lands to the height it has since 1881, nor to show that it so flooded the land as to interfere with or destroy the crops of complainants prior to that time, for a period of 15 years. This branch of the defense has utterly failed for lack of proof.

It was claimed on the part of counsel for defendants that we should apply the rule adopted in Massachusetts, and laid down in *Cowell v. Thayer*, 5 Metc. 253, and approved in *Ray v. Fletcher*, 12 Cush. 200, that the height to which a mill-owner will have a prescriptive right to maintain the water will depend upon the height of the dam by which he has raised it, and not upon the height such dam has set the water back and flowed the land in question

during the prescriptive period; and, therefore, if he repairs the dam without so changing it as to raise the water higher than the old dam, when tight and in repair, would raise it, and thereby keeps the water more constantly and at a greater height than before, it is not a new use of the stream, but a use conformable to his prescriptive right.

We cannot accede to this doctrine. It is antagonistic to the principle which underlies the doctrine of prescription. Title or rights in lands founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest to the land, so held adversely. But no one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine, and hence the statute of limitations requires that an action shall be brought within 15 years after the right first accrues or the adverse entry. The defendants, therefore, acquired no right by prescription to the lands in question until they showed that the acts which constituted the adverse user injured complainants, and gave them, or to those under whom they claim title, a right of action. *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335; *Smith v. Russ*, 17 Wis. 234; *Sabine v. Johnson*, 35 Id. 185; *Burnham v. Kempton*, 44 N. H. 90; *Griffin v. Bartlett*, 55 Id. 123; *Mertz v. Dorney*, 25 Penn. St. 519.

It is urged that relief should be denied to complainants for the reason that they have each separate interests, and are differently affected, at least in degree, by the act complained of, and are therefore improperly joined in this suit. As the bill does not ask for an accounting, but only for injunctive relief, we think it is maintainable, under our former decisions. *Scofield v. Lansing*, 17 Mich. 437; *Middleton v. Booming Co.*, 27 Id. 533; *Robinson v. Baugh*,

31 Id. 290; *Fox v. Holcomb*, 32 Id. 494; *Cobb v. Slimmer*, 45 Id. 176. More especially are we inclined to so hold where the objection was not taken by special demurrer, but the parties have taken their proofs, and proceeded to a hearing thereon.

The fact that there are several complainants praying the same relief does not materially affect the propriety of the decree. Story, Eq. Pl. § 544, and note 2. Nor do we experience any difficulty in granting relief. Although it is true that the lands situated lower down the Cedar river are flooded to a greater extent than those farther up, yet, if complete relief is given to the one situated lowest down, those farther up must of necessity be relieved.

We think the complainants have made a case by their proofs, and the only serious difficulty we have had to contend with is whether we should grant the relief prayed. It is not always a matter of course to grant relief in such cases, in a court of equity, when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative values of the properties affected, and other considerations which may present themselves under the varying circumstances, ought to be duly weighed, and relief afforded or withheld, as equity and good conscience require. *Robinson v. Baugh*, 31 Mich. 297, 298; *Fox v. Holcomb*, 32 Id. 494; *Cobb v. Slimmer*, 45 Id. 176; *Hall v. Rood*, 40 Id. 46; *Edwards v. Mining Co.*, 38 Id. 46; *Gilbert v. Showerman*, 23 Id. 448.

The testimony of complainants shows that there are about 300 acres of land belonging to them which are flooded and practically destroyed for agricultural purposes by reason of defendants' dam being maintained as at present; that such land is worth about $50 an acre, and its annual rental value is about $3 an acre. We have the testimony of defendants, who estimate the value of their mill property at $150,000, and they gave testimony tend-

ing to show that, if the dam was reduced to the height it was before the repairs of 1881, it would depreciate their property one-half, or $75,000. Upon these estimates we have a loss or depreciation, upon one side, of $15,000, and, upon the other, of $75,000. I think both sides have estimated their loss rather large. It appears to me especially that the depreciation in the value of the mill property is greatly overestimated. Some of the mills are at the present time supplied with steam-power to aid them in case of low water.

The testimony of defendants shows that, prior to the permanently raising of the dam in 1881, the mill-owners got along very well with the dam at the height it then was, with the aid of flash-boards, and that they had as much power as they now have; and that, should this method be resumed, the mill-owners would have all the power they had enjoyed prior to 1881.

In view of the practical destruction of 300 acres of land or over, be its value what it may, and the consequent, and weekly, and perhaps daily, recurring injury to each of the complainants, for which they severally would have a right of action, presenting a multiplicity of suits and vexatious litigation, it appears to us to be just and equitable that defendants should be decreed to abate and remove the top of their dam so as to lower the structure 12 inches, and that they should perform such decree on or before the first day of December next, and that they should be enjoined from raising the water at their said dam so as to cause the water to set back and overflow the lands of complainants, or either of them, or to such height as will cause the water to set back and percolate through the soil of complainants, or either of them, to a greater extent than was customary or usual prior to the time repairs were made upon said dam in 1881.

The decree of the circuit court for the county of Ing-

ham must be reversed, with costs of both courts, and the cause remanded to that court, with instructions to enter a decree in said cause in favor of complainants and against defendants, in accordance with the foregoing opinion.

SHERWOOD, C. J., CAMPBELL and LONG, JJ., concurred. MORSE, J., did not sit.

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GEORGE J. ROBINSON v. JAMES B. PATTERSON ET AL.

Contracts—Public policy—Officers—Estoppel.

1. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy, and void.

   So *held*, where a local commissioner on a State road made a contract (in his wife's name) with the contractor providing for the conveyance to her of certain specified lands, reserved on said State road contract, when the same should be patented by the State, and, in case of the negotiation of a sale of the said lands prior to such patenting, for an equal division of the proceeds.

2. Public policy will not permit the doctrine of estoppel to aid in validating an unexecuted contract which it holds to be void.

Appeal from Presque Isle. (Emerick, J.) Argued April 10, 1888. Decided July 11, 1888.

Bill for specific performance of contract. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Turnbull & Dafoe, for complainant

Bell & Adams, for defendants.

SHERWOOD, C. J. The bill in this case is filed to obtain specific performance of a contract made between defend-

ant James B. Patterson and Frederick D. Larke, dated September 25, 1882. The contract was made in the name of Augusta Larke, on the part of Mr. Larke, and was subsequently assigned by her to complainant, as requested by her husband. Prior to the making of this contract, James B. Patterson made a contract with the State for the construction of a State road; said contract being known as "Contract No. 23 Ocqueoc Branch of the Duncan City and Alpena State Road." He located and reserved, to be received in payment for the work, about 5,000 acres of State swamp lands. The bill claims that said lands were located and reserved by said Patterson from information and minutes furnished to him of and respecting the kind, quality, condition, and worth of said lands, by Augusta Larke, in consideration of which he made an oral agreement with Augusta Larke that she should have a sufficient interest in the contract to compensate her, though the lands should be located in his name.

That, in pursuance of such oral agreement, Patterson did, on September 25, 1882, enter into a written agreement with Augusta Larke, by the terms of which he agreed to convey to her and her assigns an equal undivided one-half interest in the said lands, being in all about 2,600 acres, situate in the county of Presque Isle; that he also agreed in said contract to convey to her the fee-simple in her undivided interest as fast as he should receive patents from the State therefor.

That said Augusta Larke, on December 19, 1882, sold and conveyed to the complainant her interest in said last-named contract, and receieved therefor from him the consideration of $2,600. The lands described in these conracts were designated as "Schedules 1 and 2."

That complainant purchased said interest with the knowledge of said James B. Patterson, and after consultation with him, and in reliance upon representations

made by said James B. Patterson and Augusta Larke that all the lands described in schedules 1, 2, and 3 had been reserved as aforesaid, upon said road contract, in the name of said Patterson, and would be patented to him; and that Patterson promised in said contract that he would do nothing to prejudice complainant's rights to the one-half of said lands, or to cast a cloud upon the title, and further assured him that the contract between him and said Larke was *bona fide;* and complainant, believing the representations of said Patterson and Larke, paid the $2,600 in the utmost good faith.

Complainant further alleges that the lands described in the first schedule, notwithstanding the representations of said J. B. Patterson, were by him reserved under said road contract last named, and located in the name of Robert Patterson, the defendant herein, and who is the father of said J. B. Patterson.

That the lands described in schedule 2 were received in the name of James B. Patterson, who subsequently, disregarding complainant's rights, transferred all the lands in schedule 2 to his father, Robert Patterson, for the purpose and with the design of cheating and defrauding complainant; and that Minor S. Newell, as Commissioner of the State Land-office, threatens to issue patents of said lands to said Robert Patterson, and complainant insists he should be restrained from so doing.

That the lands in schedule 3, at the instance and request of James B., have already been by the Commissioner patented to the said Robert Patterson; and that all these lands appear to be in the name of Robert Patterson, who has no interest therein, but he holds the same in trust for James B. Patterson,—Robert not having paid anything therefor, and taking the transfer thereof in fraud of complainant's rights; and that James B. Patterson has always retained the management and control of said lands,

and has written authority to dispose of them as he sees fit; and complainant claims and charges that James and Robert, confederating together to cheat and defraud him out of his interest in the lands in schedules 1 and 2, are now and have been offering to sell the same without respecting his rights therein.

That the said road contract has been completed and accepted by the State, and that patents will soon be issued as the said James B. Patterson may direct.

That complainant has asked the said James B. Patterson to perform, or in some manner secure the performance of, the agreement with complainant, at the same time offering to pay the amount due him under the agreement; that this the said James B. Patterson refuses to do unless complainant will buy the other undivided half of said lands, and pay an exhorbitant price therefor, viz., $16,000; and that, unless he does this, said Pattersons avow their intention to sell and place said lands entirely beyond the reach of complainant. And complainant prays that defendants may be restrained from so doing; that his rights in said property under said contract, and his interests therein, be ascertained, and especially may this be done in schedules 1 and 2; and that said defendants James B. Patterson and Robert Patterson may be decreed to convey to the complainant the undivided half interest in the lands described in said schedules 1 and 2.

The defendants James B. Patterson, Robert Patterson, and Minor S. Newell filed their several answers to complainant's bill. Augusta Larke made no answer. The defendant James B. Patterson in his answer admits the making of the contract with the State; admits that he caused to be located and reserved upon the road contract the lands mentioned in the three schedules contained in the bill, but denies that he so entered them from information furnished by Mrs. Larke; that he did receive a little

information from Mr. Larke, the husband of Mrs. Larke, in regard to a few descriptions, but that was furnished gratuitously, and was of little value, not to exceed $50; that he located the most of said lands from his own personal knowledge and examination.

He denies the making of the contract with Augusta Larke charged in the bill, or any oral agreement with her, or that he ever agreed to sell her a half interest in any portion of the lands; alleges that, if any contract was made, it was with her husband, Fred. D. Larke, who was the local commissioner appointed by the State to oversee the construction of the road under the contract with the State, and to approve and accept the road when completed, and to give certificates therefor, upon which the defendant was to receive patents for the land at the land-office, and which he could not obtain without such certificates.

And the defendant, further answering, says that, about September 1, 1882, he was entitled to have a certificate for a completed portion of the road, but, before Larke would accept said portion and give the certificate, he demanded he should have an interest transferred to or secured for him in the lands, and that the defendant J. B. Patterson was thus compelled by said commissioner to sign with Augusta Larke the contract mentioned in complainant's bill before he could get his lands; and he denies that, by the terms of such contract as read to him at the time, he was to give her a half interest in the lands, but that said lands were to be patented to him, and, when sold, the proceeds were to be divided; alleges that Mrs. Larke took no part in the negotiations, but simply signed her name to the instrument when the negotiations were completed by Mr. Larke, and that even this she did at the request of Mr. Larke; that this was so done to save Mr. Larke from the charge and conse-

quences of corrupt official conduct; that the whole of said contract was void, without consideration, and against public policy, and was extorted from the defendant by the corrupt means the official position of Mr. Larke enabled him to use in committing the fraud he did upon defendant; and he asks that the whole proceeding be set aside and held for naught upon that ground.

Defendant, further answering, says he does not know what assignments have been made by Mrs. Larke of said contract, but avers that, whatever they have been, they are without consideration and voluntary, and he denies that complainant paid $2,600 for such assignment, or any other sum, or that he took it in good faith; and further denies that he ever promised said complainant that he would do nothing to prejudice complainant's interest or cloud his title under said alleged assignment, or that he ever assured or in any way conveyed the idea that said pretended agreement between Mrs. Larke and defendant was valid or made in good faith, as stated in the bill; alleges that he never had any conversation whatever with complainant upon the subject of said pretended contract; and he denies that the said Augusta Larke has now, or ever had, any legal or equitable rights in or to any of said lands; neither has said complainant; and avers that he never knew or heard of said complainant's pretended purchase until after the same was made.

Defendant, further answering, says that the lands patented to his father, Robert Patterson, were so received by him in good faith and for good consideration, and before August 28, 1882, and were his sole and absolute property, and are not held by him on any secret trust for the defendant James B. Patterson or any other person; and defendant denies all collusion and fraud, or any intention to cheat the complainant, charged in the bill.

Defendant says that Robert owns all of said lands, and he admits that he has tried to sell the same for his father, but that he has no interest therein whatever except as agent for his father in making sale thereof, and in such portion as is held by his father as security for defendant's indebtedness to him, and which is *bona fide*.

Defendant, further answering, says that he has completed said road under his contract, but cannot say whether it has all been accepted or not; and further says that the State should pay therefor by issuing patents for the land to Robert Patterson, his father, who is lawfully entitled to the same; and denies that complainant has any interest whatever in said lands.

Defendant Minor S. Newell answers, and says he is Commissioner of the State Land-office, and, as such, has the care, management, and disposal of the public lands of the State in the manner provided by law, and admits that certain swamp lands stand reserved in the name of Robert Patterson, and others in the name of J. B. Patterson, on account of a certain State road known as "Ocqueoc Branch of the Duncan City and Alpena State Road," and that certain orders are on file in his office, directing the patenting of certain of said lands to Robert Patterson and to other persons; that the court has no jurisdiction in this cause, as against the defendant, he being a State officer, and he cannot be restrained by injunction in the discharge of his duties, and can make no decree against him by which he shall be hindered, delayed, or directed in the discharge of his official duties.

Defendant Robert Patterson answers, setting up substantially the same facts as does James B. Patterson in his answer, so far as he has any knowledge upon the subject referred to; that his transactions have all been made in good faith; and that he is entitled to patents from the State for the lands he claims, and ought not to be prevented

from receiving the same by any action on the part of complainant or by the courts.

Such is the substance of the pleadings. The lands included in schedule No. 3 are not involved in this issue. The proofs were taken before a commissioner, and the cause was heard before Judge Emerick, who made a decree dismissing complainant's bill as against the Pattersons and Newell, and that they recover their costs; holding that the material facts of the complainant's bill were not sustained by the proofs, and that the contract set up in the bill, as between these parties, in which complainant claims an interest, was against public policy, and void. In these views of the learned circuit judge we fully concur. We shall not attempt a recapitulation of the evidence. We will say, however, that it discloses a state of facts which can never be looked upon with any favor in a court of equity. While the case shows the material facts set up in the bill are not sustained, it does appear from the testimony that the facts stated in the answers are in the main true. If the facts in regard to the making of the contract are not such as claimed by the Pattersons, and if it was not subject to the objection that it is against public policy, it may be very well questioned whether it presents matters within equitable cognizance.

But we pass this, and will only say, further, that the claimed contract contains provisions which are clearly against public policy, and it is therefore void. It appears from the complainant's own showing that Mr. Larke was the local commissioner of the State, and charged with an important official duty in approving of the work and accepting the job. This deprived him from taking any interest in the pay for the work which would have a tendency to prejudice the rights of the State by favoring the contractor. The interest he took, or claims to have taken, could not fail to have this tendency, and render the agree-

ment void. The taking of the interest in the wife's name is manifestly only a part of the scheme to avoid the construction the law places upon the transaction, and rather strengthens, than otherwise, the conclusion to which the circuit judge arrived; and the complainant stands in no better position than would Larke if suit had been brought in Mrs. Larke's name. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy, and void. *Webbers v. Blunt,* 19 Wend. 188; *Winter v. Kinney,* 1 N. Y. 365; *Patton v. Nicholson,* 3 Wheat. 204; *Mitchell v. Smith,* 4 Dall. 269; *Brown v. Tarkington,* 3 Wall. 377; *Thomas v. Caulkett,* 57 Mich. 392 (24 N. W. Rep. 154); *Snyder v. Willey,* 33 Id. 483; *Whitaker v. Cone,* 2 Johns. Cas. 58; 1 Add. Cont. 387; *Richardson v. Crandall,* 48 N. Y. 348; *Gray v. Hook,* 4 Id. 449; *Bartle v. Nutt,* 4 Pet. 184; *O'Hara v. Carpenter,* 23 Mich. 410; *Eberts v. Selover,* 44 Id. 519 (7 N. W. Rep. 225); *Weber v. Weber,* 47 Id. 569 (11 N. W. Rep. 389); *Hovey v. Blanchard,* 13 N. H. 145; *Ins. Co. v. De Wolf,* 8 Pick. 56; *Knowlton v. Spring Co.,* 57 N. Y. 534.

The estoppel claimed by complainant in this case, if the facts were proved as claimed, could not have the effect sought to be attributed in this case. Public policy will not allow the doctrine of estoppel to come in, and aid in validating an unexecuted contract which it holds to be void.

The decree at the circuit must be affirmed, with costs.

CHAMPLIN, MORSE, and LONG, JJ, concurred. CAMPBELL J, did not sit.

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Evan Bowles v. Charles P. Hoard and The Upton Manufacturing Company.

Homestead—Exemption from execution—Occupancy—Husband and wife—Divorce—Dower—Mortgaged premises—Surplus on sale.

1. Actual residence upon land intended for a homestead is not an indispensable condition to its being in law a homestead, and, as such, exempt from levy and sale upon execution. *Reske v. Reske*, 51 Mich. 541; *Deville v. Widoe*, 64 Id. 593.

2. A party claiming unoccupied land exempt from execution, as a homestead, must show an intention on his part to occupy it as such, and that such intention existed prior to and at the time of such levy; and if it was conceived after the levy, and for the purpose of defeating the lien thereby created, it cannot be upheld, although a dwelling is erected or moved upon the land, and occupied by the owner and his family, after such levy and before sale.

3. Land not occupied as a homestead is *prima facie* subject to levy and sale on execution, and its exempt character must be determined upon the facts as they existed when such levy was made.

4. A wife entitled to dower under How. Stat. § 6246 (*Percival v. Percival*, 56 Mich. 297), on a divorce from her husband, is entitled to dower in the surplus arising upon a foreclosure sale under a mortgage executed prior to their marriage. How. Stat. §§ 5735, 5737.

Appeal from Shiawassee. (Newton, J.) Argued April 19, 1888. Decided July 11, 1888.

Appeal from order awarding surplus on foreclosure sale. Decree reversed, and case remanded with instructions, etc. The facts are stated in the opinion.

Lyon & Hackleman, for Ella L. Bowles, claimant of surplus.

James M. Goodell, for appellant, Upton Manufacturing Co.

CHAMPLIN, J. This is an appeal from an order of the circuit court for the county of Shiawassee, in chancery, awarding the surplus arising from a foreclosure sale to Ella L. Bowles, the divorced wife of defendant Charles P. Hoard.

The undisputed facts appear to be as follows: Solomon H. Hoard died about 14 years ago, seized of the W. ½ of the S. W. ¼ of section 33, town 6 N., range 3 E., being in the township of Shiawassee; also the north 53 acres of the W. ½ of the N. W. ¼ of section 4, township 5, N., range 3 E., being in the township of Antrim, comprising a farm of 133 acres. He left a widow, Annis Hoard, and three children, Chauncey, Charles P., and Alice Hoard.

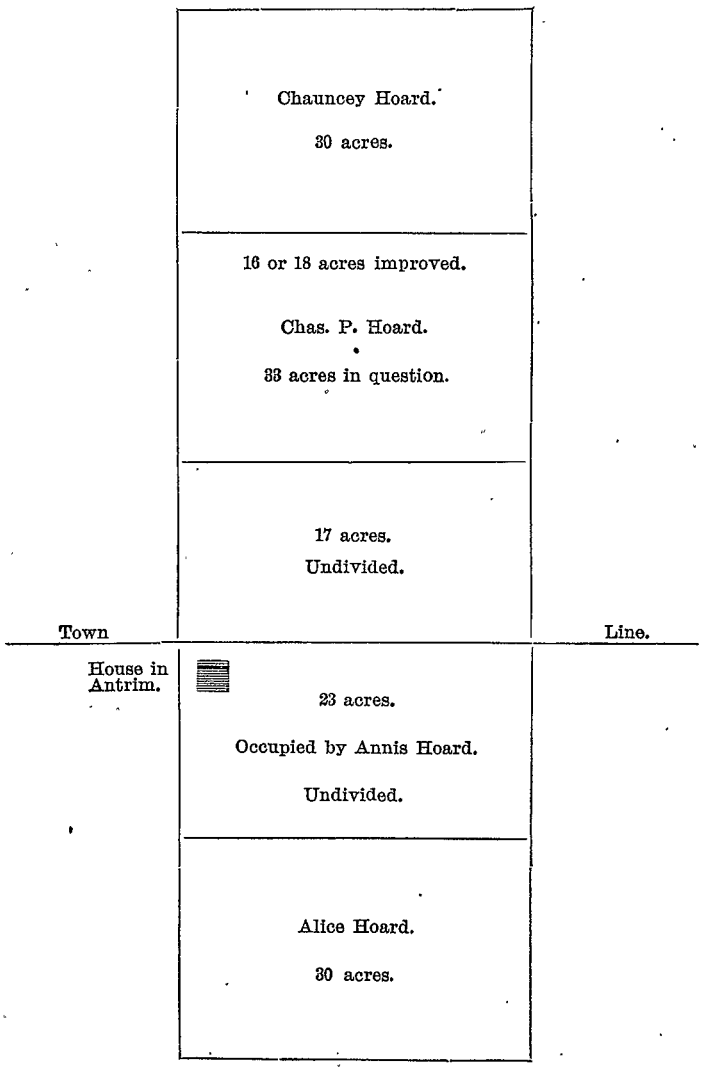
Several years after his death, his children made an amicable division among themselves of the farm, excepting 40 acres, consisting of the south 17 acres of the 80 in Shiawassee township, and the north 23 acres in Antrim, upon which was the house occupied as a homestead by the widow; Charles P. taking the 33 acres next north of the homestead 40, Chauncey taking the north 30, and Alice the south 30, acres of the farm. The diagram showing the division made will be found on next page.

After the above arrangement was made, the defendant Charles P. continued to live with his mother in the house upon the homestead 40, in which he owned an undivided one-third interest, and farmed the same in connection with his 33 acres, of which 16 or 18 acres were cleared and fit for cultivation, but there were no buildings thereon at the time of the divison.

October 1, 1882, Charles P. Hoard was married to Ella L. Bowles. They immediately went to live with his

SHIAWASSEE TOWNSHIP.

NORTH.



ANTRIM TOWNSHIP.

mother. It was talked, at the time of the division, that Charles was to take care of his mother; and after her death, or before, the brothers were each to pay their sister $75 for her interest in the 40, and, after the mother's death, Chauncey and Charles were to make a new division, by which Charles should take the south half, and Chauncey the north half, of 103 acres. This talk has never been consummated, although Charles P. has paid the agreed price to his sister. Chauncey has not. Ella L. took no furniture to the house, except one bed and bedding. They lived together as one family from October, 1882, to April, 1884; the defendant working all the land as he had previously.

In 1883, Charles sold some logs from the 33 acres to Frank Herrick, but refused to sell more, because, as he told Herrick, he did not know but he was going to build. This was in January, 1883, and the levy of the execution, as will appear hereafter, was not made until January, 1884. In the fall of 1883, Charles spoke to Henry Goodrich to build a house for him on this land, but afterwards, the next March, he told Goodrich he should not build until after planting.

December 27, 1883, an execution was issued out of the circuit court against Charles P. Hoard, Chauncey Hoard, and Charles P. Conklin, in favor of the Upton Manufacturing Company, and was levied upon the 33 acres of Charles P., and other lands, on January 21, 1884.

In June, 1884, Evan Bowles gave to his daughter, then Ella L. Hoard, the wife of Charles, a small house, which was moved onto this 33 acres, and then Charles P. and his wife moved into the house and lived there until October 1, 1884, when his wife left him, and commenced proceedings for a divorce.

Ella L. Bowles testified that her husband said he would build a house on his farm; that after they were married,

and went to live at his mother's, they did not intend to live with her, but intended to make their home on this farm of his, as she supposed, and that he always said so; that he talked about building on this place, and told her he went once to get lumber to build on the place; that this was in the fall of 1883. The reason he did not do so he said was they would not trust him.

September 12, 1884, the Upton Manufacturing Company commenced to advertise the land for sale on the execution, and on October 30, 1884, Charles P. Hoard notified the sheriff in writing that he claimed the land in question as his homestead. The land was sold on November 8, 1884, on the execution, to the Upton Manufacturing Company, and has not been redeemed.

Ella L. Hoard filed a bill for divorce against her husband, and on May 15, 1885, she obtained a decree dissolving the marriage, and granting her $500 permanent alimony, which by the decree was declared to be a lien upon the 33 acres of land in dispute.

May 9, 1882, Charles P. Hoard executed a mortgage upon this land to Lewis W. James for $300, who assigned the same to Evan Bowles, the father of Ella L. He foreclosed the mortgage, and on a sale under the foreclosure proceedings a surplus was realized of $413.64. This surplus has been paid into the register of the court. The Upton Manufacturing Company has filed a petition claiming the same by virtue of the execution levy and sale, and Ella L. Bowles, the divorced wife of Charles P. Hoard, claims the same by virtue of the decree, and on the ground that the land was a homestead, and not liable to a levy and sale for her husband's debts.

It was held in *Reske v. Reske,* 51 Mich. 541 (16 N. W. Rep. 895), that actual residence upon property intended for a homestead is not an indispensable condition to its being in law a homestead, and, as such, exempt from levy

and sale upon execution; that the question is whether, on the facts of the particular case, the land became a homestead in a legal sense before the levy was made upon it. To bring it within the exemption, when it is not actually occupied as such at the time of the levy, it must satisfactorily be made to appear that the intention in good faith exists to occupy it as such, and such intention must have existed prior to and at the time of the levy. If the idea was conceived after the levy, and for the purpose of defeating the lien created thereby, it cannot be upheld, although a dwelling, after the levy and before sale, is erected or moved upon the premises, and occupied by the owner and his family. In *Reske v. Reske*, the testimony was such as to satisfy this Court that it was the intention of Reske to make the lot a homestead when he purchased it, and that such intention existed from the time of such purchase, and that he proceeded as rapidly as he could earn the means. There was no evidence in that case leading to a contrary conclusion.

In this case the testimony is conflicting respecting the intentions of Charles P. Hoard. That pointing in that direction comes from those who had heard him say that he intended to build on the land, but nothing whatever was done in furtherance of such intent until after the levy, when a house was moved upon the place from his father-in-law's. This was after the levy. The act was therefore questionable whether it was done in good faith to carry out a design formed before the levy, or for the purpose of defeating the levy. The impression given by the testimony is that the building was not much of a dwelling. Charles Ford says that Charles P. told him that he thought the house which he moved on there would do for a granary, and did not intend to live in it when he got so he could build. He moved into the house

in June, and he and his wife occupied it about three months.

Charles P. Hoard was not examined as a witness, and his intentions as to living upon the 33 acres as a homestead are gathered from the testimony of witnesses as to what he had told them. The facts showing a contrary intention are uncontradicted, and are quite convincing. Mrs. Annis Hoard and Chauncey P. Hoard both testify to the division of the property as above stated, and both say that it was the intention that Charles should remain with his mother on the homestead, and take care of her, and, either before or after her death, Chauncey and Charles should buy out their sister's interest in the 40 for $75 each, and, after their mother's death, they were to make a new division, and Charles was to take his off from the south. This would include the whole of the homestead upon which the mother's house was, and the south 13 acres of the 33-acre tract. He paid his sister the $75, and he occupied and tilled all the land included in the homestead and the 33-acre tract, and continued to do so after his marriage; that is, from October, 1882, to April, 1884, when his wife went to her father's to live, and did not intend to return to live at his mother's again. It will be noted that the levy had been made in January, 1884. It is clear that Charles P. did not, at the time of the division, intend his 33-acre tract for a homestead, but his intention was to occupy the parcel containing the dwelling until his mother's death, and then, by a future division, to convey to his brother, Chauncey, the greater part of the 33-acre tract in exchange for his interest in the homestead. And I feel satisfied that such intention continued until the levy was made. After that time the plan was changed. Evan Bowles held the mortgage upon the 33 acres. Ella L., his daughter, had resolved upon

being divorced. What followed is more consistent with a design to defeat the levy by a claim that this 33 acres was a homestead than that the defendant Charles P. had previously in good faith designed to make a homestead of such land. Evan Bowles furnished a house to be placed on the land, and the son-in-law and wife occupy it for three months, and then she leaves him, and applies for a divorce for causes which existed prior to their removal upon the place. A decree for alimony is obtained, which is made a lien upon the land, which she claims has precedence to the levy. The case must be determined upon the facts as they existed at the time the levy was made. The land, being unoccupied as a homestead at that time, was *prima facie* subject to be levied upon, and the testimony fails to satisfy me that it was at that time, or had been, the intention of Charles P. Hoard to occupy the 33 acres as a homestead.

It follows that the decree must be reversed. We cannot, however, enter a decree here in favor of the Upton Manufacturing Company, for the reason that the record is defective, in that it does not show all the facts upon which a final decree for distribution should be entered. The record discloses that the mortgage under which the surplus arises on sale was executed by Charles P. Hoard previous to his marriage with Ella L. Bowles. It also shows that she has been divorced, but the cause for which the decree was granted is not stated. If it was granted for certain causes named in section 6246, How Stat., his wife would be entitled to dower in his lands in the same manner as if he were dead. *Percival v. Percival,* 56 Mich. 297 (22 N. W. Rep. 807). And, under sections 5735 and 5737, she would be entitled to dower in the surplus arising under the foreclosure sale in this case. 4 Kent, Comm. 45.

The case will therefore be remanded to the circuit court,

and that court will take such steps as it deems advisable to ascertain whether Ella L. Bowles is entitled to share in the surplus as the divorced wife of Charles P. Hoard; and, if so, to make such decree as will protect her rights in such surplus. If she is not, it will enter a decree directing the payment of such surplus to the Upton Manufacturing Company, and, in any event, directing two-thirds of such surplus to be paid to it as the purchaser of the equity of such redemption; Upton Manufacturing Company to recover its costs of this Court against said Ella L. Bowles.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred. CAMPBELL, J., did not sit.

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THE PEOPLE v. ELIZABETH VANDERHOOF.

Criminal law—Murder—Arsenical poisoning—Evidence—Expert testimony—Hypothetical questions—Duty of prosecutor—Medical books.

1. Respondent was convicted of the murder of her husband by arsenical poisoning, and sentenced to State prison for life, which judgment was reversed, and a new trial ordered.
2. The following propositions are summarized from the opinion of Mr. Justice MORSE, which was concurred in by SHERWOOD, C. J.:

   a—It has been declared by the courts that expert testimony is not of the best or highest order, and that it is extremely dangerous, unless well guarded, and closely confined within its legitimate province.

   b—An expert witness is to be judged from the same standpoint as any other, and if the jury find his conclusions or opinions to be the result of a biased or interested judgment, or of self-serving or improper motives, or that such opinions or conclusions are worthless or unreasonable in the light of the facts

in the case, they have a right to reject such opinions, partially or entirely, in making up their verdict.

c—Facts are always superior to theories, and the opinions of medical men are no more infallible than those of other men. Nor is their reason or judgment any less liable to be warped or colored by bias and interest than that of others; nor are they deficient in that pride of opinion which sometimes leads men "convinced against their will to be of the same opinion still."

d—It was the duty of the prosecution to lay the whole *case* of the decedent's sickness and death, as they had made it, before the expert witnesses, or as much of it as had an important bearing upon his death, instead of selecting detached portions of it to suit their theories of the case.

e—Expert testimony is only allowed upon the theory that it is necessary in some cases, where the jury cannot be supposed to comprehend the significance of facts shown by other testimony, which needs scientific or peculiar explanation by those who do comprehend it. *People v. Millard*, 53 Mich. 75.

f—It has time and time again been said by this Court that the duty of the prosecuting attorney is not to distort or withhold evidence in order to convict. He is the representative of the people, of which the accused is one, and his duty is to fairly and fully lay before the jury every material fact and circumstance known to him to exist, without regard to their tendency to establish the guilt or innocence of the respondent. This is his whole duty,—no more, no less.

g—The contents of medical books cannot be got before the jury, unless, as in the case of *Pinney v. Cahill*, 48 Mich. 584, the expert is unwise enough to state that a certain book lays down a certain proposition.

3. CHAMPLIN and LONG, JJ., concurred in the result, and CAMPBELL, J., did not sit.

Error to Berrien. (Smith, J.) Argued April 25 and 26, 1888. Decided July 11, 1888.

Respondent was convicted of murder, and sentenced to State prison for life. Judgment reversed, and new trial ordered, and bail fixed at $3,000. The facts are stated in the opinion.

Clapp & Bridgman, for respondent.

[Brief is confined to a discussion of the evidence and charge. No authorities cited.—REPORTER.]

Moses Taggart, Attorney General, for the people.

MORSE, J. The defendant was accused and convicted in the Berrien circuit court of the murder of her husband, William Vanderhoof, by administering to him arsenic on or about December 1, 1883.

The evidence showed conclusively that William Vanderhoof, from the winter of 1882 and 1883, and especially in the spring and summer of 1883, was not a healthy man. He was ill, and had spells of distress and burning in his stomach, and pain about the heart, with trembling of the body. His nerves were affected, and he was troubled at times with a coldness and numbness of his lower extremities. He also had dizzy spells, and thought his heart was affected; would have a feeling of suffocation, and could not lie upon his left side.

The physician who attended him in his last illness treated him for erysipelas in September, 1883, at which time he complained of a pain about his heart. He had made occasional complaints of heart trouble to this same physician for three years before his death. This physician, Dr. Levi Mann, treated him from October 5, 1883, almost regularly until the time of his death. On October 5 he complained of numbness in his arms and body, and nervousness. On the 13th of the same month had pain in the lungs. During the time from this date up to the last of November, with some intermissions of slight fever, his principal trouble and complaint was nervous spells, numbness, "dizzy and falling spells," pain about the heart, and difficulty in breathing. Dr. Mann saw no symptoms indicating arsenical poisoning up to November 29. On that day, about 9 o'clock in the morning, he found his patient's pulse raised to 140, and, by pressing

his finger upon the radial artery, he discovered, as he thought, a failure of the heart's action.

"The pulse was very irregular, very quick and weak, and almost imperceptible at the wrist, and a little fear of regurgitation."

The week before he died, Vanderhoof had some diarrhea, —four or five passages a day. On the morning of the 29th, the tongue was of a slimy appearance. There was no complaint of burning in the stomach or bowels, and no pain in the stomach or bowels. The bowels moved without pain. On the 30th, the patient, in the language of the physician,—

"Was in a pulseless condition. His tongue had a slimy appearance, and had been so for nearly a week. There was no complaint of burning in the stomach. He never complained of burning anywhere about his body."

There was no complaint about his bowels that indicated arsenic, and they were not bloated. On the 29th, the doctor says he was unable to assign any other cause for the condition of Vanderhoof than failure of heart action. There was no altered expression of his countenance on that day, but on the 30th there was a change; "he had a white marble appearance, and a cold, clammy surface." The raising of the pulse from 80 up to 140 was the symptom which, in Dr. Mann's opinion, might have indicated arsenical poisoning, and the only one he observed, and he testifies that he could not tell whether this was the result of arsenic or of a weak heart. The slimy tongue was not a symptom of arsenical poisoning, but of indigestion.

Vanderhoof called on Dr. Henderson, who examined him in August, 1883. He said to Henderson, at that time, that he had taken medicine which did him no good, but made him worse. He said:

"I want you to give me something to do me some good. If you can't, I don't want you to give me anything."

Dr. Henderson testifies:

"He was restless, crossing his feet, moving his hands; seemed to be in a nervous condition generally. His eyes were in motion. There was every indication of nervousness. I examined him carefully, and gave him some medicine. He said that oftentimes after eating a meal, and especially dinner, he would go out to work, and he would feel all right for a while; but, when his stomach would be empty, he would have a sensation of uneasiness in his stomach, and he would have trembling spells, and he would have to sit down, and there was a burning and a heat in his stomach. I examined him for organic trouble. I could not discover any. I examined his urine, but there was nothing I could see. I gave him calomel and quinine. I told him I could not tell what was the matter with him.

"I told him to come back. He said he had been sick for some time. He did not say a word about his heart. I examined his heart and his lungs. I listened over the region of the heart, and could hear it. His pulse was a little rapid from the nervousness. His heart was a little rapid; might have been organic, slightly, from the nervous trouble; but no organic affection of the heart that I could discover. If there was any lesion, I could have detected it. I examined his lungs casually. He had an unusual look about his face. Features were somewhat sunken, and he seemed rather emaciated in the face. He seemed so; it might have been his natural appearance.

"I don't remember that he complained of thirst. His bowels were constipated at the time he called on me. His bowels were bound up. I don't remember whether he said he had diarrhea or not. He spoke of this trembling. He said that was frequent, and numbness. After his stomach began to get empty, after eating, he would then experience a sensation of nausea, and would begin to feel bad in his stomach. His stomach would burn, and he would have to sit down, and a sweat would break out upon him."

Vanderhoof died at about 7 o'clock on the morning of December 1, 1883. Samuel Chapman, Frank Batton, Thomas Vanderhoof, father of the deceased, Tryphena Vanderhoof, wife of Thomas, and step-mother of William,

John Chapman, the respondent, and her children were in the room when he died. Batton testified that, from about midnight until the time of Vanderhoof's death, he stayed in the room all the time. While there, Vanderhoof—

"Was thrashing around, grasping the bed-quilts and one thing or another. He hallooed to open the door, and give him air; that he was smothering."

He was "flouncing around with his feet and legs" while lying upon the bed. The witness does not recollect of his complaining of anything, "only a smothering with heat."

"His hands and arms were numb. He got up several times during the after-part of the night. He claimed to have the diarrhea. His eyes were bloated; his face was swelled; his eyelids, upper and under, were bloated,—kind of a pale yellow. His face was a kind of yellow. He changed his bed a short time before he died, may be 15 or 20 minutes. He got up off from one bed, and got over onto the other. The beds were about two feet apart. Do not recollect of his asking for anything.

"*Q.* Did he ask for any person?

"*A.* Yes, sir; he kept calling for his wife during the night. They would tell him she was there. He called for his father several times during the night. I don't recollect that he said anything else. His father was present when he was asking for him. His father would say, 'William, what will you have?' and he would not say anything. He would just speak up for his father and his wife, and they would answer him, and that was the end of it. During the last 20 minutes before he died he was flouncing around with his feet, legs, arms, and hands. It was impossible to keep a blanket on him."

This witness further testified, on cross-examination, that Vanderhoof did not complain of any pain in the head. Don't remember whether he asked for water or was thirsty, and recollects no vomiting. He complained that he could not get his breath, and seemed to be suffocated; complained of his heart.

Mrs. Tryphena Vanderhoof swears that he complained of his heart and stomach during first part of the night, but didn't complain of anything that she knows of in the latter part of the night. He asked for a drink several times in the forepart of the night, and said he was thirsty. She gave him two medicine powders before Dr. Mann came, which was about midnight. He did not retch or vomit after drinking.

The body of Vanderhoof, on January 8, 1884, was removed from the grave and coffin, and an autopsy held thereon in the town hall at Galien, conducted by Drs. Bonine and Buhland. They testify that the lungs, heart, liver, and other vital organs seemed to be in a normal condition, but it is evident that they conducted the examination more with an idea of securing certain organs for chemical examination to detect poison than to observe whether or not any vital organ was affected by disease that might have caused death. They placed the following organs, or portions thereof, in hermetically sealed jars, to wit, the heart, the right lobe of the liver, the left kidney, the stomach, a portion of the spleen, and the right half of the brain. These jars were subsequently conveyed by Dr. Bonine to the University, and the contents there examined by certain professors. Drs. Palmer, Hendrix, and Bonine examined the heart and stomach and spleen. They found the spleen moderately enlarged, and the stomach gave evidence of having been somewhat congested. Dr. Palmer testifies that the heart was a rather large heart in outline, as if it was the heart of a large person.

"It was rather flabby. It did not stand up as many hearts do; and the walls of the heart, although the outlines of the heart were rather large, were not thick, but the walls of the left ventricle were thinner than is usually the case in a heart of that size. The muscular tissue was thinner. There was not as much of it as there usually is; and, being thinner, it would indicate that there was a

degree of weakness in that part of the heart. Thinning of the ventricle would make it less powerful, and the blood would not be sent as readily through the lungs as in a heart that had more muscular development; and the result of that might be, when an unusual excitement occurred or an unusual amount of exercise, that there would be some embarrassment about the circulation; some embarrassment about breathing; some difficulty in breathing; and, the blood not being thrown on readily through these veins, which come from different organs of the abdomen, they would be liable to be congested,—that is, the venous blood would be accumulated in the parts of the body from the obstruction. I think, however, there was muscular tissue enough in the heart to carry on the circulation properly, sufficiently, except under excitement or under unusual muscular exercise. I think there was some degree of weakening of the right side of the heart, but don't think that, of itself, certainly was sufficient to produce death. I have seen hearts that were even thinner than that, where patients have lived for a long time in that condition. I should say that a portion of the heart —of the muscle—seems to be healthy, what there was of it, but it was simply thin. From the examination of these organs I was entirely unable to say what was the cause of death."

He further testified that there was, at this examination, evidence of a moderate congestion of the lungs, spleen, kidneys, and liver; but what they saw was not, in his opinion, sufficient to produce any very serious consequences, and certainly not, as far as they could discover, death. There was no evidence of any congestion of the heart, but there were symptoms of inflammation about the stomach.

Prof. A. B. Prescott made the chemical examination for poison. He testifies that he found arsenic. He estimates that the stomach contained 54-100 of a grain of white arsenic; 26-100 of a grain in one pound of the liver, which usually weighs three or four pounds, so that there would probably have been in the whole liver from three-quarters to one grain of white arsenic, or its equivalent. He found a trace of arsenic in a portion of

the kidney. He examined none other of the organs.

It will be seen, from these extracts from and summary of a portion of the evidence, that there were open to the parties two theories as to the cause of Vanderhoof's death. The people contended that he died from the felonious administration of arsenic, and the defense took the ground that his death was caused by heart disease,—a failure of proper action on the part of that organ. The attending physician, Dr. Mann, seemed to be satisfied that the deceased died of heart trouble, and every witness who knew Vanderhoof, and observed him, or heard his complaints, gave evidence tending to show that, for nearly three years before his death, he was afflicted with different pains and symptoms, which might be reasonably laid at the door of the condition of the heart, as found by the University professors.

There was no particular motive shown upon the part of the defendant to commit the crime, and no direct evidence connecting her with it. There was some testimony tending to show that Vanderhoof was sometimes brutal to her, and that she had made some complaints to friends as to his treatment of her. It was shown that in the month of September she was advised by Dr. Mann to purchase "Rough on Rats" to poison rats about the house, and that the same day she purchased arsenic openly of a druggist in the place where she lived. Some evidence was introduced for the purpose of showing undue familiarity between defendant and one John Chapman, who worked for deceased the last week of his illness. The testimony was confined to two incidents, and the evidence as to those was conflicting, and some of it bore marks of bias as well as exaggeration upon the part of the witnesses.

One evening or night near to the time of the death of Vanderhoof, they both laid down, dressed, upon a bed in

the room where the other people were; the respondent lying cross-ways of the bed at one end, and Chapman at the other end. No one thought there was anything wrong about it at the time, as both were tired, and apparently worn out with work and watching about the house and sick bed.

The morning of the death of her husband the respondent was called to his bedside a few moments before his death. As he breathed his last, she apparently fainted away, and into the arms of Chapman, who was standing by. She said: "Oh, John; don't let me go to sleep," or "go away," some thing of that kind. She was given brandy, and so much of it that some of the witnesses thought she was under the influence of it. While she was apparently unconscious, some of the women opened the bosom of her dress, and put warm or hot cloths across her breast. These applications were continued for some time. Witnesses deposed that during this time Chapman was supporting her, and had his arm around her. One person testified that he saw Chapman's hand inside her dress. This was in plain sight of everybody who chanced to be there. No other familiarities were shown before or after this day between the parties. Chapman had been at Vanderhoof's only a week, and there is no evidence tending to show that Mrs. Vanderhoof ever saw him before he came there to work, or that she had any communication with him after the day her husband died.

It can hardly be conceived that this testimony could be relied upon to furnish any adequate motive for the murder of her husband. Yet, outside of her complaints of ill usage by her husband, no other motive was hinted at upon the trial. It is but justice to remark, also, that there was testimony tending to show that the relations between husband and wife were pleasant and harmonious.

An examination of the record discloses that this woman

was convicted upon the evidence of medical experts,—upon the opinions of men who never saw William Vanderhoof while he was alive. It is also apparent, with one or two exceptions, that these experts were biased against the respondent, and used their learning and ability, it is to be hoped unconsciously, to forward and aid the cause of the prosecution.

This case illustrates most forcibly the dangerous character of expert testimony, which has so often been called to the attention of the courts, and challenged by them. Here were professors from the University, and eminent physicians from the section of the State where the alleged crime was committed, summoned by the power of the people, and paid high prices *per diem*, for the purpose of establishing the fact that Vanderhoof must have died from the effects of arsenic administered before death. From the position they were employed to hold they could not be dislodged by the most rigid cross-examination, which laid before and fully presented to them the facts which, for a period of something over two years, by the people's own witnesses, from the lips of those who knew Vanderhoof while living, tended to show that the deceased was troubled with the same symptoms which culminated in his death, and which, as they admitted, might be attributable to heart disease. Nearly every one of them, at last, was obliged to rest his assumption of death by arsenical poisoning upon the fact that arsenic was found in the body after death.

The theory of the prosecution was that of acute arsenical poisoning; that the fatal dose was administered by the wife in his medicine, or instead of his medicine, on the night of November 30, and that, perhaps, it was also administered to him on the night of the 28th. But the experts had to admit that but few, if any, of the usual symptoms of arsenical poisoning were present, and that none were

present that could be called distinctive symptoms, except a puffiness under the eyes, which was admitted to be a feature of chronic or long-continued poisoning, and not of acute poisoning.

Dr. Scott, who was the fairest disposed of any of the experts, and who seemed to be candid, and without any particular bias in his testimony, testified that he had had some experience in arsenical poisoning, and that vomiting and purging and tenderness of the stomach (symptoms not present in Vanderhoof's case) had always been present in all cases that he had seen when a fatal dose of arsenic had been given or taken, but they are not always present in cases of chronic poisoning; and that one of the symptoms of chronic poisoning is puffiness under the eyes. This symptom was shown to be present in this case; but Dr. Scott testified that—

"Affection of the heart produces puffiness under the eyes, and it produces puffiness of the whole system."

The following hypothetical question was put to Dr. Scott, under objection:

"At and near to the time of the death of the deceased, pulse was 140, weak and quick, and almost imperceptible at the wrist; diarrhea, or repeated efforts to discharge; slimy tongue; puffiness under the eyes; difficult breathing; white marbled appearance; cold, clammy surface; cold extremities; able to get up and down, and sit up at the moment of death; after death a *post mortem* examination showed no apparent cause of death discovered; analysis of portions of the body revealed arsenic in the stomach and liver, one and one-half grains. What, in your opinion, was the cause of death?

"*A.* Died from arsenical poison."

He further testified, in explanation of his answer, that the conclusive item in the question upon which he based his opinion was the finding of the arsenic in the body; that the given symptoms, although some of them were signs of arsenical poison, were not marked enough to "give

a decided opinion to send any one to State's prison." He was also given the following symptoms by the prosecution in this question:

"*Q.* If the patient, before he died, was thrashing around, grasping the bed-quilts, and hallooing to open the door, and give him air; if he was flouncing around with his feet, hands, and legs, and complained of smothering with heat during the evening; his hands are numb; he got up several times during the after part of the night, claiming to have a diarrhea; his eyes were bloated and swelled up; his eyelids were bloated, and kind of a pale yellow; his face was kind of a yellow; he changed his bed a short time before he died, may be 15 or 20 minutes; he got from one bed onto the other; the beds were about two feet apart; he kept calling for his wife during the night, and they would tell him she was there; he called for his father several times during the last 20 minutes before he died; he was nervous, flouncing around with his feet and legs, arms and hands; it was impossible to keep a blanket on him; you should find no apparent cause of death, for death, in the organs, resulting from disease, and should find in the liver and stomach one and one-half grains of arsenic,—would you deem it necessary to make an examination of the spinal column to ascertain the cause of death?"

After answering the question in the negative, he further testified that the symptoms therein enumerated, with the exception of the puffiness under the eyes, and the great restlessness, did not indicate arsenical poison. The last hypothetical question was a very fair statement of the symptoms attending the demise of Vanderhoof as related by all the witnesses, excepting, perhaps, as to the part relating to the diarrhea. Dr. Scott also gave the usual symptoms of arsenical poison as follows:

"*Q.* I will ask you, in the beginning, of the symptoms of arsenical poison. Do you usually first find faintness and nausea, burning pain, and a sense of constriction in the throat?

"*A.* Those are the general line of symptoms as laid down. The burning is in the stomach; colicky pains

after a while in the bowels, after the burning sensation, followed by vomiting, but not in all cases unless the dose is large; very often a burning sensation in the throat; the vomited matter greenish, sometimes tinged with blood; excessive thirst; generally a cold, clammy surface of the skin; hot flashes, in many cases, flying over the body; tenderness in the pit of the stomach; cramps in the legs just before death. Prostration usually accompanies a severe case sufficient to produce death."

And Prof. Prescott, of Ann Arbor, gave the symptoms of acute and subacute arsenical poison to be—

"Burning pain in the stomach, a constriction extending over the bowels, nausea, faintness, depressed pain in the throat, purging, cramps in the legs, small depressed pulse.

"*Q.* A good deal of pain in the stomach or bowels?

"*A.* Yes, sir.

"*Q.* Colicky pain?

"*A.* Colicky pains. I am answering the question as to the probable symptoms.

"*Q.* Great thirst?

"*A.* Great thirst and headache. Drinking is followed quite often by retching and vomiting.

"*Q.* These symptoms you mention are quite intense?

"*A.* They are intense. They are variable in different cases to a great degree.

"*Q.* But with a degree of intensity always?

"*A.* Yes. There are cases where a collapse results from a dose of that kind; that is when the nervous centers are overpowered."

It will be seen that I have set forth the symptoms of this man's last illness as depicted by his family physician, and those who were present the night before he died; his general condition for a year before; the examination of his body and the vital organs after death, not particularly in a search to ascertain the cause of his death, but to procure certain organs for the chemist; and the symptoms usually and probably present in cases of acute arsenical poisoning. This I have done in order to clearly show that the case of the people absolutely depended upon the

evidence of experts if a conviction of the accused was desired, and to clearly point out the bearing of the errors assigned relative to the testimony of these experts, and the manner in which it was presented to the jury.

It has been declared by the courts that expert testimony is not of the best or highest order, and that it is extremely dangerous, unless well guarded, and closely confined within its legitimate province. It is often necessary, as in this case, in order that justice may be done; and without it the truth cannot always be determined. But it is a fact well known to every practitioner at the bar, and within the judicial knowledge of courts, I think, that latterly the experts, on both sides of a cause, become too often eager attorneys before the trial is ended and before their testimony is given. It therefore becomes desirable, and necessary to the due administration of justice, that the scope and power of their utterances shall not be extended; that they shall be held strictly to the rules laid down for their guidance and control. Especially should this be so in criminal cases, where the liberty for life of the accused is at stake.

In this case the experts were all on one side. It is claimed, and the evidence would seem to warrant the claim, that the respondent was not able to hire experts to testify in her behalf. It is probable that in cases of this kind the truth will ever be clouded with the sophistry of scientists until some way or method is devised by which expert witnesses can be procured who will be, and remain through the trial, entirely uninterested and unbiased, not only in the result of the trial, but also in the maintenance of their own peculiar notions or theories in regard to matters presented to them upon the trial. Until the time comes when experts shall be entirely fair and unbiased, with no desire upon the witness-stand except to arrive at the truth, it must be the duty of the courts

to see that no injustice be done, if that be possible.

The court committed grave error in instructing the jury as follows:

"Now, whether the deceased died of disease or not is a question for you to determine. It is a question of fact for you to determine upon the testimony as given to you. These men have testified as experts. *Now, the way to contradict the testimony of experts is by the introduction of testimony of the same class of men, that is, of experts, to show the thing to be different;* and, as a principle of law, you have no right to disregard the testimony of credible witnesses—experts—if the witnesses are credible, and substitute for them your own opinions or notions, without proof. You decide upon these questions upon the testimony given you in open court, and from the law as given you by the court."

In other words, the jury were, in substance, informed that this poor woman must meet the testimony of these experts by other experts, and, having failed to do so, the jury must take it for granted that their conclusions were correct.

An expert witness is to be judged from the same standpoint as any other; and if the jury find his conclusions or opinions to be the result of a biased or interested judgment, or of self-serving or improper motives, or that such opinions or conclusions are worthless or unreasonable in the light of the facts in the case, they have the right to reject such opinions, partially or entirely, in making up their verdict. Facts are always superior to theories, and the opinions of medical men are no more infallible than the opinions of other men. Nor is their reason or judgment any the less liable to be warped or colored by bias and interest than that of others; nor are they deficient in that pride of opinion which sometimes leads men "convinced against their will to be of the same opinion still."

Nor will the courts, in my opinion, compel, as this instruction would, a person accused and on trial for

murder to employ experts, at prices ranging from $10 to $50 per day, or else be bound by the opinions of the experts employed by the people. It might have been better, perhaps, as suggested upon the argument, if the counsel for the respondent had shown her poverty to the court, and asked that experts be summoned to testify in her behalf; but, nevertheless, she was entitled to have the testimony of the experts who were sworn, treated as would be the testimony of the other witnesses. The charge of the court virtually put the evidence of these doctors and professors upon a higher plane than the other testimony, which was manifestly wrong. It must be remembered that their testimony, which weighed against the respondent, was not the facts they detailed, but the theories and opinions they offered. This is an inferior, not a superior, kind of evidence.

The court also committed serious error, in this same direction, in alluding to the testimony of Dr. Mann, the attending physician, who knew and saw Vanderhoof, and saw his condition and symptoms, not for one day, to which the attention of the experts was confined by the people, but for the whole period of his last illness, over a month and a half, and for some time even before that. He said to the jury,—

"The defense claims that Dr. Mann's testimony tends to contradict the other witnesses, and tends to show that he died of disease. That is a question for you,—whether it does, or how far it does, if it does. Dr. Mann testified that he didn't contemplate poisoning at the time he was attending this man; but that he had puffiness of the eyes, and a rapid and weak pulse, which he says would indicate poisoning by arsenic. From all this testimony you must decide whether he died of disease or not."

This was or might have been easily construed by the jury as an argument by the court against this theory of the defense; saying, in effect:

"Why, gentlemen, Dr. Mann didn't think of poison while he was there, but he admits that Vanderhoof had symptoms of arsenical poisoning."

This was uncalled for, and injurious to the respondent, and not warranted by the evidence of Dr. Mann.

It seems to me that the court all through his charge gave undue prominence to the testimony of Dr. Palmer and other experts in his reference to the evidence, and that such references were harmful to the respondent's case. And the questions permitted to be put to these experts in the course of the trial were unfair and misleading. For instance, the first question submitted to Dr. Scott confined the symptoms to the point almost of the death of Vanderhoof, as did also the other question propounded to the same witness, both of which have heretofore been set out in full in this opinion. Before these questions were asked, the people themselves had shown, by Dr. Mann and other witnesses, the condition of Vanderhoof from the middle of September to the time of his death, and also the existence, long before, of these spells, which indicated, as Vanderhoof and the physician thought, heart trouble. No reference was made either to the condition of the heart as before noted, or the enlargement of the right ventricle, as testified to by Dr. Hendrix.

It was the duty of the prosecution to lay the whole case of this man's sickness and death, as they had made it, before these experts, or so much of it as had an important bearing upon his death, instead of picking out detached portions of it to suit their theories of the case. The whole of the undisputed important facts of the last sickness, and those developed at the *post mortem*, should have been embraced or summarized in the hypothetical questions leading to and inquiring as to the cause of death. But this was not done, nor fairly attempted to be done. Important facts were left out, and some things inserted

that were not facts, and could not consistently be claimed to be facts within the testimony. It is impossible to particularize all these omissions or the insertions of facts. Nor is it necessary to do so.

Nearly all the hypothetical questions propounded by the people to the medical experts confined the symptoms of the deceased to 12 or 20 hours before his death, ignoring his condition and ailments previous thereto, and gave only a partial statement of the results of the *post mortem*. The difficulty of the heart, with which Vanderhoof thought he suffered so long, was studiously avoided, as was the diseased condition of the heart as shown by the autopsy. I believe that even in a civil case all the undisputed facts of a case must be included in a hypothetical question, both as a matter of sound principle, and of reason and justice. Neither party has a right to discard an important undisputed fact because the insertion of such fact may alter or vary the answer or opinion of the witness, to the prejudice of such party. Expert testimony is only allowed upon the theory that it is necessary in some cases, where the jury cannot be supposed to comprehend the significance of facts shown by other testimony, which needs scientific or peculiar explanation by those who do comprehend it. *People v. Millard*, 53 Mich. 75 (18 N. W. Rep. 562)

This explanation cannot well be given so as to be of any worth or usefulness, especially in the diagnosis of disease, without all the facts known to exist are made the basis and foundation of the opinion. So much may a single fact or symptom present or wanting change or vary such opinion that the courts uniformly hold that, if the jury find one single material supposed fact included in a hypothetical question wanting, they must discard and reject the answer to the question as worthless. It has been said that in civil cases it is not necessary to state all th.

facts; that the party may assume such facts as he chooses to suit the theory of his case; and that the evil arising or liable to arise from such a practice can be remedied by a presentation of the omitted facts upon cross-examination, and that the jury will determine from the skill of the witnesses, and all other circumstances, the weight to be given to the answers to such questions.[1]

But every one who has been in active practice at the bar, or who has presided at trials, or reviewed records in the appellate courts as a judge, for the last 10 years in criminal cases, knows full well that, when an expert has once fixed his stakes upon the cause of death in an answer to the first hypothetical question propounded to him, no subsequent presentation of other facts, or elimination of some contained in the question, upon cross-examination, can easily move him from his first determination. He is on the alert at once to guard and bolster up his opinion, his professional pride is aroused, he seems to feel that his professional reputation is at stake, and he is sometimes the best attorney the party who employs him has in the trial of the cause. This is unfortunate, but it seems to be human nature in most cases. And the professional expert has become to be a recognized factor in criminal trials; and his pay for his services ranks, as it well may if the price of the services is to be measured by their value, with, and ofttimes above, that of the attorneys.

This being the fact, which cannot be gainsaid, justice and humanity demand that in a criminal case, where life, liberty, and reputation are at issue, the prosecuting officer, in examining an expert, should lay before such expert fairly and fully every material fact undisputed that can have a possible bearing upon the opinion of such witness.

[1]For cases treating on expert testimony in civil cases, see 69 Mich. 400, 430.

To permit, as was done in this case, a culling of facts to suit the purposes of conviction, to be propounded in hypothesis to the experts, and then to instruct the jury that the only way to contradict the opinion of the experts is by the opinion of other experts, is to deny a fair trial, and, in a case where the accused was unable to procure experts because of poverty, would be an outrage, and a reproach to our jurisprudence.

It has time and time again been said in this Court that the duty of the prosecuting attorney is not to distort or withhold evidence in order to convict. He is the representative of the people, of which the accused is one, and his duty is to fairly and fully lay before the jury every fact and circumstance known to him to exist, without regard to whether such fact tends to establish the guilt or innocence of the respondent. This is his whole duty,—no more, no less.

Complaint is also made that while the examination of the witnesses by the prosecution, and the entire conduct of the people's case, went upon the theory that the deceased came to his death from acute or subacute poisoning, to wit, the administration of large doses or fatal doses from 12 to 24 hours before death, and this was the case the defense was called upon to meet and did combat, yet the circuit judge submitted the case to the jury upon the theory of slow or chronic poisoning, commencing first in September, and that he misstated the testimony also in so doing.

We do not think the charge is fairly open to this complaint. The court, in stating what the people claimed, it is true, did state a case of slow poisoning, and, perhaps, in enumerating the facts claimed by the people, mentioned some things which were not proven. But the claim of the people, as made in their opening or in their argument to the jury, is not before us, and the court may

have correctly stated the case as made by them. It is evident, from an examination of the record, that the progress of the trial indicated the theory of the people to be a claim of acute poisoning, but there was some evidence introduced looking towards chronic poisoning. If the attention of the court and counsel had been specifically called by the attorneys for the defense to this matter, we might, perhaps, be able to determine whether error was committed by the court in this respect. As it is, the people may have claimed, as they might have done under some of the testimony, that there was chronic or slow poisoning up to November 28 or 29, when larger and fatal doses were administered.

We do not find any error in the rulings as to medical books. The court seems to have followed as consistently as possible the rulings of this Court. See *Pinney v. Cahill,* 48 Mich. 584 (12 N. W. Rep. 862); *Marshall v. Brown,* 50 Id. 148 (15 N. W. Rep. 55); *People v. Millard,* 53 Id. 77 (18 N. W. Rep. 562).

The expert has, or may take, perhaps, advantage of his position, under these authorities, and state that his opinion is derived from standard works; and if he fails to remember what particular books he has read, or what particular books he has culled his authority from, there is, under the previous decisions of this Court, no way in which to contradict the assertion he makes. But it is the settled law of this State that the contents of medical books cannot be got before the jury, unless, as in the case of *Pinney v. Cahill, supra,* the expert is unwise enough to state that a certain book lays down a certain proposition. The fact that an expert witness can, if he be shrewd enough, carry an idea to the jury that he has fortified his opinion upon a given state of facts by an extensive reading of medical authorities, and yet keep himself clear from any contradictions from the books themselves, is

another potent reason why this kind of evidence should be closely hedged and confined within its legitimate sphere, and that no unfairness should be permitted in its presentation to a jury. Unless it is so kept within bounds, and closely scanned and weighed by a jury, there is the greatest danger of a perversion of justice.

We do not feel called upon to notice the other assignments of error, as, in a general way, we have discussed the principal points argued before us.

It follows from what has been said that the verdict and judgment against the respondent must be vacated and set aside, and a new trial granted.

She will be remanded to the custody of the sheriff of Berrien county until bail is obtained, which will be granted by the circuit court of said county in the sum of $3,000.

SHERWOOD, C. J., concurred with MORSE, J.

CHAMPLIN and LONG, JJ., concurred in the result.

CAMPBELL, J., did not sit.

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IN THE MATTER OF LUCILE STOCKMAN ON HABEAS CORPUS.

Infants—Testamentary guardians—Residence—Parent and child—Conflict of laws—Comity of states.

1. Courts have a general superintending power over all infants, and the primary guardianship of the parent over his child lasts no longer than he is found to be competent, and discharges his duty, which nature has laid upon him, properly; and when he fails to do this, the proper court may interfere, and charge another with such performance.

2. Primarily, the court is the guardian of all orphan children, and will give the proper directions as to their care and support until such time as a guardian shall be appointed; and it is then its duty to see to it that the duties of the trust are properly discharged.
3. Guardians for infants may be appointed by the last will of the parent instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward.
4. The powers of a testamentary guardian are the same as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons.
5. Who shall or shall not be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the controlling question to be determined in making the selection is, and always should be, what will be for the best interest of the ward under all the circumstances?
6. In this case it is held that under the agreement made by the father of the infant with his wife's mother, on the request of his wife, and pursuant to which the child was brought from Washington to Port Huron, the last-named city became the child's residence, which was not changed by the agreement afterwards signed in Washington under duress; and that by virtue of their letters of guardianship the respondents have also the lawful custody of the child, the right to which the testamentary guardians never had, except that which comity gave them, and which can never be properly enforced in this State, under the circumstances appearing in this case.

Habeas corpus case. Heard May 17, 1888. Writ denied July 11, 1888. The facts are stated in the opinion.

F. A. Baker (*E. A. Newman,* of counsel), for petitioners, contended:

1. At common law the power to appoint a testamentary guardian did not exist, but was created by Statute 12 *Charles II.*, which act, at the time of the execution of the will of Hugh R. Stockman, and the probate thereof, was and still is in force in the District of Columbia; citing *Mauro v Ritchie,* 3 Cr. C. C. 147; Rev. Stat. D. C. §§ 937, 938; and at time of such probate the Michigan statute authorized such appointment; citing Comp.

Laws of 1857, chap. 110, § 10; and the appointment of respondents as guardians by the probate court of St. Clair county is a nullity; citing *Fridge v. State*, 3 Gill & J. 103; *Corrie's Case*, 2 Bland, 488; *Balch v. Smith*, 12 N. H. 43; *Coop v. Copp*, 20 Id. 284; *Robinson v. Zollinger*, 9 Watts, 169; *Van Houten's Case*, 2 Green, Ch. 220 (29 Am. Dec. 707).

2. See, also, as to testamentary guardians and their powers. as applicable to the case at bar, Alexander's British Statutes, 467 (note); 3 Waite, Act. & Def. 533, 534, 541, 542; Reeves, Dom. Rel. 453, 454; 2 Kent, Com. 221, and notes; *Kevan v. Waller*, 11 Leigh, 414; *Wilkinson v. Deming*, 80 Ill. 342; *Rex v. Isley*, 5 Adol. & El. 441; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103; *Talbot v. Earl of Shrewsbury*, 4 Myl. & C. 672; *Gilliat v. Gilliat*, 3 Phillm. 222

3. The domicile of the minor must follow that of the father; citing *Powers v. Mortee*, 4 Am. Law Reg. 427; *Directors v. James*, 2 Watts & Serg. 568; *In re Afflick*, 3 McAr. 95; *Crawford v. Wilson*, 4 Barb. 504; *Ex parte Dawson*, 3 Bradf. Sur. 130.

4. In support of the proposition that Act No. 133, Laws of 1887, cannot affect the rights of the testamentary guardians, counsel cite Cooley, Const. Lim. 111; *Alter's Appeal*, 67 Penn. St. 341; *Greenough v. Greenough*, 11 Id. 489; *McCarty v. Hoffman*, 23 Id. 507; *Battle v. Speight*, 9 Ired. 288; Wade, Retrs. Laws, §§ 159, 160; Ledg. Const. Stat. 144-146, 151, 152.

O'Brien J. Atkinson (*Frank Whipple*, of counsel), for respondents, contended for the doctrines stated in the opinion.

SHERWOOD, C. J. Lucile Stockman is now nine years of age, and resides with her maternal grandparents in Port Huron, who are her guardians in this State, having received their appointment as such on October 19, 1885. The *paternal* grandparents reside in Washington, D. C., and were duly appointed testamentary guardians for Lucile in that city on September 4, 1885. The child's father and mother are both dead. The testamentary guardians are the petitioners in this case, and they seek to recover by the writ of *habeas corpus* this infant girl from the Michigan guardians. Mrs. Stockman, the mother of Lucile, died in the city of Washington on November 24, 1879,

and Hugh R. Stockman, the father, died in the same city on August 23, 1885.

These parents were married in April, 1877, at Port Huron, Mrs. Stockman being only about 16 years of age when married. They remained in Port Huron until some time in July, 1877. There were some unpleasant things occurred in the manner the husband brought about the marriage, and it only need be said they were of a character not calculated to greatly increase the estimate which would most likely be accorded to him by a well-ordered and virtuous community. The wife's parents were a well-to-do and respectable family, who had resided in Port Huron more than 20 years, reputable people in good standing. While in Port Huron the newly-married couple boarded at the Huron House, and Mrs. Stockman was allowed to visit her mother but once, and then for the purpose of getting her trunk before they left the city, and the mother never saw Mrs. Stockman again but once until a few hours before she died. They lived during the marriage in Georgia and in Washington.

After the birth of the child, Lucile, which occurred while they were in Georgia, the mother was allowed to come to Port Huron for a few weeks in July and August, 1879, and then returned to Washington, where she died. Her mother was telegraphed to go to Washington about 48 hours before Mrs. Stockman died, and she was permitted to have the company of Mrs. Shaw, her mother, about 24 hours before she passed away. Before she died, Mrs. Stockman asked her husband to allow her mother, Mrs. Shaw, to take Lucile and keep her, and Mr. Stockman promised her that he would do so. And after the funeral he told Mrs. Shaw of the request his wife had made, and the promise he gave her, and then and there urged Mrs. Shaw to take the child, and do as his wife requested; and upon her suggestion that she would be

willing to take her, and bring her up, but was afraid that he might afterwards change his mind, and take the child from her, he affirmed he would not, saying:

"Oh no, mother. You may have no fear. You take the child and bring her up pure and virtuous, like her mother, and that is all I ask."

Mrs. Shaw then promised him she would take her as requested by her daughter and him, and bring up the child as one of her own.

Mr. Stockman seemed very poor at this time. The only home he had ever furnished for his wife and child was in the family of his father and mother, and at their house; and after paying sundry bills for medicine for Mrs. Stockman before she died, and lending him $50 to help pay his wife's funeral expenses, she took the child Lucile, and brought her to her home in Port Huron, where she and her husband have cared for, supported, maintained, and educated her ever since.

When Mrs. Shaw took the child she was about 17 months old, and, the evidence shows, poor and sickly. She is now healthy, and enjoying her home and the family of her grandparents, where there are several children associates. She is also receiving such Christian education and other advantages as a large and prosperous Michigan city affords; and the testimony is to the effect that she desires to remain with her grandparents in Michigan, where she is contented and happy, and does not want to go and live with her paternal grandparents in Washington, and the maternal grandparents are anxious to have her remain with them, and are willing to maintain, educate, and support her from their own means, and at their own expense.

In the month of August, 1882, and after the child had been at Port Huron about 3 years, Mr. Stockman visited his daughter at Mr. and Mrs. Shaw's, and, after

being there a few days, said he wanted to take her to Washington with him to spend the winter, and Mrs. Shaw could have her again in the spring, and was allowed to take her under his promise that the grandmother could have her again in the spring. Mrs. Shaw went for her in the month of April, 1883, when Mr. Stockman made trouble in getting her, and finally would not allow Mrs. Shaw to bring her away unless she would sign a writing, agreeing to return the child to him whenever he should call for her. Lucile was at the time not well, and these conditions, demanded of Mrs. Shaw before she could gain possession of the child, greatly embarrassed her, and, feeling that she could not leave her in Washington, she signed an instrument purporting to be of the effect stated. She then took the little girl, and returned to Port Huron with her. Mrs. Shaw avers that she was compelled to sign said written agreement before she could get away the child, who was then sick, and, fearing she might die if allowed to remain there, she was ready to do almost anything to get her away, and she was thus compelled, at the risk, as she believes, of the life of the child, and against her will, to sign said written instrument.

After their return to Port Huron, Lucile soon recovered her health, and she was permitted to remain undisturbed with Mrs. Shaw until on or about September 18, 1883, when Mr. Stockman came to the house of Mrs. Shaw, in Port Huron, and unceremoniously took the child away with the avowed purpose of taking her to Washington. This he was not allowed to do by Mr. Shaw, who found him with the child in the city, making preparation to leave with her. Shaw took her from Mr. Stockman, and went home with her. Mr. Stockman thereupon applied to the circuit court for the county of St. Clair for a writ of *habeas corpus* to recover his child. Mr. and Mrs. Shaw

appeared, and filed their answer, contesting his right to Lucile upon the following grounds:

1. That by reason of the request of the dying mother, and consummated after her death by the agreement of Mr. Stockman with Mrs. Shaw, that she should have the care and custody of the child during her infancy, she was entitled to take her away.

2. That Mr. Stockman was an unfit person to have the care, companionship, custody, or education of the child; that he was intemperate in his habits; habitually used intoxicating liquor; that he had an ungovernable temper, and could not control his passions, and was a man of improper and immoral habits.

3. That he was extremely cross and cruel in his conduct towards Lucile, and without any sufficient cause would frequently inflict upon her severe blows, and cruel and improper punishment.

4. That he improperly treated the child when sick; compelled and forced her to take medicine of his own preparation, and contrary to the advice of physicians.

5. That he held improper relations and intercourse with bad women, and allowed them in his own rooms, in the presence of Lucile; and that he is financially unable to support the child; that he had no home of his own, was out of health, and was out of business.

The circuit judge ordered the case tried before a jury, and upon the first trial the jury disagreed, and upon the second trial, which occurred about a month thereafter, the jury rendered a verdict that Mr. and Mrs. Shaw should retain the custody of the child. This verdict was afterwards sought to be set aside in the circuit court, but the motion was denied by the circuit judge on May 27, 1884.

On June 23, 1884, Mr. Stockman filed his petition in this Court, and obtained a writ of *habeas corpus* to obtain his daughter. The application was substantially upon the same grounds as had been urged in the circuit court, and was heard upon the same testimony, with some unimportant additions, in this Court on. October 18, 1884. The

Court, being equally divided in opinion as to what should be done in the premises, caused to be entered the following order on January 30, 1885:

"In this case, the Court being equally divided in opinion as to the judgment that should be entered, the clerk is directed to make an entry to that effect, and the writ is dismissed for that cause, and without any decision upon the rights of the parties, and without prejudice either to any existing right or adjudication, or to any future remedy."

Here the matter was allowed to rest until Mr. Stockman died, in August, 1885. Previous to his death, which occurred at his father's, in the city of Washington, and on February 20, 1885, he made a last will, in which he appointed his father and mother guardians of Lucile. They qualified, and letters of testamentary guardianship were duly issued to them in the orphans' court of the District of Columbia on September 4, 1885. In and by the will the testator directs his guardians to obtain the legal control of Lucile, and, if necessary to that end, they are directed to use all his property; and if they do not succeed, then he gives his property to his father and mother, if living, and, if not, he gives it in equal shares to his brother and sisters, and recites in his will that Mr. and Mrs. Shaw had committed perjury in their endeavors to retain the child.

In pursuance of and in accordance with the requirements of this will, Mr. Andrew H. Stockman and Anna B. Stockman, his wife, the father and mother of the testator, applied for and obtained a writ of *habeas corpus* from this Court to obtain the custody of their testamentary ward, Lucile, on February 8, 1887.

The petition for the writ does not vary materially in its statement of the facts from those contained in the other application, except, in addition thereto, it states that Mr. and Mrs. Shaw refused to deliver up Lucile to the testa-

mentary guardians when requested; and that at the time the testator died a large sum of money was due him for military service, and which now belongs to Lucile; and that he had some personal property besides, all of which the testamentary guardians had secured and then had; and that, under the decision of the pension office, all of the pension moneys to which Lucile is entitled on account of the service of her father are now being paid to the testamentary guardians; that such pension money and personal estate are sufficient to support the ward; and, further, that they are able, and have property enough, to support her, if necessary, aside from the pension money; and that the respondents, Mr. and Mrs. Shaw, have changed the name of Lucile from Stockman to Shaw, for the purpose of preventing identification, and have had her christened by that name.

The respondents file their answer to the petition, which is in substance the same as that made to the other writs issued, with the further statements that the said Anna B. Stockman allowed the deceased in his life-time to live and cohabit at her house with a harlot. They deny that they have changed, or attempted to change, the name of the child, and aver that they are Lucile's duly-appointed guardians in this State. The answer then proceeds as follows:

"These respondents further state, the said Francis H. Shaw upon information and belief, and the said Marietta H. Shaw from her knowledge acquired as aforesaid, that the petitioners are unfit persons to have the care and custody of the little girl Lucile Stockman, and that by reason of the great change that would take place in her mode of living, and by reason of the great cruelty which would be practiced towards the said infant by the said Anna B. Stockman, they fear that her life would be in danger, and that she would live but a short time; and upon information and belief they state that the said petitioners are persons without any moral restraint whatever; and that in matters of religion they are without any attachment to any Christian or moral community whatever; and that their

surroundings and education would taint and destroy the good moral character of said infant Lucile; and they ask the protection of this Court for such child; and that the facts and circumstances of the petition, and this answer, may be inquired into; and that by the judgment of this Court the prayer of the petitioners may be denied.

"These respondents further state, upon information and belief, that the only object and purpose which the petitioners have in obtaining the custody of said child is to enable them to have some pretext for expending whatever money the said infant may be entitled to under the provisions of the act of Congress of the United States and under the provisions of the will, as set forth in said petition; and they state, upon information and belief, that there is no adequate security filed in any court in Washington to protect the estate of said infant from loss or speculation in case her custody and control should be transferred to the petitioners; and they refer to the affidavit hereto attached as a part of this answer."

The respondents also submit all the testimony upon the former trial, when the matter was before the jury. Such is substantially the issue as made up before us now for consideration.

The superior rights of a father to his child to those of the grandparents, all things else being equal, are no longer before us. It has now come to the single question and consideration whether the paternal or maternal grandparents shall have the care and custody. So far as the desires of the parents are concerned, the father's last wish was that his parents might have such care, and, so far as the mother's feeling in the matter is concerned, it was her dying request that her parents might have the care and training of her infant daughter, and at that time such were his wishes in the matter. I have reviewed all the evidence in this case, and, after applying to it all the knowledge and experience I possess, I must say that at this time, when he was stirred up by all the feelings of his better nature, and they had so far got control of his passions and prejudices as to allow his reason, his judgment,

and affections to dictate what, under all the circumstances, would be best for the future welfare of his little child, in his wishes then expressed and the promise he gave to his dying wife, and the request he made of her mother that she would—

"Take the child and bring her up pure and virtuous, like her mother," saying, "That is all I ask,"—

He gave expression to the true sentiments of his heart, approved by his reason and his judgment; and it was the wisest and best conclusion he could have possibly reached, and in my opinion it ought not now to be disturbed.

The child is a girl. That mother knew better than any one else of its care and many wants and requirements through the period of its infancy and childhood, during a motherless future, and she knew that no one else could have the patience and affection for the little one, and minister to those wants, to the extent of her own mother. Others might be found to take the charge, but none could do it so well. There is no question but that Mrs. Shaw and her husband are competent, able, and well qualified for the duties the guardianship of this granddaughter imposes upon them, and it is a pleasure to them to discharge that duty. The child likes them, and is contented and happy with them. Why should this Court send her to a home where she does not wish to go, to friends she does not know, who have never expressed a desire for her, save to gratify the spleen and prejudice of a father, who by his will left to his daughter as her principal legacy the hatred he bore towards her mother's parents, to a climate not congenial to her health, and which brought her mother to a premature grave?

It is claimed by counsel for the Stockmans that the law is inexorable, and requires this to be done. I cannot agree with counsel upon this subject. Courts have a gen-

eral superintending power over all infants, and the primary guardianship of the parent over his child lasts no longer than he is found to be competent, and discharges his duty, which nature has laid upon him, properly; and when he fails to do this, the proper court may interfere, and charge another with the discharge of this duty. The good of society and the welfare of the State require this, and can never require less. Primarily, the court is the guardian of all orphan children, and will give the proper directions as to their care and support until such time as a guardian shall be appointed; and it is then its duty to see to it that the duties of the trust are properly discharged.

Guardians for infants may be appointed by the last will of the parent instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward. The powers of a testamentary guardian are just the same precisely as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons. Who shall or may be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the question to be determined in making the selection is, and always should be, what will be for the best interest of the ward under all the circumstances? It should control everything else.

In looking into the circumstances in this case it seems to me but one conclusion can be reached, and that is that this child should be permitted to remain where she now is, with her maternal grandparents. The testimony shows they are doing all that is necessary for her enjoyment, her education, her health, her comfort, and welfare, and without expense to the ward or her estate. Her acquaintances, her associates, her friends, are all

there, and she has all the advantages for moral and intellectual culture, with the accomplishments to be acquired in the best society; and were the change made as desired by petitioners, we are not sure she could have the benefit of all these. And I feel quite certain she would not. She is just at this time of an age when she needs the guardianship of the most exemplary and circumspect. She has now arrived at an age when impressions will become most lasting, and it is of the greatest importance to her future welfare that they should be correct. I do not think this Court would be justified in trying the experiment of transferring her custody to the grandparents at Washington, even though they were equally competent with those at Port Huron; a fact, however, I regret to say, I have been unable to find from the testimony. I am not prepared to give my assent to an experiment fraught with the danger of destroying the happiness of this innocent young girl's future life. There is no law which requires this Court to make such a decision, and justice to the dead as well as to the living protests against it.

Mr. and Mrs. Shaw have been duly appointed guardians of the child in this State. Under the agreement which was made by the father, on request of the mother, with Mrs. Shaw when she brought the child to Port Huron, that place became the child's residence, and it was not changed by the agreement which Mrs. Shaw subsequently signed under duress in Washington. By virtue of the letters of guardianship the respondents have also the lawful custody of their ward, and the testamentary guardians never had any right to such custody, except that which comity gave them, and which can never be properly enforced in this State, under the circumstances appearing in this case. Laws of 1883, p. 3; Laws of 1887, p. 147; How. Stat. § 6312; *In re Rice*, 42 Mich. 528 (4 N. W.

Rep. 284); *Johnstone v. Beattie,* 10 Clark & F. 42; *Morrell v. Dickey,* 1 Johns. Ch. 153; *Kraft v. Wickey,* 4 Gill & J. 332; Story, Confl. Law, §§ 494–504; *Overseers v. Overseers,* 5 Cow. 527; *Riley v. Riley,* 3 Day, 74; *Fenwick v. Sear's Adm'rs,* 1 Cranch, 259; Whart. Confl. Laws, §§ 261–264; Reeve, Dom. Rel. 454; *Creuze v. Hunter,* 2 Cox, Ch. 242; *De Manneville v. De Manneville,* 10 Ves. 52; *Wood v. Wood,* 5 Paige, 596, 605; *Leonard v. Putnam,* 51 N. H. 247; *Hubbard's Case,* 22 Alb. Law J. 315; *Ex parte Watkins,* 2 Ves. Sr. 470; *Woodworth v. Spring,* 4 Allen, 321; *Townsend v. Kendall,* 4 Minn. 412; *Boyd v. Glass,* 34 Ga. 253; *In re Turner,* 41 Law J. (Q. B.) 142; *Rowe v. Rowe,* 28 Mich. 353; *Corrie v. Corrie,* 42 Id. 509 (4 N. W. Rep. 213); *People v. Brown,* 35 Hun, 324; 2 Lead. Cas. Eq. (White & T. Notes), 1528; Hoch. Inf. § 56; *Gishwiler v. Dodez,* 4 Ohio St. 615; *McLoskey v. Reid,* 4 Bradf. Surr. 334; *Ex parte Dawson,* 3 Id. 130; *Bennet v. Bennet,* 13 N. J. Eq. 114; Tyler, Inf. 283, 285–292; *Dumain v. Gwynne,* 10 Allen, 270; *In re Spence,* 2 Phil. Ch. 247.

Comity cannot be considered in a case like this, when the future welfare of the child is the vital question in the case. The good of the child is superior to all other considerations. It is the polar star to guide to the conclusion in all cases of infants, whether the question is raised upon a writ of *habeas corpus* or in a court of chancery. The infant's desire in determining where she shall reside, if of sufficient age and uninfluenced, is always listened to with interest, and in this case we have it marked and most emphatic. She wants to remain where she is.

I think the duty of the Court in this case is plain and clear. I have no doubt of Mrs. Shaw's right to the custody of this child under the contract she made with her father at the death-bed of her mother, and I am entirely satisfied that she is now receiving the care she needs, and

that her education is properly attended to, and that she is happy in her home and surroundings, and that she never could be at Washington, under the guardianship of her paternal grandparents.

In my judgment the writ should be denied, with costs, and the child should be allowed to remain where she now is, with Mr. and Mrs. Shaw, in Port Huron.

MORSE and LONG, JJ., concurred with SHERWOOD, C. J.

CAMPBELL, J., (*dissenting*). If this were a mere difference of opinion on questions of fact legitimately in issue before us, I should probably not care to do more than indicate that I did not agree with the majority of the Court. But the case is one where the doctrine on which the majority opinion rests is, in my opinion, not in conformity with the fundamental principle that personal rights and liberties cannot rest on the uncontrolled discretion of courts or magistrates, and that legal rights cannot be lawfully disregarded. The only facts legitimately in issue are not, I think, open to any very serious difference of opinion. Laying aside irrelevant matters, upon which, however, I do not think respondents stand in any superior position upon the burden or results of the testimony, I cannot think there should be any doubt on relators' rights before us. And to reach any result favorable to the defense, we must disregard our own previous action, which I will briefly refer to.

The father of this child, who is still of tender years, and legally incapable of being entitled to choose her own guardians or custodians, applied to the circuit court for the county of St. Clair, and was granted a *habeas corpus*. That court allowed respondents to introduce whatever testimony they chose, and they got in a large mass of what was treated as testimony, and the court, instead of

exercising its own duty in deciding upon the question of custody, left the whole to be dealt with by a jury, and the jury finally decided in favor of respondents. This Court issued a *habeas corpus* as an act of original jurisdiction, and, holding the circuit proceedings as having no effect here on the inquiry, directed the parties to take testimony, and confined the issues within certain limits. These were not allowed to include the scandalous aspersions on the husband and his dead wife concerning their marriage. The record shows just how far the issues were allowed to be made up, and they did not include a very large share of the matters included in the circuit stenographer's minutes, which are not evidence here, and could only be made so to the extent agreed on by the parties. Much of it is irrelevant, and all of it is inadmissible, except as made so in this Court.

Some testimony was taken, and on the final hearing the then Judges of this Court divided in opinion, but in so doing ordered that nothing in the record should prejudice any future application in any way whatever. It is unfortunate that, as was then usual, nothing was filed to indicate on what we differed. But there could not at any rate properly be differences on issues not before us.

The father died, and in his will appointed his father and mother testamentary guardians. The will was proved in the District of Columbia, where both parents had resided, and which was in law the infant's domicile. Those guardians now seek to recover the child, and are opposed by the maternal grandfather and grandmother, who have got out letters from the probate court of St. Clair county, which is the county in which they detained the child against the will of the father, and in fraud of the agreement by which they got possession of her.

When this Court issued the present writ of *habeas corpus*, the only issue which we ordered to be passed upon was

the fitness of the testamentary guardians to have custody of the infant. I do not understand on what principle any other issue is before us. Neither do I see that any other inquiry was legitimate in any legal point of view.

I do not propose to consider the wishes of this child in the matter. She is too young to have any intelligent judgment, and is not entitled in law or in common sense to select her custodians. That she is prejudiced as far as so young a child can be against her father and his parents, is the necessary result of the sedulous efforts of her present keepers; and it could not be otherwise. To allow feelings thus cultivated any respect in such a controversy is to encourage what ought to be reprobated.

If we had any right to appoint guardians for this child, which is not a power the law has given us, and if the two sets of grandparents were candidates for that position, I am not prepared to say that, so far as social and personal respectability is concerned, the Michigan grandparents are not in perfectly good standing, and able to bring up the child, and kindly disposed to do so. There is nothing against their personal character.

On the other hand, the testimony is equally clear from witnesses of as high a character as anybody in Washington, where they have lived and been known a great many years, that the grandparents there stand just as well as respondents, are socially thoroughly reputable, and identified with religious associations of the best kind, and are in all respects worthy and esteemed members of society. The witnesses who know them are themselves well known, and beyond reproach. The place where they live is not a new domicile. The idea that their witnesses cannot be supposed to know what they swear to is not one which we have any reason or right to assume. Unless these persons are affirmatively shown to be unfit to have charge of such a child, they have prevailed on the only issue which we

ordered to be tried, and should recover possession of her. That they are fit is clearly established, unless we disregard unimpeached testimony, which stands unshaken. Respondents, in their answer, have set up calumnious charges, which they have neither proved nor attempted to prove. We have no right to let the fair fame of any one be impeached by our decision without satisfactory proof. The proof is the other way.

I cannot conceive any legal justification, under such circumstances, for refusing to put this child's custody where it belongs, both by the laws of Michigan, if they apply, and by the laws of the United States, which are to the same purport, namely, that the surviving father may appoint testamentary guardians for his children.

There is and there can be no rule which leaves any court unqualified power, at its own will, to abolish the rights and incidents legally springing out of the family relation, and to disregard the positive rules of the statutes. No rule is better settled than that the domicile of a child must always be where the father's domicile is; and our laws recognize the father's absolute right to appoint a guardian.

When such a power has been exercised, those courts which have gone furthest in assuming a very doubtful discretionary power in violation of the rights at law have limited interferences with legal guardians to cases where they cannot safely be trusted. The courts thus far have not ventured to hold that their rights can be held subject to the unlimited discretion of judges, or interfered with unless their own conduct has forfeited them. And Lord Eldon, who is notorious for having stretched this power to extreme limits, and acted on very peculiar notions of what were proper conduct and opinions, himself declared it was no part of the function of courts as such to use it. In *De Manneville v. De Manneville,* 10

Ves. 52, a case which has not met with much respect for its stretch of power, he expressly decided that the court of king's bench, which is the highest of the ordinary common-law courts, could not interfere to deprive a father of his child's custody by the exercise of—

"Any of that species of delegated authority that exists in the king, as *parens patriæ*, and resides in this court as representing his majesty." Page 59.

He himself did not treat this power as one which could be exercised except on an original chancery proceeding, and such is the view of the best writers on the subject. 2 Story, Eq. Jur. § 1351; 3 Pom. Eq. Jur. § 1304. But that peculiar discretionary power, whatever it may have been, that belonged to the king, and was exercised by an implied legal deputation, as in the case of charities, has never been regarded in America as a part of the judicial power properly so called or vested in any court, except where it has been done directly by the action of the legislature. It is very certain that we have no original chancery jurisdiction. We have only such powers as the Constitution gives us. Neither Constitution nor statute has given us this: Neither have we any power to determine by our discretion that the custody of a child may be placed where we see fit to place it. Any such power, as pointed out by Judge Bronson, in *Mercein's Case*, 3 Hill, 399, would destroy the family relations entirely. There are many childless people who might very possibly be better parents than those who have children, and any doctrine which would sustain the views of my brethren in this case would authorize us to make a new distribution of children, and deprive them of their homes. The children of our State are not in the position of children of the people, and this Court is not the arbiter of their destines as such, and it will be a sad day for our civilization

when they are so treated. If the family is not respected, there will be no hope for the State.

Respondents, among other things, set up that just after the child's mother died the father turned over the infant to the maternal grandmother, and relinquished his own rights. I do not think there is any foundation for this claim. That he allowed her temporary charge is not disputed. But he always insisted on keeping her, and Mrs. Shaw gave him a positive agreement to return her before he would let her take the child back. This she now claims she resorted to as a subterfuge to get possession. There could have been no need of deceit if there was any valid agreement. Courts in Washington have full power over all matters arising there, and if such an agreement was made, and was valid, it is not presumable they would not do justice. But I think that if the agreement was made, which I do not believe, it was utterly void. Mrs. Shaw, as a married woman, had no power to make such a bargain, and it could not be enforced against her. But, further than this, the relations between parents and children cannot be changed without legal authority. The father's duty to his child and to the public is fixed by public policy as indissoluble, except in the few cases provided by statute. An agreement, with or without consideration, to give up a child to any third person, even a near relation, cannot bind any one. The child cannot consent to it. The parents' duty cannot be shaken off. It has been recognized as void on plain grounds of public policy. See *Reg. v. Smith*, 16 Eng. Law & Eq. 221. Also *Kennedy v. May*, 7 Law T. (N. S.) 819, cited 2 Story, Eq. Jur. § 1347 (*c*). In this latter case there was a written agreement between competent parties, a father and a widowed grandmother, but it was held void and illegal.

In cases of adoption, when allowed by law, the infant's rights are carefully protected, and so in apprenticeship.

But in such a case as the present, had the father lived, and Mrs. Shaw died, it is manifest that the infant must either go back to a father whom she has been taught to hate, or be without any responsible protection. The relation would be as effectually broken up for all the usual family ties as if it had never existed.

There is one feature of the controversy which cannot be ignored. From the beginning of this dispute until now respondents have done all that was in their power, not only to keep the child, but to blacken the character of its father and his parents, and in doing so have made atrocious charges, affecting to some extent the mother also. I think the testimony of this man's character where he was best known, and the proof of his official as well as personal standing, indicate that the whole charge against his life in Washington is unfounded, and a cruel slander. But whatever may have been the imagined policy of it when he was living, it ceased when he died, and left representatives who are certainly good people. If this infant remains where she is, the result of this proceeding and the broadcast and unproved imputations set out in the record cannot fail hereafter to fix a stain on the child herself, and make her ashamed of her parentage. I do not think such conduct is excusable, even in the desire of these persons to retain a child whom they love, and no doubt wish to befriend. The consequences are cruel, and, if the child grows up with the natural feelings of humanity, will give her very bitter memories.

In the present case the guardians appointed by the District of Columbia court applied to the proper department for the money due the estate from the government, and after a careful investigation the Interior Department sustained their claim as against respondents. I do not regard the property question as one of primary importance, but it is after all the only estate which this child is at all

sure of having. But when we attempt to practically annul an appointment depending on the laws made by Congress to govern the District, not because it is illegal, but because we think we can make a wiser arrangement than that which the will and the law made, we, in my opinion, are usurping authority, and doing injustice.

DANIEL STEWART AND ANDREW T. STEWART v. GEORGE JEROME.

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Statute of frauds—Verbal promise to pay the debt of another.

A *verbal* promise by a mortgagee to pay a debt due a creditor of a mortgagor, in consideration of which the creditor agreed to and did refrain from attaching property belonging to the mortgagor *not* covered by the mortgage, and which property was afterwards converted to his own use by the mortgagee, is void under the statute of frauds.

Error to Wayne. (Brevoort, J.) Argued June 5, 1888. Decided July 11, 1888.

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

H. C. Wisner, for appellant.

Larned & Larned (*D. Augustus Straker,* of counsel), for plaintiffs.

[The points of counsel, and the authorities relied upon, are so fully discussed in the opinion, that their restatement is omitted.—REPORTER.]

CHAMPLIN, J. This suit was commenced by declaration which consisted of the common counts in *assumpsit.*

The defendant demanded a bill of particulars, and one was served, which consisted of several items from May 2 to June 5, 1884, of oats, amounting to $395.66, and a statement that the goods were sold and delivered to Joseph H. Morris for feed for his livery horses at his stables on Michigan Grand avenue at Detroit.

That said Morris owed defendant $10,000, and to secure the same defendant held a chattel mortgage on Morris' horses, harnesses, and other property in said stables, dated June 4, 1884; that said mortgage included no goods or stock of Morris acquired by him after the date thereof, and that Morris purchased and had in his stables stock, goods, and property not covered by said mortgage to the amount of $4,000, and on or about June 20, 1884, said Morris absconded with intent to defraud his creditors; that said Jerome took possession of all of said horses, coupés, carriages, harnesses, and other property, including stock and property not included in his mortgage, and more than sufficient to satisfy plaintiffs' said demand, which with the mortgaged property, was liable to attachment; that of the above written account, all being past due and unpaid, $200 worth of the oats were at the time Morris absconded then in the stables, and not fed out, and were purchased fraudulently, and were repleviable by plaintiffs, on the ground that they were obtained by fraud by said Morris, and said plaintiffs intended to proceed to replevin said $200 worth of oats, and intended to proceed by attachment against the residue of the property taken by defendant to satisfy his mortgage, and not covered by it; and the defendant, well knowing all the above premises, and in order to prevent said plaintiffs from enforcing payment of their just debt and lien by attachment and replevin, did promise and agree with said

plaintiffs that if they would forbear to enforce their said claims he, said defendant, would assume and pay said debt of said plaintiffs, and relying on said promise, plaintiffs did so forbear, and took no steps to replevin or attach or attempt collection of their debt, and have hitherto forborne until the commencement of this suit, relying on his, defendant's, promise to pay said debt. The defendant pleaded the general issue.

Upon the trial of the cause the plaintiffs, against objections made by counsel for defendant that the proof offered was inadmissible under the pleadings, introduced evidence tending to prove the indebtedness of Morris to plaintiffs, the execution of the chattel mortgage by Morris to defendant, the departure of Morris, and the possession taken by defendant of the whole stock and property in the stable, and the promise of the defendant. The plaintiffs are copartners, composed of Daniel Stewart, the father, and his son, Andrew T.

As soon as Daniel Stewart had learned that Morris had left the city, he went to the stables on Michigan Grand avenue, and found defendant's servants in possession, and one of them informed him that defendant wished to see him immediately, and took him in a buggy to the office of defendant, where he had a conversation with defendant as follows:

"State what that conversation was fully.

"*A.* He asked me how much Mr. Morris owed me, and I told him he owed me $395.66, at the same time handing him the bill. He looked at it a moment, and turned around to me and asked me what I was going to do, and I told him I was going to replevin my oats and attach other property to get my money; that I could not afford to lose it.

"*Q.* Now, at that time, what was the fact of your intending to attach any particular property in the stable that he had recently been purchasing?

"*A.* Mr. Morris offered me, a few days before he left,

a span of large bay mares, and offered me them cheap, tried to persuade me very much to buy them, and also a two-seated wagon that Morris told me was not included and Jerome had no business with.

"*Q.* Then you intended to attach what,—these horses and the wagon, you say, and the open account?

"*A.* Yes, sir.

"*Q.* Now, Mr. Jerome asked you what you were going to do, and you told him you were going to replevin your oats, and attach some other property, and get your debt. What did he say to you?

"*A.* Be quiet, do nothing, and I will pay you; that is it exactly.

"*Q.* What else did he say?

"*A.* That my bill was similar to a supply man on a railroad,—when the railroad broke down the supply man had to be paid whoever was paid, and he would pay me.

"*Q.* What did you say to that?

"*A.* Well, I agreed to it."

He further testified that he did not replevin or attach because he relied upon Mr. Jerome paying him, and was satisfied he would; that he reported to his son the interview with Mr. Jerome, and he was not satisfied with it; and they both went the second day after to see Mr. Jerome, when nearly the same conversation was had as before, Mr. Jerome agreeing to pay them if they "stood quiet," and would wait six months, to which plaintiffs agreed; at the end of which time they called upon him, when he offered $200 in cash to settle the bill, or, if they would wait 10 months, he would pay the whole face of it. The plaintiffs then agreed to wait 10 months, and directed an entry to be made on their books so they would know when the 10 months was up. At the end of this time plaintiffs again called upon defendant for payment, and he was not yet ready;—

"Complained that he had sold his business to Edmunds, but got very little or no money, and he was scarce of money."

Later they called again, and the plaintiff Daniel Stew-

art testified to the conversation that then occurred as follows:

"My son went to him and asked him what was the reason he would not pay us: Why didn't you let us replevin, and attach at once, and get our money? Jerome got a little wrathy, and he said that unless he was willing to pay the bill we could not get it any more than we could get the paint off the wall."

The defendant introduced no testimony, and the plaintiffs recovered.

The defense to the action is placed upon two grounds:

1. That the promise of defendant is void under the statute which enacts that every special promise to answer for the debt, default, or misdoings of another person shall be void unless some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized.

2. If not void, no recovery can be had upon such promise under the common counts in *assumpsit.*

This clause of the statute of frauds has often come before this Court for consideration. In *Corkins v. Collins,* 16 Mich. 478, the plaintiff sued Collins on a verbal promise to pay a board bill and money lent, due from one James Sykes. The consideration was the release of certain trunks supposed to be held for the debt. The defense was the statute of frauds. Mr. Justice CAMPBELL said:

"Such a release of a valid lien or claim would be a sufficient consideration for a written promise, for, if a consideration passes from the promisee, it usually makes no difference to whom it passes. * * * It is not pretended that an extension of time, or any other agreement involving no release of property or extinguishment of liability, if made in favor of the principal debtor, would authorize the verbal promise of a third person to pay the debt to be enforced. But a distinction is sought to be drawn where property is released or given up to the debtor. There is no obvious reason for any such distinction. The law puts all valuable considerations on the same footing. * * * When by the release of property from a lien

the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor; and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing."

In *Calkins v. Chandler*, 36 Mich. 320, it was held that an agreement to extend the time of payment and forbear to sue a third person, who was plaintiff's debtor, was a sufficient consideration for defendants' promise to pay. And this was because the promise of defendants to pay the debt of such third person was at the same time, when paid, to apply on an indebtedness that was to accrue against themselves, and was consequently a promise to answer for their own debt. And Chief Justice COOLEY in that case quotes with approval from the opinion of Chief Justice Shaw, in *Nelson v. Boynton*, 3 Metc. 396, as follows:

"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 the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

In *Curtis v. Brown*, 5 Cush. 488, Shaw, C. J., said:

"It is no sufficient ground to prevent the operation of the statute of frauds that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage had not also directly inured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has

relinquished some lien, benefit, or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question."

The doctrine was declared and acted upon in several other cases in that state. *Fish v. Thomas,* 5 Gray, 45; *Jepherson v. Hunt,* 2 Allen, 417; *Furbish v. Goodnow,* 98 Mass. 296; *Ames v. Foster,* 106 Id. 400; *Wills v. Brown,* 118 Id. 137; *Fears v. Story,* 131 Id. 47.

The same doctrine is recognized in Wisconsin (*Clapp v. Webb,* 52 Wis. 638, 9 N. W. Rep. 796); and in Indiana (*Crawford v. King,* 54 Ind. 10; *Palmer v. Blain,* 55 Id. 11); and in Vermont (*Whitman v. Bryant,* 49 Vt. 512).

In New York the exposition of this section has been somewhat variant, as will be seen by reference to *Leonard v. Vredenburgh,* 8 Johns. 29; *Mallory v. Gillett,* 21 N. Y. 412; *Brown v. Weber,* 38 Id. 187; *Ackley v. Parmenter,* 98 Id. 425. The latest enunciation of the principles which should be applied in cases coming under this provision of the statute in that state is by Mr. Justice Finch, in *Rintoul v. White,* 108 N. Y. 222 (15 N. E. Rep. 318). He reviews the leading decisions in New York above cited, and says they—

"Have ended in establishing the doctrine in the courts of this state, which may be stated with approximate accuracy thus: That where the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor."

The difficulty in applying the doctrine, and one which

has given rise to much seeming conflict in the authorities, lies in the failure to distinguish between the consideration for the promise of a third person to pay the debt of another, and the promise itself, whether it be to answer for the debt of another, or to pay or perform his own obligation. There must be a consideration to support every promise, whether it be evidenced by writing or not; and where the promise is to answer for the debt, default, or misdoing of another, the statute requires that such promise must be evidenced by writing.

Under the undisputed testimony there can be no doubt but that in consideration of Mr. Jerome's promise the plaintiffs relinquished an advantage which they had for securing their own debt. The oats and the horses and buggy not covered by Jerome's chattel mortgage were liable to be attached at the suit of the plaintiffs. This is a sufficient consideration for the promise; but the difficulty is that this advantage which the plaintiffs forebore to exercise or appropriate did not inure to the benefit of the defendant. The plaintiffs had no lien which they released. They had no title to any of the property which they transferred to defendant. It was alleged in the notice attached to the bill of particulars that the plaintiffs owned the oats which they had delivered to defendant because they were obtained by fraud, but there is no evidence which supports such claim.

It is true that, by forbearing to attach such oats and other property, it was left in the hands of Jerome, and it may be inferred that he converted such property to his own use; but he derived no right or title thereto from plaintiffs, and is still liable to account to or pay for such property to Mr. Morris, or the true owner, whoever he may be. There was nothing, therefore, which inured to the benefit of defendant, received from plaintiffs, which supports a new promise or agreement to assume and pay

the amount as an original debt from defendant to plaintiffs.

There is nothing in the facts or circumstances of this case to distinguish it from that of *Waldo v. Simonson,* 18 Mich. 345, and we think this case is ruled by that. Had the title to the oats in the bin remained in the plaintiffs, and the defendant under his promise had appropriated and fed the oats to his animals, the case would have been different; or had the plaintiffs attached first, and then, in consideration of the promise, released, so that the rights of possession acquired by the attachment passed to defendant, it would have afforded a consideration for the promise to pay the debt as his own within the authorities.

The objection to the pleadings stands or falls with the ruling upon the question as to the promise being void under the statute of frauds. If the promise had been held good as an original promise to pay defendant's own debt, the common counts would have been sufficient, and a recovery could have been maintained under the count stated.

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

The other Justices concurred.

DANIEL L. DAVIS v. CLARENCE V. SEELEY.

[See 68 Mich. 303, 389, 454.]

Bills and notes — Void consideration — Good-faith holder — Notice.

1. Negotiable instruments, fair on their face, which have, before maturity, passed into the hands of *bona fide* holders for value, will be enforced in their hands, although non-enforcible as

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80 319
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132 s643
133 s327
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134 s621
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137 s178

between the original parties on grounds of public policy; but if declared void by statute they are void as against the party who gave them, and in the hands of all other parties.

2. To defeat a recovery by the holder of commercial paper purchased for value and before maturity, he must be shown to have had knowledge of such facts and circumstances as would make his purchase of the paper with the intention of enforcing it an act of bad faith. *Miller v. Finley*, 26 Mich. 254; *Howry v. Eppinger*, 34 Id. 29; *N. Y. Iron Mine v. Citizens' Bank*, 44 Id. 352; *Mace v. Kennedy*, 68 Id. 389.[1]

Error to Oakland. (Moore, J.) Argued June 14, 1888. Decided July 11, 1888.

Assumpsit on "Red Lyon Wheat Note." Defendant brings error. Affirmed. The facts are stated in the opinion.

Cass E. Herrington and *Theo. Hollister*, for appellant.

Peter B. Bromley, for plaintiff.

[The points of counsel, and authorities cited, are stated in the opinion.—REPORTER.]

CHAMPLIN, J. Plaintiff recovered judgment before a justice of the peace against defendant upon a promissory note dated August 18, 1886, for $75, payable to C. H. Williams, or bearer, due on or before one year from date, and signed by defendant. Defendant appealed to the circuit court for Oakland county, where a trial was had, and resulted in a verdict for plaintiff.

The suit was defended on the ground that the note was given as part of a scheme to defraud the public, and was illegal and void as against public policy, and that such facts were well known to plaintiff at the time he purchased the same.

[1] See *Sutton v. Beckwith*, 68 Mich. 303; *Mace v. Kennedy*, Id. 389; and *McNamara v. Gargett*, Id. 454,—for Bohemian note cases.

The defendant is a farmer residing in Oakland county. The plaintiff is an attorney at law, and is also engaged in buying and selling notes, loaning money, dealing in tax titles, trading farms, and other speculations.

On August 18, 1886, one Sherwood and another person, representing themselves as agents of the Ohio & Great Western Seed Company, went to defendant's farm, where he was in the field plowing, and told him they would like to sell him some "Red Lyon wheat;" told him where they had sold wheat the previous year, and that they had always sold for parties as they agreed; and they unfolded to him the scheme for cheating the gullible portion of the agricultural community by selling wheat to them at speculative prices. They exhibited to him the bond, which he read and perfectly understood, which they proposed to give him if he would give them his notes for 15 bushels of wheat. The bond, with the indorsements thereon, discloses the whole scheme, and we therefore give the contents entire, to wit:

"No. 595. Capital Stock, $50,000.00.

"This Bond is Used for Wheat Only.

"Incorporated July 21, 1885, under the state laws of Ohio, for the production and sale of grain.

"HOME OFFICE, NAPOLEON, O., U. S. A.

"Bond of the Ohio & Great Western Seed Company.

"It is agreed and understood by and between the party named in this bond and said company that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain.

"Mr. C. V. Seeley, of Oakland county, Southfield township, witnesseth, that on or before the 18th day of July, A. D. 1887, we hereby agree to sell thirty (30) bushels of Mr. C. V. Seeley wheat, at $15 per bushel, and for which he agrees to take his pay in notes. And the said Mr. C. V. Seeley hereby acknowledges that he has bought of the said company fifteen bushels of the Red Lyon wheat, at $15 per bushel, as a speculation, and for which he has given his note for the same, and that said price is not based upon its real value. And the said Mr. C. V. Seeley hereby agrees to allow the

said company 33⅓ per cent. of all notes taken for all of his wheat sold at $15 per bushel, as their commission.

"Signed and sealed this 18th day of August, 1886.

"THE OHIO & GREAT WESTERN SEED COMPANY,
"Per C. H. Williams, Secretary.

"The Ohio & Great
[Seal] Attest: J. B. AUGENSTEIN, President.
"Western Seed Company. C. V. SEELEY, Purchaser."

On the back of said bond is the following:

"Capital Stock, $50,000.00. Constitution and By-Laws. The Ohio & Great Western Seed Co.

"This company was incorporated under the laws of the state of Ohio governing stock companies, July 31, 1885, recorded in volume 33, page 60, of the Records of Incorporation. The following rules were adopted by the company for the sale of wheat:

"SECTION 1. All bonds shall be signed and sealed by the secretary of the company, and attested by the president, and this company will be responsible for their business transactions according to the laws made and provided for governing stock companies in the state of Ohio, and under which this company was incorporated.

"SEC. 2. All purchasers of wheat shall receive a bond agreeing to sell double the amount of wheat purchased, at $15 per bushel, a speculative value. Each purchaser hereby agrees to allow the said company one-third of all notes taken for all his wheat sold at $15 per bushel, as their commission.

"SEC. 3. If any purchaser of wheat from this company fails to raise the amount specified in his bond, the said amount shall be furnished him free of charge, and sold the same as specified in the bond.

"SEC. 4. There shall be no less than 10 nor more that 30 bushels of wheat sold to any one purchaser, or to more than five in any one township in one year.

"SEC. 5. All wheat shall be sold by the company at $15 per bushel to good and responsible parties, and the said company shall receive a commission of 33⅓ per cent., payable in notes.

"SEC. 6. It must be further agreed by said purchaser that he will do all he can to promote the interest and assist in the sale of grain in this company, and that he will report to the office of the company any bad conduct

or misdemeanor on the part of any agent representing said company.

"SEC. 7. All communications concerning the business of this company shall be addressed to The Ohio & Great Western Seed Co., Napoleon, Ohio."

The wheat was furnished defendant as agreed, which he sowed, and harvested about 12 bushels to the acre, but the Ohio & Great Western Seed Company has never appeared to Mr. Seeley since. The man who signed his name as "C. H. Williams, Secretary," sold the notes given by defendant, soon after the date thereof, to the plaintiff in this suit, together with several others made by farmers in the vicinity.

Several exceptions were taken to the rulings of the court upon the admission and rejection of testimony. We find no error in such rulings, and they were not of sufficient importance as to require discussion here. Aside from the refusal to give certain instructions requested by counsel for defendant, the important question upon this record is whether the note sued upon is void, in the hands of an innocent holder for value, as being against public policy; and whether, upon this issue, the refusal of the court to charge as requested by counsel for defendant, and the charge as given, were proper.

The scheme, upon its face, was a transparent fraud. The design to defraud third parties was mutual, and entered into with a common understanding between the parties. The gains to be derived by the defendant were dependent upon duping others into purchasing on a speculation in the same manner that defendant was duped, and he agreed and entered into a scheme by which two or more persons were to be defrauded, and the plunder divided, two-thirds to him, and one-third to his confederates.

A similar scheme was declared by this Court in *McNamara v. Gargett*, 68 Mich. 454 (36 N. W. Rep. 218), to be against public policy, and void as between the par-

ties, and as to purchasers of notes with notice of the consideration.

There is a distinction between contracts which are void between the immediate parties because they will not be enforced on grounds of public policy, and contracts where the statute declares them void. In the first class, negotiable instruments, fair on their face, which have, before maturity, passed into the hands of *bona fide* holders for value, will be enforced in the hands of such holders; but in the other class they are void as against the party who gave them, and in the hands of all other parties. *Edwards v. Dick,* 4 Barn. & Ald. 212; *Towne v. Rice,* 122 Mass. 71; *Aurora v. West,* 22 Ind. 88; *Eagle v. Kohn,* 84 Ill. 292; *Cowing v. Altman,* 71 N. Y. 435.

At the time the note in question was given and transferred to the plaintiff, there was no statute of this State declaring such notes void. It is therefore good in the hands of an innocent holder for value before maturity, and without notice or knowledge of the transaction in which it originated.

The following requests were presented to the court by counsel for defendant, and upon the refusal to give the instructions as requested error is assigned:

"4. Actual notice to the plaintiff, when he purchased this note, that it was given for an illegal consideration, is not necessary to defeat his recovery. If he had notice or knowledge of such facts and circumstances in relation to what the note was given for as to make his purchase of it an act of bad faith, then he cannot recover."

"6. If the plaintiff, when he purchased this note, from facts and circumstances within his knowledge relative to the consideration of the note, had good reason to and did believe that it was given upon an illegal consideration, he cannot recover.

"7. If the jury find that, at the time plaintiff purchased this note, he did not know the exact terms or consideration upon which it was given, yet, from circumstances of which he had notice, he did know, believe, or

have good reason to believe, that it was tainted with fraud or illegality, then he cannot recover.

"8. Unless the plaintiff has satisfied you by a preponderance of proof that, at the time he purchased this note, he did not know, have notice, believe, or have good reason to believe, that it was tainted with fraud or illegality, and did not know or have notice of facts or circumstances impeaching its validity, he cannot recover."

In response to the several requests presented by the counsel for the defendant, the circuit judge charged the jury as follows:

"The plaintiff cannot recover in this case unless he is a *bona fide* holder; and if you find from the evidence that, at the time plaintiff purchased this note, he knew the circumstances impeaching its validity, then plaintiff cannot recover.

"This note is void as between the parties thereto, that is, as between defendant and C. H. Williams, for the reason that it was given for an illegal consideration, and plaintiff cannot recover unless he is a *bona fide* holder.

"If the jury find that the consideration upon which the note was given was the bond of a company, whereby the company agreed to sell ordinary wheat under the fictitious name of Red Lyon wheat, at the speculative value of $15 per bushel, whereas its real value was not to exceed $1 per bushel, then such notes are void, and plaintiff cannot recover if, at or before the time he purchased it, he had knowledge or notice that this note was given on such consideration.

"If the plaintiff had notice or knowledge of such facts and circumstances in relation to what the note was given for, as to make his purchase of it an act of bad faith, then he cannot recover.

"The fact that plaintiff paid value for the note is not sufficient of itself to make him a *bona fide* holder. Although he may have paid value, still he is not entitled to recover if he had notice or knowledge of facts or circumstances impeaching its validity.

"If the jury find that, at the time plaintiff purchased this note, he did not know the exact terms or consideration upon which it is given, yet from circumstances of which he had notice he knew that it was tainted with fraud or illegality, then he cannot recover.

"Unless the plaintiff has satisfied you by a preponderance of proof that, at the time he purchased this note, he did not know or have notice that it was tainted with fraud or illegality, and did not know or have notice of facts or circumstances impeaching its validity, he cannot recover."

He also charged the jury upon the right of the plaintiff to recover under the testimony in the case as follows:

"On the part of the plaintiff, I charge you as follows: That this note is negotiable, and subject to all the rules as to negotiable paper, and may become the property of the holder by mere purchase and delivery.

"That the law will sustain the claim of an innocent, *bona fide* holder of a negotiable promissory note for a valuable consideration, purchased before due, however viciously other parties may have acted, or whatever objection to the consideration may arise. If the jury finds that the plaintiff purchased this note before it became due, innocently, and for a valuable consideration, before maturity, by giving money for it in the usual course of business, he is entitled to recover on it.

"That the possession of a note payable to bearer, unaccompanied by any declaration or other evidence in regard to it, is *prima facie* evidence that the holder is the owner of it; that he took it for value before it became due, and in the regular course of business,—that is to say, if simply this note had been offered in evidence, and then both parties had rested, it would have been your duty, of course, to have rendered a verdict for the amount of the note, with the interest on it; and that is what I desire to say by this request with reference to its being *prima facie* evidence. But, after the note is in, then it is entirely competent to do what has been done in this case,—to give other evidence both as to the facts and circumstances, and oral testimony, for the purpose of determining the *bona fides* of the transaction. If there is nothing upon the face of a negotiable note to notify the purchaser that the note was originally given upon an illegal consideration or through fraud, the purchaser who pays value therefor, and takes it in good faith before maturity, may recover as against the maker. This is true, even though the purchaser be in possession of facts

and circumstances sufficient to arouse suspicion in the minds of persons of ordinary prudence.

"And in this connection I desire to say that just a mere suspicion that there may be something wrong is not sufficient to defeat it; that, if the plaintiff purchased this note before due, without knowledge of any defect of title or defense to it, and for a valuable consideration, he will take a good title, unaffected by any of the defenses now set up by the defendant. Suspicion of the defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, will not defeat his title alone; that is, mere suspicion itself will not do so. A holder of negotiable paper who takes it before maturity, for a valuable consideration, in the usual course of business, without knowledge of the facts which impeach its validity as between antecedent parties, is deemed a *bona fide* holder.

"That a party about to purchase a promissory note is under no obligation to call upon the maker, and make inquiry as to possible defenses which he may have, and of which the purchaser has no notice, either from something appearing on the face of the paper, or from facts communicated to him at or before the time of the purchase. That is to say, when a paper is presented to a man entirely free from anything on the face of the paper, or free from any knowledge which he may have which would go to impeach its validity, he is under no obligation to go and look the man up, and make inquiries in reference to it.

"The fact that the note was purchased by the plaintiff at a discount was nothing unusual or contrary to the usual manner in which those engaged in discounting notes transact that kind of business, and is no evidence, of itself, of bad faith on the part of the plaintiff. But I desire to say, in that connection, that the fact that it was purchased at a discount may be taken into consideration, with all the facts and circumstances, as bearing upon the question of good faith. Bad faith or fraud cannot be presumed without proof. That is undoubtedly true, but the proof may be not only oral testimony, but it may be acts and facts and circumstances which appear in evidence in the case where the question is involved. * * * The fact that defendant knew, when he gave his note, that the wheat was not worth the price he was paying for it, and went into the transaction as a speculation, would not legalize

the transaction, and cannot in any way help plaintiff to recover.

"There has been something said in the argument of counsel with reference to Mr. Seeley's acting in bad faith in this matter, and I desire to say to you in this connection that it does not make any difference whether Mr. Seeley was acting in just as bad faith in connection with this matter as was Mr. Williams, so far as this case is concerned. The courts hold—and I desire to emphasize that fact to you now—that the contracts like this, as between the original parties, are absolutely void; and they are held so, not for the advantage of either individual who is connected with the matter, but for the advantage of the public,—that it is against public policy that they should be sustained by the courts. And whether Mr. Seeley expected to make a good deal of money, or whether he was acting in entire good faith, does not make any difference so far as this case is concerned. The question for you to consider in this case is, was the plaintiff acting in good faith? Did he buy this note before maturity, for a valuable consideration, without notice of the defense? That is the important question for you to consider when you shall attempt to get at your verdict.

"If, from the facts and circumstances surrounding this case, you are satisfied that plaintiff's statement in relation to his knowledge about what the note was given for is false, you are under no obligation to believe him, even though uncontradicted by oral proof. Unless his testimony has convinced your reason, you may reject any part of it, or reject it altogether. What is true of him is true of any witness in the case. In passing upon the truthfulness of his statement, you may take into consideration his acts, and all the facts and circumstances involved in the case.

"In this case the burden is upon the plaintiff to satisfy you by a preponderance of evidence that, at the time he purchased the note in question, he did not have knowledge or notice of the consideration upon which it was based."

The particular complaint made by counsel for defendant against the charge of the court is that the court did not, in terms or substantially, charge the jury that if the

plaintiff, when he purchased the note, from facts and circumstances within his knowledge relative to the consideration of the note, had good reason to and did believe that it was given upon an illegal consideration, he cannot recover.

The important part which negotiable paper performs in the business transactions of a commercial people makes it of the utmost importance that the rules which govern its transfer from one to another, and the rights of the holder, should be uniform and stable. It should not be subjected to new tests concerning its negotiability and validity in the hands of innocent holders for value.

In England, prior to 1820, it was pretty generally held that bad faith alone would prevent a holder for value from recovering upon commercial paper. In *Gill v. Cubitt*, 3 Barn. & C. 466, under the influence of Lord Tenterden (see *Slater v. West*, 3 Car. & P. 325), due care and caution was made a test. In 1834 the king's bench held that nothing short of gross negligence could defeat the title of a holder for value. *Crook v. Jadis*, 5 Barn. & Adol. 909. But Lord Denman, in 1836, in the case of *Goodman v. Harvey*, 4 Adol. & E. 876, reasserted the doctrine, which has since been held in England, that bad faith alone could disentitle a holder for value to recover; that gross negligence might be evidence of bad faith, but was not conclusive of it.

This doctrine is now firmly established in the United States. *Murray v. Lardner*, 2 Wall. 110; *Collins v. Gilbert*, 94 U. S. 753; *Farrell v. Lovett*, 68 Me. 326; *Bank v. Bank*, 10 Cush. 488; *Chapman v. Rose*, 56 N. Y. 140; *Johnson v. Way*, 27 Ohio St. 374; *Shreeves v. Allen*, 79 Ill. 553; *Kelley v. Whitney*, 45 Wis. 110; *Miller v. Finley*, 26 Mich. 254; *Howry v. Eppinger*, 34 Id. 29; *Hamilton v. Vought*, 34 N. J. Law, 187; *Welch v. Sage*, 47 N. Y. 143; *Oats v. Bank*, 100 U. S. 239.

In *Miller v. Finley*, Mr. Justice CAMPBELL said:

"There is nothing on the face of the paper to cast suspicion upon its character, and it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith. The proof must show that the holder for value, who takes a note with no ear-marks of fraud or illegality, has had notice of such a nature that he could not honestly take the paper without further inquiry. The facts of which he must have either knowledge or notice must be such as go to the defects of title."

If we should adopt the test contended for by defendant, namely, that if, from facts and circumstances within his knowledge relative to the consideration, the purchaser had good reason to and did believe that it was given upon an illegal consideration, he cannot recover, it would introduce a new element of uncertainty in the legal title of negotiable paper, and permit a jury to speculate upon the effect facts or circumstances within the knowledge of the holder of such paper produced upon his mind, and whether he had good reason to believe or did believe it was given upon an illegal consideration.

Facts and circumstances innocent in themselves, and insufficient to raise a suspicion of fraud or illegality, might be deemed by one jury sufficient grounds for belief, while another would require very plain indications of fraud or unfair dealing. We think the rule which has been so long and so universally established among English-speaking people is broad enough to protect the rights of parties to such paper. Baron Parke, in the case of *May v. Chapman*, 16 Mees. & W. 355, said:

"I agree that 'notice and knowledge' means, not merely express notice, but knowledge, or the means of knowledge, to which the party willfully shuts his eyes."

And Chief Justice Beasley, in *Hamilton v. Vought, supra*, said:

"Mere carelessness in taking the paper will not of itself impair the title so acquired, but carelessness may be so gross that bad faith may be inferred from it. Nor is it necessary, in order to defeat the title of the holder, that he have actual knowledge of the facts and circumstances constituting the particular fraud. It is sufficient if he have knowledge that the paper is tainted with any fraud, although he may be ignorant of the nature of it."

We think the court covered the whole law of the case in his instructions to the jury. The testimony was conflicting. If the jury believed the plaintiff, they would be justified in finding for the plaintiff; and also, we think, there was testimony which would have justified them in finding that he was a bad-faith holder. The defendant did not occupy a position which was calculated to influence the jury in going a great ways to relieve him of an obligation which he had voluntarily assumed with the intention of imposing a fraudulent scheme upon his fellow-townsmen.

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

MORSE and CAMPBELL, JJ., concurred with CHAMPLIN, J.

SHERWOOD, C. J., (*dissenting*). In this case I am not able to agree with my brethren in the opinion they have filed.

The law-merchant, I am aware, is a part of the law of the land, and courts are bound to take notice of it, and apply it to cases involving its principles. But in making such application we should never forget that, like other rules of law, it was adopted to secure the rights of men in their business transactions one with another; and any application of it which does not do this, but destroys such rights, is an improper application of that law, or any other.

The note sought to be enforced in this case was obtained

from the maker without any consideration whatever, and through one of the grossest schemes of fraud practiced upon the agricultural community known to the present generation. It has been made a crime by statute, and punished as a felony. This Court has denounced the transaction as against public policy, and the law has forbidden it. To hold that a note coming into existence under such circumstances can be held valid in any person's hands, or under any condition, is, in my judgment, in violation of the rule imposed by commercial law, and converts the court into an engine of wrong and oppression every time such a contract is enforced by it.

This Court has held that there can be no *bona fide* holder of a note put in circulation without being first delivered; and it is elementary doctrine that all contracts which contravene the general policy of the common law, or the positive provisions of any statute, are void. And I think, in this class of cases, the note should be treated as declared void by statute, and held to be so, to all intents and purposes, as to all parties. It is no hardship for the purchaser to ascertain from the holder the character of the consideration before he receives such paper. Certainly it can be no more so than to ascertain the fact of whether or not the note has ever been delivered. He may always take it relying upon the presumptions of honest dealing; but, if an infirmity lies back of that, the holder should take the risk in this class of notes. It is the only application of the law which will ever be effectual in carrying out the intentions of the Legislature and preventing the evil. In my opinion, it should be done, and the judgment in this case should be set aside, and the case dismissed out of court.

LONG, J., did not sit.

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JUSTUS LITTLEFIELD v. PHEBE DINGWALL AND GEORGE DINGWALL.

Husband and wife—Contracts of married woman—Surety—Joint debtors—Payment—Statute of limitations.

1. A wife, whose only interest in her husband's business is that of a creditor for money put into the business, is not liable on their joint note given in payment of a debt due from the husband to the payee, and to secure a loan used in payment of other debts of the husband.
2. A payment by one joint debtor from his own means, on the joint obligation, will not save the running of the statute of limitations as to the other debtor.

   So *held*, where the property of a wife, mortgaged to secure her husband's debt, was sold, and the proceeds paid by her on his note, which she had signed as surety, he not being present, and having nothing to do with the sale or payment.

Error to Wayne. (Gartner, J.) Argued June 15, 1888. Decided July 11, 1888.

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

Howell & Torrey (*Edward S. Grece*, of counsel), for appellant, contended:

1. If the husband caused the wife's property to be sold, and procured the money from her to be applied on the note, and he so understood it, he is as much bound by the payment as if he had handed the money to the plaintiff personally, as his own money, and requested him to indorse it on the note; citing *Mainzinger v. Mohr*, 41 Mich. 685.
2. A married woman may contract in relation to her own property, as if unmarried; citing How. Stat. § 6295; and the only question is whether there is a direct relation between her contract and her property; citing *DeVries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Id. 464; *Russel v. Savings Bank*, 39 Id. 671;

Johnson v. Sutherland, Id. 579; *Schlatterer v. Nickodemus*, 51 Id. 626; *Reed v. Buys*, 44 Id. 80; and cases cited in *Edwards v. McEnhill*, Id. 162.

3. If there were any substantial testimony tending to prove the liability of defendants, or of either of them, it should have been submitted to the jury; citing *Conely v. McDonald*, 40 Mich. 150; *Lazenby v. Omo*, 50 Id. 52.
4. It is immaterial whether the wife was a regular partner,—her money and property were in the business, and to that extent she was interested therein; citing *Noel v. Kinney*, 106 N. Y. 74.
5. A wife is liable when her money or property is involved, and when any consideration moves to her; citing *Glover v. Alcott*, 11 Mich. 470; *Tillman v. Shackleton*, 15 Id. 447; *Emery v. Lord*, 26 Id. 431; *Johnson v. Sutherland*, 39 Id. 579.
6. A husband and wife may freely engage in business ventures in this State; citing *Randall v. Randall*, 37 Mich. 572; *Edwards v. McEnhill*, 51 Id. 160.
7. A wife may not so mingle her property with that of her husband that it is not easy to separate it, and escape liability upon her contracts relating to her affairs when so associated; citing *Glover v. Alcott*, 11 Mich. 470; *Carew v. Mathews*, 49 Id. 302.

Wilkinson & Post, for defendants, contended:

1. One joint contractor will not lose the benefit of the statute of limitations by reason *only* of a payment made by the other; citing How. Stat. § 8730, which section has been considered in *Sigler v. Platt*, 16 Mich. 206; *Holcomb v. Sloan*, 39 Id. 173; *Rogers v. Anderson*, 40 Id. 290; *Mainzinger v. Mohr*, 41 Id. 685; *Gates v. Fisk*, 45 Id. 522.
2. If, as the plaintiff distinctly testifies, the consideration of the note was a debt of the husband, and money loaned to him, the wife was not liable on the note. (No authorities cited.)

CHAMPLIN, J. Suit was brought in the Wayne circuit court against defendants upon the following promissory note:

"$700. DETROIT, September 8, 1877.

"Two years after date we promise to pay to the order of Justus Littlefield seven hundred dollars at his office, value received, with ten per cent. interest; interest pay-

able semi-annually. This note is collateral to mortgage bearing even date herewith. PHEBE DINGWALL.
"GEO. DINGWALL."

Said note is indorsed on the back as follows:

"February 8, 1882.
"Received on the within note $300, being what mortgaged property sold for by Dingwall.
"J. LITTLEFIELD."

The defendants pleaded separately; Phebe Dingwall pleaded the general issue, and George Dingwall gave notice under his plea of the statute of limitations.

On the trial, plaintiff was sworn, and testified in his own behalf that the consideration of the note was a balance due him from George Dingwall of something over $150, and the rest was cash loaned to him.

It appeared that Phebe was the wife of George Dingwall, and signed the note with her husband, and at the same time gave a mortgage upon her separate property, being a house and lot in Marshall, as security. Mrs. Dingwall afterwards sold the property for $300, and turned the avails over to plaintiff, and he discharged the mortgage, and indorsed the amount upon the note. No other payments were made. Plaintiff testified that he told George Dingwall that he had indorsed the $300 on the note, and he replied, "All right."

George Dingwall gave testimony, on behalf of defendants, tending to show that he was, at the time the note was given, in the grocery business at the corner of Montcalm and Beaubien streets; that his wife was interested in that business, not as a partner, but she had put means of her own in the business; and that the money borrowed from plaintiff went to pay the debts of the grocery business.

Conrad Clippert, who advised with Mrs. Dingwall in relation to the sale, testified

"They had failed in business, Mr. Dingwall and Mrs. Dingwall. They could not raise the money, and I guess Mr. Littlefield insisted on having something, or wanted a deed of the property; and then I advised her to execute a deed, * * * and this I understood was to be a final settlement of the claim of $700."

The court charged the jury that Mrs. Dingwall could not be held upon the note, for the reason that she could not become personally liable upon the promise to pay her husband's debt, and the payment and indorsement upon the note from the avails of the mortgaged property did not take the case out of the statute of limitations as to George Dingwall, and directed a verdict for the defendants.

We perceive no error in this charge. The testimony, when given its broadest latitude, only went to show that Mrs. Dingwall was interested merely as a creditor of her husband, and not as joint owner with her husband in the grocery business. The plaintiff did not regard her as jointly interested with her husband when he loaned Mr. Dingwall the money and took the note. He understood that she was pledging her separate property to secure her husband's debt, and, so far as the note was concerned, she stood in the relation of surety to him. Mr. Dingwall was not present when the property was sold and the money turned over by Mrs. Dingwall, and he had nothing to do with that transaction.

Had she been liable on the note as a joint debtor, the payment made by her from her own means would not have saved the case from the operation of the statute as to him. He has made no payment, and no written promise to pay the note. Six years elapsed after the maturity of the note and before suit and the statute is a bar to a recovery as against him.

The judgment must be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JAMES E. MACKEY v. THE TOWNSHIP OF COLUMBUS.

Townships—Contract for building bridge—Failure of commissioner to require security—Public corporations

1. A contract let by a highway commissioner for building a bridge at a cost of over $50, without security, as required by How. Stat. § 1414, is invalid.
2. Persons dealing with public corporations are bound to make their contracts according to law, and will not be protected unless they do so. *Detroit v. Paving Co.*, 36 Mich. 335; *Detroit v. Robinson*, 38 Id. 108; *Mackenzie v. Treasurer*, 39 Id. 554; *Niles Water Works v. City of Niles*, 59 Id. 311.
3. Contractors have ample means to protect themselves, and if a township can be held on an implied contract, or estopped by the acts of its officers, when there is no valid contract, it would enable those persons to disregard the law entirely, and collude with their friends to do indirectly what, if directly done, would be a plain illegality.

Error to St. Clair. (Stevens, J.) Argued June 14 and 15, 1888. Decided July 11, 1888.

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

Atkinson & Vance, for appellant.

Avery Bros. and *Elliott G. Stevenson,* for plaintiff.

CAMPBELL, J. Plaintiff sued and was allowed to recover on a written contract for building a bridge over Belle

river, purporting to be made with Patrick Kelley, commissioner of highways. The contract included the abutments or piers, the trestle-work and approaches, and the material. This contract, which was dated and approved by the town board July 24, 1883, provided for the completion of the work by September 25, 1883, for $614. Any delay involved a forfeiture of $200, and made plaintiff liable for damages.

The place where this bridge was to be built was on a newly-projected highway, at a not great distance from the old highway and bridge to be superseded. It would seem that the new highway was not worked, and was probably meant only to be used in case of the completion of the new bridge.

When plaintiff got his work done, as he claimed, the town authorities refused to accept, and never did accept it. The bridge remained unused, and the access to it was not made available, until about midwinter, when the whole structure was swept out during a freshet.

It was claimed, and the evidence tended strongly to show, that the work was not done properly, and that both material and workmanship were bad.

In the view we take of the case these questions need not be considered. There was never any acceptance or use of the bridge, and plaintiff's rights, whatever they may have been, were under the alleged contract

It appears from the record that the highway commissioner was anxious to have a bridge at the new location, and that he wanted to bring its cost within what he supposed to be his power to expend, $1,000, out of which he had already laid out a considerable sum, leaving a margin of only about the sum fixed in this contract. He talked the whole matter over with Mackey, who was informed what he wished to do, and for how much, and Mackey was entrusted with the drawing of specifications. There-

upon bids were advertised for, and Mackey's was $135 lower than any other, and $235 lower than the highest. His bid was accepted by the commissioner, and the contract was let without security.

The law is positive that no such contract can be let without—

"Good and sufficient security for the performance of the work." How. Stat. § 1414.

There is no doubt that the specifications, fairly considered, entitled the town to a well-made work of good materials, and bidders generally must have bid on that basis. It is shown quite plainly that Mackey measured the quality of his work and materials by the low price at which he contracted, and we doubt whether, if the contract had been valid, any recovery could be had on the facts.

Since townships have been made liable for defective bridges, it would certainly be wrong for town officers to resort to cheap and poor work to avoid expense, and if a bridge cannot be had within the general power of the commissioner, it ought not to be built without procuring the necessary authority to raise money enough to build a safe one. We are not authorized to impute fraud in fact to any of these parties, but no more effective means to enable fraud to be practiced could be found than such as appear here. Mackey was given exceptional facilities. He knew just how much money there was to expend, and made his specifications and bid accordingly. He seems to have felt justified in measuring the quality of his material by the standard of his pay. The other bidders had no knowledge of these things, and bid on what appeared upon the face of the papers. Had this bridge been accepted, and the acceptance been followed by some accident due to bad materials, the consequences to the township would

have been unfortunate, and the lack of security would have involved direct loss.

We have had occasion several times to hold that all persons dealing with public corporations are bound to make their contracts according to law, and will not be protected unless they do so. This case illustrates the necessity of such a rule. The doctrine was applied under the statute applying to townships, in *Mackenzie v. Treasurer*, 39 Mich. 554. It had already been held, in *Detroit v. Paving Co.*, 36 Mich. 335, and in *Detroit v. Robinson*, 38 Mich. 108, that there could be no liability against a municipality upon contracts not made in conformity with the statutes. And in *Niles Water Works v. City of Niles*, 59 Mich. 311 (26 N. W. Rep. 525), the law was laid down strictly on the same principles. It is the only rule which can be relied on to prevent fraud and collusion. Contractors have ample means to protect themselves, and if a township can be held on implied contract, or estopped by the acts of its officers, when there is no valid contract, it would enable these persons to disregard the law entirely, and collude with their friends to do indirectly what, if directly done, would be a plain illegality.

As the rule has been uniformly settled in this State, we need not discuss it further. No better example to show its necessity could be found than appears in the record before us.

No cause of action was made out, and there is no theory which could sustain the action. The judgment must be reversed, with costs of both courts.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit.

GEORGE BROOKS AND OTIS JOSLYN v. THE TOWNSHIP OF ARENAC.

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Taxes—Assessment—Personal property—Logs in transit.

1. An assessment made on property which is not believed to be, and is not in *fact*, assessable, cannot be valid.

   So *held*, where a supervisor assessed logs in his township to the owners, who resided in another county, although he had information which satisfied him (as was the fact) that the logs were *in transit*, and by statute assessable at their place of destination.

2. Inasmuch as the assessment of personal property creates a personal judgment against the owner, which may be satisfied out of his other property, such a proceeding must be founded on a clear right to render it.

3. The statute does not contemplate that the owner of saw-logs, who may be a non-resident of the State as well as of the county or township, must appear in all parts of the State where his logs may be in transit, at the day when their liability to assessment is supposed to accrue in each township.

4. While, under certain circumstances, a party may be called on for sworn information, yet this is only to inform the conscience of the taxing officers, who, if satisfied concerning the facts, have no need of further information, and when so satisfied they cannot properly make an assessment against the facts.

Error to Arenac. (Green, J.) Argued June 15, 1888. Decided July 11, 1888.

Assumpsit for taxes paid under protest. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Elliott G. Stevenson, for appellants.

Lawrence McHugh (Cahill & Ostrander, of counsel), for defendant, contended:

1. At the dates fixed by the statute for assessments and review, plaintiffs' logs were lying on the bank, in the stream, or in the boom at the mouth of Rifle river, in Arenac township, which facts made them assessable there *prima facie*, which presumption must be removed by a contrary showing by the owners to the supervisor or board of review in due season, and their decision was final, to the extent, at least, that the same question cannot be retried in this action; citing Cooley, Tax. 212,550,552; *People v. Inspectors*, 4 Mich. 187; *People v. Regents*, Id. 98; *Att. Gen. v. Supervisors*, 42 Id. 72; *Williams v. Saginaw*, 51 Id. 120; *Woodman v. Aud. Gen.*, 52 Id. 28; *McDonald v. Escanaba*, 62 Id. 555; *Soller v. Township Board*, 67 Id. 422.
2. Errors of law on the part of such officer or board may be corrected on *certiorari*, when the courts may look into the case far enough to see whether there was *any* evidence to support their action, and if not, it might be held that to decide without evidence was error of law; citing *Berry v. Lowe*, 10 Mich. 9; *Hyde v. Nelson*, 11 Id. 357; *Brown v. Blanchard*, 39 Id. 790; *Bank v. Whittle*, 41 Id. 365; *Carver v. Plank-road Co.*, 61 Id. 584.

CAMPBELL, J. Plaintiffs, in order to relieve their property from an actual levy and threatened sale, paid taxes under protest upon certain logs which during the previous year had been assessed to them in Arenac while in transit to Port Huron.

It appears from the testimony of the supervisor that he had information which satisfied him that these logs were in transit, as the undisputed testimony showed them to be, but that nevertheless he went on and made the assessment.

He did not attempt to notify the owners, whom he knew to reside and have their mill in Port Huron, until the day the board of review met, when he notified them by letter addressed to them at Port Huron. They replied, informing him of the condition and destination of the property. The board of review raised no question about the facts, of which they were satisfied, but nevertheless did not disturb the assessment. No notice was given to produce testimony.

On the trial of the cause the court below held that in the absence of any showing on oath to the board of review the assessment must stand.

The general rule of taxation confines the taxation of personal property of residents of the State to their place of residence. To this there are some exceptions, including such fixed places of business or deposit as involve practically what may be called a business domicile. Property in transit is, by section 11 of the tax law of 1885, to be assessed at its place of destination. This section contains a proviso that forest products in transit shall be held to be destined to the sorting grounds of the booming company or driving agents nearest the mouth of the stream, unless the contrary is made to appear by the owner or party having the same in charge.

Inasmuch as the assessment of personal property creates a personal judgment against the owner, which may be satisfied out of his other property, such a proceeding must be founded on a clear right to render it. The law authorizes the taxing officers to obtain information in various ways. This section does not contemplate that the owner, who may be a non-resident of the State as well as of the county or township, must appear in person in all parts of the State where his logs may be in transit, at the day when their liability is supposed to accrue in each township. That would be manifestly impracticable. The assessing officer is given a full month to make out his roll, and it is made his affirmative duty to ascertain the assessable property. Section 12. The information he got in this case came from the agent. It convinced him, and he asked no further information till after his roll was finished. He then merely wrote to the owners in Port Huron, seeking information by letter, and got what he asked for, which satisfied his belief, as it did

that of the board. The local agent was not informed that any further information was needed.

We think that while, under certain circumstances, a party may be called on for sworn information, yet this is only to inform the conscience of the officers. If they are satisfied concerning the facts, they have no need of further information. When satisfied, they cannot properly make an assessment against the facts. The jurisdiction depends on the fact of the logs not being in transit to any place outside of the township, and if they are in transit they should not be assessed there. An assessment made on property which is not believed to be, and is not in fact, assessable, cannot be valid.

The record presents some other questions, which it is hardly necessary to consider. The judgment must be reversed, with costs, and a new trial granted.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. LONG, J., did not sit

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ARTHUR M. WHITNEY AND FRED SAUNDERS v. THE TOWNSHIP BOARD OF THE TOWNSHIP OF GRAND RAPIDS.

Liquor traffic—Constitutional law—Police power—Soldiers' Home.

Act No. 31, Laws of 1887, making it unlawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold, or kept for sale, within one mile of the Michigan Soldiers' Home, or within the same distance to sell or give such liquor to a soldier, sailor, or marine who is an inmate or employé of said Home, is not in conflict with section 32 of Art. 6 of the State Constitution, nor with the fourteenth amendment to the United States Constitution.

Mandamus. Submitted June 12, 1888.. Denied July 11, 1888.

Relators apply for *mandamus* to compel respondent to approve a liquor bond. The facts are stated in the opinion.

Eggleston & McBride, for relators.

Stuart, Knappen & Van Arman, for respondent.

MORSE, J. This case involves the constitutionality of Act No. 31, Laws of 1887, which provides that it shall not be lawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold, or kept for sale, within one mile of the Soldiers' Home, and also prohibits the sale or giving of liquor to a soldier, sailor, or marine, who is an inmate or employé of such Home, within the same distance.

The relators, Whitney and Saunders, on September 13, 1884, purchased about three-fourths of an acre of land on the Canal-street gravel road, a few miles out from the city of Grand Rapids, and near where a bridge upon said road crosses the Grand river. They built upon these premises a two-story brick building and out-houses and sheds. The relators aver that these buildings were erected for the express purpose of conducting the business of selling at retail spirituous, malt, brewed, fermented, and vinous liquors, and other refreshments, including warm meals and lunches, usually provided in a wayside inn. The buildings were finished, and relators entered upon the business of selling liquors therein on or about June 1, 1885, which business they have since continued. The expense and cost of the said property, buildings, fittings, and furniture was about $6,000. They aver that the buildings, and the fittings and furniture therein, have been so

constructed as to be useful for no other purpose than the business they have engaged in.

On May 21, 1888, being desirous of still carrying on the business of selling liquor, they prepared the necessary bond, complying with the terms and conditions prescribed by Act No. 313, Laws of 1887, and presented the same, with two sufficient sureties, to the township board of the township of Grand Rapids; that being the township in which their said place of business is located. The board refused to approve said bond because said place of business is within one mile of the Soldiers' Home.

If the law is constitutional, this action of the township authorities was proper; if not, the writ of *mandamus* should issue, as prayed by the relators, directing said board to approve the bond.

It is claimed that the law is in conflict with section 32 of Article 6 of our State Constitution, which declares that no person shall be deprived of life, liberty, or property without due process of law; and with the fourteenth amendment of the United States Constitution, which declares that—

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws."

The facts are that the relators had established and were carrying on a lawful business, under our laws, before the Soldiers' Home was located within one mile of their premises; and it is argued that the State has no right, by this act, to destroy their business, which before its passage was legitimate, and to make useless and valueless their property, without compensation.

It must be remembered, however, that when the premises were purchased by the relators, and the buildings and

improvements made thereon, the business in which they then proposed to engage, and which they have been engaged in, was restricted and regulated by law. The police power had been already invoked, in the interest of good order and the public welfare, to restrain the selling of liquor, and regulating its sale, in certain cases; and no one was permitted to enter upon the business of keeping a saloon without application to the township board, and complying with certain conditions and requirements of the law. They had therefore full notice that the business, though lawful if confined within the lines of the statute, was under the supervision, if not the ban, of the law, and was not as free and permanent as other occupations or trades which involved no need of police watch or restriction. They cannot, therefore, claim for their business the same open and unrestricted right of use which belongs to the avocations with which the police power has heretofore not been called upon to meddle.

It is not necessary, in the present case, to determine whether the Legislature, under the police power, would have the right to destroy, without compensation, a business, and the property connected with it, that had been built up and carried on for years without any restrictions whatever upon it, and which no law had ever undertaken to prohibit or regulate. I am not yet prepared to hold the police power absolute and omnipotent; that the Legislature can arbitrarily and without reason, and in defiance of right, pass any statute it may see fit under this power, provided it does not run against some express provision of our State or Federal Constitutions. It cannot destroy fundamental rights without good reason

But the liquor traffic has ever been considered a business fraught with so much danger and disturbance to the public welfare as to be peculiarly under police surveillance and control. And the Supreme Court of the United

States, in the Kansas cases, have lately gone so far as to affirm the right of a state to, in effect, destroy the property in breweries and other buildings used in the manufacture of liquor, and principally, if not wholly, valuable for such use.

I cannot agree with the Chief Justice that the Legislature can arbitrarily prohibit the sale of liquor in this State, or any portion of this State. I do not doubt the power to prohibit the sale and manufacture of liquor in the whole State by general laws; but the Legislature, in my opinion, cannot, without good reason, prohibit the sale of liquor in one township or county, or a specified number of townships and counties, and legalize the traffic in the rest of the State; and whether a law of this kind is reasonable or not belongs to the courts to determine. If the Legislature can do this without challenge from the courts, why cannot it pass a law allowing liquor to be sold in Detroit and nowhere else? Such legislation is contrary to the spirit of our State government, and would confer special and local privileges against right and reason, and in defiance of the principles upon which our free institutions are based.

I pass no opinion upon the power of the Legislature, by general laws, to authorize townships, villages, and cities to regulate or prohibit the sale of liquor as they see fit, or of the right of the Legislature to provide by a general enactment that the question of such regulation may be determined by vote of the electors of such municipalities, as those questions are not involved here, and the argument above made is confined to the passage of special laws for special localities.

But the State has a right to guard and protect its poor and its unfortunates within and about the State institutions in which they are cared for and maintained, and has a right, under the police power, to make such rea-

sonable regulations as are necessary to that end. Such legislation is not new in the history of our State, as applied to such institutions or to public places and property. The sale of liquors is forbidden within a quarter of a mile of certain cemeteries. How. Stat. § 4773. No liquor shall be sold in the State prison, or in any building appurtenant thereto, or on land granted to the State for the use and benefit of the prison (Id. § 9701); nor in jails (Id. § 8954); nor in the State House of Correction, nor on the land granted to the State for its use (Id. § 9783).

There was for many years, when liquor selling was practically unrestricted in this State, a statute forbidding its sale within a certain distance of camp or other outdoor religious meetings. The power of the Legislature could not be doubted, in my opinion, to forbid the sale of liquor within certain distances near to school-houses and churches. But it is argued that the law must be general, and apply to all school-houses and churches within the State. This can be granted without affecting the present question.

It is the custom and practice of the Legislature to enact laws specially in relation to the government, control, and wants of State institutions, and I know of no constitutional or other good reason why this cannot be done. No one will question the right of the State to enact that liquor shall not be sold, given away, or furnished to the inmates of the Soldiers' Home, or upon the premises belonging to the State. And I have no doubt of the equal right of the State to forbid such sale or furnishing of liquor upon ground, though it be private property, immediately abutting or adjoining the land belonging to the Home, or within a reasonable distance of it.

These men who are within this Home are the wards of

the State. They have earned, as no other men have earned, the right to the care and protection of the State in their want or old age. Having given their best blood and vital energies to their country in its time of utmost need and peril, the power of the State may wisely and worthily be invoked, at this day, to supply their needs, and to protect them from every peril. And as, by common consent both of the law and public conviction, the use of liquor as a beverage is attendant with danger and peril, it is right and reasonable that the sale of it to them should be restricted, and perhaps prohibited altogether. Certainly, the maintenance of a saloon at the very door of this institution, with its abundant temptations to excess in the use of liquor, would be not only detrimental to the health and welfare of these old soldiers, but at the same time a standing menace to the good order and necessary discipline which must exist at the Home, or its usefulness and benefit be destroyed.

The limit of one mile is not an unreasonable one, and the law must be sustained. The writ, therefore, should be denied, with costs against the relators.

CHAMPLIN and LONG, JJ., concurred with MORSE, J.

SHERWOOD, C. J. The petitioners are retailers of spirituous and intoxicating liquors in the town of Grand Rapids. Their place of business is about four miles north of the city of Grand Rapids, where they own about three-fourths of an acre of ground, upon which they erected, in 1885, a large two-story brick building, in which they have ever since carried on their liquor business, selling at retail. The buildings, fixtures, and furniture cost about $6,000, several thousand dollars' worth of which is worth but little for any other purpose. Desiring to continue the business, the relators prepared and executed a bond, with two good and sufficient sureties, in conformity with

the requirements of the statute for that purpose, and on May 21 presented the same to the township board, and requested its approval, which, on consideration, was refused, the board placing its refusal upon the ground that the place where the relators proposed to carry on said business is within one mile of the Michigan Soldiers' Home, within which limit such business is forbidden by law.

The respondent made no question but that the bond was in compliance with the statute upon that subject, and the sureties were pecuniarily of sufficient responsibility; and, but for the prohibition contained in the statute, the board expressed a willingness to approve the bond. The statute referred to was passed by the Legislature March 17, 1887. The first section declares that it shall not be lawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold or kept for sale, nor to give away or dispose of any such liquors, within one mile of the Home for Disabled Soldiers, Sailors, and Marines established by the State. See Laws of 1887, p. 30.

The relators claim that the provisions of this act furnish to the board no sufficient excuse for its refusal to approve the bond. They claim and insist that said statute is in conflict with section 32 of Article 6 of our Constitution, and that it is obnoxious to the fourteenth amendment of the Constitution of the United States, which declares that—

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fact that the relators had established and were

carrying on their business at the place mentioned, in a lawful manner, before the Home for Disabled Soldiers came into existence, or any action taken by the State to locate it where it now is had been had, is thought to have an important bearing upon the question; and the relators insist that they have been deprived of their property, in the profits of their business, which is their property, without consideration and without due process of law; that the act in question is void, and therefore it cannot be claimed as a legal justification for the refusal of the town board to make the approval of the bond asked for.

I do not think the position taken by the learned counsel for the relators is tenable. All property is held at all times subject to the proper exercise of the police power of the State, and it makes no difference whether the property is tangible and material, or consists of the right to use such property, and the enjoyment of its use. *Foster v. Kansas,* 112 U. S. 201 (5 Sup. Ct. Rep. 97.) The carrying on of the business of retailing liquor has ever been regarded as accompanied with danger to the lives, health, and happiness of the people; and civilized countries have always regarded it as a proper subject for the exercise of the legislative power. It has always been regulated, to some extent, under the police power of the State, and it has never been attemped to apply any other to it, for the reason no other power exists which has ever been found adequate to furnish the remedy necessary to prevent and punish the innumerable wrongs and injuries it inflicts and entails upon the citizens, society, and the state; and, even in the exercise of this power, in many instances, it has been found almost entirely inadequate, while regulating it, to prevent a recurrence of the evils. In several of the states it has been found necessary to prohibit the business altogether in order to get rid of the excesses which seem to

be almost inseparably connected with the traffic. Such prohibition is clearly within the police power of the state. Without such power the community would be left without the necessary means for its protection, and the preservation to the citizen of those rights which by nature are his to enjoy, and without which life would not be worth living. Cooley, Const. Lim. 708.

I have no doubt of the right of the State to prohibit the business entirely; and, if so, the Legislature may forbid the sale of intoxicating liquors, in the whole or any part of the State, whenever and wherever the lives, health, and welfare of the people may require it. And in so doing no provision of the Constitution is violated; but, on the contrary, the great object for which it was ordained will, in part, be accomplished, wherever such prohibition can be carried out. Cooley, Const. Lim. 482, 744; *State v. Rauscher,* 1 Lea, 96; *West v. State,* 9 Humph. 66; *Boyd v. Bryant,* 35 Ark. 69; *O'Leary v. County of Cook,* 28 Ill. 534. The application of the law to the locality of the Home in this case is, no doubt, very desirable and beneficial. It will secure, in part at least, the protection of those brave men who have found a home in that excellent institution which they have so richly earned, and now have the right to enjoy in peace and quiet in their declining years. It should not only be accorded, but secured, to them; and they should be protected against the mercenary and merciless.

The police power is a part of the "law of the land," and all rights are held subject to it. Without it, legal protection to life and property, and the peacefulness of the home, would cease to have any place in the land. The most sacred rights of the citizen would be at the mercy of the lawless and the desperado. Life would be endangered, and liberty and property would scarcely find an abiding place among men. The police power is not

that wielded, as is often erroneously supposed, by the tyrant or the despot, nor is it the rule of the anarchist which comes but to destroy; but, on the contrary thereof, it is the destroyer of these. It is the power that lays hold of and controls men in the community until they can be brought into proper relations with each other in a state of society. It is that power which protects and enables the law to become supreme, thereby securing to the people civilization, liberty, peace, and prosperity; and, under a government like ours, allows the will of the majority to become a rule of action and the law of the land, to which all must yield obedience. When properly understood, it is the right arm of regulated liberty, a menace to despotism and tyranny, and a terror to all evil-doers. It insures the protection and enforcement of the morality of the law, which makes law tolerable and desirable. *Beer Co. v. Massachusetts,* 97 U. S. 25; *License Cases,* 5 How. 589; *House v. State,* 4 G. Greene, 172; *Mugler v. State,* 8 Sup. Ct. Rep. 298; Cooley, Const. Lim. 581.

The fact that relators were established in their business before the Home was located and erected near them can make no difference. All property is taken, held, and enjoyed subject to the law of the country in which it is located; and one provision of that law is that it shall be so used and enjoyed as not to become a nuisance, or seriously impair the life, health, and welfare of the citizen wherever he makes his home, or wherever he may engage in any lawful avocation or employment, or to disturb his peace or the good order of the community. *Fell v. State,* 42 Md. 71; *Beer Co. v. Massachusetts,* 97 U. S. 25, 33; *Mugler v. State,* 8 Sup. Ct. Rep. 273.

Condemnation and compensation are not necessary in any case where the business has always been regulated under the police power, and parties have built it up, and

invested their money therein, knowing that its continuance is only permissible at the will of the Legislature; and such has always been the case so far as relates to the public sale of intoxicating liquor. I do not think the position of counsel for relators is therefore tenable upon this subject. The township board of the township of Grand Rapids did right, in my judgment, in rejecting the relators' bond on the ground it did, and the writ of *mandamus* should be denied.

CAMPBELL, J., (*dissenting*). I do not think this case presents any question of the invasion of property rights in the true sense of the term. If relators had invested money in property which was useful for some one purpose and for no other, or where use for any other purpose would directly diminish its value, I am not prepared to say they would not be legally injured by a forced suspension or destruction of that use.

But here they show that they bought and improved certain real estate for the purpose of a way-side inn and house of entertainment generally, furnishing meals and other refreshments. In such a business the furnishing of any particular kind of refreshments is merely incidental to the rest, and not essential. It would be a very violent inference to assume that any of relators' fixed property had been destroyed, or could be destroyed, by interfering with liquor retailing in their tavern, when, presumptively, many guests would not touch it.

But the business of retailing liquor as a part of their other business being lawful under the statutory conditions for all persons who choose to engage in it through the State generally, these parties have the right, as citizens, to be protected in it on complying with those conditions, unless it is lawful to put them on an exceptional footing. The right of carrying on any lawful business is a valuable one, and courts are bound to protect it.

It would hardly be claimed, as it certainly would not be sound doctrine, that the Legislature can arbitrarily except some single precinct, large or small, from the operation of the general laws of the State. Equality before the law is one of the fundamental principles of representative government. Our Constitution, in recognizing counties and townships and other districts, with their inhabitants, cannot contemplate the right anywhere to classify them, or to place them singly under different conditions. Every foot of land in the State must be under the municipal rule of some legal municipality, and subject to the same general laws, and its inhabitants cannot be separately dealt with. Under the Constitution of the United States, there are various government reserves placed under the exclusive control of Congress, and removed from all other control. But the Constitution of Michigan has not placed, or authorized to be placed, any territory under the exclusive control of the Legislature for one purpose or for general purposes; and, in my judgment, nothing but an express grant of power could put it there.

If the power exist in the Legislature to restrict the conduct of one kind of business in a particular place, no court can distinguish one business from another in the exercise of that restriction. It is entirely fallacious to say that the particular business in question here is a dangerous one, and very generally regulated. That is undoubtedly true as a matter of fact, but it is not true as a source of authority. Legislation has frequently existed for encouraging and for restricting many kinds of business; and, where the power exists, the determination of the policy is a matter of legislative discretion. We have had tariffs which on some articles were prohibitory, and were meant to be so. There has been legislation regulating or checking the cultivation of plants of various sorts, the exportation of domestic raw materal, or the importa-

tion of manufactured articles. We have on our own statute-books legislation imposing onerous conditions on several kinds of business, including banking, auctions, insurance, fishing, and some kinds of manufacturing, and we have inspection laws applicable to various commodities. All of these laws, so far as they are lawfully enacted, derive their authority from the opinion of the Legislature that public policy makes that regulation desirable for the public welfare; and liquor laws stand on precisely the same foundation, and no other.

The law under which respondents justify their refusal to accept the liquor tax and approve the bond of relators is somewhat peculiar in more than one aspect. It purports in the title to prohibit either the keeping of saloons, or the sale or giving of intoxicating liquor, within one mile of the Soldiers' Home. But in the body of the act, while it forbids the maintenance of saloons within one mile of the Home, yet it only punishes the sale or gift within that distance to inmates of the Home. This law took effect May 1, 1887. Laws of 1887, p. 30. A subsequent law, taking effect 90 days after the close of the session, forbids the sale or furnishing of liquors to such inmates except when on furlough, and away from the city of Grand Rapids. Page 204. Taking these two laws together, they indicate that the individual soldier on furlough may buy or receive intoxicating liquor anywhere except in Grand Rapids or the mile limit; that in any part of Grand Rapids the trade shall be open except as to soldiers; and that immediately over the line of the city, when the mile circle is reached, there can be no places of sale for anybody.

This mile circle, which is not a legal territorial subdivision, is therefore put on a different footing from any other parcel of the State. It cannot rest on the offensive theory that disabled soldiers are not entitled to *sui juris*,

because they are not individually protected anywhere else except in Grand Rapids. There is nothing to prevent a belt of saloons coming up to the mile line; and, on the other hand, if the radius had been made a few rods longer, a part of the citizens of Grand Rapids would have been cut off from the business privileges of the rest,—just as relators are cut off from equality with other people of the township who may be practically as accessible from the Home as relators; for, in any region where there are roads and streams, proximity is not really measured by a radius of distance, but by facilities of travel. And, as it was and is entirely practicable to place a State institution within a city, any principle that will uphold this legislation will enable the people of that city to be put under peculiar and separate conditions from other municipalities.

The apparently benevolent purpose of this statute cannot take away the odious and disagreeable principle which underlies it. It means neither more nor less than that the Legislature may at will put any place or any person or thing under exceptional conditions under the law, from such imagined reasons of policy as seem plausible. If such a power exists, courts cannot review the legislative opinion of policy or the legislative finding of necessity. It is no answer to say that abuses are not probable. All constitutional rules are adopted to prevent possible abuses, and yet there is always a presumption that they will not be allowed. The experience of all time has shown that no one can anticipate the excesses of unlimited power. Most evasions of the Constitution are sought to be excused by good intentions; and every such evasion sooner or later leads to palpable mischief. When the door is opened, it cannot be effectually closed.

Furthermore, the State owes the same duties to all of its citizens. Except for their honorable antecedents, which have no bearing on their helplessness, the temptations and

risks incident to these inmates apply in precisely the same way to every public and private refuge in the State for the reception of indigent persons. All of these which are either public or corporate are created or maintained under State laws. The inmates of all public asylums are entitled to the same safeguards of law. But the business and convenience of persons outside cannot be subordinated to them. The burdens and rights of the people at large must be dependent on equality. If some city or county asylum had been singled out for protection from any particular kind of risk or annoyance within a given distance, the inequality would be obvious. But it can make no difference in the principle what public agency has charge.

I think the relators should have their remedy.

71	249
100	596
71	249
114	334
71	249
152	262

ADDISON P. COOK AND RICHMOND W. FRENCH v. JOHN C. COVERT, TOWNSHIP TREASURER, AND THOMAS SWARTOUT.

Township drains—Irregularities in proceedings for constructing—Estoppel—Assessment of benefits—Notice.

1. Land-owners who petition for the construction of a drain, and release the right of way over their lands, and assent to all the proceedings in laying out, establishing, and constructing it, are estopped from complaining of any irregularities in such proceedings.
2. The failure of a drain commissioner to give notice of the time and place for a review of his assessments of benefits, which were made without any notice to those interested some two or three months after the contracts for the construction of the drain were let, and without the knowledge or assent of certain complaining land-owners, will render such assessments void as to them.

Appeal from Jackson. (Gridley, J.) Argued June 14, 1888. Decided July 11, 1888.

Bill to restrain the collection of a drain tax. Complainant Cook appeals. Decree reversed, and drain commissioner directed to makea new apportionment of benefits and assessments, and give proper notice of review, etc. The facts are stated in the opinion.

Hewitt & Freeman (Eugene Pringle, of counsel), for complainant Cook.

Hammond, Barkworth & Cobb, for defendants.

SHERWOOD, C. J. The bill in this cause was filed February 17, 1885, to restrain the collection of that part of a tax claimed to have been assessed upon the complainants' lands as benefits for the construction of Plumb Brook drain, located in the township of Columbia, in the county of Jackson. The drain was laid by the township drain commissioner.

It is claimed by the complainants that the proceedings in laying out, establishing, and constructing the drain are all irregular, and, in the apportionment and levying of the tax therefor, the commissioner exceeded his authority, and his acts were without jurisdiction and void; and it is the prayer of the bill that the township treasurer, and his successors in office, may be restrained from collecting the assessments made for said drain against the complainants' lands, and from returning the same for the non-payment of such assessment.

A review of the record shows that there are many irregularities in the proceedings taken by the commissioner in laying out and establishing this drain, but these complainants do not occupy a position which will enable them

to take advantage of any action previous to the apportionment and assessment of the taxes sought to be raised to pay for its construction, by reason of their connection with such proceedings. They were both prime movers for its construction and establishment; they both signed the petition to have it constructed, and under which petition the commissioner acted; each gave a release for the right of way; and each of them assented to all the proceedings in laying out, establishing, and constructing the drain, but objected to the proceedings taken for the purpose of raising the tax necessary to pay for its construction. Of those proceedings to which they assented, and aided in taking, they cannot now be heard to complain. *Rædiger v. Commissioner*, 40 Mich. 745; *Mabee v. Commissioner*, 45 Id. 568 (8 N. W. Rep. 578); *Harwood v. Commissioner*, 51 Id. 639 (17 N. W. Rep. 216); *Hall v. Slaybaugh*, 69 Id. 484 (37 N. W. Rep. 545); *Gillett v. McLaughlin*, Id. 547 (37 N. W. Rep. 551).

In regard to the expenses, and the apportionment and assessment thereof, for said drain, the statute provides that they shall be ascertained by the drain commissioner, and—

"Shall include all the expenses of locating and establishing the same, including the commissioner's fees, cost of survey, and fees and expenses of the special commissioners, advertising, and all other expenses, the amount of damages awarded by the special commissioners, and the amount of the contracts," etc.

He is required to—

"Add the whole in a gross sum, and shall add thereto ten per cent. to cover contingent expenses, delinquencies, and any extra charges that may accrue, and the sum thus ascertained shall be the cost of construction of such drain." How. Stat. § 1710.

The commissioner is then to apportion the sum so ascertained to the township benefited by the—

"Construction of such drain, to the public health, or as a means of improving any public highway;"—

And the balance of the cost of construction he is required to ascertain, and assess as benefits, and apportion the same upon the lands benefited; and he is required to make a list showing the amount apportioned to the township, the amount to be raised as benefit to lands, the lands to be assessed, and the amount apportioned to each parcel to be paid. A copy of such list, showing such apportionment, he is to serve upon the supervisor or upon the township clerk of the township in which the lands are situated and assessable. How. Stat. §§ 1705, 1711.

In this case the cost and expenses of the construction of the drain were computed by the commissioner at the sum of $770. He apportioned to the township, to be raised by it, the sum of $123.20, which was 16 per cent. of the whole amount; and he assessed against the complainants, as the amount their property should pay, to Mr. Cook $331.10, and to Mr. French $231.30. It is these amounts that are now claimed by the treasurer of the township to be liens against the complainants' property, and which he is now seeking to realize by enforced collection, and against which the complainants ask relief, claiming such assessment of their property is without authority of law.

It is admitted in the answer filed by the defendants that the commissioner has never filed any of his proceedings, or a copy thereof, in said drain matter, in the office of the township clerk, as required by statute, and they admit that the commissioner never made any return of his doings in the matter of such drain, or of any of the papers in connection therewith, as required by statute.

The complainants claim that they are entitled to the relief they ask, for the reasons, among others, that the

commissioner gave no notice of the time and place when and where he would meet parties for the purpose of letting contracts for the construction of said drain; and that he gave no notice of the time when the assessment of benefits would be made, or be subject to review by parties interested. These notices were essential, and should not have been omitted, unless expressly waived; and the record does not show any such waiver. It appears, upon an inspection of the record, that no notice was ever given that the assessment of benefits would be subject to review at any time or place; and it further appears the assessments actually made were never noticed for review by those interested, and in fact were not made until about two or three months after the contracts for the construction of the drain were let, and then without the knowledge of either of the complainants.

The property of the citizen cannot be condemned or taken from him without notice of some sort, either actual or constructive, of the proceeding in which it is to be done; and this is true in making and levying assessments of taxes, as well as in any other proceeding. No such notice was given to the complainants in this case, and the assessments made by the drain commissioner cannot be sustained. It is unnecessary to repeat our former decision upon this subject. The assessment was without any knowledge or assent upon the part of the complainants, and as to them is void.

I do not think, upon this record, it appearing that the ditch has been constructed, and orders given at least for part pay, that the entire proceedings should be set aside, but so much only as relate to the apportionment of benefits and making assessments. Those should be set aside, and the decree of the circuit judge must be reversed, and an order entered directing the drain commissioner to make a new apportionment of benefits and assessments in

accordance with the requirements of the statute, and give proper notice of the time and place to the parties interested when and where they may review the apportionment thus made.

The other Justices concurred.

AARON BREWER v. JEREMIAH W. BOYNTON, HIRAM KNAPP, AND HARRY H. IVES.

Pleading—Assumpsit—Debt—Statute of limitations—Notice—Bills and notes—Release of prior indorser—Joint debtors—Discharge in bankruptcy—New promise.

1. Where an action was commenced on a judgment by a summons in *assumpsit*, but the declaration was in *debt*, and the defendant gave notice that the cause of action did not accrue within *ten* years, within which time the suit was commenced, the variance is of no consequence.
2. An endorser of a note who signs his name below that of the payee, to whose order it is drawn, is liable as a *subsequent* and not *joint* indorser, and is released by the release of the payee without his consent.
3. Nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding. *Craig v, Seitz*, 63 Mich. 727.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued June 19, 1888. Decided July 11, 1888.

Debt on judgment. Defendants bring error. Reversed. The facts are stated in the opinion.

W. E. Grove (Dallas Boudeman, of counsel), for appellants Boynton and Knapp.

J. H. Tompkins, for appellant Ives.

Taggart, Wolcott & Ganson, for plaintiff.

CAMPBELL, J. This is an action on an old judgment rendered in the superior court of Grand Rapids, in favor of James H. Brown, upon a promissory note made by Boynton to the order of Erastus U. Knapp, and indorsed by Erastus U. Knapp and defendants Harry H. Ives and Hiram Knapp in blank, in the order named. This judgment was finally rendered October 13, 1877. Hiram Knapp was not served within the city of Grand Rapids, but was served in the county of Kent. Some question was raised upon the jurisdiction to render judgment against Hiram Knapp, which, in the view we take of the case, is not very important.

This judgment was assigned to plaintiff soon after it was rendered. Boynton was discharged in bankruptcy. Erastus U. Knapp was treated by plaintiff as a joint promisor with Boynton, Ives, and Hiram Knapp, and was released on payment of one-fourth of the judgment.

The present action was brought by summons in *assumpsit,* and was afterwards changed by declaration in debt. It is claimed that as an action of *assumpsit* it was barred in six years from the date of the original judgment, and that it was not competent, by filing a declaration in debt, to cut off the right of pleading, as in *assumpsit,* anything which would bar such an action. But it appears that no such point was raised in the pleadings. The notice of the defense of the statute of limitations was that the cause of action did not accrue within 10 years; and, as the suit was begun within 10 years it was properly begun. The variance between the writ and declaration is of no consequence for any other purpose.

The case was presented below, and ruled by the court, on the ground that all the defendants were joint promisors

with Erastus U. Knapp, and upon this ground a verdict was ordered to be rendered against Ives and Hiram Knapp. But this is an error. The note was made payable to the order of Erastus U. Knapp alone. This being so, Hiram Knapp and Ives were not joint indorsers with Erastus, but were subsequent indorsers. Their liability is governed by the form of the contract which they made, and the holder of the note could not lawfully charge them in any other way. *Stewart v. Bank,* 40 Mich. 348; *Smith v. Long,* Id. 555; *Greusel v. Hubbard,* 51 Id. 95 (16 N. W. Rep. 248). Erastus Knapp was liable to his indorsers if they should pay the note, but they could under no circumstances be liable at law to him. His discharge without their consent discharged them, as he was not a joint promisor with them. The court erred in holding that the jury were bound to give a verdict against them.

Boynton, being the primary debtor, was not released by releasing Erastus Knapp. He pleaded and showed a discharge in bankruptcy. Reliance was had on a new promise, and he did not plead the statute of limitations.

The alleged proof of a new promise was by two witnesses. The plaintiff was one, and Harry H. Ives the other. The discharge was granted April 30, 1878.

Plaintiff swore that since April 8, 1878, he had had conversations with Boynton; but could fix no date prior to the commencement of suit, nor any place but the street. He says he met Boynton on Monroe street, about four or five years ago, with his head down, and said to him:

"'Hello, Jerry! I want you to speak to a fellow, if you haven't got any money.' 'Brewer,' he says, 'I am going to pay that judgment; you shall never lose a cent on it.'"

This is all that plaintiff swore to. He showed no negotiations on the subject, and no previous conversation. What he says about subsequent interviews is not definite enough to be of any force. Ives testified that he saw

Boynton at Brewer's request, and that Boynton said that he had not a dollar in the world. On one occasion he said he had paid out—

"Over $40,000 in cash on those old matters, and before snow flies I will have them all wiped out, and you shall not be troubled."

It appears that those matters exceeded $140,000, and Ives said Boynton made no distinction among the different claims.

It is evident that the conversations with Ives did not involve any promise to pay plaintiff, or any intention to prefer his claim over the rest. It had no tendency whatever to corroborate plaintiff, and the court erred in leaving it to the jury for any such purpose. It had no relevancy to any issue in the case, and had a tendency to mislead the jury.

Under our decision in *Craig v. Seitz*, 63 Mich. 727 (30 N. W. Rep. 347), nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding. It is very difficult to see, in what Boynton said to plaintiff, anything more than a purpose to pay it at some time or other. It would hardly amount to an absolute promise without a more distinct proof of such an intention. Had not the testimony of Ives been allowed to stand as corroboration, it is not likely the jury would have found any promise to have been made. We do not decide that the statement sworn to by Brewer, and denied by Boynton, might not be made significant by other proofs and conduct. But the benevolent purpose of the bankrupt law ought not to be defeated on any doubtful testimony. The English law wisely requires the new promise to be in writing; but even with this precaution it has been held uniformly that the promise must be unequivocal.

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

The other Justices concurred.

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122 114

ELLIS W. REDPATH ET AL. v. WILLIAM BROWN AND CATHERINE M. JONES.

Replevin—Joint judgment for defendants—Fraudulent purchase—Evidence.

1. A joint judgment in replevin for the value of the property, in favor of defendants who are not shown to have a joint interest therein, cannot be sustained.
2. It is not necessary, in order to prove fraudulent purchases, to show the complicity of the vendee's assignee and his vendee, from whom the goods are replevied, in the original scheme, if one existed, as they may be unable to hold the goods without being guilty of actual dishonesty.
3. In this case it is held that the case should have been submitted to the jury on the facts, there being pertinent testimony upon the question of fraud, the weight of which was for the jury.

Error to Wayne. (Reilly, J.) Argued June 20, 1888. Decided July 11, 1888.

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

Dickinson, Thurber & Stevenson, for appellants.

E. T. Wood, for defendants.

CAMPBELL, J. Plaintiffs sued in replevin to get back certain goods which they claimed had been obtained from them fraudulently by a firm doing business as Jones Bros. These goods were sold at various times, upon the faith of

representations of solvency; and plaintiffs claimed the facts showed that the purchasers had obtained the property with a purpose of cheating their creditors.

Brown was the assignee of that firm, and Catherine M. Jones had purchased most of the assigned stock, paying for it partly by a chattel mortgage, the good faith of which was attacked, and partly otherwise. The dealings of the defendants were claimed not to entitle them to stand in any better position than their vendors.[1]

Upon the trial the court let in proof of a series of representations of business condition which indicated solvency and healthy business, and further testimony claimed to show either that these representations were untrue, or else that goods had been disposed of in some fraudulent way, which it is insisted tended to the direction of a fraudulent scheme to get goods, and make away with them, without paying for them. It is claimed that the assignee's accounts show tampering with the assets, and that the chattel mortgage was not in good faith.

After receiving the testimony, the circuit judge ruled that no fraud was made out, and took the case from the jury, and ordered a judgment in money in favor of defendants jointly.

We do not see any foundation for such a joint money recovery. Defendants had no joint interest in the property replevied, so far as the record shows.

But we think the case should have gone to the jury on the facts. There was pertinent testimony upon the question of fraud. If the transactions involved the perpetration of continuous frauds on plaintiffs, they had a right, as against their vendees, to rescind, and an equal right as against other persons colluding with them to carry out

[1] Catherine M. Jones, a sister of the assignors, held a chattel mortgage on their stock at time of the assignment, and purchased the goods from the assignee, applying the mortgage on the purchase price, and paying the balance in cash.

their schemes. If there was any testimony tending appreciably to show fraud, the weight of it was a question of fact for the jury. Defendants introduced no testimony; and, had they done so, it would have required the same treatment.

The question before us is not what we might ourselves have inferred from the facts in evidence. We have no means of knowing that these facts would have persuaded the jury that any fraud was committed, or that all the doubts, if any, might not be cleared up. For anything we know, the firm may have given out for want of business capacity and experience. We do not propose to make any comments, or express any suspicions. All that we do is to say that we think the case was a proper one for the jury to consider. It is not necessary, in order to prove fraudulent purchases, to show defendants' complicity in the original scheme, if there was a scheme. They may be unable to hold the goods without being guilty of actual dishonesty. Had they gone into proof, the verdict might have been favorable; but, without testimony on their side, we cannot say that the jury would have found against plaintiffs.

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

The other Justices concurred.

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103 322

WILLIAM W. HANNAN v. AMADEUS T. MORAN.

Factors and brokers—Real estate agent—Right to commission.

Where a plaintiff who sues for commissions for bringing about bargains for the sale of real estate is shown to have done all that he could do in that direction, and that it was defendant's fault, and not his, that no sale was made, he makes out a good cause of action.

Error to Wayne. (Gartner, J.) Argued June 21, 1888. Decided July 11, 1888.

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

Charles W. Casgrain, for appellant, contended:

1. Plaintiff is not entitled to commissions unless he procured a purchaser ready and willing to enter into the contract on the employer's terms; citing *McGavock v. Woodlief*, 20 How. 221; *Koch v. Emmerling*, 22 Id. 69; *Wylie v. Bank*, 61 N. Y. 415; *Walker v. Tirrell*, 101 Mass. 257; *Middleton v. Findla*, 25 Cal. 76; *Williams v. McGraw*, 52 Mich. 481; Cent. L. J. No. 4, Vol. 26, p. 75; Am. Law. Reg. Vol. 35 (26 N. S.), p. 545; *Sibbald v. Iron Co.*, 83 N. Y. 378; *Mooney v. Elder*, 56 Id. 238.

James H. Pound, for plaintiff, contended for the rule stated in the opinion.

CAMPBELL, J. Plaintiff sued for commissions for bringing about bargains for the purchase of certain property in Detroit at defendant's request. The bargains were not carried out by defendant. Plaintiff recovered commissions for a single sale. Defendant brings error.

The errors assigned all go to the claim that there was no such service shown to be rendered as would entitle plaintiff to recover. If there was any such case made out, we

do not see but that all of defendant's assignments must fall. The court below did not differ materially with him on the law, and no error that he could complain of was committed. The plaintiff claims that he should have recovered more; but he has not brought error.

The testimony tended to show that plaintiff procured a purchaser first in the person of Mr. Canfield, who failed to buy only because a sewer privilege did not exist which Moran represented to exist. Without going into details, we think that plaintiff brought buyer and seller together on Moran's terms, and the bargain fell through by Moran's fault or inability to complete it.

He next procured a purchaser in Mr. Slocum. This gentleman took a written proposal from Mr. Moran, which he was ready to accept; but Mr. Moran himself backed out of his offer. It turned out that his wife had an interest which he had not mentioned, and did not care to sell. But he had made an offer which Slocum had a right to consider, and did consider, as final.

Plaintiff did all that he could do, and it was defendant's fault, and not his, that no sale was made. On the undisputed facts he had a good cause of action. The court left the facts to the jury, and they came to that conclusion. The judgment must be affirmed, with costs.

The other Justices concurred.

EDWARD W. LOCKE v. THE PRIESTLY EXPRESS WAGON & SLEIGH COMPANY.

Contract—Compliance of machine with terms of sale—Evidence—Charge to jury.

1. In a suit upon a contract for the construction of a machine at a stipulated price, which the vendee refused to accept because not answering to the requirements of the contract, evidence by the plaintiff of the cost of the machine is irrelevant, his recovery being limited to the contract price.
2. In such a case evidence of the workings of *similar* machines, but not *like* the one in suit, and the amount of help required to operate them, is inadmissible, being outside of the issue being tried.
3. If the capacity of the machine manufactured upon a contract for a particular purpose is to be tested in establishing a condition precedent to payment, it should comply with the conditions mentioned in the contract.
4. An instruction to a jury not based upon any evidence in the case is erroneous.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued June 19 and 20, 1888. Decided July 11, 1888.

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

Taggart, Wolcott & Ganson, for appellant.

Smiley & Earle, for plaintiff.

SHERWOOD, C. J. The plaintiff makes claim against the defendant for the price of one of its $400 machines under the following contract:

"GRAND RAPIDS, MICH., January 5, 1886.

"MR. EDWARD W. LOCKE, City.

Dear Sir: You will please build us a machine for bending the felloe, and putting on the tire, on the fol-

lowing size wheels: 10, 12, 14, and 16 inches in diameter.

"The machine is to be made in a workman-like manner, and to be capable of building wheels as good as samples when run by an average boy of 15 years of age; and the machine run by said boy is to average (500) five hundred wheels in 10 hours, if kept continually at work, or no pay for the machine.

"The price on the first machine is to be ($400) four hundred dollars, which price gives us the right to use the machine free of all charge for royalty for making wheels for the length of the patent, if any is obtained.

"If wanted, Mr. Locke further agrees to make us a second machine, for the same purpose, for (240) two hundred and forty dollars, or less; and a third machine, for building smaller wheels, for $240, plus the extra cost of patterns. We are to have 60 days after the machine is in practical operation in which to choose whether we pay the $400 as before stated, or pay (1,000) one thousand dollars, for which latter sum Mr. Locke agrees to assign to us all right and title in the machine, for the length of the patent or invention, for the purpose of building wheels.

"PRIESTLY EXPRESS WAGON & SLEIGH CO.
Per F. H. Priestly, Secretary.

"Machine is to be completed within 10 weeks from date.

"Accepted on conditions herein stated.
"EDWARD W. LOCKE."

The common counts were added to the special counts upon this contract. The defendant pleaded the general issue, and gave notice under it that the machine mentioned—

"Was not constructed in a good and workman-like manner, and was not capable, when operated by an average 15-year old boy, in making 500 wheels in 10 hours, and that plaintiff had refused to perfect the same in accordance with the contract."

The cause was tried by jury before Judge Burlingame, in the superior court of Grand Rapids, where the plaintiff recovered the sum of $431.73. The defendant asks

for a review in this Court. Seven exceptions are made in taking the testimony, but two of which do we find it necessary to consider.

The counsel for plaintiff was allowed to ask the plaintiff, when on the stand as a witness, what it cost to build the machine, and the witness was allowed to answer that it cost him $520, allowing wages for the time, and the money he had paid out. The objection was that the testimony was immaterial, irrelevant, and incompetent. This objection was well taken. The plaintiff could only recover, if at all, upon his contract, and was limited to the sum therein stated. What the cost of the machine was certainly was irrelevant, if not incompetent, and the testimony was well calculated to mislead the jury as to the true measure of damages.

Fred O'Brien had been at work with other machines which were doing similar work to that claimed for the machine in question. He was sworn for the defendant; and, on his cross-examination by counsel for plaintiff, he was asked about the working of the other machines, who and how many persons run them, and how much help was used when they made the most wheels; and, upon it appearing by the testimony of the witness that the machine was not like the one in suit, defendant moved to strike out the testimony as entirely outside of the case being tried. It surely was and should have been stricken out for that reason.

Seven errors are assigned, based upon the charge of the court as given, and upon the refusals to charge. Two of the charges given will be considered. The other exceptions to the requests made and charges given are not so far erroneous as to make a reversal necessary upon those grounds.

The eleventh and thirteenth assignments of error are

well taken, and the instructions therein complained of were to the prejudice of the defendant.

The eleventh assignment is aimed at the following charge:

"The test of the capacity of the machine, under the contract, was a test of what the machine would do with the materials provided for a boy 15 years of age to operate with, both hoops and spokes and felloes and tires."

This is not the test provided for in the contract; and, if the capacity of the machine was to be tested at all in establishing a condition precedent to payment, it should have complied with the conditions mentioned in the contract. They are therein clearly stated.

The thirteenth assignment of error relates to the following charge of the court:

"Now, the court does not believe that it is a matter of any consequence in your consideration as to whether the plaintiff in the suit made no objection to where they placed their steam-box or their box for the felloes, unless the contract was that they might place their box (the steam-box) and the box for the spokes at a certain distance away.

"If you should find that such was the contract, which does not appear in this contract, or if it should be a subsequent contract,—that the plaintiff had made an agreement that they might put the box at a certain distance away,—if you should find that he had agreed to anything of that kind, then, in that case, the time consumed in going to the steam-box, and going after the hoop and felloes, would not be counted against the ten hours, but you must find that such was the agreement, in order to count the time against the 500."

There was no evidence in the case tending to show any such contract between the parties relating to the location or situation of the steam-box or the box for spokes, or as to the time in going to them when the machine was running, and the suggestion should not have been made in the charge to the jury.

For the errors noted, the judgment must be reversed, and a new trial granted.

The other Justices concurred.

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JENNIE BELL v. JAMES W. FERNALD.

Libel and slander—Charge of larceny—Malice.

1. Words charging another with the crime of larceny are actionable, and if used without warrant the law presumes malice.
2. Malice, in a legal sense, means a wrongful act done intentionally, and without just cause or excuse.

Error to Wayne. (Reilly, J.) Argued June 21 and 22, 1888. Decided July 11, 1888.

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

Edwin F. Conely (*Sumner Collins,* of counsel), for appellant, contended:

1. That defendant, having missed articles from his laundry, where plaintiff worked, and having been informed that she had taken them, charged her with the taking, and by agreement with her went for the alleged stolen goods, and there stated the facts, with her consent, all being done without undue publicity, and without malice; and under these circumstances the words used were privileged, and the instruction that the law presumed malice from their use, if without warrant, was error.

Charles W. Casgrain, for plaintiff, contended for the rules stated in the opinion.

SHERWOOD, C. J. This is an action to recover for alleged slander. The defendant is proprietor of a laun-

dry in the city of Detroit. The plaintiff is a young woman who had been in the employment of the defendant at his laundry up to the time the slanderous words are alleged to have been spoken, about 18 months. The words charged in the declaration as slanderous were spoken of the plaintiff on September 21, 1886, and are as follows:

"For some months back I have missed things from my laundry,—gentlemen's wear. Jennie has stolen them out of my laundry, and I have come to search your house."

It is alleged that the defendant used this language of and concerning the plaintiff to Mr. and Mrs. Labadie, with whom the plaintiff at the time boarded. The plaintiff claims the charge made was false; that the uttering of the same, under the circumstances, in the language used, was scandalous, malicious, and defamatory; and that she has been injured thereby,—laying her damages at the sum of $5,000.

The defendant pleaded the general issue, and gave notice that on the trial of the cause he would show that what he had charged against plaintiff was true.

The cause was tried in the Wayne circuit court before Judge Reilly by jury, and a recovery was had by plaintiff of the sum of $250.

The defendant brings error, and assigns the following upon which he relies for reversal:

"1. The court refused to instruct the jury that, 'under the pleadings and evidence in the cause, the plaintiff was not entitled to recover.'

"2. The court refused to instruct the jury that 'the use of the language charged in the declaration, under the circumstances detailed in the evidence, was privileged.'

"3. The court instructed the jury as follows: 'The words in the declaration are actionable in themselves, so that it does not require anything but evidence of the use of those words to entitle the plaintiff to recover. The

law presumes malice from the use of words of this kind, if used without warrant.'"

The case, upon its facts, was clearly one for the jury, and the court committed no error in so holding. The defendant not only re-asserted the statements charged as true in his notice, but in giving his testimony in the case substantially admits that he made the alleged libelous statements charged in the declaration. There is no doubt but the words charged were actionable. Whether they were or not privileged, depended on what the jury should find the facts to be. The facts, we think, were submitted to the jury under a proper charge upon that point; and the second error assigned is therefore without merit.

The remaining error assigned relates to the charge as given. As we have already said, the words use are actionable. 5 Wait's Act. & Def. 736; *Gaul v. Fleming*, 10 Ind. 263; *Coleman v. Playsted*, 36 Barb. 26; *Holley v. Burgess*, 9 Ala. 728.

The words used imputed to the plaintiff the commission of a crime, for which, if she was convicted, she could be imprisoned. Malice, in a legal sense, means a wrongful act done intentionally, and without just cause or excuse. *Edwards v. Chandler*, 14 Mich. 471; Odger, Sland. & Lib. 181; *Carson v. Edgeworth*, 43 Mich. 241 (5 N. W. Rep. 282). There was testimony in the case tending to prove this, and the jury have found it existed; and that finding we are not allowed to review upon this record, whether correct or not, or whatever may be our opinion in the matter.

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

The other Justices concurred.

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SAMUEL G. MILLER v. CORNELIUS CORNWELL AND CLARK CORNWELL.

[See 65 Mich. 467.]

Equity—Nuisance—Bill to abate mill-dam—Laches—Estoppel—Damages.

1. The removal of a mill-dam so far as it exceeds a proper height, by the decree of the equity court, is not a matter of right, but of equitable discretion, and must depend on the circumstances of the case.
2. It is quite possible for land-owners to estop themselves from seeking equitable aid to abate a mill-dam; and when they come into a court of equity for relief, and are not willing to comply with equitable conditions, it is competent to give them their choice to do justice or get their remedy where they can. A court of equity is not to be made an instrument of wrong.
3. In this case complainant is awarded $1,500 damages as entire compensation for the total injury to him by the continuance of the dam heretofore and hereafter.

Appeal from Washtenaw. (Newton, J., presiding.) Argued June 22, 1888. Decided July 11, 1888.

Bill to abate part of a mill-dam. Defendants appeal. Decree vacated, and new one entered granting complainant a less sum as full damages for continuance of dam, to be enforced as a money decree. The facts are stated in the opinion.

Henry W. Rogers (*Austin Blair* and *E. D Kinne*, of counsel), for complainant.

Charles R. Whitman, for defendants.

CAMPBELL, J. Complainant brought this suit in chancery to abate in part a mill-dam at Geddes, between Ann

Arbor and Ypsilanti, on the Huron river, and to get damages. The dam is the same which was litigated in *Blake v. Cornwell,* 65 Mich. 467 (32 N. W. Rep. 803).

The case presented, so far as essential to indicate the controversy, is this: Complainant, in 1880, bought a farm on the north side of Huron river, lying in part north of a highway running between Ann Arbor and Ypsilanti, and in part between the highway and the river. At this time a dam at Geddes on the mill property in question was down, and defendants were preparing to build a new one a few rods further down stream, to supply a pulp-mill built on the same mill-site occupied by a former mill destroyed. The new dam, by its lower position, got a higher head than the old one, which was not adequate. It is claimed that it was built higher than this gain in head would account for, and that it flowed the water back further than had been done by the old dam; that this back flowage reached and injuriously affected complainant's farm.

Complainant claims that his farm land lying between the highway and the river, is a parcel of substantially even and level land, which was in its natural condition a rich meadow, yielding heavy hay crops and some other crops; that the setting back of the water overflowed a considerable portion of it, and soaked and destroyed the utility of still more, so as to make the land nearly up to his house wet and marshy, and malarious. It is claimed the soil became unfitted for any but marsh grass, and became grown up to marsh plants, and incapable of yielding sound hay or other crops.

There is a very great conflict of testimony upon nearly all the facts important in the case. Much of the testimony is vague and speculative. Some is definite and intelligent. There is some direct conflict where witnesses

testify from their recollection, and some which is absolute.

The court below found that the dam had been raised high enough to injure complainant's lands, and allowed $2,000 compensation for the permanent right to keep up the dam without flash-boards, but refused to abate any part of the dam. Both parties appeal.

To understand the peculiar decree, it is necessary to state that after the mill got in full operation, and defendants had invested about $50,000, complainant brought an action at law for damages in 1883. The trial of this suit was not brought on, and in June, 1884, the parties executed regular articles of arbitration, each choosing an arbitrator, and those two choosing a third. When the arbitrators were ready to act, complainant refused to go on, claiming that the arbitration agreement covered more than he meant to cover. Thereupon the third arbitrator declined to act, and no further steps were taken. Complainant discontinued his action at law, and on January 13, 1886, he filed this bill, which gives no reason for the delay except the pendency of the Blake suit, and asks for an accounting of damages, and a removal of the alleged acts of nuisance.

It appears very clearly that the dam, as formerly maintained, in no way damaged complainant, and did not set the water back as far as his easterly line. There is no doubt that the dam as now kept up does set still water back beyond complainant's east line, but just how far it goes, and just how much harm is done, cannot be determined so easily. Some of complainant's testimony exaggerates the mischief very much beyond probability. Some of defendant's testimony puts it below what is probable. It is left for us, as it was for the court below, to ascertain what justice requires. But as both parties

appeal, some questions are presented in the outset to be passed upon.

Complainant claims that the relief should have gone to the extent of removing the dam so far as it exceeds the proper height. We do not think this is a matter of right. As a matter of equitable discretion it must depend on circumstances.[1]

There is some reason to believe that complainant knew, or might have known, had he chosen to do so, that defendants' new dam would throw the water back further than the old one. He claims to have found it out in July, 1881, before or at harvest time, when the growing crops were claimed to have been injured. Complainant took no steps then to get the dam removed, although he complained of it; but some negotiations were had looking to his grant of a right of flowage, and they differed on terms, and defendants gave him to understand they would not pay so large a sum as he demanded. Just what that was does not very plainly appear. The defendants had built their dam on the supposition that the mill-site condemnation act was valid. Complainant elected to sue for damages, and defendants invested money, and pursued their business, without any warning of other proceedings. After the dam had been up and the mill running about three years, arbitration proceedings were agreed on which would have fixed the price of flowage, and secured the right. No reasonable excuse is given for his refusal to proceed with them.

This bill was not filed until four years and a half after the mill was running, and after it was known how far the dam set back the water. Under these circumstances it is very doubtful whether equity ought to relieve at all. It is very certain that it ought not to interfere in com-

[1] See *Turner v. Hart*, 71 Mich. 128.

plainant's favor without requiring him to do equity himself; and we are satisfied that pecuniary compensation is all that should be given him. It is possible that there might be difficulty in granting specific relief to defendants, which would, as an original basis of equity, compel a specific performance of an express or implied license of flowage. But it is quite possible for land-owners to estop themselves from seeking equitable aid to abate a mill-dam; and when they come here for relief, and are not willing to comply with equitable conditions, it is competent to give them their choice to do justice or to get their remedy where they can. A court of equity is not to be made an instrument of wrong. In proving his damages complainant did not confine himself to loss of rent or annual crops, but went into the question of diminished market value of the land, which could be of no great pertinency except where damages are to be awarded once for all.

On the other hand, we think that the decree, which gave what was meant to be full compensation for maintaining the dam, should not have confined the right to maintain it to any particular use. If defendants pay for the water-power, it should belong to them.

Coming down to the merits of the controversy, we have been struck by the imperfect quality of the testimony on subjects that might have been made plainer. Complainant had the burden of proof to show the precise extent and character of his injuries; but the definite testimony comes chiefly from the other side. A number of witnesses swear that while the old dam was maintained the effect of it in throwing back the water extended to a certain tree on the bank, and no further. No careful levels seem to have been taken, either to determine from that how high the old dam was, or to determine the difference in elevation between that spot and the present dam, or some one of the various points claimed to be reached by the backed water

on complainant's land. Such levels are the only strictly reliable *data*, and, with those determined, any such variations as might be due to piling or other conditions could be readily allowed for.

The defense did introduce some testimony which has the merit of being definite upon some of the important issues. It was proved very clearly by men who had worked in the old mill, and who substantially agreed in their testimony, that they had a head of fully 10 feet, and a little more. This testimony is directly opposed to the estimates and guess-work of some of complainant's witnesses that it was three or four feet less. These witnesses could not be mistaken, and there is no reason to doubt their honesty. And it needs no long reflection to be satisfied that persons who, in an attempt to fix heights, make their own estimates frequently with a margin of 50 per cent., have no definite knowledge on the subject.

The measurements of Prof. Davis, while deficient in some of the desirable *data*, indicate that there could not be many inches difference between the height of the old dam and the new; and if the water was raised much higher by the new one, it is at least possible that it may be either from the more perfect construction of the latter, preventing leakage, or the effect of putting on flashboards, which would, while on, increase the practical height of the dam.

We have also been impressed by the difference in the testimony of those who have made careful examinations of the ground, and those who have not. It appears that there is a small stream running across complainant's land into the river, the mouth of which, according to most of the witnesses, strikes dead water near the east side of the land. The testimony substantially agrees that the current is checked but a very short distance up. There is also a swale running back nearly across the land towards

the northward. Upon the extent of the effect of the raising of the water in these two places the witnesses are hopelessly at variance. According to some witnesses there was a rise of three or four feet, and nothing short of this would satisfy other conditions which the witnesses refer to. But in October, 1887, four intelligent and reputable gentlemen, familiar with farming land in the vicinity, made a careful examination, which satisfies us they were in the main correct in their views concerning the condition of the land itself, as inconsistent with a large proportion of complainant's claims. If they saw what they say they saw, the river had not been raised materially beyond its natural bed, and the land had not been extensively damaged by either soaking or overflow, and was in some places naturally wet and springy. The testimony concerning the quality of the grass, and the character of the weeds, is also by some witnesses carried back to the time of the old dam, and shown not to have been due to artificial causes. Some allowance must be made for confusion of dates in matters of several years' standing.

In the absence of more definite *data* from actual comparative levels than complainant has introduced, and in the light of such testimony as seems most likely to be accurate, we are satisfied that the estimate made in October, 1887, and platted by Prof. Davis, is substantially accurate. If so, the decree is somewhat excessive. Allowing for past damages, which would have covered a shorter period but for the delays in proceeding, and allowing the most liberal compensation for land permanently damaged or destroyed, we think no more than $1,500 should have been given as compensation for the entire injury to complainant by the continuance of the dam heretofore and hereafter. There is no testimony of a definite character showing any unfavorable change in the healthiness of the

location traced to this dam. There is some theoretical testimony, but no substantial facts.

We are not disposed to change the decree so far as it relates to flash-boards. Defendants' testimony chiefly, if not entirely, refers to conditions traced to the dam itself. It is not impossible that some of the complainant's proofs of raising of the stream relate to its raising by the dam as supplemented by flash-boards. We have no idea that the discrepancies in testimony are due to intentional misrepresentation. In cases like this, accuracy of estimates should be attained by measurements, as far as possible, and not by guess-work.

While the general principles of the decree below are correct, we think an entirely new decree will have to be entered. The decree contains no finding, and we think it would, from the testimony, be impossible to find, just how far the height of the old and new dams differs. In case of an injunction, that difference would be the true allowance, as without some definite standard to measure the condition of the stream it cannot be known with precision when the high-water line is due to the dam and when to the swelling of the river, and the height of the old dam must be assumed lawful. It will be sufficient to require payment of the damages allowed within some specified time, leaving the enforcement of the decree to the usual methods on money decrees, and not by injunction. The decree below will therefore be vacated, and complainant will have a decree for the payment of the $1,500 allowed within 90 days, and also payment of costs at the circuit. We think it equitable that in this Court each party pay his own costs, except that the printing expenses of the record should be divided equally. Defendants, on payment of what they are required to pay, will receive a release of the right of flowage by the dam as

it stood at the date mentioned in the original decree, which was October 6, 1887.

The other Justices concurred.

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ALEXANDER V. MANN AND COLON C. BILLINGHURST, EXECUTORS, ETC., v. URIAH W. HYDE AND EZRA U. HYDE.

Will—Construction—Lapsed legacies—Residuary clause.

1. Our statutes do not save legacies from lapsing if the lagatee dies before the testator, except as provided by How. Stat. § 5812, which does not make the legacy become a part of the deceased legatee's estate, but simply gives it to his or her issue as *direct* beneficiaries.
2. The law in regard to lapsed legacies of personalty has always treated them as part of the general body of the estate, so that they pass to the residuary legatees.
3. A will dividing the residue of the testator's estate into seven parts, and devising one-seventh to a father and mother, and their son, "in equal shares to each of them," though somewhat ambiguous, is construed, in view of other provisions of the will as to such residue, to give the seventh to the *collective* legatees.
4. Where a testator bequeathed one-seventh of the residue of his estate to a legatee after deducting therefrom the absolute legacy, which was valued at $6,000 for that purpose by the testator, the only way to get at such deduction is to include $6,000 with the balance of the body of the estate not specially bequeathed, and divide the aggregate into sevenths, and, if one-seventh exceeds $6,000, the legatee will be entitled to the difference, and, if not, the remainder, after leaving out the $6,000, would belong to the other residuary legatees.
5. Under our statutes, as well as under the general policy of the law, no part of a testator's estate should be treated as intestate if it can be reasonably avoided.

Appeal from Muskegon. (Dickerman, J.) Submitted on briefs June 22, 1888. Decided July 11, 1888.

Bill to construe a will. Complainants and defendants appeal. Decree modified and affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for complainants.

Bunker & Carpenter, for defendants.

CAMPBELL, J. This is a proceeding to determine the rights of defendants in certain legacies left by Chauncey Davis to Mrs. Lydia A. Hyde.

The testator, who lived in Muskegon, made his will in February, 1885, disposing of a considerable estate, mostly personal and partly real. He made several specific and definite legacies, and some more general, chiefly among relatives, and made a residuary bequest, which will be referred to hereafter. Mrs. Lydia A. Hyde was his sister-in-law, and not a blood relation. Uriah W. Hyde was her husband, and Ezra U. Hyde their son. Mrs. Hyde died soon after the will was made, and testator lived some years longer. The questions presented to our consideration arise out of the fact that she died first.

By the third clause of the will, Mr. Davis bequeathed—

"To my sister-in-law, Mrs. Lydia A. Hyde, wife of Uriah W. Hyde, of Orangeville, Trumbull county, Ohio, all of my silver plate, silver ware, and plated ware."

He further bequeathed to her certain named books, and gave some of them to other persons.

The remainder of his library he gave in three divisions, of which was "one-third to said Lydia A. Hyde and her husband, Uriah W. Hyde."

His paintings, clothing, and furniture were specifically bequeathed in shares to other persons, to be divided among them, and a note was given up to the maker.

There were money bequests of either $500 or $1,000 each to various persons named. Among them was this bequest:

"To said Uriah W. Hyde and Lydia A. Hyde, five hundred dollars each."

His real estate and personalty in Wisconsin he disposed of to persons named. The residuary clause was as follows:

"All the residue and remainder of my estate, after conversion thereof into money or securities, as hereinafter provided, I give, devise, and bequeath as follows:

"To my said brother Jason Davis one-seventh of such residue and remainder, after deducting from said one-seventh, at a valuation of six thousand dollars, the provisions I have made for him and his wife in and by the twelfth paragraph of this, my will; to my said brother Jacob B. Davis, one-seventh; to Mrs. Caroline Davis, of Milwaukee, Wis., widow of my late brother, Harrison H. Davis, one-seventh; to said Julia A. Chisholm, one-seventh; to said Uriah W. Hyde, Lydia A. Hyde, and their son, Ezra Hyde, in equal shares to each of the three, one-seventh; to said Wealthie French and her daughter Mattie E. French, in equal shares to each of the two, one-seventh; and to Mrs. Eugenia B. Grace, wife of Joseph Grace, of Waverly, Chemung county, N. Y., George Davis, of Owen's Mills, in said Chemung county, and a third person whose name I do not remember, meaning the three children of my late brother, Osborne Davis, deceased, in equal shares, to each of the three, the other one-seventh, provided the three survive me. In case either or any of the three last above referred to do not survive me, then and in that case I give and bequeath the share or interest intended to be given to such deceased person or persons, if alive, to said Julia A. Chisholm."

Two sets of questions are presented: *First*, as to the various bequests to Mrs. Hyde; and, *second*, as to the Jason Davis bequests.

It is not seriously disputed that the bequest to Mrs. Hyde and her husband of one-third part of the library

was joint, and passed to Mr. Hyde, and so the court below found.

It is not claimed that any of the other bequests to Mrs. Hyde, except in the residuary clause, were joint, and they stand as bequests to her alone. The court below held that they lapsed, and fell into the residuary estate. It is claimed, as a question of some consequence, that, though lapsing, they did not go into the residum, but remained undisposed of by intestacy.

While Mrs. Hyde was evidently very much thought of by the testator, he sets forth nothing in his will which requires her to be treated as anything but a sister-in-law. He does not treat her as a blood relative, and he gives no directions as to what shall become of her legacies should she die before him.

Our statutes do not save legacies from lapsing if the legatee dies before the testator, except as provided for by section 5812 of Howell's Statutes, which is as follows:

"When a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

It will be observed that this does not make the legacy become a part of the deceased legatee's estate, but simply gives it to his or her issue as direct beneficiaries.

There is nothing in this case to show that Mr. Davis considered Mrs. Hyde as a relation, or as occupying any position towards him not mentioned in the will. In the clauses providing for her, she is twice mentioned alone, and once jointly with her husband. In one clause each obtains an equal but separate gift of money. In the thir-

teenth clause, husband, wife, and child are together given one-seventh share, to be equally divided.

We can see nothing in the will which should put Mrs. Hyde in any different class from any other persons of similar affinity. As a stranger in blood, there can be no doubt that the legacies given to her separately, except in the residue, lapsed. There is no authority for any other doctrine that we have discovered.

The law in regard to lapsed legacies of personalty has always treated them as part of the general body of the estate, so that they pass to the residuary legatees. In some places a distinction has been taken between lapsed devises and lapsed legacies, which does not concern us now. A lapsed legacy is in law the same as no legacy, for residuary purposes. There is no law to the contrary.

The only remaining question affecting the Hyde legacies relates to the residuary bequests. As already stated, the will divides the residue into seven parts. One-seventh of this residue was given to Mr. and Mrs. Hyde, and their son, "in equal shares to each of the three." This phrase is, no doubt, somewhat ambiguous; but it seems to us that its natural meaning is that the share is given to those three persons, and not that the estate shall be divided into sevenths if Mrs. Hyde lived, but in some other way if she did not. No provision is made for the case of the death of legatees in any of the residuary sevenths but one, and the fact that it was done there indicates that the matter was not overlooked. In the case of the three children of Osborne Davis, it is declared that the death of any of them before the testator should devolve the share of such decedent upon Julia A. Chisholm, so that the division by sevenths would not be disturbed; otherwise there would be great confusion. If each bequest is treated as a single legacy of one-seventh, the one to the Hyde family would, by Mrs. Hyde's death,

become the property of her husband and son equally. We think that the residuary clause had for its general purpose the gift by sevenths to the collective legatees to whom each seventh was given, and that this is the probable intention of the testator, and that there was no lapse in this instance.

So far, then, as Mrs. Hyde's legacies are concerned, we think the decree below is right, except as to the residuary clause, and that the one-seventh interest goes to Mr. Hyde and his son entire, with no diminution by reason of Mrs. Hyde's death.

We can discover no ambiguity concerning the Jason Davis bequests. The twelfth paragraph of the will gave him and his wife absolutely the property therein described. To ascertain his share in the residuary portion of the estate, it was declared he should have one-seventh, and that, in estimating it, the property given by the twelfth clause should be estimated at $6,000, and deducted. The only way to get at such a deduction must be to include $6,000 with the balance of the body of the estate not specially bequeathed, and divide the aggregate into sevenths. If one-seventh should exceed $6,000, he would be entitled to the difference. If not, then the remainder, after leaving out the $6,000, would belong to the other residuary legatees.

Under our statutes, as well as under the general policy of the law, no part of a testator's estate should be treated as intestate if it can be reasonably avoided. We think everything not covered by valid legacies belongs to the residuary legatees, in the manner suggested. The decree below is correct, except the fourth clause, which treats Mrs. Hyde's interest in the residuary estate as lapsed. We think that her husband and son are entitled to the whole share of one-seventh, and that there is no intestacy.

The decree, with that exception, and so modified, will be affirmed. The case is a proper one to have the costs of this Court, as well as of the court below, charged on the fund.

The other Justices concurred.

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108 622

PORTER L. SWORD AND CHARLES D. SWORD v. VICTOR H. LANE, CIRCUIT JUDGE OF LENAWEE COUNTY

Attachment—Sufficiency of affidavit—Allegation of indebtedness.

An allegation in an affidavit for a writ of attachment that two defendants, naming them, "are justly indebted" to the plaintiffs, imports a *joint* indebtedness, and the after averment that such debt is due from *one* of said defendants necessarily avers that it is due from *both*.

Mandamus. Submitted June 26, 1888. Denied July 11, 1888.

Relators apply for *mandamus* to dismiss attachment proceedings for a defect in the affidavit. The facts are stated in the opinion

Watts & Smith, for relators.

A. L. Millard, for respondent.

SHERWOOD, C. J. Relators apply for a *mandamus* requiring the respondent to dismiss a writ of attachment and all proceedings taken thereunder, on the ground that the affidavit upon which the writ was based is insufficient.

The plaintiffs in the attachment were four persons, composing the firm of H. Brewer & Co., and residents of the

county of Lenawee. The defendants in the attachment are the relators in this case. The affidavit for the writ was made by Herbert E. Stout, one of the members of said firm, and reads as follows:

"Herbert E. Stout, of said county, being duly sworn, deposes and says that he is a member of the firm of H. Brewer & Co.; that said firm is composed of Albert Brewer, Hudson W. Conklin, himself, Herbert E. Stout, and the said Hendrick Heeson; and that Porter L. Sword and Charles D. Sword are justly indebted to the said Albert Brewer, Hudson W. Conklin, Herbert E. Stout, and the said Hendrick Heeson, composing the firm aforesaid, in the sum of seven thousand ($7,000) dollars as near as may be, over and above all legal set-offs (and that the same is now due to the said Albert Brewer, Hudson W. Conklin, Herbert E. Stout, and Hendrick Heeson from the said Porter L. Sword upon expressed contract); and deponent further says that he knows that the said Porter L. Sword and Charles D. Sword are not residents of the State, and neither of them have resided in this State for three months immediately preceding the time of making this affidavit, to wit, the seventeenth day of December; and that the said Porter L. Sword and Charles D. Sword have property in this Lenawee county subject to attachment; and further deponent saith not.

"Subscribed and sworn to before me this 17th day of December, 1887. JOHN E. BIRD,

"Notary Public in and for Lenawee county."

The writ that was issued upon the filing of this affidavit was served by the deputy-sheriff by seizing the personal property belonging to defendants situate then in the county. No personal service was made of the writ on either of the defendants. Publication was had under the statute, and at the proper time plaintiffs filed their declaration, and are now proceeding to judgment in said cause. The property taken was duly appraised at the value of $300.

On April 19, 1888, defendants appeared specially by their attorneys, and moved the court to set aside the

writ and all the proceedings in the case, for the reason that the court had no jurisdiction to issue the writ; that no affidavit such as is required by law was made or annexed thereto, or presented to the clerk of the court before or at the time of its issue. This motion was heard and denied in the circuit court. The same grounds are relied upon here for the order asked.

It is claimed by counsel that the affidavit does not allege that there was any debt due against Charles D. Sword upon express or implied contract; that it is at least doubtful whether it contains such an allegation, and it is therefore within the case of *Wilson v. Arnold*, 5 Mich. 103. The counsel further claim that the fact that the allegation in this regard is expressly limited to Porter L. Sword fairly imports that it was not due as against Charles Sword.

I have not been able to take the same view of the question presented as do the relators' counsel. The language of the affidavit "that Porter L. Sword and Charles D. Sword are justly indebted to the said" plaintiffs named, imports a joint indebtedness, and until the contrary appears the common acceptation of the meaning of the terms should be applied. See 1 Pars. Cont. 11, 12, and cases cited; *York v. Peck*, 14 Barb. 644; *Miller v. Circuit Judge*, 41 Mich. 426; 1 Wait's Act. & Def. 76; *Geiges v. Greiner*, 68 Mich. 153 (36 N. W. Rep. 48). Any other construction of the language used might be accompanied with great mischief. If this construction is placed upon the language of the affidavit, that the indebtedness is joint, then it necessarily follows that when such indebtedness became due against one it must have been due against the other.

This disposes of both grounds of the motion in favor of respondent, and the writ must be denied.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred.

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103 596

JOHN A. HEWITT v. CHAUNCEY H. GAGE, CIRCUIT JUDGE OF SAGINAW COUNTY.

Jury—Summoning and impaneling—Challenge to array—Statutes —Repeal.

1. The provision in the charter of the city of East Saginaw creating the office of assessor, and requiring such officer to make and return lists of persons to serve as jurors, supersedes the general statute in that regard, and is sustained.

2. The return of more than 200 *qualified* petit jurors, under How. Stat. § 7556, is good cause for a challenge to the array; but, in such a case, it is the duty of the court to direct the clerk to strike from the *excessive* lists all names listed below the requisite number *first* appearing.

3. The following propositions are summarized from the opinion of Chief Justice SHERWOOD:

a—The selection of the jury, secured to litigants by our Constitution, is of first importance to parties, who have a right to have such jury constituted in substantial conformity with the law as established; and where a departure has occurred, and the positive provisions enacted to guard the right of trial by jury have been violated or disregarded, there is no warrant in our jurisprudence for treating the deviations as harmless irregularities.

b—There is nothing compulsory upon the Legislature as to how or in what manner lawful jurors' names shall be returned, but it is required to make some regulation upon the subject; and the general law enacted for that purpose is of no higher or greater authority than any other enactment upon that subject. One of the principal objects in any mode prescribed has been that the panel shall come from the *body* of the county, which means, under our system of territorial division, from *every township* in the county.

Mandamus. Submitted June 26, 1888. Granted July 11, 1888.

Relator applies for *mandamus* to vacate an order sus-

taining a challenge to the array, and discharging the jury, etc. The facts are stated in the opinion.

Camp & Brooks, for relator.

Wisner & Draper, for respondent.

SHERWOOD, C. J. The relator lives in the county of Saginaw, and is plaintiff in a cause in the circuit court for that county, wherein the Flint & Pere Marquette Railroad Company is defendant. The cause came on for trial at the May term, 1888, and a jury was summoned for that purpose. The defendant thereupon challenged the array of the panel upon the following grounds, as stated by its counsel:

"1. That the persons selected to serve as petit jurors in the year 1887, and from which the jurors of the May term, 1888, of this court were drawn in part, from the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th wards of the city of East Saginaw, were not selected by the assessor of said city, and the alderman of each ward thereof, as is required by law, but it says such selection was made by the assessor of said city alone.

"2. That the lists of persons selected to serve as petit jurors for the May, 1888, term of said court, and filed in the office of the clerk of this court, from all or any of the wards of the city of East Saginaw, were not made out and signed by the assessor of said city and the aldermen of said wards, nor by the assessor and a major part of the aldermen, but were made out, signed, and returned to the clerk of Saginaw county by the assessor of said city alone.

"3. And, for further cause of such challenge, it says that the list of jurors returned from the various townships and wards in Saginaw county, and on file in the office of the clerk of Saginaw county, in the year 1887, and from which lists the jury impaneled in this cause was drawn, shows that 376 names were selected and returned as petit jurors, and 216 names were so selected and returned as grand jurors, making the total number exceed by 192 the number which by law could be returned, and that the list of names so returned to serve as petit jurors exceeds by

176 the number which by law could be returned to serve as such petit jurors.

"4. That the list of persons selected and returned from all the wards of the city of Saginaw, and from which the jurors from said city for the May term, 1888, of said court, were drawn, are all designated as petit jurors, and not one-half petit and one-half grand jurors, as required by law, and so the number of persons so selected as petit jurors from said city is excessive by upwards of 35.

"5. That the lists of persons returned as petit jurors in 1887, and from which jurors for the May term, 1888, of this court were drawn, from the townships of Brady, Chapin, Fremont, James, Jonesfield, Saginaw, and St. Charles is largely in excess of the number which by law could be returned from said townships, and from each of said townships.

"6. That in the lists of persons returned to serve as jurors in 1887, and from which the petit jurors for the May term of said court for 1888 were drawn, from the townships of Brady, Fremont, Saginaw, and St. Charles, 78 names are returned, 60 of which are designated as petit jurors, and that the number of persons returned from said townships are largely in excess of that which is allowed by law.

"7. That the number of names returned to the county clerk from the townships and wards of Saginaw county, and from which the jurors for the May, 1888, term of said court, were drawn, had no regard to the population of the respective townships and wards, or to the population of Saginaw county, computed according to the last census of said townships, wards, and counties."

These statements of causes of challenge the plaintiff admitted to be true. The circuit judge by his order sustained the challenge, discharged the jury, and continued the cause for trial until the next term of the court. The relator now asks that the circuit judge may be required by a writ of *mandamus* to vacate and set aside said order. The respondent, in making answer to the order to show cause, admits the facts stated in relator's petition to be true, and insists that he should not be required to set aside the order, for the reason that the statutes relating

to securing a jury for the trial of the case have not been complied with by the township and city officers.

The principal questions raised by the record in the case arise under sections 7554 and 7556 of Howell's Statutes, relating to the duties of officers in returning lists of persons to serve as jurors in the circuit court. By the first section referred to it is provided that—

"The supervisor and township clerk of each township," and, in cities, "the supervisor or assessors, as the case may be, and aldermen of each ward or assessment district, * * * make a list of persons to serve as petit jurors, and a list of persons to serve as grand jurors, for the ensuing year," the number to be based upon the population shown in the last census.

By the charter of the city of East Saginaw, which lies in said county, the office of assessor is created, and he is required to make and return lists of persons to serve as jurors. Local Acts of 1885, pp. 350, 365. By the provisions of the charter of the city of Saginaw the controller is made the assessor of the city, and is required to make out and return the list of jurors for each ensuing year. Local Acts of 1887, p. 727.

It appears by the return of the circuit judge that the persons selected as petit jurors in 1887, and from which the jurors were drawn at the May term, 1888, in the suit in question, were drawn, in part, from the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th wards in the city of East Saginaw, and were not selected by the assessor of the city, and the alderman of each ward thereof, but the selection was made by the assessor alone; and that the lists of persons selected and returned were not signed by the assessor and aldermen, but by the assessor only. This, it is claimed by respondent's counsel, is not a compliance with the law, and rendered the action taken by the circuit judge necessary.

The selection of the jury, secured to litigants by our Constitution, is of first importance to parties, and they have a right to have such jury—

"Constituted in substantial conformity with the law as established; and where a departure has occurred, and the positive provisions enacted to secure and guard 'the right of trial by jury' have been violated or disregarded, there is no warrant in our jurisprudence for treating the deviations as harmless irregularities."

And, when the party to be affected thereby seasonably makes his objections to such deviations, he stands on substantial and valuable rights, and ought to have his challenge prevail. The provisions of the law cannot be set aside, although it may appear to us that neither party has been injured by the transgression. That we never can for a certainty know, and for this reason safety can only be secured by a reasonable compliance with the law.

There is nothing compulsory upon the Legislature as to how or in what manner lawful jurors' names shall be returned to the box, but it is required to make some regulation upon the subject; and the general law it has enacted is of no higher or greater authority than any other enactment upon that subject. One of the principal objects in any mode prescribed has been that the panel shall come from the body of the county; and this means, under our system of territorial division, from every township in the county. Substantially the same provisions as we now have for getting a jury have continued during our State existence. Rev. Stat. 1838, pp. 439–446; Rev. Stat. 1846, p. 463; Laws of 1853, p. 188, § 9; 2 Comp. Laws of 1857, p. 1188; 2 Comp. Laws of 1871, p. 1719; also provisions hereinbefore referred to.

East Saginaw received her charter as a city as early as 1859; and by an amendment in 1869 it was made the duty

of the assessor of the city to prepare and furnish the list of jurors to serve as jurors from that city (see Laws of 1869, p. 432); and this legislation was entirely proper. It took the city out of the operation of the general statute in that regard. The learned counsel for respondent, however, refer us to the amendment of the general statute passed in 1881, which says:

"The supervisor and township clerk of each township, and the supervisor or assessors, as the case may be, and aldermen of each ward or assessment district, in any city, shall, at the time appointed by law for the review of the assessment roll for each year, make a list of persons to serve as jurors," etc. (see Laws of 1881, p. 55);—

And claim there is no conflict in these statutes; that the general law provides that it shall be done by the supervisor or assessor, and the charter fixes definitely which of these officers in East Saginaw shall do it, but, this done, it then becomes his duty to act with the aldermen; and that the law requires that the list of jurymen made should be by the joint action of all of them.

This, of course, would be a substantial repeal of the clause we have referred to in the charter of East Saginaw. I do not think such a repeal can be impliedly made. Neither do I think it was ever intended by the Legislature, or should be allowed to have that effect. It is not the rule that general statutes or acts repeal by implication special acts and chartered provisions in any such way. 1 Dill. Mun. Corp. § 87, and cases there cited. But, if it be conceded that it did effect such repeal, it was afterwards repealed by an amendment to the charter in 1885, which re-enacted the old charter provision referred to. See Local Acts of 1885, p. 365, § 5.

It may be well contended that the statute invoked by respondent was never intended to apply to a city whose chartered provisions are like those contained in the East

Saginaw charter. By that charter the assessor is a city officer, and assesses all the property of the city, and comes more or less in contact with all persons therein having the qualifications of jurors; while in cities incorporated under the general law the person assessing is but a ward officer, not acting beyond the limits of his ward; and such was the case in Detroit when the statute was first passed, in 1839. See Laws of 1839, Act No. 35, §§ 4, 5.

We might further say there seem to be a peculiar fitness and special circumstances why the assessing officer of either township or ward or city should make the list, which is to be made from the names contained upon the assessment roll for the preceding year. The assessor is the custodian of that roll, and, having made it himself, he should be peculiarly qualified for the work required by the statute. I think the first position of respondent's counsel cannot be sustained.

We now come to the objection made by respondent's counsel under the second section of Howell's Statutes referred to, being 7556, and which reads as follows:

"Such lists shall contain not less than one for every one hundred inhabitants of such township or ward, computing according to the last preceding census, and having regard to the population of the county, so that the whole number of jurors selected in the county shall amount at least to one hundred, and not exceeding four hundred, one-half of whom shall be designated as petit jurors, and one-half as grand jurors."

It is claimed by them that the facts contained in the third and fourth paragraphs of the challenge show that the statute was entirely disregarded, and they strongly intimate as their view that the statute cannot be applied to Saginaw county, with its present population, and they suggest that the difficulty can only be remedied by the Legislature. The particular fault claimed is that the

whole number of jurors to be raised in all the townships and cities in the county must not exceed 400, one-half of whom should be designated as petit and the other half as grand jurors; that the limitation of this number, and the proper designation of those returned, have been utterly disregarded by the township and city officers; that in some instances one half of those returned were not designated as petit and the other half as grand jurors.

An examination of the section of the statute discloses that at no time is the number of the jurors to be returned on the lists to be less than 100 or more than 400, and one-half are to be returned as grand and the other half as petit jurors; and it further provides that the lists shall contain not less than one juror for every 100 inhabitants there shall be in the township or ward. Of course, no serious question can arise until the population of a county exceeds 40,000; and, inasmuch as the number to be listed and returned must never exceed 400, I think it quite apparent that after that time the ratio of population to the juror must necessarily be increased. For instance, when the population of a county shall number 80,000, the ratio will necessarily be one juror to every 200 inhabitants. I see no difficulty in construing the section in this manner, and thereby the obvious intention of the Legislature will be thus attained, and the embarrassment claimed will be removed.

But the statute provides for listing and returning but 200 petit jurors; and the present case shows that 376 names were returned as petit jurors, and 216 as grand jurors; that the total excess of jurors returned from the county was 192, and in the number returned there was an excess as petit jurors of 176. There is no pretense but that the men whose names were listed and returned all have the qualifications of jurors. There is no difference in the qualifications of grand and petit jurors,

and all were listed and returned by the proper officers.

We need not consider the case of grand jurors, as it is only with the number of petit jurors returned that the parties in the case are interested. And the question raised is, does the excess stated constitute such an irregularity, and so far prejudice the suitors, as to furnish good ground for the challenge made?

I think it does. It is clear that a plain violation of the law has occurred, and it is impossible for the Court to know or say that the parties will not be prejudiced thereby. It is its duty to require a compliance with the law in all cases when it is not plainly manifest no injury or prejudice can come to the parties by reason of non-compliance. In this case we cannot know this. If a less number had been returned than the law requires, the case would have been different. In that case each person returned would not have been a legal juror. I think the case comes clearly within the principles first above stated.

In regard to the number of jurors returned from the several townships mentioned in the challenge, the law was not complied with; and in this case the excess of the quota from each township, and its effect, for the reasons above given, apply with equal force to them. Had the number of petit jurors, with those mentioned from the townships named, in all not exceeded the lawful number, another and different case would have been presented, and upon which no opinion herein is expressed.

It may be, however, proper to say that the returning officers should never return more names for either grand or petit jurors than the law requires; but the full number which the population of a town or ward entitles it to should be listed and forwarded to the clerk, as required by the statute. While, however, it is proper that the jury-list should not exceed the statutory number, there would be considerable public inconvenience in holding that

this cannot be rectified. Such mistakes are often made; and, if they should be held to invalidate the jury-lists entirely, the business of the courts may be seriously delayed, and the interests of both civil and criminal litigation would be jeopardized.

Where all the persons enrolled are competent jurymen, there cannot be any legal presumption that one is more fit than another. The lists may be corrected by striking off all names listed below the requisite number first appearing. All beyond those was improperly returned.

A *mandamus* will therefore issue directing the circuit judge to vacate the order complained of, and he will direct the clerk to strike from such excessive lists the names as suggested, to sufficiently reduce them to the number lawfully authorized to be returned; and this will be held to be the duty of the court in all like cases.

The other Justices concurred.

The People v. Eugene Brown.

Criminal law—False pretenses—Information.

An information charging respondent with obtaining two promissory notes by means of *false* representations as to the pecuniary responsibility of an alleged corporation for which he claimed to be agent, but which fails to show that the corporation, directly or by agent, made any agreement or had any dealings with the party alleged to have been defrauded, or to state the consideration for the notes, or to whom payable, or whether negotiable or not, charges no offense.

Error to Shiawassee. (Newton, J.) Argued June 27, 1888. Decided July 11, 1888.

Information for obtaining two promissory notes by means of false pretenses. Respondent was convicted. Reversed and respondent discharged. The facts are stated in the opinion.

D. Shields and *L. S. Montague,* for respondent.

Moses Taggart, Attorney General, and *S. F. Smith,* Prosecuting Attorney, for the people.

CAMPBELL, J. Respondent was convicted of obtaining two promissory notes—one of $200, and one of $80—on false pretenses. From the testimony the case seems to have been one of the Bohemian oat cases; but it is claimed that no offense was charged in the information. The purport of this was as follows: It charges that Alva Ellis and respondent, with fraudulent design, etc., represented to one Harmon Hartwell that respondent was agent for an incorporated company, designated as the "Bohemian Oat & Cereal Company," having its chief office at Ypsilanti; that it was a good, responsible, and reliable company, that fulfilled all its contracts, and had a paid-up capital of $100,000, and was so wealthy and financially responsible that it would be impossible for it to avoid payment of all its liabilities; that it intended in good faith to carry out all contracts, and any contract made with it through its said agent would be fairly and honestly fulfilled, and it had thus far fulfilled all its obligations, and was not a fraudulent or swindling company, but honest, fair, and trustworthy, and any deal with it would be fairly and in good faith carried out.

That Hartwell, relying on these representations, was induced to sign and deliver the two notes to Ellis and respondent, who obtained them by the false and fraudulent representations, and with the fraudulent design mentioned. The information then negatives the allegations imputed to respondent specifically.

The information does not point out for what consideration these notes were given, or to whom they were payable, or whether negotiable or not.[1] It does not show that the corporation, directly or by agent, made any agreement or had any dealings with Hartwell. In other words, it does not show in what way it concerned Hartwell whether the Bohemian Oat & Cereal Company was an honest and responsible or dishonest and swindling concern. There is nothing to connect the notes with any fraud practiced on Hartwell. A falsehood not acted on can be no fraud; and, so far as this information goes, the statements concerning the corporation had no more to do with the notes than any other irrelevant lies would have had. Unless Hartwell dealt with it, the condition or character of the company could not concern him.

The information charged no offense. The conviction under it cannot be sustained, and must be reversed and set aside, and respondent discharged.

The other Justices concurred.

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THE PEOPLE v. PHILLIP LENNON.

Criminal law—Self-defense—Evidence.

1. In cases of self-defense, the question to be determined is, did the accused, under all of the circumstances of the assault, as it appeared to him, honestly believe that his life was in danger, or that he was in danger of great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger, and, if so, the inquiry is ended.

[1] Hartwell testified that he delivered the notes to Brown, and had not seen them since, and did not remember who was the payee in the notes.

It can and ought to make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted with broils or assaults, as to the *sufficiency* of his reason for his action, if the jury believe that he acted honestly in fear of his life or of great bodily harm.[1]

2. In cases of self-defense, the physical and mental make-up of the respondent, and his experience in danger, are to be considered as bearing upon the *honesty* of his alleged belief, upon which he bases his right to act; and in such consideration the fact that the accused is weak, timid, and cowardly by nature is to be weighed in his favor.

Error to Mackinac. (Steere, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of an assault with intent to do great bodily harm less than the crime of murder, and sentenced to State prison for two years. Judgment reversed and prisoner discharged. The facts are stated in the opinion.

Brown & Packard, for respondent.

Moses Taggart, Attorney General, and *Henry Hoffman,* Prosecuting Attorney, for the people.

MORSE, J. Lennon was convicted in the circuit court for the county of Mackinac of an assault upon one Herbert Ryerse, with intent to do said Ryerse great bodily harm less than the crime of murder. There was another count in the information filed against him, charging him with an assault with intent to commit the crime of murder. By the verdict he was acquitted upon this count. The errors assigned relate to the charge of the court.

The court charged the jury upon the subject of self-defense, among other things, as follows:

[1] See *People v. Coughlin,* 65 Mich. 704, 67 Id. 467 (head-note 8).

"And if you believe, from the evidence in this case, that at the time of the alleged assault the defendant, Lennon was first attacked by the complaining witness, and that the circumstances, as they then appeared to him, were such as in reason would and did justify or induce in his mind a probability of a belief that he was to receive from Ryerse some great bodily harm, and in doing what he did he was acting under the instincts of self-preservation, he would not be guilty of the offenses charged in this case.

"But in that connection you ought to remember that human life is not to be lightly regarded. A man cannot avail himself of this fact in order to escape the penalty of such acts as were provoked by his own unlawful act. And if a man kills or attempts to kill him, or unlawfully attacks or injures another, through mere cowardice, or under circumstances not warranted to induce in his mind a reasonable fear of injury, and which would be considered to arise from a want of courage, or an unwarrantable cowardice under the circumstances, situated as the party attacked was, and as the circumstances then presented themselves to him, the law of self-defense would not apply, and would not justify such an act."

I do not think it proper that a jury should be authorized to determine the standard of courage in a case of self-defense, or whether the party attacked, in what he did in his defense, acted cowardly, and therefore without warrant. There is no question of courage or cowardice in the case. I am aware that the rule laid down by the trial court has been sustained in some cases, collected and reported in Horrigan & Thompson's Cases of Self-defense; but the doctrine, or the reason given for it, is not in accord with the principles of self-defense, as now almost universally held and enunciated by the courts of this country.

The question to be determined is, did the accused, under all the circumstances of the assault, as it appeared to him, honestly believe that he was in danger of his life, or great bodily harm, and that it was necessary to do what he did in order to save himself from such appar-

ent threatened danger? If so, the inquiry is ended. It can and ought to make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted with broils or assaults, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm. The fact of his physical and mental make-up, and his experience in danger, are to be considered, it is true, as bearing upon the honesty of his alleged belief, upon which he bases his right to act; but in such consideration the fact that the accused is weak, timid, and cowardly by nature is to be weighed in his favor, and not against him. To hold otherwise would be to set at naught, and to rule at variance with, the well-known laws of human nature, and to place the weak and timid at the mercy of the strong. It is bad enough to be constitutionally a coward, without having the law also declare that the coward has no right to act in self-defense until he reaches the point where a man of average courage would have defended himself in the same manner, and to have the quantum of courage necessary in such cases determined by a jury sitting in safety and cool blood, listening to what must always be a tame recital of the facts, compared to their appearance at the time they occurred.

Upon the argument I was inclined to the belief that the error committed was not a prejudicial one, as from a hasty perusal of the record I had formed the impression that the respondent, in his own statement, did not claim to act in self-defense, but that he fired the pistol in the air purposely with the intention of scaring Ryerse away, and not with any idea of hitting him. But a careful examination of the record discloses that the claim of self-defense was made and relied upon by the defendant and his counsel.

It is also claimed that the court erred in instructing the jury that the respondent could be convicted of an assault with intent to do great bodily harm in case the jury found that the assault was made unlawfully, without malice aforethought, but with an intention to take life, suddenly formed, under such circumstances of provocation that, if death had ensued, the killing would have been manslaughter. As we view the testimony appearing in the record, there is no necessity of examining this claim of error. We find no evidence in the case warranting a conviction of the respondent of any greater offense than assault and battery, if he was guilty of any offense. Ryerse was not hit by a bullet, and there is no testimony showing that respondent meant to shoot him. Ryerse was not hurt to speak of, and was more to blame than defendant.

On the evening of July 4, it is admitted and undisputed that he stopped in front of respondent's residence in company with a squaw prostitute, and then deliberately and grossly insulted Lennon in the presence of his family by remarks in a loud tone to the prosititute, using language unfit to be here repeated. Most men would have felt justified in chastising such an obscene brute at the time, and the infraction of the law in so doing would have been satisfied by a light penalty.

There was testimony tending to show that there had been trouble for some time between the Ryerse family and Lennon. Lennon claimed that for a long time he had been the subject of many indignities and outrages on the part of Ryerse and his father, and others who were in league with them. This last insult was too much, and Lennon felt that he could no longer submit to such treatment. He therefore, on the morning of July 5, stopped Ryerse as he was passing his house, and expostulated with him; asked him, "How long are you going

to torment me in this way?" Ryerse gave him an insulting answer, which led to blows. Ryerse claims Lennon struck first, and the respondent swears that Ryerse assaulted him, backing him towards his gate, and "punching" him in the face. Lennon testifies that he was sickly, and scared; that he considered his life in danger, as he was so weak that he felt that one good blow, "the least thing in the world, would lay me out; it would knock me dead." He claims he fired his pistol the first time to scare Ryerse, but, as Ryerse kept on afterwards following him up and striking him, he struck Ryerse on the ear with the revolver, and it went off the second time accidentally. Whether Ryerse first assaulted Lennon or Lennon first struck Ryerse on this morning of July 5 is immaterial. At the best, Lennon was only guilty of assault and battery, and he has now been sufficiently punished for that offense.

The judgment and sentence against him is vacated and set aside, and he will be forthwith discharged from any further custody or restraint in this case.

The other Justices concurred.

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THE PEOPLE v. FRANK GLOVER.

Criminal law—Rape—Age of consent—Complaints of injured girl—Evidence—Testimony of physician—Privilege.

1. In a prosecution for rape upon a girl 11 years old, her statements to her mother charging respondent with the offense, made 13 days after its alleged commission, is admissible, it appearing that her reason for not making a more immediate disclosure was from fear that her mother would whip her. *People v. Gage*, 62 Mich. 271.

2. The testimony of physicians as to the physical condition of a respondent charged with rape, a knowledge of which was gained from an examination at the jail submitted to voluntarily after respondent was informed that the prosecuting attorney had sent them for that purpose, which was the *sole* object of their visit, is not privileged, and its admission is not error.
3. In a prosecution for statutory rape upon a girl under 14 years of age, evidence of her reputation for chastity, or of specific acts of lewdness, is inadmissible, her good or bad character not being in issue, she being too young to consent to the intercourse.
4. Where a respondent on trial for rape testifies in his own behalf that he did not have a venereal disease, as testified to by the people's witnesses, it is proper to show, on his cross-examination, the nature and object of certain bottles of medicine used by him while confined in jail.
5. The refusal of the court to permit counsel for a respondent to read in the hearing of the jury from a medical work which had not been made evidence is not error.

Error to Bay. (Cobb, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of rape, and sentenced to State prison for 15 years. Judgment affirmed. The facts are stated in the opinion.

C. E. Pierce, for respondent.

Moses Taggart, Attorney General, and *James Van Kleeck,* Prosecuting Attorney, for the people.

LONG, J. Respondent was convicted of the crime of rape, in the circuit court for the county of Bay, and sentenced to the State prison at Jackson at hard labor for the period of 15 years. The offense was alleged and shown to have been committed on December 4, 1887.

On the trial the people called as a witness Barbaraellen Murray, who testified that she was 11 years of age, and that Frank Glover, the respondent, raped her on Decem-

ber 4, 1887, giving the details of the transaction. This was the only direct testimony produced as to the actual commission of the offense. The people produced other evidence, to which no objection was made, tending to show that Barbaraellen Murray, on December 17, 1887, was suffering from gonorrhea. It is admitted that she made no disclosure that her person had been violated until December 17, 1887, when her mother, the prosecutrix in this case, induced by the girl's singular behavior, questioned her; and was permitted to testify, against the objection of the defendant, to what the girl told her relative to the offense. The only evidence given by the mother as to what the girl told her was her statement that the girl said: "Frank Glover, ma, has done this on me;" and said statement was made at the time she first discovered the condition of the girl. It appears from the evidence that the reason she did not make a more immediate disclosure was from fear that her mother would whip her.

The testimony of physicians who made an examination of defendant's person at the jail on December 19, 1887, was admitted, against the objection of the defendant.

This testimony tended to show that the defendant was suffering with venereal disease. It further appeared that defendant was notified by the physicians that they made such examination by direction of the prosecuting attorney, and that he submitted to such examination voluntarily, and made no objection thereto.

The defendant offered to introduce testimony showing that the reputation of Barbaraellen Murray for chastity was bad. This testimony was objected to by the prosecuting attorney, and excluded. The defendant also offered testimony showing specific acts of lewdness on the part of Barbaraellen Murray with young boys in

the months of December, 1886, and April, 1887. This testimony, on motion of the prosecuting attorney, was excluded.

The defendant, having been sworn in his own behalf, denied the alleged rape; and, having given evidence tending to show that he had not gonorrhea at the time the offense was alleged to have been committed, upon his cross-examination, the court, against the objection of defendant's counsel, required the defendant to answer questions propounded by the prosecuting attorney as to his physical condition with reference to the venereal disease, and as to the nature and object of certain bottles of medicine used by the defendant while confined in the jail. At the close of the testimony, the defendant's counsel offered to read from Beck's Medical Jurisprudence, which offer was refused by the court; the court saying he would excuse the jury temporarily, and permit counsel to read, but that he did not think it was proper to read from that book in the presence of the jury. After conviction and sentence, the defendant brings the case to this Court by writ of error.

The following errors are assigned:

"1. The court erred in admitting the testimony of Mrs. Murray as to what the girl told her relative to the offense 13 days after the alleged commission of the crime.

"2. The court erred in admitting the testimony of physicians, who made an examination of defendant's person in the jail, as to defendant's physical condition with reference to venereal disease.

"3. The court erred in refusing to permit the evidence to be introduced, which defendant's attorney offered to introduce, showing that the reputation of Barbaraellen Murray for chastity was bad.

"4. The court erred in refusing to permit the evidence to be introduced, which defendant's attorney offered to introduce, showing specific acts of lewdness on the part of Barbaraellen Murray with young boys.

"5. The court erred in requiring the defendant to answer

questions as to his physical condition, propounded by the prosecuting attorney.

"6. The court erred in refusing to permit defendant's counsel to read, in the hearing of the jury, from a book entitled 'Beck's Medical Jurisprudence.'"

We find no error in this case. The mother was properly allowed to testify to what the girl told her on December 17, 1887; and the case falls directly within the ruling of this Court in *People v. Gage*, 62 Mich. 271 (28 N. W. Rep. 835), where cases on this point are collected and reviewed by Mr. Justice CHAMPLIN.

The claim that the court erred in admitting the testimony of physicians who examined defendant, after his arrest, while in jail, as to his physical condition, has no force. It is not claimed that any confidential relations existed between the defendant and the physicians who examined him, or that such examination was made to enable the physicians to prescribe for him, or to do any act for him as surgeons, and the defendant was told, at the outset, by the physicians, that they came there at the instance of the prosecuting attorney, and he voluntarily submitted to their examination. Under the circumstances here stated, we think this testimony was competent, and the physicians were properly permitted to testify to the information derived from such examination. The privilege does not extend to cases where no confidential relations exist. *Campau v. North*, 39 Mich. 606; *Pierson v. People*, 79 N. Y. 424.

Error is alleged upon the refusal of the court to allow defendant to show that the reputation of the girl for chastity was bad. The good or bad character of the girl for chastity was not in issue. The prosecution was had under the statute of 1887, which fixes the age of consent at 14 years; and, the girl being too young to consent to the intercourse, it would be no answer that she had a bad reputation for chastity.

The court properly excluded the evidence offered to show specific acts of lewdness on the part of the girl in December, 1886, and April, 1887. She was too young to consent to such acts, and it would have no tendency to show that the venereal disease was contracted by her if such acts had been proven, and, indeed, no such claim is made by counsel for the respondent.

The defendant produced himself as a witness in his own behalf, and gave testimony tending to show that he did not have gonorrhea at the time the offense was alleged to have been committed; and it was proper, on his cross-examination, to show that he had certain bottles of medicine, and used it in the jail after his arrest, and the court properly admitted the evidence.

The medical book which defendant's counsel proposed to read in presence of the jury on the argument of the case had not been made evidence in the case, and was properly excluded by the court.[1]

We find no error in the case, and the judgment of the court below must be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred.

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[1] For a case on this question, see *People v. Vanderhoof*, 71 Mich. 158.

THE PEOPLE v. LAUGHLIN McLEAN.

71 309
97 486
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148 139
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153 59

Criminal law—Rape—Evidence—Specific acts of intercourse.

In a prosecution for rape, specific acts of intercourse by the prosecutrix with persons other than the respondent cannot be shown: and her denial on her cross-examination of having admitted such acts is conclusive.

Error to Clare. (Hart, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of an assault with intent to commit the crime of rape. Judgment affirmed. The facts are stated in the opinion,

Gallup & Pearson, for respondent.

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

LONG, J. The respondent was convicted of an assault with intent to commit the crime of rape, in the circuit court for the county of Clare on January 24, 1888, and brings the case into this Court by writ of error.

On the trial of the cause, Myrtie Merrill was called as a witness by the people, and testified that she was the daughter of Wellington Merrill and Fannie McLean; that her father is the complainant in this case, and is now living; and that he was divorced from her mother about one year ago, soon after which time the respondent, Laughlin McLean, and her mother were married.

That about August 1, 1887, her mother was called away from home to attend the funeral of her parent, and, after her mother had been away from home a few days, the defendant came into her room one night, soon after

she had retired, and then and there ravished and carnally knew her, and that said act was by force and against her will; that it was about one week before her mother came home, and that she continued to keep house for the defendant until her mother returned, about one week after which time, witness told her of the affair; that this was the first she told any one about it; and that she told one of her school-mates about it some time afterwards, and told no one else until she told her father.

On her cross-examination by defendant's counsel, she testified that one Alfonzo Langworthy worked for Mr. McLean during the summer of 1887, and that he went away from his house only a few days before the time when her mother went to the southern part of the State to attend the funeral of her parent; that she had never before had sexual intercourse with any one; that she had not told Mr. and Mrs. Bates that she had sexual intercourse with Alfonzo Langworthy, at the time she was stopping at their house; that she stopped there at the time of the arrest in this case.

The people here rested their case, and the defendant called as witnesses in his behalf Mr. and Mrs. Bates, and offered to prove by them that Myrtie Merrill did tell them, while stopping at their house, that she had had sexual intercourse with Alfonzo Langworthy several times while he was working for the defendant. This evidence was excluded by the court, and error is assigned upon such ruling. This raises the only question in the case for review.

The rule is laid down by Mr. Greenleaf, in his work on Evidence (3 Greenl. Ev. § 214), that the character of the prosecutrix for chastity may be impeached; but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. Nor can she be interrogated as to crim-

inal connection with any other person, except as to her previous intercourse with the prisoner himself; nor is such evidence of other instances admissible. The weight of authority, both in this country and England, is decidedly against the admissibility of such evidence.

In *King v. Hodgson,* Russ. & R. 211, the prisoner's counsel offered a witness to prove that he had sexual intercourse with complainant about a year before the charge; but Wood, B., who presided at the trial, rejected the evidence. Subsequently the question as to the admissibility of such evidence was argued before the 12 judges of England; and it was decided by them unanimously on the 30th of January, 1812, that the objection to its reception had been properly allowed.

In *King v. Clarke,* 2 Starkie, 241, it was held that, in the case of an indictment for rape, evidence that the woman had a bad character previous to the supposed commission of the offense is admissible, but the defendant cannot go into the evidence of particular facts.

In Phil. Ev. (3d ed.) 222, 223, it is laid down as a rule that, on an indictment for rape, the woman is not obliged to answer whether, on some former occasion, she had not a criminal connection with other men, or with particular individuals; nor is evidence of such criminal intercourse admissible.

Defendant's counsel cite *People v. Abbot,* 19 Wend. 192, in support of the doctrine for which they contend. Mr. Justice Strong, speaking of the above case in *People v. Jackson,* 3 Park. Crim. R. 391, says it is true that Judge Cowen, in the case of *People v. Abbot,* disapproves of the rule, strongly sustained, as it is, by numerous judicial decisions and the opinions of many elementary writers; but the point was not necessarily raised in that case, as the conviction was reversed on the ground that the court of general sessions, before which the trial for rape had

been conducted, had no jurisdiction of the case; and what was said by the learned judge as to the rejection of evidence was a mere *obiter dictum.*

In *Strang v. People,* 24 Mich. 1, Mr. Justice COOLEY, speaking for the Court, says:

"The prosecutrix could not be supposed to have come prepared to meet charges of this character; and, though the defense might question her regarding them, the right to go into proof of particular facts is not very clear."

Evidence that the prosecutrix is a common prostitute, or that her character for chastity is bad, is admissible, and particular acts of unchastity or sexual intercourse with the defendant may be shown; but evidence of such acts with a third person is not admissible. *McDermott v. State,* 13 Ohio St. 332.

It being incompetent to show specific acts of intercourse by the prosecutrix with third persons, the fact could not be shown that the girl, Myrtie Merrill, stated that she had such intercourse with Alfonzo Langworthy. She had had denied making such statements upon her cross-examination by defendant's counsel, and her answer is conclusive. The defense had no right to attack her in this way, and the court properly excluded the evidence.

The judgment must be affirmed.

The other Justices concurred.

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82	31
71	313
111	463
71	313
117	77

THE PEOPLE v. JOSEPH HILDEBRAND.

Criminal law—Information for larceny—Preliminary examination—Warrant—Amendment.

After the examination of a respondent on a charge of larceny, a variance between the complaint and warrant in stating the name of the owner of the property, he being described as Allen *Bricker* in the complaint, and as Allen *Brinker* in the warrant, is properly corrected by the justice by amending the warrant to correspond with the complaint and the testimony given on the examination; and, if such amendment is not made, the circuit court may make it under How. Stat. § 9537.

Error to Clinton. (Smith, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of larceny. Judgment affirmed. The facts are stated in the opinion.

Auten & Moss, for respondent.

Moses Taggart, Attorney General, and *Charles M. Merrill,* Prosecuting Attorney, for the people.

CHAMPLIN, J. Complaint was made against Hildebrand before a justice of the peace, charging him with the larceny of an overcoat of the value of $30, the goods and chattels of Allen Bricker, and in his possession. The justice issued a warrant, in which he recited that Allen Brinker had made the complaint, and following the language of the complaint in other respects, except that the property was charged to be the property and in the possession of Allen Brinker.

The respondent was arrested and brought before the magistrate, where, by his counsel, he made a motion to quash the warrant, for the reason that the complaint was

sworn to by Allen Bricker, whereas the warrant charged complainant as Allen Brinker, which was overruled, and an examination was had; and before holding the respondent for trial in the circuit court the justice amended the warrant by substituting the name "Bricker" for "Brinker," and then returned and filed the papers in the circuit court. The prosecuting attorney thereupon filed an information charging the respondent with the larceny of the overcoat belonging to one Allen Bricker.

The respondent, by H. F. Auten, moved to quash the information, for the following reasons:

1. The defendant has never been examined, nor waived an examination, upon the warrant upon which he was bound over to the circuit court.
2. The defendant was never arrested upon the warrant upon which he was bound over for trial.
3. The justice had no authority to amend the warrant as set out in his return.

Other objections were stated, but are not important. The circuit judge overruled the motion, and such ruling is relied on here for a reversal of the judgment.

We think that the ruling of the circuit judge was right. The amendment made by the justice was one which the circuit court would have been authorized to make in the circuit had no amendment been made before the information was filed. How. Stat. § 9537.

The examination was had upon the same charge as that for which he was held to bail, viz., for the larceny of a coat from the possession of Allen Bricker, and belonging to him; and the warrant was amended to correspond with the complaint and the testimony given upon the examination.

Judgment affirmed.

The other Justices concurred.

71 315
123 400

The People v. August Schultz.

Criminal law—Larceny—Felonious intent—Claim of title.

A judgment debtor, whose sewing-machine had been seized and sold on execution, and left by the judgment creditors on trial with a party who desired to purchase it, is not guilty of larceny in taking the machine from said prospective vendee, to whom he made known his claim that it was exempt property, and to whom he gave a receipt for the machine, he acting in the matter under the advice of counsel.

Exceptions from Wayne. (Brevoort, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of the larceny of a sewing-machine. Circuit court directed to set aside the conviction and dismiss the case. The facts are stated in the opinion.

Peter E. Park and *James H. Pound,* for respondent.

Moses Taggart, Attorney General, and *George F. Robison,* Prosecuting Attorney, for the people.

Sherwood, C. J. The respondent in this case, under an information containing two counts,—the first charging him with stealing a sewing-machine, and the second charging him with receiving and secreting the same machine knowing it to have been stolen,—was prosecuted and convicted in the Wayne circuit court, and is now awaiting sentence pending the determination of the exceptions taken on the trial by this Court.

The substance of all the evidence given upon the trial is in the record before us. From this it appears that Miller & Thompson, of Detroit, had a judgment against the respondent, and on August 24, 1886, they took out

an execution upon the judgment. At this time the respondent had the sewing-machine mentioned, which he claims was exempt property. The execution was levied upon the machine, which was taken and sold by the constable under the execution to one Fox, who sold it to Miller & Thompson for a dollar advance. They subsequently offered it for sale, and left it with a Mrs. Burch on trial, who desired to buy a machine. While it was there, respondent, claiming it as exempt, went to the house of Mrs. Burch, and took the machine away, telling her how he claimed the property, and gave Mrs. Burch a receipt for the machine. This the respondent did under the advice of his counsel, Mr. Park, that he had the right so to do, and it is this taking that is supposed to constitute the larceny charged in the information.

Mr. Schultz did not actually do the taking, but this was done by Mr. Tyler, whom he took with him to assist in getting the machine, and to whom he stated his right thereto, and the respondent received the machine from Mr. Tyler; and this is the offense charged in the second count in the information against the respondent.

On the trial the respondent offered testimony to show that the machine was exempt from the levy and sale made upon the execution. He offered testimony to show that, before he took the machine from Mrs. Burch, he took counsel of a lawyer as to what his rights were in the property, and that he was advised he was the owner of the property, and could take it wherever he could find it; and that, believing the advice to be correct, he in good faith took the means he did in getting possession of the property, and had no intention of stealing it. He offered to show by the respondent his intentions were not felonious in taking the property.

The foregoing offers of testimony were all rejected by the circuit judge on the ground that what was offered to

be shown was no defense, and no part of defendant's case. These rulings were erroneous.

When the testimony had all been taken, counsel for respondent requested the court to charge the jury as follows:

"1. If the jury find that the title of the machine was in Miller & Thompson, before they can convict the defendant, they must find that defendant had a felonious intent.

"2. If the jury find that the defendant took the machine in good faith, under claim of title in himself, even though it was the property of another, the defendant must be acquitted.

"3. If Miller & Thompson did not acquire a good title under the execution sale, then the defendant is not guilty.

"4. If the jury find from the evidence that there was no legal sale of said machine by posting notices, etc., as the statute requires, then the people have not shown that Miller & Thompson had acquired a legal property in said machine, and the defendant must be acquitted.

"5. The burden of proof rests with the people to show that the proceedings were regular and lawful under the said judgment and execution.

"6. If the jury find that the defendant believed the machine was his, then there would not be felonious intent, and defendant is not guilty.

"7. Under the evidence in this case, the defendant should be acquitted."

These requests were all proper, and, under the uncontradicted evidence, I think the last request ought to have been given. The plaintiffs in the execution claimed title to the property only through the sale. Instead of giving these requests of the respondent, the court, in the last portion of his charge, said to the jury:

"Now, I believe that he is charged with both receiving this machine and the larceny of it. There is no evidence here before you that he received this property from anybody who had received it unlawfully. Therefore that part of it you are to eliminate from your minds entirely;

and if, under the evidence, you should find him guilty, he will be guilty of stealing the property, and not receiving it. Follow an officer."

After a time the jury returned, and submitted the following question:

"Could they find the defendant guilty if they found there was no felonious intent?

"*The Court.* No, gentlemen. A man cannot commit a crime without committing trespass. If you believe this man's own story, that he took this machine in the way stated, I charge you, as a matter of law, he is guilty. Because he was badly advised, does not excuse him."

To the foregoing charges the counsel for respondent very properly excepted. From a careful reading of the record it is very certain the respondent committed no crime in what he did; and, if the people's evidence is to be taken as showing the facts, at most he could only be guilty of trespass, and this prosecution should not have been made.

The circuit court must be directed to set aside the verdict entered in the case, and enter a judgment dismissing the case.

The other Justices concurred.

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104 581

THE PEOPLE v. JOHN MONTAGUE.

Criminal law—Receiving stolen property—Evidence.

In this case it is held that there was no evidence that the property received by respondent was *stolen* property, and the verdict is set aside and the respondent discharged.

Error to recorder's court of Detroit. (Swift, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of receiving *stolen* property. Conviction set aside and prisoner discharged. The facts are stated in the opinion.

Edwin F. Conely, for respondent.

Moses Taggart, Attorney General, and *George F. Robison*, Prosecuting Attorney, for the people.

[Briefs confined to a discussion of the testimony.—REPORTER.]

LONG, J. The respondent was convicted in the circuit court for the county of Wayne, on April 20, 1888, for feloniously receiving stolen property, knowing the same to have been stolen, and brings the case into this Court by writ of error.

The charge contained in the information is that respondent, on January 14, 1888, at the city of Detroit, in the county aforesaid, one seal-skin sacque, of the value of $150, of the personal property, goods, and chattels of William H. Alms and William F. Doepke, of the city of Cincinnati, in the state of Ohio, copartners, doing business under the firm name of Alms & Doepke, then lately before from the possession of the said William H. Alms and William F. Doepke, doing business as aforesaid, feloniously stolen, taken, and carried away, feloniously did receive, have, and aid in concealing; he, the said John Montague, then and there, at the time he so received, had, and aided in the concealment of said personal property, goods, and chattels, as aforesaid, well knowing the same to have been feloniously stolen, taken, and carried away, contrary to the form of the statute, etc.

The only question in the case which we need consider is, was there any evidence given to warrant the conviction? I have carefully read all the evidence given,—the whole

of the evidence taken on the trial is returned to this Court,—and from such examination am led to the conclusion that there was no evidence that the sacque in question was feloniously stolen, taken, and carried away from the store of Alms & Doepke at Cincinnati. It was incumbent on the prosecution to establish, by competent evidence, and beyond reasonable doubt, not only that the respondent feloniously received the property knowing it had been stolen, but that the same had been feloniously stolen, taken, and carried away.

The theory and claim of the prosecution was that on December 23, 1887, a woman whom the respondent afterwards registered as his wife at the Wabash Hotel, in the city of Detroit, was in Cincinnati, Ohio, and went into the business house of Alms & Doepke on the pretense of purchasing a seal-skin sacque, and while there feloniously took and carried away the sacque in question; and some evidence was given that the respondent was in Cincinnati about the same time; that the sacque was brought to Detroit, where the respondent attempted to make sale of it at much below its real value.

The evidence given in the case is summarized in the brief of the prosecuting attorney as follows:

"Emma Clarke, a witness called for the people, testified that on January 14, 1888, about four o'clock in the afternoon, two men, named Whalen and O'Day, came to her house, and tried to sell her a seal-skin sacque, but she did not purchase, because it was a misfit, and the two men went away. About two hours afterwards, respondent, Whalen, and O'Day returned to her house with a larger sacque, which she tried on and agreed to purchase.

"At that time, respondent talked with her about the smaller sacque, claimed and exercised ownership, and offered to sell it to her at a very low price. The price agreed upon for the larger sacque was $100. She did not have all the purchase price with her, and respondent was unwilling she should take the sacque without paying

in full. He took the sacque away, and agreed that she and Whalen should go to the bank, and procure the balance of the money, when Whalen was to conduct her to where the respondent was stopping.

"She identified a sacque produced in court as the one shown her by respondent, which she agreed to buy."

On her cross-examination, however, she was asked:

"*Q.* What induced you to distinguish this sacque from any other sacque that might have been offered you?

"*A.* I don't know as I know.

"*Q.* You have no means, have you?

"*A.* No, sir; not exactly."

"Charles O'Day, called by the people, testified that he met respondent at the Wabash Hotel about five or six o'clock the day he was arrested, January 14, in company with Whalen. Before that time he and Whalen had been to Emma Clarke's house with a seal-skin sacque. From the Wabash Hotel the three went to Mrs. Clarke's again, where she tried on another sacque, and announced herself as satisfied with it. The sacque came from the Wabash Hotel.

"Thomas Bolles testified that he was proprietor of the Wabash Hotel; that on January 12 respondent and a woman whom respondent registered as his wife, came to the hotel, and registered as from Cleveland, Ohio. They stayed at the hotel until respondent was arrested, occupying a room together. The woman went away the same evening of the arrest. She was last seen, about 15 minutes before the arrest, in the dining-room. Witness saw the woman at the Essex House, in Windsor, the day before the trial. A man by the name of Hoebel (one of the witnesses of the people), was present when witness saw her in Windsor. The two seal-skin sacques in court were found in a room in the vicinity of respondent's room the evening of the arrest.

"C. R. Tuttle and Ralph A. Crawford testified that they were police officers, and talked with respondent two days after his arrest. They asked him whose sacques those were he was trying to sell, and he replied that he knew nothing about any sacques, hadn't seen any, and had not been out of the hotel the day he was arrested.

"Jeremiah Sullivan, a police officer, testified that he had known respondent for a year; that his business was a prize-fighter; that he saw him at the Wabash Hotel the

day he was arrested, and also on Jefferson avenue, between Griswold street and Woodward avenue, the same day.

"August Hoebel testified that he was the floor-manager in the fur department of Alms & Doepke, a firm in Cincinnati, Ohio; that the day before the trial he was at the Essex House, in Windsor, and saw the woman whom witness Bolles had identified as respondent's wife. Saw her at Alms & Doepke's store, in Cincinnati, December 23, 1887, at about 6 o'clock in the evening, just as the store was closing. She was in the fur department, trying to buy a cloak. She seemed hard to fit, and tried on several cloaks. She was left alone in the fitting-room when the salesman went to the sales-room to get sacques. She always asked for the best garments. She finally selected one and directed it sent to the Walnut-street House, C. O. D., giving her name as C. A. Carver. The price of the sacque was $360.

"A collector was sent with the sacque (witness volunteered testimony to the effect that the collector returned, and said there was no such person stopping at the Walnut-street House, which was afterwards stricken out by the court), and subsequently returned with it, and it was never delivered. Witness also identified a photograph as a photograph of the woman he saw in Cincinnati and Windsor. Saw the photograph at the time of the examination in the police court, before he saw the woman in Windsor, and identified it then.

"Albert Boeberitz and Joseph Manning testified that they had seen the woman identified as respondent's wife stopping at the Essex House, in Windsor, and that the photograph shown witness Hoebel was a photograph of her.

"Jeremiah Sullivan testified that he got the photograph out of the trunk in the room occupied at the Wabash Hotel by respondent and his wife; that there was then written on the back of the photograph: 'I am at my mother's. Em. Montague.'

"J. J. Lichstenstein testified that he was superintendent of the manufacturing department of Alms & Doepke in Cincinnati. He identified the sacque in question, by various marks, as one manufactured by him for that firm. They were the factory mark, stencil mark, initials of the firm, factory number, name of cutter, number of the lot, all marked on the skins inside the lining. There was also a mark, an embroidered silk mark, similar to that sewed on

the inside of a man's coat-collar, sewed on the inside of the collar of the sacque, which had been ripped off. Witness last saw this sacque December 21 or 22, when he showed it to a particular friend of his. There were only two of the size of this sacque in stock. The sacque was not missed until between the 15th and 20th of January. This sacque was worth from $225 to $235.

"There were about 75 clerks employed on the same floor in which the fur department was. Witness testified that this sacque was numbered 220. The other sacque, which he spoke of as being of the same size, was numbered 219. On each sacque there was sewed a ticket, on which there was written the bust measure and the length, the number of skins in the garment, the size and number of the lot of skins, and the wholesale and retail price. In the ordinary course of business, when a sacque was sold, this ticket would be taken off. Upon it would be written the name of the purchaser, and the price at which it was sold. A duplicate of this ticket would be made and fastened to the sacque, and go out with it. A sacque could not pass the wrapping desk without this duplicate on it. The original ticket is kept in a box in the store. After witness missed this sacque, he looked through this box, but the ticket was not there.

"Thomas J. Windsey testified that he lived in Cincinnati. On December 22, he saw respondent in Pete Nolan's saloon, in that city, offering to fight any one for from $50 to $500. He was then under the influence of liquor.

"Mrs. J. A. Campbell testified, on behalf of respondent, that she was wife of the proprietor of the Essex House, Windsor; that she knew the woman whom the witness had identified as the wife of respondent; that the photograph which had been identified as her photograph did not in any way resemble her. She did not know who the woman was. She was stopping there under the name of Mrs. Miller, and had been there nearly three months."

It is beyond controversy that the supposed loss of the sacque was not discovered until January 18 or 20, though on January 1 an inventory of the stock had been taken; and there is no proof that the sacque was not taken by some one of the numerous customers who went in and out of the store between those dates, and in fact the tes-

timony is not satisfactory that the sacque was stolen at all. It does not appear that this woman took anything from the store on that day, or that she had any opportunity to take anything without discovery.

The testimony of the witness Lichstenstein shows that he was one of five salesmen. He did not have the exclusive charge, nor was he in possession exclusively of all knowledge on the point to which his attention was called. The testimony, taken as a whole, would have fallen far short of sustaining a conviction of the woman had she been on trial for the larceny of the sacque; and I think it falls far short of showing any larceny of the sacque.

At the close of the testimony, the counsel for the respondent asked the court to discharge the respondent. This the court refused to do, but stated:

"So far as this case is concerned, I am very strongly inclined to state what my opinion is, but at the same time the people have been at considerable expense in the prosecution of this case, and I have concluded to leave the matter to the jury, and let the counsel argue it."

This fact can have no weight, and we think the court should have directed the jury that there was no evidence of the larceny of the sacque, and have directed the discharge of the respondent.

The verdict of the jury must be set aside, and respondent discharged.

The other Justices concurred.

71 325
110 325

THE PEOPLE v. THOMAS O'NEIL.

Game laws—Importation from another state—Possession—Evidence.

1. That quail and other wild fowl or birds fit for food come within the meaning of the word "game" there can be no doubt.
2. How. Stat. § 2202, does not apply to quail killed in another state, and brought into this State after they are killed.

Certiorari to a police justice of Detroit, to review a conviction under the game law. Argued June 27, 1888. Decided July 11, 1888. Conviction reversed and prisoner discharged. The facts are stated in the opinion.

Henry M. Cheever, for respondent.

Moses Taggart, Attorney General, and *George F. Robison,* Prosecuting Attorney, for the people.

[The points of counsel and authorities are fully stated and reviewed in the opinion.—REPORTER.]

CHAMPLIN, J. Section 2 of Act No. 251, Laws of 1881, enacts:

"No person shall kill or destroy, or attempt to kill or destroy, any colin or quail, sometimes called 'Virginia partridge,' save only during the months of November and December of each year; nor kill, nor attempt to kill, any pinnated grouse or prairie chicken, before September 1, 1882, and thereafter only in the months of September and October in each year."

Section 5 of the act provides:

"No person shall sell, or expose for sale, or have in possession for the purpose of selling, or exposing for sale, any of the kinds or species of birds protected by this act, after the expiration of eight days next succeeding the times limited and prescribed for the killing of any such birds."

The act declares a violation of its provisions a misdemeanor, and imposes a penalty of $50 for each offense on conviction; and, if the penalty is not paid, the offending person shall be committed to the common jail of the county until the penalty is paid, but such imprisonment shall not exceed 30 days.

Thomas O'Neil was complained of on May 7, 1888, in the police court of the city of Detroit, which complaint charged him with—

"Having in his possession, for the purpose of selling, a large number of quail, being game birds to the complainant unknown, on the 9th day of April, 1888."

He was arraigned and pleaded not guilty, and was tried before Edmund Haug, a police justice. The testimony showed that on April 9, 1888, the defendant had in his possession two dozen quail. The defendant testified that he had in his possession, on said April 9, two dozen quail, but that he purchased them in the state of Missouri in the month of December, 1887; that he had received them in the regular course of his business during said month of December, and had preserved them on ice from the day he received them until said April 9, and that he had them then and there for sale.

The justice found the defendant guilty, and imposed the penalty of $50, and $3 costs, and sentenced the defendant to stand committed to the House of Correction in the city of Detroit until such fine was paid, provided such imprisonment should not exceed 30 days. The defendant sued out a writ of *certiorari* from this Court, and alleges the following errors in the record:

"1. The court erred in finding the defendant guilty on the evidence.

"2. The court erred in finding the defendant guilty under the law.

"3. The complaint does not set forth any offense known to the law.

"4. The statute under which the complaint was brought does not prohibit the having in possession, and exposing for sale, any quail killed in another state, and brought into the State of Michigan after they are killed.

"5. The law in question prohibits the having in possession, with intention to sell, quail which are 'protected' by the act only, and the only quail protected by the act are quail which are alive and at large within the State of Michigan.

"6. The provisions of the law prohibiting the having in possession quail with intent to sell the same is unconstitutional and void, in that the object of the act in this regard is not expressed in its title."

If the statute applies to quail killed in another state, and brought into this State after they are killed, then both the complaint and evidence were sufficient to sustain a conviction. The objection that the object of the law, as to the possession of game being unlawful, is not expressed in its title, and therefore unconstitutional, is without force, and is overruled. The main objection, and the one most strongly urged upon the argument, is that based upon the fourth assignment of error, viz.:

"The statute does not prohibit the having in possession, and exposing for sale, any quail killed in another state, and brought into the State of Michigan after they are killed."

This precise question is not a new one to the courts. In February, 1876, the case of *State v. Randolph*, 3 Cent. Law J. 187, was decided in the St. Louis court of appeals under a similar statute, in which the same objection was taken, and the court said:

"The game laws would be nugatory, if, during the prohibitory season, game could be imported from the neighboring states. It would be impossible to show, in most instances, where the game was caught."

The conviction was had under a statute which provided that—

"It shall be unlawful for any person to purchase, have in possession, or expose for sale any of the birds or game mentioned in the preceding section of this act during the season when the catching or injuring the same is prohibited."

It was shown that the birds (prairie chickens) were imported from the state of Kansas, and sold to the defendant, and it was claimed that the statute was a violation of the Constitution of the United States; Congress alone having power to regulate commerce among the several states. The court held that the act did not violate this provision of the Constitution, and that the state of Missouri had the right to preserve its game, and to prohibit the exhibiting for sale within the state of provisions out of season. The decision did not enter into an extended argument of the principles upon which it was based.

In February, 1875, the same question came before the court of appeals of the state of New York in *Phelps v. Racey*, 60 N. Y. 10, under a statute which declared that—

"No person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail, between the 1st day of January and the 20th of October, under a penalty of twenty-five dollars."

The defendant was convicted under this section. He had invented an apparatus to preserve game; and the game which he had in possession, and specified in the complaint, was put up by him in his apparatus in the month of December, when the killing was lawful in New York state, or was received from the states of Minnesota and Illinois, where the killing was, at the time, legal.

Church, C. J., in delivering the opinion of the court, said:

"The language of these sections is plain and unambiguous. Hence there is no room for construction. It is a familiar rule that, when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is that 'any person having in his or her possession,' between certain dates, certain specified game killed, shall be liable to a penalty. The time when or the place where the game was killed, or when brought within the State, or where from, is not made material by the statute; and we have no power to make it so. * * * That it was either killed within the lawful period, or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after the time, irrespective of the time or place of killing."

The court further held that the Legislature had power to enact the law, and that it was not in conflict with the Constitution of the United States.

Two years later the same question came before the high court of justice in England, presided over by Lord Coleridge, in the case of *Whitehead v. Smithers*, 2 C. P. Div. 553, 21 Moak, Eng. R. 458. It was provided by section 2 of an act (39 and 40 Vict. c. 29) that any person who shall have in his control or possession any wild fowl recently killed, wounded, or taken, between the 15th of February and the 10th of July in any year, shall, on conviction, forfeit and pay for every such wild fowl so killed, wounded, or taken, or so in his possession, not exceeding one pound, with costs of the conviction. The defendant had purchased the birds, which had been killed in Holland, and consigned to and received by Mr. Howard, a poulterer, and it was claimed for defendant that the statute did not apply to birds killed in Holland, and imported into the United Kingdom.

Lord Coleridge said:

"I am of opinion that that argument is not well founded. It is said that it would be a strong thing for the legislature of the United Kingdom to interfere with the rights

of foreigners to kill foreign birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as of protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed and sold under pretense of their being imported from abroad."

In February, 1881, the supreme court of Illinois, in the case of *Magner v. People*, 97 Ill. 320, under a statute similar to ours, held that the defendant, who was a retail dealer in game in the city of Chicago, and who had bought a box of quail on December 20, from a dealer in Leavenworth, in the state of Kansas, who shipped them to defendant, and were by him received on December 23, but who sold them in Chicago on January 15, was liable to the penalty provided by the statute, notwithstanding it was lawful to purchase and receive the quail in Chicago at the time these arrived. The season closed on January 1, and the act made it unlawful, after five days from that date, for any person to sell or expose for sale, or have in his or their possession for the purpose of selling, or exposing for sale, any of the wild fowls or birds mentioned in section 1 of the act, which included quail.

In February, 1885, a decision was rendered in the case of *Game Ass'n v. Durham*, 51 N. Y. Super. Ct. 306, in which the court followed *Phelps v. Racey, supra;* and the defendant was mulcted in penalties in the sum of $5,000 under circumstances which rendered such construction of the law peculiarly odious.

Durham was a commission merchant doing business in the city of New York. Warner, a resident of Chicago, Ill., consigned a few boxes and barrels of quail from Chicago, Ill., to Durham, to sell on commission. The season in New York did not close until February 1. The birds were received in New York, January 2. The consignor directed Durham not to sell short of two dol-

lars a dozen, and to put the birds in a refrigerator. Durham accordingly delivered the birds to a refrigerator company, where they were stored so as to preserve them.

No sales were made during January, but in February a portion of the birds were withdrawn from the refrigerator company, and some of them sold in the city. The remainder Warner withdrew from the company, and the opinion does not disclose what became of them. The court, however, held that all of the quail were in possession of defendant, in violation of law, after the time limited for the open season, and affirmed the conviction of the trial court.

In *State v. Judy*, 7 Mo. App. 524, that court held that the statute prohibiting the killing or having in possession certain game is not unconstitutional, either as depriving one of his property without due process of law or as in restraint of commerce.

A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must be not only within the letter, but within the spirit, of the law to gain my assent to its enforcement. Our statute requires no such strict or harsh construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to the public health, but the whole end and object of the legislation is to protect and preserve game in the State of Michigan. The first legislation upon the subject was in 1863 (Act No. 236). The Constitution requires the object of every act of the Legislature to be expressed in its title. The title to this act was,—

"An act to provide for the protection of game in the State of Michigan."

In 1865, section 2 of this act was amended. In 1869 a new act was passed, entitled—

"An act to revise and consolidate the several acts relating to the protection of game, and for the better preservation of elk, deer, birds, and wild fowl."

This was afterwards amended in 1873, 1875, 1877, 1881, and 1887; but the revision and all the amendments had but one object, and that was the same stated in the original act, to protect and preserve the game of this State. The various provisions of the act are all directed to that purpose. And how it can be held that this law is violated, either in letter or spirit, by importing game from other states to supply food to citizens of this State, is a point that I am unable to understand. The only ground upon which such construction is attempted to be defended, is that it prevents evasion of the statute; that game might be killed in this State in violation of law, and shipped to another state, and there reshipped into this State, and the prosecution might be unable to prove that it was Michigan game killed in violation of law. That may disclose a defect of proof; but I submit it does not apply to cases where the fact is conceded or proved to the satisfaction of the jury that the game was not killed in violation of law. This difficulty of proof has been remedied by the Legislature.

Act. No. 68 of the Laws of 1887 enacts—

"That in all prosecutions for the violation of any of the laws for the protection and preservation of game and fish, proof of the possession of any such game or fish, or of the skin, carcass, or any portion of the skin or carcass of such game or fish, at any time when the killing, taking, or having in possession any of such game or fish is by law prohibited, shall be *prima facie* evidence of the violation of the law by the person or persons in whose possession the same shall have been found."

That quail and other wild fowl or birds fit for food

come within the meaning of the word "game" there can be no doubt. They are so recognized by the game laws of England, and of New York, Massachusetts, and other states, which have passed acts for the preservation of game, and are mentioned in the act of 1863 under a title "to provide for the protection of game in the State of Michigan."

Act No. 68 is a legislative construction of the game law under which this prosecution is had, and it is in consonance with the view that it is not a violation of the law to have in possession and selling game imported into this State from other states, or killed in this State, when it was lawful to do so. It was right and proper for the Legislature to cast the burden of proof upon those having such game in their possession when the killing is by law prohibited, and fully protects the State from its evasion.

The game law of Massachusetts contains a similar provision; and in *Com. v. Hall,* 128 Mass. 410, it was held that—

"Saying that possession should be *prima facie* evidence necessarily implies that it shall not be conclusive; if the mere possession of birds, during the time within which the taking or killing of them is prohibited, of itself constituted an offense under the previous sections of the statute, to say that such possession should be *prima facie* evidence would be superfluous, if not absurd."

The court, Gray, C. J., delivering the opinion, further said:

"The object of the statute is to protect these birds during the breeding season, and for such a reasonable portion of the year as may prevent them from being exterminated or their numbers diminished in this Commonwealth. The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this Commonwealth during the times specified, or the buying, selling, offering for sale, or hav-

ing in possession, in this Commonwealth, during those times, of birds so taken or killed, and by enacting that the possession in this Commonwealth, at such times, of any birds of the kinds specified, shall be *prima facie* evidence to convict, leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this Commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its objects, and is free from all constitutional difficulty."

In *Allen v. Young*, 76 Me. 80, it was held that where a statute made it an offense to kill deer at a certain time, or to transport it from place to place during that time, it was not an offense to transport from place to place, during the prohibited season, deer killed before. Defendant had killed a deer before the season closed, and had the carcass and skin in his possession after it had closed. He then took them to a railroad station to be shipped to market, when they were seized by the game-warden. A section of the statute with reference to the possession of the carcass of a deer made the person in possession liable to a penalty, but contained the proviso that he should not be precluded from producing proof in his defense; but this proviso was not contained in the section relative to the carrying or transportation of the carcass or skin from place to place in the state, and the court held that it would apply the same meaning to the latter section, and the defendant might show that the deer was not killed in violation of law.

We think the conviction should be reversed, and the prisoner discharged.

SHERWOOD, C. J., and LONG, J., concurred with CHAMPLIN, J.

CAMPBELL, J. Concurring, as I do, in the meaning of our statute as explained by my Brother CHAMPLIN, I do so for the further additional reason that I do not think

it would be competent for our Legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound. While in England the power of parliament cannot, perhaps, be questioned by courts, there is no such rule here, and I cannot see on what principle such decisions are maintainable. It is not competent for any American statute to raise conclusive presumptions of guilt in any case. This is well settled. When the possession is traced back of the time when it became unlawful to take game, the presumption has no further force as evidence, and what was then lawful cannot be made a crime by lapse of time only.

MORSE, J., concurred with CAMPBELL, J.

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THE PEOPLE v. JOHN MANGOLD.

Constitutional law—Police court of Grand Rapids—Misdemeanors—Liquor law of 1887—Jurisdiction.

1. The police court of Grand Rapids cannot try a party for a misdemeanor punishable by fine and imprisonment beyond the jurisdiction of a justice of the peace.
2. The following propositions are summarized from the opinion of Mr. Justice CAMPBELL:

   a—The liquor law of 1887 was intended to remove the trial of offenses under it into the higher courts, where the proceedings are conducted by common-law methods, and the rights of the public and of the prisoner fully guarded.

   b—The general policy of the State divides the original crim-

inal jurisdiction into that which is exercised by courts having plenary common-law powers and that which is exercised by justices of the peace. A similar distinction has been kept up for a long time between cases subject to summary jurisdiction in inferior courts, and cases prosecuted by common-law methods.

c—In regard to the former, which are always petty offenses, a jury may be waived; and when a jury acts it has complete authority over facts and law, and the magistrate has not the control incident to common-law trials.

d—In common-law cases the prosecution must be by indictment, or some equally safe method, based on some sworn showing; the jury must be selected and sworn, so as to secure the full benefits of the law; and the court passes upon the law questions instead of the jury, and error lies upon its judgment.

e—Redress against judgments of inferior courts is either by *certiorari* or by some statutory remedy, and not by error and exceptions.

f—The right of trial by jury, in the circuit court, means more than that there shall be a trial before a body of laymen. It involves all the incidents of common-law jury trials, including challenges to the array and to the poll, peremptory and for cause, the assistance of counsel, the enforced attendance of witnesses, the separation of court and jury powers, and whatever else is essential on hearing or review; and under the Constitution it requires substantial equality throughout the State in methods of prosecution.

Exceptions from Kent. (Montgomery, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was tried and convicted in the police court of Grand Rapids of failing to keep his saloon closed on Sunday, as required by the liquor law of 1887, and appealed to the circuit, where he was again convicted. Proceedings reversed and respondent discharged. The facts are stated in the opinion.

Eggleston & McBride, for respondent.

Moses Taggart, Attorney General, and *W. J. Stuart*, Prosecuting Attorney (*Stuart, Knappen & Van Arman*, of counsel), for the people.

CAMPBELL, J. Respondent was tried and convicted in the police court of Grand Rapids for violating the Sunday clause of the liquor law of 1887, by which act such violation is made a misdemeanor, and punished by fine and imprisonment beyond the jurisdiction of a justice. Respondent appealed to the circuit court of Kent county, where he raised, as he had done before, the question of jurisdiction. This was ruled against him, and he was again convicted.

The Grand Rapids police court was originally intended to exercise the jurisdiction of justices of the peace in criminal cases, and some special jurisdiction. In 1885 an attempt was made to confer exclusive jurisdiction over all misdemeanors committed in Grand Rapids.[1] It is under this grant of power that respondent was prosecuted. He was complained of by a private prosecutor, and the prosecution was conducted by that complainant, who appeared for the public, and took part in striking the jury. Under what law this was permitted we are not informed.

The liquor law of 1887 was intended to remove the trial of offenses under it into the higher courts, where the proceedings are conducted by common-law methods, and the rights of the public and of the prisoner fully guarded. There is, however, nothing said in the liquor law about courts. The jurisdiction follows the general statutes. The offense in question is made a misdemeanor by express terms.

It would probably come within the language of the police court act of Grand Rapids. But there are difficulties in the way of allowing this which are very serious.

The general policy of the State divides the original

[1] See Act No. 127, Laws of 1885, § 6.

criminal jurisdiction into that which is exercised by courts having plenary common-law powers and that which is exercised by justices of the peace. A similar distinction has been kept up a long time between cases subject to summary jurisdiction in inferior courts, and cases prosecuted by common-law methods. In regard to the former, which are always petty offenses, a jury may be waived; and when a jury acts, it has complete authority over facts and law, and the magistrate has not the control incident to common-law trials. In common-law cases the prosecution must be by indictment, or some equally safe method, based on some sworn showing; the jury must be selected and sworn, so as to secure the full benefits of the law; and the court passes upon the law questions instead of the jury, and error lies upon the judgment. Redress against judgments of inferior courts is either by *certiorari* or by some statutory remedy, and not by error and exceptions.

While our Constitution provides some discretion in regard to criminal jurisdiction of justices, it gives to the circuit courts original jurisdiction except as otherwise provided, and it gives them general appellate powers over all inferior tribunals. It also secures the right of trial by jury, and several other important safeguards against abuses. This right of trial by jury means more than that there shall be a trial before a body of laymen. It involves all the incidents of common-law jury trials, including challenges to the array and to the poll, peremptory and for cause, the assistance of counsel, the enforced attendance of witnesses, the separation of court and jury powers, and whatever else is essential on hearing or review. And under the Constitution it requires substantial equality throughout the State in methods of prosecution.

We have misdemeanors which involve consequences as

serious as those attached to felonies. There are some cases in which the statutes expressly declare some State prison offenses to be misdemeanors. We have provisions which authorize felonies to be shown on trials for misdemeanor, so that conviction or acquittal bars any further action against them as felonious. And all attempts to commit felonies punishable by less than five years' imprisonment in the State prison are misdemeanors. So is every common-law offense of any kind to which no specific punishment has been applied by statute; and many such crimes are in law infamous.

This police court must be put upon the same footing with justices' courts in criminal cases, or it must have unlimited jurisdiction over all crimes but felonies. There is no middle ground.

With the exception of a few pieces of machinery, it cannot be distinguished from other justices' courts, and it gets most of its powers from the statutes regulating justices. In case an indictment is found for misdemeanor, the law provides no means for getting it into the police court; and if it did, we should have the singular spectacle of a case transferred to an inferior court for trial by a court having appellate jurisdiction over it, and original jurisdiction over the same offenses outside of the corporation. There is no provision for preliminary examinations, and none for filing informations. The prosecuting attorney is bound to attend on call of the court, but he does not appear to have been given any independent power. The practice is required to conform to that of justices of the peace. The court has no power to assign counsel, or to secure to the prisoner his witnesses from outside the city, or such a jury as he is entitled to demand.

The statute which attempts to give this court jurisdiction over misdemeanors in general cannot exercise that

power, for want of indispensable means to carry it out. Those powers cannot be given to it without changing its entire character. Whether such a change can be made we need not inquire. It is certain no court can be so constituted as to deprive either the public or criminals of their substantial rights. As we have had occasion to suggest before, the judicial system of the State is not within legislative discretion except to a limited extent. The legislation concerning Grand Rapids has for some reason been extended in a more questionable way than any other that has been brought to our notice. This police act has got beyond any range which the Constitution recognizes.

We think the police court could not try the offense charged, and that the proceedings should be reversed, and the respondent discharged.

The other Justices concurred.

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THE PEOPLE v. PHILIP S. HAMILTON.

Criminal law—Information for resisting an officer.

An information for resisting an officer while attempting to preserve the peace, which fails to inform the respondent of the acts or facts constituting the offense, or of the acts of the officer which the respondent obstructed, or in what manner the resistance was made, charges no offense

Exceptions from Luce. (Steere, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of resisting an officer. Conviction set aside and respondent discharged. The facts are stated in the opinion.

Brown & Packard, for respondent, contended:

1. It is no more allowable under the statutory charge to put the defendant on trial without specification of the offense than under a common-law charge; citing *Bonneville v. State*, 53 Wis. 680; *Seuer v. State*, 59 Id. 472; *Peters v. State*, 66 Id. 339; *People v. Murray*, 52 Mich. 288; *People v. Minnock*, Id. 628; *People v. Heffron*, 53 Id. 527.
2. A charge of a breach of the peace, and nothing more, is no definite charge, and the arrest leads to no trial, and would be within the mischief of *Hibbard v. People*, 4 Mich. 125; *Robison v. Miner*, 68 Id. 549.

Moses Taggart, Attorney General, and *S. N. Dutcher,* Prosecuting Attorney, for the people, contended:

1. A statutory offense is sufficiently described in the words of the statute; citing *People v. Kent*, 1 Doug. 42; *Rice v. People*, 15 Mich. 1; *Hess v. State*, 5 Ohio, 5; How. Stat. § 9539.
2. Whenever a statute creates an offense, and expressly provides a punishment, the statutory provisions must be strictly followed; citing Whart. Cr. Law, § 371; *People v. Stevens*, 13 Wend. 341; *People v. Hislop*, 77 N. Y. 331.
3. The duties of a peace officer commence with an attempt to pacify those about to break the peace; citing 1 Chitty, Crim. Law, 17; and he may arrest without warrant for a breach of the peace committed in his presence; citing *Way's Case*, 41 Mich. 304; *People v. Rounds*, 67 Id. 482; which last case fully supports the information in this case.
4. The law presumes that an officer correctly performs his duty; citing *Perkins v. Nugent*, 45 Mich. 157; *Sinclair v. Learned*, 51 Id. 335.
5. A failure to prosecute after an arrest for a breach of the peace cannot avail as a defense to the respondent if guilty of resisting the officer who made it; citing *Davis v. Burgess*, 54 Mich. 518.
6. The use of grossly indecent, profane, and abusive language toward another person upon the public street, and in the presence of others, is a breach of the peace; citing *Davis v. Burgess*, 54 Mich. 518.

SHERWOOD, C. J. The respondent in this case was informed against for resisting a constable in the township of McMillan, on June 20, 1887, who was at the time

alleged to have been engaged in the effort to maintain, preserve, and keep the peace. He was tried in the circuit court for the county of Luce, before Judge Steere with a jury, and was convicted.

The following is a copy of the information in the case:

"Sanford N. Dutcher, prosecuting attorney in and for the county of Luce aforesaid, for and in behalf of the people of the State of Michigan, comes into said court in the July term thereof, in the year 1887, and gives the court here to understand and be informed that Philip S. Hamilton, late of the township of McMillan, in the county aforesaid, heretofore, to wit, upon the 20th day of June, A. D. 1887, at the township of McMillan, in the county of Luce, aforesaid, did knowingly and willfully obstruct, resist, and oppose a certain constable of the township of McMillan, and of the county aforesaid, to wit, William T. Crocker, a person authorized by law to maintain and preserve the peace, in his lawful act, attempt, and effort to maintain, preserve, and keep the peace, against the form of the statutes in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

When the cause was called for trial, counsel for defendant objected to the sufficiency of the information, and asked that it be quashed for the reason it contained no statement of any offense. The court refused this request, and counsel excepted to the ruling.

The prosecution called as a witness William T. Crocker. Defendant's counsel then objected—

"To the introduction of any testimony under the information for the following reasons:

"1. The information charges no offense known to the law.

"2. The information contains no allegation of any breach of the peace.

"3. The information contains no statement of facts constituting any specific offense."

The court overruled the objection, and defendant's counsel excepted.

We think both these exceptions were well taken, and it is unnecessary to consider the other questions argued. The information alleges no acts of the defendant or facts constituting the offense; neither does it give us any idea of the acts of the officer at the time he alleges the respondent obstructed him, or in what manner the respondent made the resistance. Of these things the respondent should have had some information, before he could be legally called upon to make answer to a criminal charge. Conclusions will not be allowed to take the place of facts in an information charging the respondent with crime.

The conviction in this case must be set aside; and, as the information charges no crime against the respondent, he must be discharged.

The other Justices concurred.

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THE PEOPLE v. DEELBERT A. REYNOLDS.

Criminal law—Information for obtaining property under false pretenses—Statutes—Construction of.

An information for obtaining property by false pretenses, which avers that the respondent well knew them to be false, but fails to aver that such pretenses were false in *fact*, is fatally defective, and a conviction cannot be sustained under it.

Exceptions from Tuscola. (Beach, J.). Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of obtaining goods by false pretenses. Judgment reversed, and respondent discharged. The facts are stated in the opinion.

Davis & Nichols (*Mitchel & McGarry*, of counsel), for respondent.

Moses Taggart, Attorney General, and *T. W. Atwood*, Prosecuting Attorney, for the people.

LONG, J. The respondent in this cause was tried and convicted in the circuit court for the county of Tuscola for obtaining a stock of drugs and groceries of one Florence L. Coy by false pretenses, and brings the case into this Court upon exceptions.

The information was filed under section 9161 of Howell's Statutes, which provides:

"Every person who, with intent to defraud or cheat another, shall designedly, by color of and false token or writing, or by any other false pretense, cause any person to grant," etc., "or obtain from any person any money, personal property, or valuable thing," etc., "shall be punished," etc. The information reads as follows:

"STATE OF MICHIGAN, } ss.
"County of Tuscola, }

"The Circuit Court for the County of Tuscola.

"Theron W. Atwood, prosecuting attorney for the county of Tuscola, aforesaid, for and in behalf of the people of the State of Michigan, comes into said court in the September term thereof, A. D. 1887, and gives it here to understand and be informed that on the 10th day of March, A. D. 1887, at the township of Columbia, in said county, Florence L. Coy was engaged in the business of selling drugs and groceries at retail; and on said day, at said place, she had and owned in her store building, in which she carried on said business, a stock of drugs and groceries of the value of $2,146.36.

"That the said business of Florence L. Coy, and the exclusive management of the same, and the said stock of drugs and groceries, was under the control of John S. Coy, who was acting as the agent of said Florence L. Coy.

"That on to wit, the said 16th day of March, A. D. 1887, at said township of Columbia, DeElbert A. Reynolds, late of Lyons, Ionia county, Mich., with intent to cheat and defraud her, the said Florence L. Coy, did then

and there apply to said John S. Coy, who was acting as the agent of the said Florence L. Coy, as aforesaid, and desired to purchase and buy said stock of drugs and groceries of said Florence L. Coy.

"That the said DeElbert A. Reynolds then and there said to the said John S. Coy that himself and one John M. Mosser were copartners, doing business under the firm name of D. A. Reynolds & Co., and desired to purchase and buy said stock of drugs and groceries for said firm; that he desired to turn out and exchange a certain real-estate mortgage, hereinafter mentioned, as part payment for said stock of goods.

"That on, to wit, the said 16th day of March, A. D. 1887, at said township of Columbia, in said county, the said DeElbert A. Reynolds, with intent to cheat and defraud her, the said Florence L. Coy, did then and there designedly and falsely represent to said John S. Coy, who was then acting as the agent of said Florence L. Coy, as aforesaid, that a certain real estate mortgage, which he desired to turn out towards payment for said stock of drugs and groceries, as aforesaid, made and executed by one Frank Kuney to said De Elbert A. Reynolds upon the south one-half of the north-east quarter, and the north one-half of the south-east quarter, of section four, in township sixteen north, of range fourteen west, in Newaygo county, Mich., dated 17th day of June, A. D. 1886, for the sum of $2,400 drawing interest at seven per cent., payable as follows, two hundred dollars, and interest, August 15, 1886, and two hundred dollars, and interest, upon the 14th day of each month thereafter, was a gilt-edged mortgage, and first-class security for the payment of $1,736.36, the amount due upon the same.

"That the said land upon which the mortgage was given was worth $3,000 cash; that he had sold said land to said Frank Kuney for $3,000, and upon the sale to said Kuney received $600 in cash, and took back said mortgage for $2,400 to secure the balance of said purchase price of said land.

"That there was then growing and standing upon said land between one million and five hundred thousand and two million feet of good green pine sawing timber.

"That said Frank Kuney had paid in cash upon said mortgage, and the note accompanying the same, the sum of $400, June 21, 1886; twenty-three dollars and thirty-

five cents, September 16, 1886; two hundred and eleven dollars and sixty-six cents, October 15, 1886; and one hundred and ten dollars and fifty cents, November 15, 1886, —which left due upon said mortgage the sum of $1,736.36 on said 16th day of March, 1887.

"That said Frank Kuney would pay said mortgage by the last of June or the first of July, 1887; that said Frank Kuney, if he could not raise the money with which to pay said mortgage in any other way, would remortgage said land, and pay said mortgage.

"That the said DeElbert A. Reynolds had assigned said mortgage to said John M. Mosser, who was the junior member of D. A. Reynolds & Co., but Mosser would execute an assignment of said mortgage to said Florence L. Coy in case she would take and accept it as part payment for said stock of drugs and groceries.

"That said John S. Coy, relying upon and believing said false representations and pretenses so made to him by said DeElbert A. Reynolds as aforesaid to be true, was thereby then and there deceived and induced to sell, transfer, and deliver, and did sell, transfer, and deliver, as agent of said Florence L. Coy, having authority to do so, said stock of drugs and groceries of the said Florence L. Coy, of the value of $2,146.36, to said pretended firm of D. A. Reynolds & Co., for $410 in cash and said real estate mortgage, an assignment in writing of which mortgage was then and there delivered to the said Florence L. Coy by said DeElbert A. Reynolds, executed by said John M. Mosser, which mortgage was received by said Florence L. Coy as payment of the sum of $1,736.36 upon said stock of drugs and groceries, and the said DeElbert A. Reynolds did then and there, by means of said false pretenses and representations so made as aforesaid, unlawfully and fraudulently obtain said stock of drugs and groceries, the property of said Florence L. Coy, with intent to cheat and defraud her, the said Florence L. Coy, of the same.

"Whereas, in truth and fact, the said DeElbert A. Reynolds well knew that said real-estate mortgage was not a gilt-edged mortgage, and was not first-class security for the payment of $1,736.36, the amount due upon the same, and that it was of no value whatever; that said land upon which mortgage was given was not worth $3,000, and was not worth to exceed $100; that said land did not have 1,500,000 to 2,000,000 feet of good green

pine sawing timber growing and standing upon it, or any amount whatever; that he had not sold said land to said Frank Kuney for $3,000, or for any sum whatever; that said Frank Kuney had not paid $600 in cash, or any sum whatever, upon the purchase of said land; that said Frank Kuney had not paid cash or anything whatever upon said mortgage; that the said Frank Kuney would not remortgage said land to pay said mortgage, and never intended to,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Michigan."

On the trial, Mr. Coy was called as a witness for the people, and gave testimony tending to show that his wife, Florence L. Coy, was engaged in the drug and grocery business at Unionville, in 1886 and 1887, and that he was her agent in carrying on the business, and had exclusive charge of the same. He was then asked by the prosecuting attorney:

"*Q.* Do you know DeElbert A. Reynolds?

"*A.* Yes, sir.

"*Q.* When did you first become acquainted with him?

"*Mr. McGarry, Respondent's Attorney.* I object to that. I object to any evidence, under this information, seeking to charge the respondent with any crime, because the information is not sufficient in itself to authorize any evidence to be received connecting the respondent with the alleged crime, because—

"1. It is not pretended that the respondent pretended to make any pretenses whatever; the indispensable requirement has been left out in that respect.

"2. Neither is it alleged that the pretenses stated by Mr. Atwood to the jury were false in fact; it simply alleges that the respondent knew them to be false, without alleging the further necessary requirements that, in point of fact, they were false.

"Before any evidence whatever can be introduced connecting this respondent with the crime charged, there must be an information sufficient in itself to warrant the court in rendering judgment upon it.

"*By the Court.* There is a doubtful question upon the face of the information, but I am inclined to think that these subsequent allegations aid the omission of that word

'pretend' in there, so that the information on its face really works no injury to the defendant. I think I will hold it sufficient in this court."

The only allegations in the information showing the falsity of the pretenses are:

"Whereas, in truth and fact, the said DeElbert A. Reynolds well knew that said real-estate mortgage was not a gilt-edged mortgage," etc.

These are not allegations that the pretenses were false in fact. A false pretense was defined in a Massachusetts case to be "a representation of some fact or circumstance, calculated to mislead, which is not true." *Com. v. Drew*, 19 Pick. 184. This statute, like all criminal statutes, must be construed strictly, and nothing not within its words be held to be within its meaning. The most obvious proposition is that the pretense must be false (*People v. Tompkins*, 1 Park. Crim. R. 224); and the doctrine undoubtedly is that if it is not false, though believed to be so by the person employing it, it is insufficient. It being, therefore, necessary to prove the falsity of the pretense, it is necessary to aver it in the information. *State v. De Lay*, 93 Mo. 98 (5 S. W. Rep. 607). In this respect the information is fatally defective, and no conviction could be sustained under it.

The verdict and judgment of the court below must be set aside, and the respondent discharged.

The other Justices concurred.

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THE PEOPLE v. ROBERT RILEY.

Liquor traffic—Sale to minor—Charge to jury.

Where in a prosecution for selling liquor to a minor the undisputed and only evidence showed such sale in the respondent's presence, and in such a manner as to make his ignorance of it impossible, unless he lacked some of his senses, or was willfully ignorant, an instruction to the jury that such ignorance would make no difference, and that he would be liable at all events, could have no bearing or effect, there being no pretense of such ignorance.

Exceptions from Berrien. (O'Hara, J.) Argued June 27, 1888. Decided July 11, 1888.

Respondent was convicted of selling liquor to a minor. Conviction affirmed. The facts are stated in the opinion.

C. B. & A. H. Potter, for respondent.

Moses Taggart, Attorney General, and *George W. Bridgman,* Prosecuting Attorney, for the people.

CAMPBELL, J. Respondent was convicted of selling intoxicating liquor to Sidney Phillips, a minor. The only testimony on either side bearing upon the merits was that of Phillips, who swore he was 17 years old, and that he drank and gambled in Riley's saloon, when Riley was present, and that liquor was served him by the barkeeper.

Upon this undisputed testimony, which the jury believed and had no reason for disbelieving, the only two issues of fact were whether it was Riley's saloon, and whether the liquor was sold in the manner witness said it was.

But counsel propounded, and the judge considered, a possible ignorance of Riley concerning the sale of the

liquor. The court charged that such ignorance would make no difference, and that he would be liable at all events.

This might make it necessary to consider the correctness of the charge upon the hypothesis of actual ignorance and moral innocence. But we do not think that question is before us for decision.

The only testimony concerning any sale showed it was in Riley's presence, and that it was impossible he did not know it, unless he lacked some of his senses, or was willfully ignorant. If the jury believed Phillips concerning the sale, they could not disregard the details of it. It would be difficult to find a plainer case of undisputed facts. If it had been possible for the jury to have been misled by the range of discussion in the charge, it might be material; but all that part of it which referred to what might hold an ignorant party could have no bearing or effect where there was no pretense of ignorance. The testimony pointed all in one way.

The conviction was proper, and should be affirmed.

The other Justices concurred.

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HENRY W. CORNELL v. THE NEW ERA LUMBER COMPANY.

Logs and logging — Contract — Construction of term "mill tally" — Evidence — Custom and usage.

In this case it is held that in view of the fact that there are times and places that lead to different usages in economizing lumber, the old processes being more wasteful than the new, and what was once not worth saving being now frequently of commercial

value, grades being multiplied and subdivided, and sawing closer, there was no objection to receiving testimony as to the construction placed upon the term "mill tally;" and the witnesses whom the jury followed having testified that it included all that was saved and set apart as proper to be classed as lumber, including "mill culls," which testimony is in harmony with the apparent meaning of the term, and warrants the conclusion reached by the jury, the judgment is affirmed.

Error to Oceana. (Russell, J.) Argued June 28, 1888. Decided July 11, 1888.

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

J. C. Fitz Gerald (F. A. Stace, of counsel), for appellant, contended:

1. The interpretation of the agreement to pay according to the "mill tally" was wholly with the court, whose province it was to determine its proper construction and legal effect; citing *Thompson v. Richards*, 14 Mich. 172; *Stadden v. Hazzard*, 34 Id. 76; *Paine v. Ringold*, 43 Id. 341; *McKenzie v. Sykes*, 47 Id. 294; *Spaulding v. Coon*, 50 Id. 622; *Ferris v. Wilcox*, 51 Id. 105; *Ranney v. Higby*, 5 Wis. 62.
2. It is not competent to explain the meaning of words used in a written instrument by the testimony of witnesses; citing *Harvey v. Cady*, 3 Mich. 431; *Adair v. Adair*, 5 Id. 204; *White v. Bailey*, 10 Id. 155; *Phelps v. Town*, 14 Id. 374; *Ins. Co. v. Throop*, 22 Id. 146; *Black v. Ward*, 27 Id. 191; *Battershall v. Stephens*, 34 Id. 68; *Spence v. Bowen*, 41 Id. 149; *Johnson v. Cranage*, 45 Id. 15; *Kelsey v. Chamberlain*, 47 Id. 241; *Brewster v. Potruff*, 55 Id. 129.
3. The words "board measure" imply lumber, as it is the only article thus measured, and *lumber* is merchantable sawed boards, scantling, plank, or timber, and not mill culls, slabs, edgings, and the like. In speaking of commodities for sale generally, it is the universally recognized rule that *merchantable* commodities are intended; citing *Whitmore v. Iron Co.*, 2 Allen, 52, 58; *Swett v. Shumway*, 102 Mass. 365; *Gallagher v. Waring*, 9 Wend. 20, 28; *Hart v. Wright*, 17 Id. 267; *Howard v. Hoey*, 23 Id. 350, 351, 352; *Hargous v. Stone*, 5 N. Y. 73; *Reed v. Randall*, 29 Id. 358, 362; *Brown v. Sayles*, 27 Vt. 227; *Perkins v. Hoyt*, 35 Mich. 506.

4. The court is the tribunal to pass upon the sufficiency of the evidence to establish a custom; citing *Pevey v. Lumber Co.*, 33 Minn. 45; *Wootters v. Kauffman*, 67 Tex. 488; *Ledyard v. Hibbard*, 48 Mich. 421; *Adams v. Ins. Co.*, 76 Penn. St. 411.

5. The office of a usage, when thus proved and applied to a contract, is to give a particular effect and meaning to the words of a contract; citing *Randall v. Smith*, 63 Me. 105, 106; but where the terms are clear and explicit, no customs of the country can vary them; citing *Harvey v. Cady*, 3 Mich. 431; *Greenstine v. Burchard*, 50 Id. 434.

6. To be valid, a local usage must be certain, definite, uniform, notorious, and clearly proved, and the contract must be shown to have been made with reference to such usage; citing *Ledyard v. Hibbard*, 48 Mich. 421, 427; *McMasters v. Railroad Co.*, 69 Penn. St. 374; *Potts v. Aechternacht*, 93 Id. 138; *Isham v. Fox*, 7 Ohio St. 317; *Harper v. Pound*, 10 Ind. 32; *Bissell v. Ryan*, 23 Ill. 566; *Leggat v. Brewing Co.*, 60 Id. 158; *Hinton v. Coleman*, 45 Wis. 165; *Smith v. Gibbs*, 44 N. H. 335; *Walls v. Bailey*, 49 N. Y. 464; *Harris v. Tumbridge*, 83 Id. 92; *Stevens v. Reeves*, 9 Pick. 197; *Janney v. Boyd*, 30 Minn. 319; *Taylor v. Mueller*, Id. 343; *Pevey v. Lumber Co.*, 33 Id. 45, 47; *Porter v. Hills*, 114 Mass. 106, 110.

M. Brown (*W. E. Ambler* and *E. F. Uhl*, of counsel), for plaintiff, contended:

1. That parol evidence was admissible to show the meaning of the term "mill tally," because its meaning is doubtful; citing *Ins. Co. v. De Graff*, 12 Mich. 124; *Jones v. Anderson*, 2 Sou. Rep. 911; *Beason v. Kurz*, 29 N. W. Rep. 230; *Myers v. Tibbals*, 13 Pac. Rep. 695; *Jaqua v. Witham*, 7 N. E. Rep. 314; 2 Whart. Ev. §§ 954, 962; *Bissel v. Campbell*, 54 N. Y. 353; *Miller v. Stevens*, 100 Mass. 518; *Page v. Cole*, 120 Id. 37; *Keller v. Webb*, 125 Id. 89.

CAMPBELL, J. Plaintiff sued defendant to recover the compensation agreed to be paid him for cutting and delivering logs under a written contract originally made by defendant with plaintiff and his partner, Angus Mackintosh. By this agreement Corneil and Mackintosh agreed, under certain restrictions and regulations not necessary to be described, to cut and deliver at the mill named, in board and strip logs, the timber on certain

lands described. The work was to be paid for on terms the meaning of which is disputed. The provision was as follows:

"At the rate of three dollars and seventy-five cents per thousand feet, board measure, according to the mill tally thereof."

The jury found a verdict for an unpaid balance of $9,637.57, of which plaintiff remitted $448.14 for rent of railroad iron during a period which he had claimed he was delayed. By the findings of the jury plaintiff recovered for the logs at the price he claimed, and for a small bill not disputed. The credits allowed defendant included all admitted sums, and apparently a trifle more. We do not think it appears from the record as admitted that any more should have been allowed. There is a little confusion in some figuring near the end of the bill of exceptions, but it appears distinctly that the claims of the two parties on which they went to the jury left nothing admitted that has not been allowed.

The issue thus narrowed down was very fairly presented by the charge, and we can see no reason to think it was not considered properly by the jury. And we have found nothing in the very prolix record laid before us which requires attention except the question of compensation. We are at a loss to imagine any reason why this enormous volume should not have been cut down to moderate limits. It contains a mass of repetitions and useless rubbish that could never have served any good purpose, and that has no proper place in a bill of exceptions. It is rather remarkable that with so much irrelevant matter there was not more that was prejudicial. But we are satisfied the jury was not misled.

The dispute which is really important relates to what is included within the meaning of the term "mill tally."

The defendant claimed that it included only the classes of lumber generally called "merchantable," excluding a cheaper kind known as "mill culls."

If the term is one not having a settled judicial meaning, it cannot be said that the contract makes it any plainer. It is not unusual to calculate the lumber value of logs by scaling them before sawing. That is a process which involves more or less skill and sagacity, and is not purely mechanical. Some scale more closely than others, but it would be very uncommon for any one to make his log scale correspond exactly with the result in sawed lumber. There is frequently a difference caused by modes of sawing, and the care and skill of the mill work.

In the present case the parties saw fit to have the logs measured by their actual product, and the question is whether the mill tally covers the whole or only certain qualities of that product.

In the absence of any other light, it would seem more natural to make the mill tally include all that is tallied as lumber than any less. But the fact that a dispute arose about it, and the circuit judge did not consider himself judicially informed upon the subject, suggests that there must be some practical construction that should be followed. It is perfectly well known that there are times and places that lead to different usages in economizing lumber. The old processes were more wasteful than the new. What was once not worth saving is now frequently of commercial value. Grades are multiplied and subdivided, and sawing is closer.

Under these circumstances, we can see no objection to receiving such testimony as was offered here. Those witnesses whom the jury followed testified that the mill tally included all that was saved and set apart as proper to be

classed as lumber, and that mill culls were so included. That testimony is in harmony with the apparent meaning. The word naturally refers to what is usually tallied, and that is what these witnesses say it is understood to mean. The members of this Court have no judicial or other knowledge to the contrary. Neither have we judicial knowledge that the phrase has not a possible occasion for interpretation. It is not safe for courts to assume to know everything about the usages of all kinds of business. And even in those cases where they are understood to have judicial knowledge their supposed possession of it is often very much refreshed by inquiry.

In our view the conclusion of the jury was warranted by the testimony, and the testimony was properly regarded.

We do not think there is any other question in the case which we can regard as improperly disposed of. The jury had careful and correct instruction on the disputed points, and their verdict is final. We think they had enough before them to pass upon.

The judgment must be affirmed.

The other Justices concurred.

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JOEL H. CRANSON, JUDGE OF PROBATE, FOR THE USE OF DAVID H. RHEUBOTTOM, v. ARMINA WILSEY, JAMES FRANKLIN MEAD, AND JAMES I. MEAD.

Executors and administrators—Bond—Distribution of estate—Liability of surety—Leave to sue—Amendment of record in Supreme Court.

1. An order of distribution *alone* cannot discharge executors until the estate is distributed.
2. It is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be.
3. Where executors, after an order for distribution, make a wrongful conversion of the property to the use of one of them, it is a clear breach of duty, for which action will lie on their bond.
4. Where leave was granted to an administrator appointed on the removal of the executors, who had failed to comply with the order of distribution, and had converted the property to the use of one of them, for leave to sue on their bond, which suit was prosecuted to judgment in the name of the judge of probate for the use of a contingent residuary legatee, who had no definite interest, the record was amended in the Supreme Court so as to show the administrator as the party in interest, he being entitled to take the fund, and see to its proper investment.

Error to Clinton. (Smith, J.) Argued June 28, 1888. Decided July 11, 1888.

Debt on an executors' bond. Plaintiff brings error. Reversed, and judgment rendered on the findings below *nunc pro tunc* for the penalty of the bond, to be satisfied on payment of the amount found due, etc. The facts are stated in the opinion.

H. & H. E. Walbridge and *O. L. Spaulding*, for appellant, contended:

1. The execution of a trust of this nature is legally committed to the executors; citing *Haddon v. Hemingway*, 39 Mich. 615; *Hinckley v. Probate Judge*, 45 Id. 343.
2. It is clearly within the terms of the bond. By its terms the executors are required to pay all legacies, which they have not done; citing *Supervisors v. Jones*, 19 Wis. 61.
3. The surety on the executors' bond will be liable for their acts as trustees; citing 2 Perry, Tr. § 574.
4. The executors and the surety were cited, and showed no cause why this bond should not be put in suit, and took no appeal. He has had his day in court, and if his principals are liable so is he; citing *Clark v. Fredenburg*, 43 Mich. 266.
5. But, in any event, the executors could not hold as trustees instead of as executors, until as executors they had settled their administration account, and the balance due from them as executors allowed to their credit as being retained by them as trustees; citing *Hall v. Cushing*, 9 Pick. 406; *Conkey v. Dickinson*, 13 Metc. 51; *Williams v. Cushing*, 34 Me. 370.

Kilbourne & Humphrey, for defendants Mead, contended:

1. A surety on an executors' bond cannot be held liable for any duties beyond the statutory requirements of the executors; citing How. Stat. §§ 6801-6807; *Hinds v. Hinds*, 85 Ind. 312; *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Id. 373.
2. On the assignment of the residue of the estate, the executors ceased to act as such, and commenced to act as trustees; citing *Calkins v. Smith's Estate*, 41 Mich. 412; *Brown v. Forsche*, 43 Id. 497, 500; *Hinds v. Hinds*, 85 Ind. 315.
3. The surety is only liable for the obligations fairly intended at the execution of the bond, and cannot be held for a breach of other duties attached to his principal's office; citing *Wyman v. Hubbard*, 13 Mass. 233; *Biddle v. Wendell*, 37 Mich. 454; *White v. East Saginaw*, 43 Id. 567; *Hat Manufactory v. Messinger*, 2 Pick. 223; *Bank v. Chickering*, 4 Id. 314.

CAMPBELL, J. This suit was brought on an executors' bond, given by the defendants Armina Wilsey and James Franklin Mead, as executors of David G. Wilsey, deceased,

and Delos C. Wiley and James I. Mead as sureties. Wiley died several years ago. James I. Mead has died pending these proceedings in error.

David G. Wilsey's will was probated January 23, 1871. He left to his widow, the defendant Armina Wilsey, a life-interest in realty, and some personal property was also bequeathed to her. The residuary personal property, after providing for various matters, was to be divided so as to give half to his daughter, Mary D. Fitz, and the remaining half, on certain contingencies, to the two children of a deceased daughter, Calvin W. and David H. Rheubottom, who were then small infants, and who took a residuary interest in land after the death of the widow. The bequest to these children was conditioned that in case either died it should go to the survivor, but not in any case to become vested until he should reach the age of 21 years. In case of death without issue before reaching that age, the property was given to others. This fund was to be invested, and the income re-invested, in real-estate mortgages at 10 per cent. The education of these children was placed in charge of the executors, who were authorized to use so much of the income as should be allowed by the judge of probate. Calvin W. died without issue while a minor. David Henry Rheubottom was born December 7, 1869, and is still a minor.

On May 20, 1872, the probate court ordered a division of personal property, without requiring its conversion into cash, and the executors were required to pay Mrs. Fitz certain securities, amounting to $987.27½, and to "take for the grandchildren of said deceased, Calvin Wilsey Rheubottom and David Henry Rheubottom," several notes and accounts, a reaper, and $314.12 in cash, making $987.27½.

Nothing further was done in the probate court until October, 1884, when John A. Sleight, guardian of David

H. Rheubottom, petitioned that the executors should account and file a new bond. This petition set up the death of Calvin, the insolvency of James F. Mead, the doubtful sufficiency of James I. Mead, and a fraudulent disposition of Armina Wilsey's property. The executors were cited to account, but failed to do so. A petition was then made for their removal, and for the appointment of an administrator. Upon the hearing they were removed, and Irving M. Eaton was appointed to act as administrator with the will annexed.

Mr. Eaton then applied for leave to sue on the bond, and leave was granted. The breaches assigned are the conversion of the fund to Mead's own use, with the consent of Mrs. Wilsey, a failure to use the income to educate David, and a failure to account.

The circuit judge found as facts, among other things, the order of 1872 for distribution, and a failure to invest the funds as required by the will, and its investment in real estate in the name of James Franklin Mead, by consent of Mrs. Wilsey. The court further found the probate action before mentioned, which was not appealed from, but held that after the order of 1872 the executors did not hold the estate officially as such, but as donees of a power in trust, and that their sureties were not liable. It was held further, as matter of law, that the removal and other recent proceedings were not valid.

We do not think the conclusions of law are correct. An order of distribution alone cannot discharge executors until the estate is distributed. The Rheubottom children could not take the property, and inasmuch as their interest was contingent no one else could take it for them. The will required it to be invested by the executors. If the property had been invested in real-estate securities as required, the question might have arisen whether this was not equivalent to such a compliance with the order of

distribution as would have changed the nature of their holding. Upon this question we express no opinion. It is at least a doubtful proposition. But we think it is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be.

As the finding is that they did no such thing, but made a wrongful conversion of the property to the use of one of them, we think this was a clear breach of duty, for which action would lie on the bond.

It is claimed, however, that this action was brought in the name and for the use of David Rheubottom, who has no definite interest. This is undoubtedly true, and the action should not have been for his use. But the leave was granted to the administrator, who is a proper party, and who is entitled to take the fund, and see that it is duly invested. Inasmuch as the judge of probate is the proper plaintiff, we see no reason why the record should not be so amended as to make it show the administrator as the party in interest, and it will be so done.

The finding does not show that the fund could have been compounded at 10 per cent., and there is doubt whether it could have been. But interest computed in the ordinary way at 10 per cent. will make good the conversion, and will be allowed. This will fix the amount of the judgment at $987.27\frac{1}{2}$, with interest to the day when the writ of error was issued. This seems to be the first suit on the bond.

Judgment will be rendered *nunc pro tunc* as of that date for the penalty, to be satisfied on payment of that amount, with costs of both courts against the executors and James I. Mead, inasmuch as it is, in our view, the legal effect of the finding of facts.

The other Justices concurred.

FIDELIA LEE v. SCHOOL-DISTRICT NUMBER TWO OF THE TOWNSHIP OF ALCONA.

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Schools and school-districts — Contract with teacher — Board of school examiners—Special certificate—Authority of secretary of board.

1. The secretary of the board of school examiners had no right, after the refusal of the board of examiners to grant, upon examination, a certificate, to issue a special certificate to the rejected applicant, under How. Stat. § 5154.
2. The object of How. Stat. § 5154, was to bridge over the time between the commencement of a school and the next meeting of the board of examiners, and a special certificate granted thereunder had life only until the time of such next regular examination.
3. The action of the majority of a board of school examiners in refusing a certificate cannot be questioned by the rejected applicant in a suit to recover wages she would have earned under her contract but for such adverse action.

Error to Alcona. (Tuttle, J.) Argued June 28, 1888. Decided July 11, 1888.

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

Henry & Cornville and *O. H. Smith*, for appellant.

W. E. Depew, for defendant.

MORSE, J. The plaintiff, on October 14, 1884, entered into the usual written contract with the officers of the defendant school-district as a teacher. She was to teach nine months, and receive therefor the sum of $315. When she commenced teaching under this contract, the plaintiff had no certificate received upon a regular examination of the county board of school examiners, but was

granted a special certificate by the secretary of the board, one J. E. Fair, under the statute as it was at the time, and before the amendment of 1887.[1]

The statute provides as follows:

"The secretary of the board of school examiners shall have power, upon personal examination satisfactory to himself, and subject to such rules and regulations as the board of school examiners may establish, to grant special certificates, which shall license the holder thereof to teach in a specified district for which it shall be granted; but such certificate shall not continue in force beyond the time of the next public examination by the board of school examiners, and it shall not in any way exempt the teacher from a full examination before said board." How. Stat. § 5154.

A general examination of teachers for the county was held October 30, 1884, of which plaintiff had notice, and which she attended. At such examination only two of the examiners were present. The place of the absent member was filled by one Mr. Stecker, who acted in his stead, and took part in the examination. The plaintiff was on that day examined with others. After the examination was concluded, the plaintiff was informed that it was undecided who would receive certificates, and she was instructed by the secretary to go on with her school until she heard from the board. The board refused to grant her a certificate upon such examination, but on November 3, 1884, Mr. Fair, the secretary, without the knowledge or consent of the board, issued to her another special certificate, upon which she taught until the 21st of the same month, when she was dismissed by the officers of the school-district, and another teacher employed.

Evidence was offered to show the ability and willingness of the plaintiff to continue the school till the end of her term, and her inability to procure other employment.

[1] See Act No. 266, Laws of 1887, § 5.

She was paid for the full time she actually taught the school, but she brought this suit to recover the balance of the $315, claiming that she was entitled to the full contract price, as the district had no legal right to discharge her. It does not appear that she was discharged for any other cause than the lack of a proper certificate.

The circuit judge directed the jury to find for the school-district, and judgment was entered for the defendant.

The judgment is right. The secretary had no authority, four days after the refusal of the board of examiners to grant plaintiff, upon examination, a certificate, to issue a special certificate to her. The certificate so issued was invalid. The school-district had a right to the services of a competent teacher, and one who had received the proper license to teach under the law.

We cannot agree with the counsel for plaintiff that the statute authorizes the secretary at any time, where no rules or regulations to the contrary are established by the board of examiners, upon a personal examination, to grant a special certificate, and that the second certificate issued by him to plaintiff was good until another public examination of teachers was held. To hold this would authorize the secretary to nullify, at any time, the action of the board, and make him, in effect, the sole person, under the law, to judge of the qualification of teachers, and to issue certificates. The object of the statute evidently was to bridge over the time between the commencement of a school and the next meeting of the board, as in the case of the first certificate issued to plaintiff. The intention is also plain that such certificate shall have life only to the time of such examination; and that if the applicant for a certificate is rejected, though holding a special one, she shall not be granted another special certificate immediately upon the heels of such examination.

The fact that one of the examiners did not participate in the examination of plaintiff, or that an unauthorized person filled his place, and took part in the proceedings of the board, cannot affect the situation of plaintiff. A majority of the board acted, and decided against her, and she cannot question the validity of such action in this suit. It cannot be said that no legal public examination took place, and it is not shown that the action of Mr. Stecker had anything to do with her failure to obtain a certificate upon such examination.

The judgment is affirmed, with costs.

The other Justices concurred.

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RICHARD LUKE v. THE WHEAT MINING COMPANY.

Contributory negligence—Submission of question to jury.

1. Where the question of contributory negligence is in doubt under the evidence, it is the duty of the court to submit it to the jury.
2. In this case it is held that such doubt existed, and the judgment is affirmed.

Error to Marquette. (Grant, J.) Argued June 29, 1888. Decided July 11, 1888.

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

Hayden & Young, for appellant.

E. E. Osborn, for plaintiff.

CHAMPLIN, J. On October 31, 1885, the plaintiff met

with an accident while in the employment of defendant, which caused the loss of a leg.

Defendant operated a small open pit-mine, which, at the time of the injury, was only about 20 feet deep below the surface at the deepest place. Ore was raised to the surface by means of a "skip road;" being a track laid from the bottom of the mine up the inclined side to the surface, a distance of about 70 feet, and thence continued up a trestle-work, at a less grade, to the dumping ground, a distance of about 90 feet from the surface of the mine. Upon this track a "skip car" was used in taking out the ore. This was worked by an engine and drum. A rope led from the drum around a pulley at the end of the trestle, and was attached to the "skip," which was by this means hauled from the pit loaded with ore, and dumped, and then allowed to descend again by its own gravity; its speed being regulated by a brake in the engine-house under the control of the engineer.

The grade from the bottom of the pit to the surface was represented by an angle of 16 or 17 deg. from a horizontal plane. When near the surface, the "skip track" passed through a cut in the rock for several feet, just wide enough for the "skip" to pass, and too narrow for a person to pass with safety between the "skip" and the walls of the cut. This point was about 50 feet from the pump-house, near the bottom of the mine. The pump is worked by steam carried to it from the engine-house, and is used for pumping the water out of the pit.

It had been the custom to use this skip track for the men employed at the mine in going to and from their work. Although there were two or three other passages by which the men could descend into the pit, yet they were more difficult, and seldom used. The movements of the skip car were controlled by the engineer in the engine-

house under signals from the men in the pit. These signals were given by a bell in the engine-house, from which a wire led to the bottom of the pit; one bell to stop, two bells to lower, three bells to hoist for ore, four bells for rock. The usual practice was to keep the skip over night at a certain place called the "skip station," which was near the foot of the trestle, and from 10 to 15 feet from the surface. It could be seen at this point from the bottom of the pit.

On the morning of the day stated, the plaintiff, whose place of work was upon the surface, finding the water frozen in his bucket, went to the pump-house at the bottom of the mine to thaw out the ice with steam. Arriving there, he found Capt. Prout, who was the boss of the workmen in the mine. It was after 7 o'clock, and time for the men to commence their day's labor. The plaintiff and the captain had some conversation at the pump-house while plaintiff was thawing the ice. The plaintiff testified that Capt. Prout said: "Look sharp, Uncle Dick, it is time for you to get out; it is half-past seven;" that he replied: "Give me time;" and the captain said: "You may have good time." Capt. Prout testified that he was in the pump-house when the whistle blew for 7 that morning, and a few minutes after 7, the plaintiff came to the pump-house to have the ice thawed out of his bucket; that the steam was applied by a hose, and he applied the steam, and thawed out the bucket, and then said: "Now, Dick, get out of the way, and let Carey come in." Carey was Dick's partner. Luke might have said: "Give me time to get out of the way." Capt. Prout testified that he had no reference to Luke's getting out of the mine, or out of the way of the "skip," but out of the way of Mr. Carey, who had a tool called the "gun," which is part of a drill, that he wanted to thaw out.

The court adopted Capt. Prout's version in his charge to the jury.

After the ice was thawed from the bucket, Luke started to go up the skip track to his work at the surface; and, when in the narrowest place near the surface, the skip descended upon him without timely warning, ran upon him, and broke his leg, and so crushed it that amputation was necessary. The plaintiff claims that Capt. Prout gave orders to the engineer to lower the skip by an oral order to that effect while in the engine-house; that it was not lowered in accordance with the ordinary signal given by the men in the mine, when they could see the track was clear, or give timely warning to those upon the track.

The engineer testifies that Capt. Prout came into the engine-house about half past 7, and ordered him to lower the skip into the mine, as it was already late; that he was engaged, at the time, in "firing," and, as soon as he had finished, he lowered the skip without any signal from the mine, and in obedience to the captain's orders.

The captain was sworn on the part of the defendant, and flatly contradicted giving any order for the lowering of the skip. The question of defendant's negligence was made to turn upon the veracity and credit which the jury should give to these two witnesses.

The court charged the jury, if the signal to lower the skip was given by the skip tender or laborers at the bottom of the mine, the injury received would be the result of the negligence of a fellow-servant, and the plaintiff could not recover. The defendant also contended that the plaintiff was guilty of contributory negligence; that he knew that the path he was traveling was a dangerous one, and knew that the skip was above the surface, and was liable to descend at any moment, and he ought to have expected it, and been on the alert to avoid the danger

which constantly threatened any one in passing along the skip track after the commencement of working hours; that, by plaintiff's own testimony, he was looking down upon the ground to see where to step, and did not see the skip until it was within eight feet of him, when it had moved thirty-eight feet from where it started.

The defendant's counsel submitted special questions to the jury, which were answered by them as follows:

"1. Did Mr. Prout instruct the engineer, Smith, to lower the skip in the manner testified to by Smith?

"*A.* Yes.

"2. At what time was the skip lowered?

"*A.* About half past seven A. M.

"3. Would Luke have been struck by the skip if he had been looking up, and taking such care as he ought to have taken under the circumstances?

"*A.* Yes.

"4. Did some one of the men at the bottom near the skip pit pull the bell wire, and give the signal for the skip?

"*A.* No."

The jury returned a general verdict for the plaintiff.

Counsel for defendant insist that the plaintiff was guilty of contributory negligence, and the court should have instructed the jury that for this reason he was not entitled to recover. We regard the question a very close one upon this record. The circuit judge evidently so regarded it. But where there is any doubt, under the evidence, it is the duty of the court to submit it to the jury. Counsel for defendant seems to have considered that there was evidence to go to the jury on the question of plaintiff's care; for, notwithstanding he requested the court to instruct the jury that the plaintiff could not recover because the plaintiff was guilty of contributory negligence, he submitted a request to the jury to find as a fact whether he would have been struck by the skip if

he had been looking up, and taking such care as he ought to have taken under the circumstances.

We think there was testimony that made it proper for the court to submit the question whether or not the plaintiff was guilty of contributory negligence to the jury. Luke was nearly 60 years old, and had worked at mining since he was 14 years of age. He must therefore have been well acquainted with the methods and customs in which mines were worked. He testified that, on account of the frost on the morning of the accident, the track where he walked was slippery, and his mind was upon where he stepped; that it had been customary, when any one was upon the track when the skip car was about to be lowered, for the skip tender to sing out, and warn persons to look out for the skip car. But on this occasion the skip car was lowered without warning by the engineer, as was found by the jury, in obedience to the order of the mining captain; and we cannot say, in view of all the facts and circumstances, that the plaintiff himself was not in the exercise of ordinary care. It is a question, at least, upon which different minds might very well arrive at different conclusions from the testimony; and in such case the question must be submitted to the jury.

The charge of the court was very careful and very fair, and was as favorable to the defendant as it was entitled to. It would not have been error if the judge had left it as a fact for the jury to find whether, from the conversation testified to by plaintiff between himself and Captain Prout, the plaintiff was assured that time should be given him to reach the surface in safety, and before the car should be lowered; but the judge took the other view, and construed the expression as applying to the plaintiff's getting out of the way of others who wished to

reach the pump-house, and were waiting to have the ice thawed from their working tools.

We perceive no error of law in the record, and the judgment is affirmed.

The other Justices concurred.

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136 124

71 370
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GEORGE A. WAGAR v. MATTHEW B. FARRIN.

Sale—Contract—Passing of title.

In this case it is held that, if defendant could be made liable for the burned lumber, it could not be under the contract, but on independent grounds (which are not relied upon); and that such liability does not exist, the lumber not having become defendant's property, subject to his risk as buyer. An examination of the opinion is necessary to a full understanding of the case.

Error to Oceana. (Russell, J.) Argued June 29, 1888. Decided July 11, 1888.

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

T. J. O'Brien and *James H. Campbell* (*E. F. Uhl*, of counsel), for appellant.

L. G. Rutherford (*W. E. Ambler*, of counsel), for plaintiff.

CAMPBELL, J. Plaintiff sued the defendant for the breach of a lumber contract in not accepting and paying for lumber sawed. Upon the trial the testimony and issues presented by the plaintiff took a wide range, and

the record is accordingly quite large. But the assignments of error, though numerous, are confined on the argument to a narrow controversy, and the case need not be detailed at length.

On August 15, 1882, plaintiff, by written contract, made an agreement to sell 6,000,000 feet of pine, that should cut in specified grades, at specified prices. These were three grades of clear uppers, at $34 a thousand; selects, $25; fine common, $19; common $10; clear strips, $30; A. & B. strips $25; C. strips, $18; shipping culls, $6. The lumber was to be cut and cross-piled, and cut as fast as possible at plaintiff's mill, commencing the next October. Should the cut exceed 6,000,000, defendant could have the overplus, if he saw fit, at the same rates.

Defendant agreed to take the 6,000,000, and pay for it as follows: Two-thirds in 90 days from the 1st and 15th of each month, for what is sawed; the balance, one-third, in 30 days from the time of shipment,—to be paid in notes and drafts that Wagar could use at bank. The contract closed as follows:

"And it is agreed by both parties that the sorting and inspection shall be final when loaded in cars, and Mr. Backus shall be the inspector, providing he can be obtained; if not, some other party agreed upon; sorting, inspecting, and loading to be paid by both parties equally."

After some delay, plaintiff sawed over 2,000,000 feet, and piled it in the mill yard, of which something over half a million was shipped. Instead of having the lumber inspected provisionally when it was piled, an understanding was had that eight dollars per thousand feet should be advanced as the estimated two-thirds, and advances were made to that full amount, as claimed by defendant, and to a somewhat smaller amount, as claimed by plaintiff. In November, 1883, over a million and a half feet were burned in the yard. Plaintiff claimed the

lumber belonged to defendant, and stood at his risk. This defendant denied. Both parties had insurances on their respective interests, but not to the full value of the lumber.

In December, 1883, plaintiff brought this suit, not to recover the price of lumber sold and delivered, but for loss by defendant's refusal to accept the lumber which plaintiff agreed to furnish. The damage averred was loss by falling market.

Upon the trial the court left it to the jury, under some instructions complained of, to determine whether title had not passed. The jury found it had, and gave damages for the balance of price, or what must be assumed as meant for that. The sum appears to be arrived at by some leveling process.

It is admitted by plaintiff's counsel that, under this agreement, the presumption is that title did not pass; but it is claimed this presumption was overcome by testimony. We have discovered nothing in this record which could, if admissible, destroy the presumption here. And, in our opinion, the contract, taken together, shows that no such result could be allowed. The question is not whether defendant would not have a lien for his advances; it is whether there was a completed sale.

This contract does not call for any inspection before the lumber was piled, and it does not contemplate that any would be made beyond the rough estimates made at the mill on the sawing. And even this was temporarily discarded, and an arbitrary sum of eight dollars taken as the amount which should be advanced, which would, if it had been regarded as accurate, have represented an average value of twelve dollars. But no one could tell in advance what lumber would be finally accepted as belonging to any class or entirely rejected, as was possible among the lowest grades. Defendant could not, under

the contract, be compelled to pay except a certain sum for grades ascertained by inspection. When inspection became impossible, it became equally impossible to fix prices. If the lumber had not been burned, its value could have been reached. But there could be no liability, under the contract, for the price of lumber that was not inspected and shipped, or ready for shipment, if defendant accepted it.

If defendant could be made liable for the burned lumber, it could not be under the contract, but must have been on independent grounds. But no such grounds are relied on. The suit is brought by declaring expressly on the contract, and averring readiness to perform, and refusal to accept lumber. It is not for the price of lumber sold, but for refusing to carry out an executory agreement to buy and pay. And the record fairly corresponds with this claim.

We think defendant is not liable for the burned lumber, and that it had not become his property, subject to his risk as buyer.

We do not deem it necessary to consider the other points in the case, as this one appears sufficient to dispose of the judgment, which must be reversed, with costs, and a new trial granted.

The other Justices concurred

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86 231

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97 458

THOMAS D. STIMSON v. THE MICHIGAN SHINGLE COMPANY.

Transfer of causes—Disqualification of circuit judge—Place of transfer.

1. Under How. Stat. § 6499, the residence of the parties or of the attorneys of record controls as to the place of transfer, and the number or residence of the witnesses is not considered.
2. Where the attorney for a party is elected to the office of circuit judge, and thereby becomes disqualified to try the suit, the client has the right to select any attorney he sees fit in his stead, after which he may avail himself of his statutory right to transfer the case.
3. How. Stat. § 6499, does not seem to apply to any but the attorneys of record in the case to be transferred.
4. In this case, the commissioner having jurisdiction to act in the premises, his determination cannot be disturbed on *certiorari* on the showing made.[1]

Certiorari to a circuit court commissioner of Muskegon county to review proceedings to transfer suit. Submitted on briefs June 29, 1888. Proceedings sustained July 11, 1888. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin, for defendant.

Edwin F. Uhl, for plaintiff.

MORSE, J. *Certiorari* from the order of Frank H. Bassett, a circuit court commissioner of the county of Muskegon, transferring the suit from that county to the county of Kent.

On January 1, 1888, Albert Dickerman assumed the duties and office of circuit judge of the Fourteenth judicial circuit of this State, to which position he was elected

[1] See *Fellows v. Canney,* 75 Mich. 445, as to when the action of a commissioner will be reviewed.

by the people at the judicial election held in the spring of 1887. At and before that time he was a member of the law firm of Keating & Dickerman, practicing attorneys in the city of Muskegon. The said firm of Keating & Dickerman were the attorneys of record of the plaintiff in this suit, which was instituted August 26, 1887.

January 27, 1888, Edwin F. Uhl, who resides at Grand Rapids, in the county of Kent, was duly substituted as the plaintiff's attorney of record in the place of Keating & Dickerman.

The Fourteenth judicial circuit embraces within its limits the county of Muskegon. The circuit judge, therefore, being disqualified to try the cause, application was made by the plaintiff, by petition to Frank H. Bassett, a circuit court commissioner, for the removal of the cause under section 6499, How. Stat., to the circuit court for the county of Kent, where Uhl resided.

Upon hearing of said petition, the defendant answered, in opposition to such removal, that on December 18, 1887, George J. Cummings, an attorney at law residing in the county of Clare, was employed by it as counsel in the cause, with the expectation at the time that the suit would be tried in the county of Muskegon; that no less than 15 witnesses of the defendant reside in the county of Clare, and near Harrison, the county-seat thereof; and because of the employment of said Cummings, and the great expense of procuring the attendance of said witnesses at Grand Rapids, the defendant asked that the cause be transferred to Clare county instead of Kent.

It appeared that the circuit judges of both the Kent and Clare circuits were qualified to hear the cause. It further appeared from testimony taken upon the hearing that the subject-matter of the suit was located in Clare and Roscommon counties. The fact of the number of witnesses residing in Clare county, and the employment of Cum-

mings, was admitted, as stated in the answer of the defendant.

The attorneys of record of the defendant were Messrs. Smith, Nims, Hoyt & Erwin, residing in Muskegon.

The commissioner ordered a change of venue to the circuit court for the county of Kent, in accordance with the prayer of the petitioner.

The counsel for defendant claim:

1. That the order was contrary to the spirit and meaning of the statute.
2. The order of removal was unjust and inequitable.
3. The statute, rightly interpreted, means, as far as the attorney or solicitor is concerned, one who resided in the county to which change of venue is asked at the time the disqualification of the judge arose, and not the place of residence of an attorney afterwards hunted up and substituted.

The statute, after providing that causes may be transferred where the circuit judge is interested, and the manner of securing such transfer, and conferring upon circuit court commissioners the authority to make such transfers upon cause shown, provided in section 6499 that—

"If any party, or the attorney or solicitor of record of any party, shall be a resident of any county in this State other than the county in which said suit or proceeding is pending, and the judge of the circuit court of such other county shall not be disqualified to sit, within the provisions of the first section of this act, the said suit or proceeding shall be transferred to the circuit court of the county in which the party, attorney, or solicitor, or one of them, resides, unless the parties thereto shall by stipulation otherwise agree, and, in case of such agreement, the order on such transfer shall be in accordance therewith."

We think the commissioner had jurisdiction to act in the premises, and that his determination cannot be disturbed by us on this writ under the showing made.

By the terms of the statute it does not matter when or how Mr. Uhl became attorney of record for the plaintiff. There was no showing in this Court or before the commissioner that the spirit of the statute was violated by the selection of Mr. Uhl for the purpose of removing the cause to Kent county. When Mr. Dickerman became circuit judge, and thereby disqualified to act in the cause, the plaintiff had the right to select any attorney he chose in his stead, and, after selecting such attorney, to avail himself of his right under this statute. The statute does not seem to apply to a person like Mr. Cummings, who is not an attorney of record in the cause. The words are:

"If any party, or the attorney or solicitor of record of any party, shall be," etc.

Nor does the number or residence of the witnesses in the cause cut any figure in the statute; it is the residence of the parties or the attorneys of record that controls.

The writ of *certiorari* must be dismissed. The order of the commissioner will stand, with costs to plaintiff.

The other Justices concurred.

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s38NW 885
s15ASR 266
133 6469

71 377
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DANIEL FIRESTONE v. WALTER J. RICE AND FRANK FENN.

Arrest—Felony—Misdemeanor—False imprisonment—Assault and battery—Probable cause—Handcuffing prisoner —Assisting an officer.

1. A person who responds to the call of a *known* officer to assist in making an arrest is protected by the *call*, and must necessarily be by the *law*, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the officer.

2. Whenever the statute punishes an offense by imprisonment in the State prison, unless it is expressly declared by the statute to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process.
3. In this case it is held that the question of probable cause for the arrest complained of was fairly submitted to the jury, and that from the undisputed facts (see opinion) the sheriff was justified in arresting the plaintiff.
4. There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; which discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness, or a reckless indifference to the common dictates of humanity.
5. In order to justify a sheriff in handcuffing a prisoner arrested for felony, it is not necessary that he should be unruly, or attempt to escape, or to do anything indicating a necessity for such restraint, nor, in the absence of these indications, that he should be a *notoriously* bad character.
6. The sheriff making an arrest for felony cannot stop, when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. The officer's duty is to take and safely keep him, and bring him before a magistrate, and, if he does this without wantonness or malice, it is not for the jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish such officer in damages for doing what honestly appeared to him at the time to be reasonable and right.

Error to Allegan. (Arnold, J.) Argued June 29, 1888. Decided July 11, 1888.

Action for false imprisonment and assault and battery for making an arrest without process. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Padgham & Padgham, for appellant.

C. R. Wilkes, for defendants.

[The points of counsel are fully stated in the opinion. REPORTER.]

MORSE, J. This suit was brought to recover damages for false imprisonment and assault and battery upon the plaintiff, alleged to have taken place on the night of August 6, 1885. Rice, at the time, was sheriff of Allegan county, and Fenn was night-watch of the village of Allegan. The arrest occurred in the township of Monterey, in that county. Upon the trial it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one Zeigler, who was arrested at the same time and place as the plaintiff.

The court instructed the jury that if Fenn knew that Rice was sheriff, and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and their verdict, as to Fenn, should be no cause of action.

"Under the laws of this State, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable, and for that reason I give you this request."

The jury rendered a verdict in favor of both defendants.

The plaintiff alleges error in the charge of the court as above given. There was no error in this direction. It is admitted that Fenn did nothing in wantonness or in

malice. He went to the house of Zeigler, where the arrest was made, at the request of the sheriff, and while there, under his direction, placed handcuffs upon plaintiff, and rode beside him in a buggy to Allegan. The court would have been warranted in directing a verdict in Fenn's favor.

The sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace (How. Stat. § 591); and, if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment (How. Stat. § 9250).

We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offense charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required.

Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in

his acts he confines himself to the order and direction of the sheriff. *McMahan v. Green*, 34 Vt. 69; *Reed v. Rice*, 2 J. J. Marsh. 44.

The plaintiff and Zeigler were arrested for the commission of a statutory offense, under section 9168, How. Stat., which reads as follows:

"Every person who shall willfully and maliciously break down, injure, remove, or destroy any dam, reservoir, canal, or trench, or any gate, flume, flash-boards, or other appurtenances thereof, or any levee or structure for the purpose of conveying water to any such dam or reservoir, or any of the wheels, mill-gear, or machinery of any mill, or shall willfully or wantonly, without color of right, draw off the water contained in any mill-pond, reservoir, canal, or trench, shall be punished by imprisonment in the State prison not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year."

The sheriff had a warrant against Zeigler, but none against the plaintiff.

It is claimed by the counsel for the plaintiff that this statutory crime is not a felony, but a misdemeanor, and the circuit judge was requested to so instruct the jury, and to further direct them that, therefore, the arrest of plaintiff was unwarranted and illegal, as no lawful arrest could be made without process. The court refused to comply with this request, and charged the jury that the offense was a felony under the laws of this State. Under the statute and the previous decisions of this Court, we think that whenever a statute punishes an offense by imprisonment in the State prison, unless it is expressly declared by the statute to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process. See How. Stat. § 9430; *People v. Brigham*, 2 Mich. 550; *Shannon v. People*, 5 Id. 71; *People v. Bristol*, 23 Id. 118; *People v. Sweeney*, 55 Id. 589 (22 N. W. Rep. 50); *Drennan v.*

People, 10 Id. 169; *People v. Donald,* 48 Id. 493 (12 N. W. Rep. 669).

The counsel for the plaintiff also claim that the sheriff, under the circumstances, had no right to handcuff the prisoners; that the same was an unnecessary indignity and an outrage; and that the plaintiff, by reason of riding handcuffed in a buggy for several miles over a rough and jolting road in the night-time, received injuries to his health and person, from which he suffered for a long space of time. And they complain of the charge of the court in this respect.

The court was requested to direct the jury as follows:

"If you find, from the evidence in this case, that the defendants put handcuffs on the plaintiff, and compelled him to go a long distance with them on, and that plaintiff in no way attempted to escape when arrested, and offered no resistance at any time, then I charge you that defendants would be guilty of assault and battery on the plaintiff, and would be liable to him for such an amount in damages as, under all the circumstances of this case, the plaintiff ought to recover.

"When a person is arrested for the commission of a supposed crime, and is taken and held for trial or examination, as the case may be, the prisoner ought to be used with the utmost humanity, and at the time of arrest, and during his being taken to prison, should not be fettered or handcuffed, nor subjected to any other hardships than such as are absolutely necessary for the purpose of safe-keeping and confinement under the arrest; and an officer is not justified in handcuffing a prisoner unless he is unruly, or attempts to escape, or is a notoriously bad character, or does something indicating a necessity on the part of the officer to restrain him by handcuffing.

"That the evidence in this case does not disclose any necessity for the handcuffing of the plaintiff, as it was done."

These requests were refused, and the court, in relation to this claim of the plaintiff, instructed the jury in the language following:

"Now, while an officer is bound to treat his prisoner with such kindness and humanity as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in arrest for felony, or offenses of magnitude. His action, in this regard, is to be considered in the light of all the circumstances of the particular case bearing upon the question of what means are reasonably necessary to keep his prisoner secure.

"I do not think, gentlemen of the jury, in this case, under the undisputed circumstances surrounding this arrest, as shown by the evidence, you would be warranted in holding the defendant Rice liable for any damages in this action, solely upon the grounds that the handcuffs were placed upon the plaintiff by his direction, and kept there until the jail was reached, unless you find that this was ordered without any view to prevent the escape of the plaintiff, or keep him in safe custody.

"If it was a wanton act, and done without any view to secure the plaintiff or prevent his escape, the defendant Rice would be liable for the damages resulting from the placing and continuing of the handcuffs upon the plaintiff."

The question of probable cause for this arrest was properly submitted to the jury, and from the undisputed facts of the case we are of the opinion that the sheriff was justified in arresting the plaintiff. It was represented to the sheriff by one William Dumont and his brother John, who came to Allegan, and waked Rice up in the night, that the dam of the said John Dumont had been cut that night, and that the Dumont brothers had tracked two persons directly from the spot where the dam was opened to the house of John Zeigler. The Dumonts were old citizens of Allegan county, and there was no reason why the sheriff should doubt the truth of the representations made by them; and a warrant was procured by John Dumont against Zeigler, and also directed against another as an unknown person.

Upon reaching the house, they found Zeigler and Fire-

stone in bed. The wet boots of Zeigler and the shoes of plaintiff were found at the house, and measured by Dumont, who claimed that they corresponded exactly with the tracks. The pantaloons of both parties were wet around the bottom of the legs, and a spade was found inside the kitchen door, which appeared to have been recently used. The lower part of this spade was wet and clean, but upon the upper part of the blade sand was sticking, which Dumont informed Rice was in appearance like the sand of which his dam was constructed.

Firestone was the only male occupant of the house besides Zeigler, and there can be no reasonable claim made, under these circumstances, that the officer did not have probable cause for taking him into custody. Having reasonable cause for making the arrest, the question arises, was the officer justified in handcuffing the parties?

We think the rule laid down by the circuit judge a proper one. There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension. And this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person.

It is not necessary, as claimed by the plaintiff's counsel, that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing, at the time of the arrest, in the way of attempting to escape, or resisting the officer, is it necessary that he should be a *notoriously* bad character in

order to justify the tying of his hands. There may be other and sufficient reasons, as it seems to me there were in this case, why such extreme measures should be resorted to in order to secure and safely lodge the prisoner.

In this case there was evidence tending to show that the sheriff was informed that these men, Zeigler and Firestone, were "slippery" and desperate men. He did not know either of them personally, and had no information, save what he received from the Dumonts that evening, as to their reputation and character in the community; and he had no time to make inquiry.

The arrest was made in the night, at a late hour, under the supposition, if not made then, that the persons sought or at least the plaintiff, might escape apprehension altogether, or only be captured after much hunting and expense. The night was dark, and the country wooded. The parties had to be taken about 80 rods, along an old winding wood road, to the buggy, every foot of the way opening and inviting an opportunity to escape. From there to Allegan was a night drive, with two officers and two prisoners. There was no evidence of any harshness upon the part of the sheriff or Fenn other than the placing of the handcuffs upon Zeigler and plaintiff. The plaintiff made no complaint at the time

There is nowhere in the whole record a single instance tending to show malice or wantonness on the part of the sheriff. There is absolutely no evidence tending to show any ill will, or even a malevolent impulse, of the sheriff towards plaintiff or Zeigler.

It appears, from the testimony of the sheriff, that, upon the same day of this arrest, a prisoner had broken away from him in the day-time in the streets of Allegan, causing him some effort and trouble to recapture him.

It is plainly apparent that in this case the sheriff put

the handcuffs upon plaintiff for no other purpose than to prevent his escape, and that he had good reason to believe it was necessary to do so. That it turned out afterwards that the plaintiff was innocent of any offense, was neither a "slippery" nor desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape, cannot alter the rule which saves the sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable.

The arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities ofttimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime.

An officer is bound to act humanely, and cannot lightly and without reason either arrest or harshly treat a supposed offender, be he innocent or guilty. It is, no doubt, true that petty officers, too often unduly inflated by a too high conception of their office and authority, are inhuman and cruel in their treatment of suspected persons. Such conduct the law does not hesitate to punish. But to mulct the sheriff, under the circumstances of this case, in damages for handcuffing the plaintiff while conveying him, on a dark night, through the woods, to the village of Allegan, when he had good reason to suspect him to be guilty of a felony, and one likely to escape at the first opportunity, when it was done neither in recklessness, wantonness, nor malice, would be to put in peril every officer of the law who, under like circumstances, was alert and vigilant in the performance of his duties in the arrest of supposed criminals.

The hardened and skillful offender against the criminal laws is sometimes, and generally, the meekest when arrested, but his eye is open to every avenue of escape;

and to say that unless such person attempts to escape, resists arrest, or is known to the officer to be a *notoriously* bad character, he cannot be shackled for an hour or two, until he can be conveyed to a place of safety, is to lay down a rule which will make escapes easy, and place new obstacles in the way of the apprehension and safe-keeping of offenders. The sheriff cannot stop, when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable and right.

Several assignments of error are made to the ruling of the trial judge upon matters of evidence, but we find no merit in any of them.

The statements made to the sheriff by the Dumont brothers, both before and at the time of the arrest, were material and competent, bearing upon the question of probable cause for making the arrest, and also upon the reasonableness of the act of the sheriff as to the use of the handcuffs. It was also proper for the sheriff to testify that he believed such statements as bearing materially upon his good faith as to both of these matters.

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

The other Justices concurred.

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CHARLES NITZ v. HENRY BOLTON AND DONALD MCRAE.

Taxes—Deed for tax of 1881—Replevin for timber—Waiver of return—Damages.

1. A tax deed issued upon a sale made pursuant to the tax law of 1882, for the tax of 1881, is void upon its face. *Ball v. Busch*, 64 Mich. 336.
2. Where the assignee of a certificate issued on the sale of land for the tax of 1881, made under the tax law of 1882, cut the timber and replevied the logs from the original land-owner, who had seized and marked them, the measure of damages on a recovery by the defendant is the value of the logs at the time of serving the writ, with interest from that date.

Error to Alpena. (Emerick, J.) Argued June 28, 1888. Decided July 11, 1888.

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

R. J. Kelley, for appellants.

Turnbull & Dafoe, for plaintiff.

CHAMPLIN, J. The plaintiff brought replevin for 130,000 feet of pine saw logs, failed in his action, and the defendants waived a return, and took judgment for the value of the property. The only question involved is the measure of damages, and the rulings of the trial court upon the admission of testimony affecting that question.

It was alleged in the declaration, as a part of the description of the property, that the logs were cut from the S. W. ¼ of the N. E. ¼ of section 25, town 32 N., range 8 E.

The plaintiff purchased a tax title for the taxes of 1881, given on a sale of the land made in 1884, from one Nor-

ton, of Pontiac, and received from said Norton a quitclaim deed thereof, which deed bears date February 7, 1884, but was not acknowledged until February 7, 1885. The deed from the Auditor General to Norton bears date June 11, 1885, and recites that Norton became the purchaser at the tax sale made on May 5, 1884. It will thus be seen that at the time plaintiff purchased from Norton the latter had no deed from the State, and the quitclaim would operate at most merely as an assignment of the certificate of sale.

No point is made upon this by defendants, and its consideration is only material as bearing on plaintiff's good faith in cutting the timber from the land above described. The defendants were the owners of the original title, and held the patent of the State of Michigan therefor, bearing date February 5, 1875.

In the winter of 1885–86 plaintiff went upon the 40 acres in question, and cut the pine therefrom, and put it in a stream called the "Narrows," at the outlet of Long lake. The haul from the land to where the logs were put into the stream was about two miles. Plaintiff gave testimony of the circumstances under which he purchased from Norton, and claimed that he cut the pine in good faith, and should not, therefore, pay any greater damage than the timber was worth standing in the tree, ordinarily designated as "stumpage."

The defendants claimed that they were entitled to the value of the logs at the time and place where they were when taken from their possession by the writ of replevin, which was in the stream, they having previously taken possession thereof, and placed their mark upon them.

This Court held in *Ball v. Busch*, 64 Mich. 337 (31 N. W. Rep. 565), that such a tax title was void upon its face. In April, 1885, the law under which Norton became the purchaser at the tax sale in May, 1884, was held, by a

divided Court, to be unconstitutional and void. This was more than six months before plaintiff went upon the land to cut and take off the pine, and was also prior to the deed from the State to Norton. Under such circumstances there is no ground for claiming that the plaintiff was acting in good faith when he cut and removed the pine from this land

Without deciding now whether, under any circumstances, the flexible rule of damages allowed in actions of trover and trespass may be applied in actions of replevin, we think in this case the rule laid down in *Hanselman v. Kegel,* 60 Mich. 550 (27 N. W. Rep. 678), should be applied, and that the measure of damages is the value of the property at the time of serving the writ by which the defendants were dispossessed of the property, with interest from that date. *Gates v. Boom Co.,* 70 Mich. 309 (38 N. W. Rep. 245).

The judgment should be reversed, and a new trial granted.

The other Justices concurred.

OCTOBER TERM, 1883.

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LUTHER BEECHER v. DENNIS GALVIN ET AL.

Ejectment—Boundary lines—Evidence—Opinions and conclusions of witness—Adverse possession—Special questions to jury—Charge of court.

1. The suppositions of a witness as to the location of a disputed division line are incompetent testimony, as are his conclusions that land-owners had acquiesced in such location.
2. There are other ways of holding possession of land besides inclosing it by a fence.[1]
3. The object of the statute in allowing special questions to be submitted to the jury, and requiring answers thereto, 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 it is error to direct what answer shall be made, in the event the general verdict is a certain way.[2]

Error to Wayne. (Brevoort, J.) Argued April 13, 1888. Decided October 5, 1888.

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

Henry M. Cheever, for appellant.

Dickinson, Thurber & Hosmer, for defendants.

SHERWOOD, C. J. This suit was an action of ejectment by the plaintiff, who owns property on the Lognon farm, against the defendants, who own property on the Wood-

[1] See *Cook v. Clinton,* 64 Mich. 310 (head-note 2); *Murray v. Hudson,* 65 Id. 670.

[2] See Act No. 15, Laws of 1885, as to form of questions, etc.

bridge farm, adjoining on the east. The Galvins were the owners, and Hickey was their tenant, occupying the strip of land in dispute, the same being a parcel 12 feet in width and about 130 feet in length, lying in the city of Detroit. The declaration was in the usual form, and the plea the general issue.

The plaintiff claims the strip was a part of the Lognon farm, and the defendants insist it was a part of the Woodbridge farm. The plaintiff also claimed that the defendants had moved their west fence from the dividing line between the two farms over on the Lognon farm at some time less than the period of 15 years before the plaintiff brought his suit.

Upon the trial the plaintiff claimed to hold by adverse possession, under claim of title, and an acquiescence on the part of defendants and those under whom they claim. It was claimed by him that a certain fence east of the ditch on said land was the line, as established by them, and the acquiescence of the parties and their grantors. On the contrary, the defendants insisted that the center of said ditch was the division line between the parties' parcels of land.

The suit was commenced November 25, 1879, and the trial of the cause was closed on November 20, 1887, and the defendants prevailed. The plaintiff brings error. The record shows that the cause has been tried five times.

The question presented upon this trial was one of possession entirely as it went to the jury, and whether such possession was adverse in the plaintiff.

J. Wilkie Moore was called to the stand by the plaintiff, and gave testimony in answer to plaintiff's questions that he was 73 years old, and had known the premises about 50 years, and knew the Lognon farm, and knew of Lognon and the Spechts when they occupied the farm, and

knew Gov. Woodbridge when he lived on his farm, and saw the old fence between the two farms as early as 1835 or 1836; that the Spechts then claimed to own the Lognon farm, and occupied it as far east as the fence; and from the time he first knew the premises the Lognons and the Spechts occupied up to the fence, down to the time Beecher bought. On cross-examination by defendants' counsel, he said he also knew of the ditch; that it was from five to seven feet wide; that it was there when he first knew the premises; that he recollected talking with Gov. Woodbridge about the lines of the farms; that the ditch was on the west side of the fence; that there were three lines,—that is, there was a fence, a ditch, and a row of trees. Counsel then put the following question:

"What will you say as to the ditch being the dividing line of occupation between the two farms?"

This was objected to by plaintiff's counsel as incompetent, and because—

"It is not pretended that the witness has any knowledge of any survey or anything to show where the dividing line was."

The objection was overruled, and the witness was allowed to answer:

"I supposed the ditch was a line; yet at the same time there was the fence, and the ditch, and the row of trees about five feet on Woodbridge lot, and the ditch the other way. I don't know as this is proper, but I supposed the ditch was on the line, and the fence was put over."

Witness was then asked by counsel for the defendants the following question:

"You say the ditch was the line. It was generally supposed the ditch was the line, was it not?"

This was objected to as—

"Incompetent under the theory of the plaintiff's case as we have outlined it. It is immaterial where the line

is. The question is whether they occupied up to the fence."

The objection was overruled, and the witness answered (the question being repeated in substance), "I think it was."

This testimony was incompetent. What the witness supposed was generally understood, or what he supposed or thought in the matter, was clearly inadmissible, and especially as it is quite apparent from all his testimony he knew nothing of the line whatever. This witness' age and long acquaintance with the premises gave an importance before the jury to his testimony, which, in this particular instance, was entirely misleading, and undoubtedly prejudicial to the plaintiff's case, if he had any, and the objections should have been sustained.

The following question, put to William Woodbridge was clearly objectionable as calling for a conclusion, of a most mischievous tendency, viz.:

"What can you say as to the ditch being acquiesced in as the dividing line between the farms by the respective parties in interest? What can you say of the ditch being acquiesced in as the dividing line between the Woodbridge farm and the Lognon farm at the time the land was possessed by the Spechts,—Ferdinand, Victor, and Louis?"

Witness answered:

"Well, sir, it was tacitly consented to by all parties that the center of that ditch was the dividing line, for nobody ever obstructed it at all in any way. They never put up any fence down in the ditch."

All the questions relating to the subject of acquiescence put to this witness were objectionable on the ground stated, and the testimony was erroneously admitted. We find no other rulings of the court so far objectionable as to make a reversal necessary to correct them. Seven rulings of the court, relating to the charge and the requests to charge, remain to be considered.

In regard to plaintiff's first request, it was not a case where the court should have directed a verdict for the jury, and the court did not err in declining so to do.

The defendants, in their fifth request, asked the court to charge the jury as follows:

"If you believe the testimony of the Fitzpatricks, that the fence along the Galvin lot, along the Woodbridge orchard, was removed prior to the summer of 1864, then there can be no claim of adverse possession on the part of Luther Beecher alone, and defendants are entitled to a verdict."

The giving of this request was properly excepted to. It assumes that, unless land adversely occupied is inclosed by a fence, such possession and occupancy cannot ripen into a title by the lapse of time. Such, however, is not the law; there are other ways of holding possession of land besides inclosing it by a fence.

We see no objection to the other requests of defendants' counsel given by the court.

The plaintiff's counsel made request of the court to submit to the jury, to be answered specifically, the following questions:

"1. Did not the Lognons, the Spechts, and Beecher, during their respective occupancy of the Lognon farm, occupy the same, each under a claim of title, openly, exclusively, adversely, notoriously, and hostile to any other person, up to the old farm fence; and did not each of them, respectively, acquiesce in that fence as the dividing line between the farms; and did not Gov. Woodbridge, during his occupancy of the Woodbridge farm, also thus occupy to the fence, and acquiesce in it as the dividing line?

"2. Had not the old farm fence stood for many years along the west side of the Galvin lot, some five or six feet east of the place where the fence now stands, on the west side of said farm lot?

"3. Was not this old farm fence along the west side of the Galvin lot moved by John Galvin and others for the defendants, in the summer of 1865, five or six feet further

west, and to the place it now occupies; and was not such removal less than 15 years before November 25, 1879, which was the date of the commencement of this suit?

"4. Had not the occupation of the Spechts, the Lognons, and Beecher been continuous for more than twenty years before the Galvins removed the fence in the summer of 1865?"

The court declined to submit the fourth question at all, and submitted the first, second, and third, with the following instructions:

"Now, gentlemen, if your verdict should be for the plaintiff, then I direct you to answer the first three questions submitted by plaintiff's counsel,—Nos. 1, 2, and 3. If you find against the plaintiff, then you want to designate your verdict on the special questions in accordance with the queries submitted."

We see no reason why these questions should not have been submitted; and it was not proper for the court to tell the jury what answers they should give to the questions, or either of them. The object of the statute in allowing such specific questions to be submitted to the jury, and requiring them to make answer thereto, was to ascertain whether the jury had, in making up their general verdict, properly applied the law, as given by the court, to the facts in the case. This can never be done if the jury are to be directed by the court what answer shall be made to each question asked, in the event the general verdict is a certain way. This direction by the court was error, and it was also error for the court to decline to require the jury to make answer to the plaintiff's questions so submitted when asked to do so by plaintiff's counsel.

The following questions were submitted for specific answers by the jury by defendants' counsel, and were returned by the jury, answered as follows:

"1. Is not the land in dispute on the Woodbridge farm?

"*A.* Yes.

"2. Was not the center of the ditch acquiesced in by all the Spechts, and Lognons, and Woodbridge, as the dividing line?

"*A.* Yes.

"3. Have not the heirs of Governor Woodbridge, and the Galvins, occupied this land since the summer of 1864, and maintained an adverse possession?

"*A.* Yes.

"4. Did Mr. Beecher ever claim any title to this strip until the commencement of this suit in 1879?

"*A.* No.

"5. Has not the Galvin fence stood where it now is since 1865?

"*A.* Yes."

There was the same error committed by the court in telling the jury what answers to make, if the general verdict was in favor of one or the other of the parties.[1]

Some objection was made to the submission of these questions and answers given, but we see no objection to them, and but for the errors pointed out they would have been conclusive of the case in favor of defendants.

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

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

[1] The instruction was as follows: "If you find for the defendants, you are to answer those questions in the manner which the questions call for,—favorably, of course, to the defendants."

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JEROME DICKERSON v. EDWIN F. UHL AND WILLIAM E. GROVE, IMPLEADED, ETC.

Mortgage foreclosure—Parties—Prior liens.

Prior lien-holders, or those claiming under a title paramount to the mortgage, are not proper parties to a suit for its foreclosure, nor can their claims be litigated in such suit.

Appeal from Kent. (Montgomery, J.) Argued April 19 and 20, 1888. Decided October 5, 1888.

Foreclosure case. Defendants Uhl and Grove appeal. Decree reversed, and record remanded, with directions to enter a decree against the defendants Huggard for the amount found to be due on the $1,000 mortgage, upon a recomputation. The facts are stated in the opinion.

Taggart, Wolcott & Ganson, for complainant.

Edmund D. Barry (*Jacob Ferris,* of counsel), for defendant Uhl.

William E. Grove, in pro. per.

SHERWOOD, C. J. On May 13, 1875, John Huggard gave to Francis Huggard his note due in two years from date for $3,000, with interest, and at the same time executed to Francis a mortgage on the S. E. ¼ of section 1, and N. ½ of N. E. ¼ of section 12, in township 10 N., of range 10 W., in the county of Kent, to secure the payment of said note.

October 19, 1875, John Huggard conveyed to Francis Huggard, in payment of about $500 of the said mortgage money, the N. E. ¼ of the N. E. ¼ of said section 12, part of the mortgaged premises. The deed was duly

acknowledged and delivered, and Francis placed it of record in the office of the register of deeds for the said county of Kent. On November 6, 1876, John Huggard conveyed to Francis Huggard, in full payment of the balance of said mortgage money, the N. ½ of the S. E. ¼ of section 1, and the S. E. ¼ of the S. E. ¼ of section 1, and the N. W. ¼ of N. E. ¼ of section 12, of the said mortgaged premises. This deed was also duly acknowledged and delivered, and Francis Huggard placed it of record in the said register's office on the same day.

About February 20, 1877, Francis and John went to Cedar Springs together, and to the office of Nicholas R. Hill, a justice of the peace, and Francis had Mr. Hill make out a satisfaction piece for said mortgage, which Francis then executed and acknowledged. It was witnessed by Mr. Hill and one Barber. Francis there, in the presence of those witnesses, delivered the satisfaction piece to John, and John took it home, placed it in a box with the note and mortgage, where he kept his papers, and he has since seen it there.

After the making of the $3,000 mortgage, and prior to its payment by the two deeds aforesaid, and on September 17, 1875, Isaac E. Messmore attached all these lands in a suit in the Kent circuit court against John Huggard, and such proceedings were therein had that Messmore recovered a judgment against John Huggard for $700 and upward, on which an execution was issued to the sheriff, and he levied on and sold the lands to Messmore, and in due time gave him a sheriff's deed thereof, which was placed of record in the office of the register of deeds for Kent county, May 19, 1879.

November 12, 1881, Francis applied to the complainant for a loan of $1,000, which he obtained, and gave his note, secured by mortgage on the lands above described, due in one year at 10 per cent. He also transferred by

assignment as further security the $3,000 note and mortgage.

The defendant Grove claims a lien upon the mortgaged premises by virtue of a judgment and levy against John and Francis Huggard in a suit begun by attachment on February 3, 1881.

Defendant Uhl claims to be the owner of the mortgaged lands, except 40 acres described as the S. W. ¼ of the S. E. ¼ of section 1, and as evidence of his title shows a quitclaim deed from defendant Messmore, dated September 29, 1885, who obtained his title as before stated.

The bill in the case is filed to foreclose the $1,000 mortgage. The bill, after describing the $3,000 mortgage given by John Huggard to Francis Huggard, and averring that the entire principal and interest remained due thereon from date, and that the premises therein described were thereafter transferred from John Huggard to Francis Huggard, states that, by reason of intervening claims and pretended claims of different parties, said mortgage was not canceled or discharged, but still held, as in equity it ought to have been, a valid and existing claim. This is all that is said in the bill in regard to the large mortgage, except that it was assigned by Francis, together with the note, to complainant as collateral to the small mortgage. Said assignment contained a clause that it was to be re-assigned when the $1,000 and interest was paid. The bill then contains the usual averments of a foreclosure bill, claiming the amount due on the small mortgage to be $1,450, and prays for a sale of the property, which is the same in both mortgages, to satisfy the decree, and, in case of deficiency, that the said John and Francis may be held personally liable for the payment of the same.

The defendants all appeared in the case, except Samuel B. Horne and Francis Huggard; and defendants Uhl,

Grove, John Huggard, and Messmore each filed his several answer. The bill was taken as confessed by defendants Horne and Francis Huggard.

Mr. Uhl in his answer says:

1. That the $3,000 mortgage was void, because given without consideration, and with intent to defraud the creditors of John Huggard; and that Messmore was such creditor when the mortgage was made.

2. That no consideration passed from complainant for the $1,000 note and mortgage, and that no valid debt was secured thereby.

3. That complainant took the one mortgage and the assignment of the other without consideration, and with knowledge of the fraudulent purpose of the Huggards, and to assist in consummating such frauds.

4. That if any money was actually secured by the latter mortgage, and the assignment of the former one, it has been fully paid.

5. That said first-mentioned mortgage was, and was intended to be, discharged by the quit-claim deeds from John to Francis.

6. That defendant Messmore acquired title to most of the mortgaged lands by sheriff's deed, as above stated, and that he has since deeded to defendant Uhl.

7. He insists that said first mortgage is wholly void as against him, and said second mortgage is of no effect as against his (Uhl's) deed of the premises; that his title is paramount and adverse to the mortgages; and asks that the bill be dismissed as against him.

John Huggard, in his answer, says he made the note and mortgage for $3,000 to Francis, mentioned in the bill, but that before November 12, 1881, he paid to Francis the full amount of said note and mortgage; that he conveyed the mortgaged land to Francis, except the homestead, which was for the payment of said note and mortgage; and that Francis thereafter made, executed, acknowledged, and delivered to him a proper written discharge of the mortgage; that he knows nothing of the small

mortgage. He also denies that there is the amount due upon the small mortgage claimed in the bill, and asks that the bill may be dismissed as to him.

Defendant Grove answered, and denies the validity of the $3,000 mortgage; admits the small mortgage, but denies that any unconditional assignment was made of the large mortgage to complainant, and does not admit the amount claimed to be due on the small mortgage; avers his interest in the premises to be as hereinbefore stated; that his interest was under a judgment rendered in favor of him and defendant Harris against the two Huggards, commenced by attachment on February 3, 1881; that said Harris assigned his interest in the judgment to him, said Grove, on April 1, 1882; that said judgment was for the sum of $201.52; that notice of the execution levy was filed with the register on February 21, 1882; that the complainant had notice of the defendant's judgment and attachment levy when he took the $1,000 mortgage; that said mortgage contains the following clause:

"And if said second party shall be compelled to pay any lien or claim against said land for his own protection, the same shall become a part of this mortgage, and draw interest at the same rate. And the said first party do hereby covenant and promise to and with said second party, representatives and assigns, that he, the said first party, will pay to said second party the full sum of one thousand dollars, with interest, as above provided, and other claims above provided."

That the said assignment of the said $3,000 mortgage made at the same time, although nominally as security for said loan of $1,000, was in fact taken, as this defendant is informed and believes, to prevent the said Francis Huggard from asserting the same as a first mortgage lien against the lien of said complainant's mortgage, and also to protect the said $1,000 mortgage from those claims of

creditors, which in said bill of complaint are described as "intervening claims," levied upon said lands prior to the said conveyances of the fee thereof to said Francis Huggard; that the mortgaged lands are abundant security to satisfy complainant's debt after the defendant's lien shall have first been paid; that at the time defendant's lien under his attachment was obtained, Francis owned the title in fee to the mortgaged property; that, at the time of the levy of said attachment, Francis and John Huggard had all the interest there was in said property, legal or equitable; and he claims that he is entitled to have his claim satisfied first out of any moneys arising from the sale of said property under this foreclosure proceeding, and prays the benefit of a cross-bill, and of such relief, and for decree establishing priority of his claim.

Defendant Messmore answered, admitting the execution of the $3,000 mortgage by John Huggard to Francis Huggard, but averring that it was without consideration, and was given to defraud creditors; that he was such creditor; and that complainant well knew of such fraudulent purpose. He admits the subsequent conveyance of the mortgaged premises by mortgagor to mortgagee, and alleges the same fraudulent purpose, and notice thereof to complainant. He admits the execution of the $1,000 mortgage, and denies that there was any consideration therefor. He admits the assignment of the mortgage, with same averments of fraud and knowledge, and sets up adverse title in himself derived from sheriff's deed on sale of the premises upon execution issued on a judgment in his favor against said John Huggard, mortgagor, in a suit commenced by writ of attachment after the execution and recording of said $3,000 mortgage, and insists that he is the lawful owner of the mortgaged premises, and that both of the mortgages mentioned in the bill are void as against him and his assigns.

The proofs were taken in open court before Judge Montgomery in the Kent circuit, who, on the 9th day of September, 1887, made a decree sustaining the validity of the $3,000 mortgage, and finding that there was due and unpaid thereon $5,587.08, and that the complainant had an interest therein to the amount due him, to wit, $1,582.50; which sum, with interest, the commissioner was directed to pay to him out of the proceeds of the mortgaged premises, and the remainder of the money realized upon the foreclosure sale the commissioner was directed to bring into court to abide its further order; and that the defendants be foreclosed and barred, etc.

From this decree defendants Edwin F. Uhl and William E. Grove appeal.

It is upon the theory that all these defendants are subsequent purchasers or incumbrancers that they are made parties to this suit. If any of their claims are prior in time to the date of the mortgage being foreclosed, it would not be the privilege of the complainant to call them into court and ask them to litigate such claims. It therefore becomes important to ascertain just what is trying to be done in this suit, and what is the object of the complainant's bill.

Solicitors for complainant in their brief say:

"The bill in this case was filed to enforce the collection of the amount due to the complainant from the defendant Francis Huggard upon a promissory note made November 12, 1881, for $1,000."

They further say this note was secured by a mortgage made by Francis Huggard to the complainant, of the same date and for the same amount, and covering the same lands as the $3,000 mortgage, which mortgage, and the note accompanying the same, were also assigned by Francis to complainant as security for the loan of the same $1,000. From this explanation by counsel, who filed

the bill, it seems quite evident that the foreclosure of the $1,000 mortgage was all that was intended in this suit, and the statements in the bill in relation to the $3,000 mortgage are entirely consistent with this view.

It seems very evident, however, the court did not take this view. It ascertained the amount due upon the $3,000 mortgage to be $5,587.08, and directed John Huggard to pay this amount to the complainant on or before the first day of November, 1887, with interest thereon at 7 per cent. from date of decree, with costs, and, in default of so doing, directed a sale of the premises to be made; in which case the court further directed that the commissioner, out of the proceeds of such sale, retain his fees, disbursements, and commissions on the sale, and pay to complainant his costs and the sum of $1,582.50, together with interest thereon from date of the decree at 10 per cent. (the latter being the sum found to be owing on the small mortgage), and that he bring the remainder into court.

It will be remembered, by the terms of the assignment of the $3,000 mortgage to the complainant, the latter was to re-assign the mortgage as soon as the $1,000 mortgage was paid. It would seem there was good reason for having the $1,000 mortgage foreclosed first; and such was not only the intention of the complainant, but such was in fact the object of the bill, as ascertained by the prayer, which is that the defendants may come to a fair and just accounting touching the amount due and owing upon the small mortgage and note accompanying the same, and that they, or some of them, may be decreed to pay the amount which shall be found to be due thereon, meaning the small mortgage.

No accounting is asked as to the amount due on the $3,000 mortgage, nor for any decree for payment of such amount, nor, in default in making payment, that the

lands may be sold to satisfy the mortgage; nor is there any averment that no proceedings at law have been taken to obtain payment of the debt, nor is it averred that no portion of said debt has been paid. Indeed, it is only on information and belief of the complainant that anything is claimed to be due upon said mortgage. We think the decree, so far as it relates to the $3,000 mortgage, is entirely unauthorized by the bill.

The claim made by Mr. Messmore and Mr. Uhl was one existing long before the complainant obtained his mortgage, and is of title paramount and adverse to that of the mortgage if valid. Mr. Uhl, who is the sole owner of that claim, having purchased the same of Mr. Messmore after this suit was commenced, and who was allowed to take his place in the case by stipulation, expressly says in his answer that neither—

"He nor Messmore is a purchaser subject to said mortgages or either of them, but he holds title paramount and adverse to said mortgages."

There is no question but that the claim set up by Mr. Uhl and Mr. Messmore antedated the mortgage of complainant being foreclosed, and, being adverse to the said mortgage, cannot be litigated in this foreclosure suit. The bill is not framed to raise any such issue. No decree therefore could be rendered in favor of either of them, and neither were proper parties to the suit. *Summers v. Bromley,* 28 Mich. 125; *Wilkinson v. Green,* 34 Id. 221; *Bell v. Pate,* 47 Id. 468 (11 N. W. Rep. 275); *Banning v. Bradford,* 21 Minn. 308; *Rathbone v. Hooney,* 58 N. Y. 463; *Dial v. Reynolds,* 96 U. S. 340; *Peters v. Bowman,* 98 Id. 56.

Upon the claim of defendant Grove, the only question is as to the priority of lien. The complainant's lien, now being foreclosed, was acquired November 12, 1881, and defendant's on February 3, 1881, and on the same day

proper notice was given of the defendant's levy of his attachment by filing the same in the register's office. This shows he was not a subsequent incumbrancer, and should not have been made a party to the suit, as his interests are not affected thereby. Defendant Harris' claim was purchased in by defendant Grove after suit was commenced.

We have now considered all interests necessary for a proper disposition of the case. The decree must be reversed, and the bill dismissed as to all the defendants except John Huggard and Francis Huggard, with costs to Messmore, Uhl, and Grove; and the record will be remanded to the circuit court, with direction to enter a decree against the Huggards for the amount found to be due upon the $1,000 mortgage, upon a recomputation in accordance with the rule established by this Court.

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

BYRON E. WARREN v. HENRY F. GUTCHES.

Landlord and tenant—Lease—Forfeiture—Right of possession—Execution—Replevin.

The owner of a newspaper who leases the entire plant, including the good-will of the business, for a term of years, with covenants for the continued publication of the paper, and for the return of the leased property and good-will at the expiration of the lease, and in case of a breach to have the right of immediate possession, can maintain replevin against a creditor of the lessee who levies upon the leased property as the property of the lessee.

Case made from Calhoun. (Hooker, J.) Submitted on briefs June 14, 1888. Decided October 5, 1888.

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

Rienzi Loud (Hatch & Cooley, of counsel), for appellant, contended for the rule stated in the opinion, and cited the authorities therein referred to.

M. D. Weeks, for defendant.

LONG, J. This is an action of replevin, brought by the plaintiff in the circuit court for Calhoun county, to recover possession of one paper-cutter, one Gordon press, and one Universal printing-press.

The property taken under the writ had been in the possession of Robert L. Warren under a written lease from the plaintiff, and was used by the lessee in the conduct of his business as editor and proprietor of the Albion Recorder. It was levied upon by virtue of certain executions against Robert L. Warren, the defendant claiming the same to be the property of the lessee. The trial was had before the court without a jury, and at its conclusion the court found the following facts and conclusions of law:

"1. The plaintiff is a resident of Bay City, Mich. In 1884, his brother, Robert L. Warren, a printer by trade, was desirous of acquiring a paper published in Albion, known as the 'Albion Recorder,' and opened negotiations with a Mr. Cooper, its owner, with a view to its purchase.

"2. These negotiations resulted in the purchase of the property by the plaintiff, who paid the entire consideration therefor, and took a bill of sale of the office. He thereupon allowed his brother, Robert L. Warren, to use the property, who continued the publication of the Recorder as editor.

"3. This he did in his own name, purchasing necessary stock and supplies upon his own credit.

"4. In 1884 he bought three presses, one a Prouty press, one Universal, and one Campbell. All were bought in the name of and billed to the plaintiff, and were paid for by him, unless it be a small balance on the Prouty press.

"5. On February 14, 1885, the parties executed a lease of the property for five years, by which the plaintiff leased it to Robert L. Warren; the instrument providing that the document should date from May 1, 1884, which was the time of the original purchase.

"The following judgments were afterwards taken against Robert L. Warren, without opposition by him, to wit:

Name.	Date.	Damages.	Costs.
E. Brooks Pease.	May 29, 1886.	$105.98.	$2.90.
Bradner *et al.*	March 6, 1886.	44.42.	2.80.
Bingham.	March 6, 1886.	19.15.	2.80.

"Said judgments were in actions commenced by summons that were returned personally served, and were regular in form and valid.

"6. Executions were afterwards issued upon said judgments, and levied by the defendant upon the property in controversy, which was replevied in this suit by the plaintiff. The property consisted of articles purchased in the name of the plaintiff, and paid for by him in full.

"7. The property replevied is not shown to have been any part of the consideration for the indebtedness upon which said judgments were rendered.

"8. The property was taken from the possession of Robert L. Warren, by the officer, at the time of the levy.

"9. Plaintiff was general owner of the property replevied at the time the suit was commenced, subject to the rights of Robert L. Warren under the lease."

CONCLUSIONS OF LAW.

"1. The plaintiff was not, at the time the suit was commenced, entitled to the possession of the property; such right of possession being vested in his brother, Robert L. Warren, by virtue of his lease.

"2. Not being entitled to such possession, said plaintiff cannot maintain replevin.

"3. Defendant is therefore entitled to a judgment for the return of the property, with costs."

Exceptions were filed to such findings, and on August 18, 1887, judgment was entered in the cause in favor of the defendant for a return of the property, with costs. The proceedings are brought to this Court by plaintiff on case made.

The lease referred to in the findings reads as follows:

"It is hereby agreed between Byron E. Warren, of Bay City, Mich., party of the first part, and Robert L. Warren, of Albion, Calhoun county, Mich., party of the second part, as follows:

"The said party of the first part, in consideration of the rents and covenants herein specified, does hereby let and lease to the said party of the second part the following property, situate and being in the said village of Albion, county of Calhoun, State of Michigan, to wit: The good-will of the newspaper known as the 'Albion Recorder,' together with the presses, types, boiler and engine, furniture of all kinds,—an inventory of which property is hereto attached and made a part of this lease,—for and during the term of five years from the 1st day of May, 1884, on the terms and conditions hereinafter mentioned, to be used in carrying on the business of publishing a newspaper and doing job-work in said village of Albion:

"*Provided* that, in case any rent should be due and unpaid, or if default shall be made in any of the terms, conditions, or covenants herein contained on the part of the second party, then it shall be lawful for said party of the first part, his certain attorney, heirs, representatives, or assigns, to repossess said property, and to go upon the premises occupied by said second party with said property, and to take, use, and have said property, with the good-will of said business, and the name of said newspaper, as if this lease had never been made.

"And the said party of the second part does hereby hire the said property for a term of five years from the date hereinbefore mentioned, and does covenant and promise to pay said first party, his representatives and assigns, an annual rent of $162 in equal quarterly installments, in advance. And he further agrees, as additional consideration for the use of said property, to keep said property insured in the name of and for the benefit of said first party, in such amounts and companies as said first party

shall direct; and shall pay all taxes and assessments that may be assessed upon or against said property.

"The said party of the second part further agrees, at his own expense, during the continuance of this lease, to keep the said property and every part thereof in as good repair, and at the expiration of the term yield and deliver up the same in as good condition, as when taken, damage by the elements excepted; and that he will, in case said property, tools, furniture, or outfits, or any part thereof, shall wear out, renew the same by purchase of new materials, which new materials shall be the property of the said first party.

"The said second party further agrees that he will not assign or transfer this lease, or sublet said property or any part thereof, without the written assent of the said party of the first part.

"And the said party of the first part does covenant with the said party of the second part that said party of the second part, on paying the aforesaid installments, and performing all the covenants aforesaid, shall and may peacefully and quietly have, hold, and enjoy the said property for the term aforesaid. The covenants, conditions, and agreements made and entered into by the several parties hereto are declared binding on their respective heirs, representatives, and assigns.

"This instrument is to date from May 1, 1884.

"Witness our hands and seals this 14th day of February, 1885. BYRON E. WARREN. [L. S.]

"ROBERT L. WARREN. [L. S.]"

The facts found by the circuit judge are supported by evidence, and are conclusive. There arises but one question for our consideration. Under the facts found, and under the terms of this lease, had the plaintiff such a right of possession of the property, at the time of the commencement of the suit, as entitled him to maintain his action of replevin?

No question of fraud upon creditors is involved. The finding of facts by the court is conclusive, and from such finding it appears that the plaintiff was the general owner of the property replevied at the time the suit was commenced; and the property forms no part of the considera-

tion for the indebtedness of Robert L. Warren, for which these judgments were rendered. The defendant took the property from the possession of Robert L. Warren under his execution levies, and sought to dispose of it, and apply the proceeds to the extinguishment of debts of Robert L. Warren. There is no pretense that the levies were being made upon his interest as lessee; but, on the other hand, the claim made was that the title to the property was in the lessee. Defendant now seeks to set up the claim, to defeat the plaintiff's action, that the right to possession is in the lessee, and not in the plaintiff. There is no privity between him and the lessee, whose right he sets up to defeat plaintiff's recovery. He took the property from the place where the plaintiff had the right to have it kept, and interrupted and interfered with the business which plaintiff had the right to have continued and maintained. Not only was the property replevied described in and conveyed by the lease, but the good-will of the business in which the property was being used was also conveyed under the lease, and any interference with the property and machinery by which the business was being conducted was an interference with the rights of the plaintiff in the premises.

The lessee would have had no right to take the property out of the business, and sell and dispose of it; and any attempt so to do would be a forfeiture of the covenants of the lease; and the defendant can invoke no aid from his process to do what the lessee would have had no right to do, and thus relieve himself from the character of a naked wrong-doer. One of the covenants of the lease is that the lessee shall, at his own expense, during the continuance of the lease, keep the property and every part thereof in good repair, and at the expiration of the term yield and deliver up the same in as good condition as when taken; and also shall keep the property insured in

the name of and for the benefit of the lessor, and pay all taxes assessed thereon.

It was the intention of the parties, as gathered from the terms of the lease, that the lessee should continue the publication of the newspaper for the term of five years, taking all the property described in the lease for that purpose, and, to enable him so to do, should have the good-will of the paper as thus established, and at the end of the term yield and deliver up, not only the property, but the good will thus leased to him; and any interference with the business so established and to be conducted amounted to a forfeiture of the covenants of the lease, and would entitle the plaintiff to repossess himself of the property; and as against the general owner of the property a mere naked trespasser could not set up the possessory rights of the lessee to defeat the action. The levy impaired the good-will of the business. It put the property beyond the reach of the lessee, so that he could not keep it in repair, or keep it insured. The levy was a step towards divesting the lessor's title, and assigning it to another. Every one of these results was a breach of the covenants of the lease.

A lessee of chattels cannot sell the same. If he does he is liable to an action of trespass. Wood, Landl. & Ten. 296. A creditor cannot do anything which the lessee cannot do. *Ashley v. Wright,* 19 Ohio St. 291. The property was turned over to the lessee to enable him to conduct the business of publishing a newspaper, and to do job-work; and it was to these purposes the property was to be applied, and these purposes were entirely defeated by the levy of the execution and the removal of the property. The lessee had no right to do this, and his creditor could gain no greater right under his execution. *Bassett v. Armstrong,* 6 Mich. 397; *Tandler v. Saunders,*

56 Id. 142 (22 N. W. Rep. 271); *Ashley v. Wright,* 19 Ohio St. 291.

Some question is raised that, even if the defendant had judgment, it could not be for a return of the property, under section 8342, How. Stat., but that, he having only a lien upon and special interest in the property, the same should have been ascertained by the court, and judgment given for such amount, and finding the general ownership of the property in the plaintiff. This is undoubtedly the correct rule; but we need not discuss that question, as, from the view taken by us upon the other question, it becomes wholly immaterial.

The judgment upon the facts found by the court below and under the lease should have been in favor of the plaintiff, and the judgment will be reversed.

We see no necessity for remanding the case for a new trial, and judgment will therefore be entered in this Court in favor of plaintiff, with costs of both courts.

The other Justices concurred.

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JAMES W. CLEAVER v. THE TRADERS' INSURANCE COMPANY.

[See 65 Mich. 527.]

Fire insurance—Forfeiture of policy—Additional insurance—Waiver—Authority of agent.

1. The former opinion in this case, reported in 65 Mich. 527, is held controlling, as far as the defense of a forfeiture of plaintiff's policy by taking additional insurance contrary to its conditions is concerned; but it is further held that the question of the waiver by the defendant of such forfeiture should have been submitted to the jury.

2. It is the duty of the insured to *know* what his contract of insurance is, and he must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement; and the fact of his not having *seen* the policy will not excuse a want of such knowledge any more than his failure to *read* it, in the absence of proof of any adequate reason for *not* seeing it.
3. The fact that an insurance agent had authority, in a certain way and manner, to consent to the taking of additional insurance, and had done so in other cases, will not save a forfeiture incurred by taking such insurance with the consent of the agent in a manner outside of such authority, his right to waive such conditions of the policy not being shown.
4. An insurance company will be held to have waived the forfeiture of a policy incurred by taking additional insurance contrary to its conditions, where with full knowledge of the facts showing such forfeiture, which was supposed to have been waived, it fails to notify the insured of an intention to insist on such defense until after its adjuster has examined into the loss, and received from the insured all the information he asked for in relation to its extent and value, taking two days of his time and the services of a man furnished by the insured, and making no point of the taking of such additional insurance as a reason why the insurance should not be paid.

Error to Tuscola. (Beach, J.) Argued June 15, 1888. Decided October 5, 1888.

Assumpsit on insurance policy. Plaintiff brings error. Reversed. The facts are stated in the opinion.

T. W. Atwood, for appellant.

Norris & Norris, for defendant.

MORSE, J. This case has been once before in this Court, and will be found reported in 65 Mich. 527 (32 N. W. Rep. 660). Upon a trial since then, in the circuit, the defendant had judgment; the court instructing the jury to find a verdict in its favor. It is claimed by the counsel for the defendant that the case as presented upon this last trial does not differ materially from the case

made at the first trial, and that the ruling of the circuit judge was in accord with the decision of this Court, as above reported. But the counsel for the plaintiff contends that the evidence taken on the last trial, and contained in the record now before us, differs from that taken before in this:

1. There is testimony now, not presented before, that the plaintiff never had his policy in his possession, and therefore knew nothing of the clause which governed the ruling of this Court in its former opinion.
2. That it is now shown that the agent, Quinn, did have authority to consent to the taking of other insurance.
3. That there is testimony in the present record tending to show that, after the fire, with full knowledge of all the facts, the defendant, by its acts, waived the forfeiture of the policy, if any such forfeiture had taken place.

It appears from the record that the plaintiff testified on the last trial that Quinn asked him where his policy was, and the plaintiff replied that he had never had it. Quinn says: "I know now you never had it." Quinn then said that the consent for the additional insurance ought to be indorsed upon the policy, but that he could enter it upon his books,—make a memorandum of it,—and it would be just as well. He went and got his book, but plaintiff did not see him write anything in it. Quinn denies that any such thing took place. The plaintiff's excuse for not testifying to this fact upon the first trial is that he was not asked about it. Quinn also testified on the last trial that, as agent of the company, he had power to consent to other insurance, and had done so repeatedly. This fact does not appear in the record before us of the first trial. The extent of his authority to consent, however, was by indorsing the same upon the policy, and reporting such indorsement immediately to the company. The plaintiff testifies also that he never saw

the policy in suit before the fire, but that this policy was a renewal of one which he had upon the same property before, which policy he thinks he read, and probably got the idea from reading it that he must get the consent of the company before taking additional insurance.

We do not think that these additional facts, as testified to by the plaintiff and Mr. Quinn, materially change the *status* of the case. As we said when the case was here before, it was the duty of the plaintiff to know what his contract of insurance was, and the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. The fact that plaintiff had never seen his policy does not help him any more than the fact that he had not read it, which appeared upon the first trial. There is no adequate reason shown why he could not have seen the policy had he desired to do so, and the same was not kept from him through any fault or fraud of the defendant or its agent. It was delivered to Mr. Whitney, with his knowledge and consent, who assigned it back to him before the commencement of this suit.

The fact that Quinn had authority, in a certain way and manner, to consent to the taking of additional insurance, and had done so in other cases, does not aid plaintiff. He did not consent in this case, within the line of his authority, or in the manner prescribed by the policy; and it is not shown that he was authorized to waive any of its provisions. The case, therefore, in this respect, stands as it did before, controlled by the clauses in the policy providing that the policy should be void if the insured procured further insurance without the indorsement of the consent of the company upon the policy, and that the agent has no authority to waive or modify this condition.

But we think that the question of waiver should have been submitted to the jury. It appears that on the day of the fire Quinn informed the company by telegraph of the loss. The secretary of the company, at Chicago, upon the same day wrote to Quinn in reference to the fire. Quinn replied by letter of date December 30, 1884, three days after the fire, in which he stated to the company that there was this additional insurance upon the property in the Millers' Mutual Insurance Company of Lansing, and, as there was no indorsement of permission in his record of contents of policy, he would make an explanation of his knowledge of such additional insurance. He then proceeds to state in his letter, substantially as he testified on both trials, that Cleaver, who was a client of his, came into his office, and said that the agent of the Millers' Mutual Insurance Company had examined his mill, and had urged him to take insurance; that he had made up his mind to take $2,000 in that company. Quinn looked over the application, and "filled up" some of the answers. He understood that the Millers' Mutual Insurance Company had agreed to accept this application, and carry the insurance, and knew that Cleaver had received his policy afterwards. He further stated in this letter that nothing was said by Cleaver about getting consent for other insurance, and, his attention not being called to it, he (Quinn) did not think about there being no permission for the other insurance.

"If he had asked for it, I would of course have consented, as the property would stand more insurance, and Cleaver is a first-class man."

The letter concludes as follows:

"The property is totally destroyed, and the loss is complete. The origin of the fire is unknown. Cleaver lives on farm in country, and was not here. His partner, Wilder, lives in the village, and when awakened by

watchman, the mill, which is some distance from the village, was all on fire. The alarm was given at three o'clock in the morning, at which time it was a mass of flames. It had unquestionably been on fire some time previous, as I was told by a farmer who lives near town he observed the light at half past one. Wilder, partner in running mill, was in there until 10 o'clock at night, and says, when he left, everything was secure. The firm was doing a good business, and had heavy stock on hand, and the fire, no doubt, is a great loss both to Cleaver and the firm.

"Our village is getting badly scorched by fires. We had another heavy fire—Wilcox & Weal's planing mill—last night. Fortunately the policy I had on the mill expired last spring, and they would not renew with me.

"Yours truly,

"T. C. QUINN.

"P. S. Cleaver never has had possession of your policies for either year, nor in fact has he ever seen them. I delivered them to agt. of Whitney, the mortgagee, who forwarded the policy to him. T. C. Q."

The secretary replied as follows:

"Loss. CHICAGO, Jan. 5, 1885.

"T. C. QUINN, ESQ., Agt.,

"Caro, Mich.

"*Dear Sir:* Yours of the 30th ult., giving us further information in regard to loss under policy 55,313, Jas. W. Cleaver, is received. We presume that the conversation that you had with Mr. C. in regard to the other insurance will be a waiver of any rights we might have under our policy on this subject of additional insurance without notice. Our adjuster will be able to give this loss attention sometime next week, and will make a thorough investigation of the origin of the fire, value of the property, etc. If it is totally burned up, as you say, there is no special hurry.

"Yours truly,

"R. J. SMITH, Sec'y."

It will be seen by this last letter that the company, after reading Quinn's statement of the facts of his connection with the taking of the additional insurance, supposed that it had waived any forfeiture of the insurance contract

because of the non-indorsement of consent to the same upon the policy.

In February, 1885, its adjuster, one Berne, appeared at Caro. Before that time, Mr. Cleaver or his attorney was notified to measure the shafting, gearing, etc., about the mill, so that an accurate account could be taken. Berne sent for Cleaver, who lived five miles out in the country, and was with him nearly two days. Cleaver testifies that he said he was an adjuster of the company, and had come to adjust his loss. He wanted Cleaver to furnish length of belts, shafting, and size of pulleys. Plaintiff told him he could not do it, but would find Mr. Adams, who could. He got Mr. Adams, who made a statement of length of shafting, size of pulleys, length of belts, length of the elevator, size of the bolts, size of the bolts to the stones, and the size and number of the stones, and went through the mill generally. Berne made objections finally to paying the whole loss, because the application stated that the mill had not settled, and he had ascertained that it had settled, and offered plaintiff $2,000 in settlement of the loss, which plaintiff refused. Cleaver swears that Berne did not say anything about the taking of the additional insurance, or assign any other reason than that of the mill settling why he would not pay the full amount of the insurance.

Berne admits that he required the statement, and that plaintiff procured Adams, who went with him to the ruins, and there estimated the value of the property. He says: "Plaintiff furnished me with everything I asked him for." Admits offering him the $2,000, but swears that he brought the matter of additional insurance to Cleaver's attention, and told him that the company was under no legal obligation to pay him any of the insurance on that account; that his policy was violated, but that he offered him this amount because he thought the fire

was a fair one, and that $2,000 was the fair value of his loss, added to what he would receive from the other company.

It will be seen that the defendant company was notified about the 1st of January of this fact, now relied upon to void this policy, but supposed that it had probably waived it. It did not notify the plaintiff that it intended to take advantage of this additional insurance, at least until after its adjuster had been sent to Caro, and had asked of Mr. Cleaver, and received from him all the information asked for in relation to the extent and value of his loss; taking two days of his time, and the services of another man besides. This information, time, and labor asked by the company, and furnished by the plaintiff, was wholly unnecessary under the defense made in this suit.

The undisputed action of the company, and the course pursued by its adjuster, if the testimony of the plaintiff was believed, that Berne made no point of the taking of the additional insurance as a reason why the insurance should not be paid, were sufficient under the previous rulings of this Court to warrant the jury in finding a waiver by the company of the defense made upon the trial, and to authorize a judgment in favor of the plaintiff for the amount of his insurance. And I am inclined to the opinion that such a waiver in law was made out, even if the testimony of the adjuster be taken as true, instead of that of the plaintiff. *Carpenter v. Ins. Co.*, 61 Mich. 635, 645 (28 N. W. Rep. 749); *Marthinson v. Ins. Co.*, 64 Id. 372 (31 N. W. Rep. 291); *Cobbs v. Association*, 68 Id. 463, 465; (36 N. W. Rep. 222, 788).

The judgment must be reversed, and a new trial granted, with costs of this Court to plaintiff.

SHERWOOD, C. J., and CHAMPLIN, J., concurred. CAMPBELL and LONG, JJ., did not sit.

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LOUISA VANDERPOOL v. FRANCIS NOTLEY ET AL.

[See 71 Mich. 431.]

Equity—Judgment creditors' bill—Execution.

A judgment creditor cannot file a bill to reach choses in action in the hands of third persons while an execution is outstanding on his judgment.

So *held*, where, after a levy on land claimed to have been conveyed in fraud of creditors, a bill was filed to subject said land to the payment of the judgment, and to reach choses in action in the hands of third persons, and the charge of fraud in the sale of the land was not sustained, but relief was granted upon the other branch of the case, although the execution had not been returned.

Appeal from Kalamazoo. (Mills, J.) Argued June 19, 1888. Decided October 5, 1888.

Bill in aid of execution, and to reach property not open to execution. Defendant Notley alone appeals. Decree reversed, and one entered in favor of the appellant, dismissing bill, with costs of both courts, but without prejudice, etc. The facts are stated in the opinion.

S. M. Constantine and *Howard & Roos*, for complainant. [No authorities cited.]

Dallas Boudeman, for appellant, contended for rule stated in the opinion, citing authorities therein referred to.

LONG, J. The bill in this cause alleges substantially that the complainant, on October 25, 1882, recovered a judgment, in the circuit court for the county of Kalamazoo, against Jeremiah O. Richardson, as defendant, for $1,600 damages, and $75.80 costs, in an action for breach

of promise of marriage, on which an execution was issued, March 23, 1885, directed to the sheriff of said county, returnable May 5, thereafter. April 13, 1885, said sheriff levied upon all the right, title, and interest of said Richardson in the N. ½ of the N. W. ¼ of section 30, town 4 S., range 10 W., with exceptions which amount to 10 acres. Notice of levy was filed with the register of deeds.

At the time of the rendition of said judgment Richardson claimed to be irresponsible. The bill alleges that such pretense was a fraudulent one, and was made by Richardson and the other defendants to cheat the complainant out of her judgment; that the contract of marriage involved in the suit was entered into January 1, 1879.

That in September of the same year Jeremiah O. Richardson intermarried with Eliza Notley, and he then began to scheme how to defraud the complainant, and, for the purpose of defrauding her out of any judgment she might get against him, he, in December, 1880, executed to Eliza Richardson, then his wife, a warranty deed to the land described above, which was then duly recorded; that this was part of the scheme on the part of Richardson and his wife and Francis Notley, father-in-law of said Richardson, whereby said Notley was to become the apparent owner of all said Richardson's property subject to levy and sale under execution; that on July 22, 1881, Eliza Richardson, in pursuance of such scheme, made a deed of said lands to Francis Notley, defendant; and that such conveyances were both fraudulent.

That just prior to the commencement of her suit Jeremiah O. Richardson was the owner of certain chattel mortgages and securities; and, for the purpose of hindering said complainant in the collection of her claim, or any judgment she might obtain, and after she had asserted

her claim and threatened to bring suit, said Jeremiah O. Richardson sold, assigned, and transferred the same, receiving therefor a large sum of money, which ought in justice to be applied towards satisfying her judgment, but which the said Jeremiah O. Richardson keeps fraudulently secreted and hid; and that he has no property within the reach of execution.

That she is informed and believes said Jeremiah O. Richardson has other property, goods, chattels, moneys, and effects, fraudulently concealed, and by and through the aid and assistance of his wife and father-in-law keeps it beyond the reach of execution, and for the purpose of preventing her from collecting her said judgment.

The prayer of the bill is that the deeds of conveyance of the aforesaid real estate from Jeremiah O. Richardson to his wife, and from his wife to Francis Notley, may be decreed to be fraudulent and void as against the complainant, and that her execution levy may be adjudged to be a valid lien thereon, and that the court direct that the said land and premises so levied upon be sold by the sheriff for the purpose of satisfying the judgment of the complainant; and that the defendant Jeremiah O. Richardson may be compelled to disclose and account for the assets, goods, chattels, and effects fraudulently concealed to defraud the complainant; and that the other defendants, as well as Jeremiah O. Richardson, be directed and decreed to pay over and account for all the moneys in their hands, goods and effects under their control, belonging to said Jeremiah O. Richardson, to apply on said judgment.

The answer of defendants is substantially as follows: The defendant Jeremiah O. Richardson admits that judgment was obtained against him as alleged in the bill and upon the cause of action therein set forth. Defendants

do not admit that an execution was issued upon the judgment, or, if there was any, that the same was placed in the sheriff's hands, and levy made upon the property described in the bill.

Defendant Jeremiah O. Richardson admits that at the time of the rendition of said judgment, and ever since, he has claimed that he has no property not exempt from execution; and the other defendants say they have no knowledge upon the subject, and neither admit nor deny the facts alleged in the bill about the responsibility of said Jeremiah O. Richardson, who says that his allegation that he has no property, and that he is irresponsible, is true; and the other defendants neither admit nor deny the allegation, but leave the complainant to her proofs.

Defendants deny that the contract of marriage out of which judgment was obtained was entered into January 1, 1879. They admit that in September, 1879, Jeremiah O. Richardson intermarried with Eliza Notley; but they deny that any scheme was entered into to cheat or defraud the complainant, or that they ever undertook to cheat or defraud her out of any judgment she might obtain, or put the property of said Jeremiah out of the reach of any execution she might issue. They admit that the conveyance was made by Jeremiah to his wife, and by Mrs. Richardson to Francis Notley. They deny the same were made to cheat or defraud the creditors of Jeremiah, but allege that they were valid, and that Francis Notley paid a full and valuable consideration for the conveyance to him of the lands.

They deny that there was any scheme by which the defendant Francis Notley was to absorb and become the owner of all the Richardson property subject to levy and sale on execution. They say that the land described in the bill consisted of 70 acres; that 40 acres of the same was actually occupied as a homestead by Jeremiah O.

Richardson at the time he conveyed to his wife; that the same was not worth to exceed $2,300 to $2,500, and upon which there was a mortgage of about $1,000; that the conveyance was made by said Jeremiah to his wife, and by his wife to Francis Notley, subject to the payment of that mortgage; that Francis Notley afterwards paid the mortgage in cash; that, by reason of the same having been the homestead of said Jeremiah, he had the right to convey the same at the time he did, and that none of his creditors were in a position to object to the same; that they continued to occupy said premises until the conveyance was made to Francis Notley; and that they had always been exempt from execution as against the defendant Jeremiah O. Richardson.

Defendant Jeremiah denies that he was the owner of any chattel mortgages and securities prior to the commencement of complainant's suit, or that in contemplation of said suit he had transferred or assigned any such securities, and received a large sum of money therefor, which he had secreted and hid from the reach of process, and he denies that he had any such sum of money at the time the suit was commenced. Defendants deny any concealment of any of Jeremiah's personal property by him, or by any of the defendants. Defendant Francis Notley denies that he has any property, mortgages, chattels, or securities of any kind, or any transfer of the property whatever.

They also allege that, by reason of the complainant's delay in filing her bill, she should not have the relief granted; and coupled to this answer is a demurrer, stating as a ground of objection to the bill that the same had not been filed within a due and reasonable season after obtaining a judgment, and that the property alleged to have been conveyed was not subject to execution.

That the bill is multifarious, in that it is a bill to

discover assets, and it is in part a creditors' bill and in part a bill to set aside an alleged conveyance of property, and that that part which relates to the transfer by Jeremiah of his property other than the real estate are matters in which the other defendants have no interest; that the said bill does not set forth as to the defendant Notley any transfer of any property, and does not sufficiently specify any property which it is claimed he had in his possession as belonging to said Jeremiah O. Richardson; that by the showing in the bill neither Eliza Richardson nor Jane Notley are necessary parties.

The testimony was taken in open court at two different sessions, and at the close of the case a decree was rendered in favor of the complainant, finding that the assignment by the defendant Jeremiah O. Richardson to Francis Notley of his interest in a certain mortgage, called the "Morrison mortgage," bearing date July 22, 1881, was made without consideration, and to defraud the complainant in any judgment she might obtain against the said Jeremiah O. Richardson; finding that the defendant Francis Notley had received $1,000 under said assignment in money, and that the same equitably belongs to the complainant, and should be applied upon her judgment; and requiring the said Francis Notley to pay said $1,000 within 30 days, together with the costs of the suit; and granting no relief to the complainant, as prayed in the bill, with reference to setting aside said defendant's conveyance of the land. From this decree Francis Notley alone appeals.

The bill is filed for the double purpose of aiding an execution and to reach property not open to execution. The finding of the court is that the assignment by defendant Jeremiah O. Richardson to Francis Notley, of his interest in a certain mortgage executed by Charles Morrison, was without consideration, and made to defraud

the complainant out of her said judgment; and that Francis Notley received the moneys belonging to Jeremiah O. Richardson under such fraudulent assignment, to to the sum of $1,000, and that said Francis Notley should pay the same over to complainant within 30 days.

No relief is granted against the other defendants, except as to costs against Jeremiah O. Richardson as well as Francis Notley. The complainant does not appeal, and must be held satisfied with the finding and decree of the court below, and from which it appears that the court did not find any fraud in the conveyances of the real estate upon which the execution was levied.

There are two classes of cases in which a judgment creditor is permitted to come into a court of equity for relief:

First. In aid of his execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors. The issuing and levy of the execution gives the complainant a lien upon the property, but he is compelled to come into a court of equity for the purpose of removing some obstruction fraudulently interposed to prevent a sale on execution. In this class of cases he may come into court immediately after he has obtained a lien by the levy of his execution, and, the obstruction being removed, he may proceed to a sale of the property under his execution, and subject the proceeds thereof to the payment of his judgment.

Second. To have his judgment paid out of choses in action or other property of the debtor which cannot be reached by execution at law.

Relief is given in these two classes of cases on different principles,—in the first class, on the ground of fraud; and in the other, on the ground that the complainant has exhausted his remedy at law, and that it is inequitable and unjust for the debtor, under such circumstances, to

refuse to apply any choses in action or other property belonging to him which cannot be reached by execution at law in payment of the judgment.

To entitle a party to the aid of this Court in the first class of cases, an execution must have been levied, but it is not necessary that it should have been returned (*Clarkson v. De Peyster*, 3 Paige, 320; *McElwain v. Willis*, 9 Wend. 548); or, if it has been, that a new execution has been taken out (*Williams v. Hubbard*, Walk. Ch. 29). The right to come into court for relief in this class of cases is complete the moment that an execution levy is made. The fraudulent conveyance works an injury to the creditor by hindering and delaying him in the collection of his judgment.

But when the creditor asks to have his judgment satisfied out of property belonging to the debtor that cannot be reached by execution, he must show, not only that an execution has been taken out, but that it has been returned unsatisfied in whole or in part. The reason of this rule is that a judgment debtor shall not be harrassed with a suit in chancery until the creditor has availed himself of all his common-law remedies to collect his judgment. *Thayer v. Swift*, Har. Ch. 431.

It is not unusual for judgment creditors' bills to be so framed as to include the two classes of cases, and there appears to be no objection to such a course. *Beam v. Bennett*, 51 Mich. 148 (16 N. W. Rep. 316).

The execution in this case was issued on March 23, 1885, and placed in the hands of the sheriff of Kalamazoo county, who on April 13, 1885, levied upon the lands described in the bill, and caused notice of such levy to be filed in the office of the register of deeds of said county on the same day.

Complainant's counsel make a claim in their brief filed in this Court that—

"There were two executions issued on the judgment; that the first was issued on the 27th day of February, 1884, returnable April 1, 1884, and was on the 9th day of May following returned wholly unsatisfied."

But the bill nowhere alleges, and no proofs are offered in the case, that any execution has been returned unsatisfied in whole or in part.

The court below, in its findings, excludes the idea of any fraud in the conveyances of the lands levied upon, and gives decree against the defendant Francis Notley for the sum of $1,000; evidently proceeding upon the ground that the bill was sufficient as a judgment creditors' bill to reach choses in action in the hands of defendant Notley. The complainant rests satisfied with the findings and decree of the court below. The defendant Notley appeals from the findings and decree as made.

But can relief be granted complainant under the bill as a judgment creditors' bill? The execution was still out at the time the bill was filed. It had not been returned unsatisfied in whole or in part. Complainant had not exhausted her remedy at law against the defendant Jeremiah O. Richardson.

It is a familiar principle that one must exhaust his remedy at law before he can resort to equity, except in those cases where he has an actual lien or security of such a nature as to give him an original right to file a bill to enforce it; and until he has obtained judgment, and issued execution, and failed to reach property on it, and had it duly returned *nulla bona*, he is not in a position to resort to a court of equity to reach choses in action in the hands of third parties.

It was said by this Court in *McCullough v. Day*, 45 Mich. 556:

"We notice that it contains some matters which are only appropriate where the object is to reach classes of

property that are not liable to seizure on execution, but there was no foundation, of course, for anything of that kind. The execution being still out and active at the time the suit was commenced, no necessity was legally apparent for seeking through equity to discover and subject to the judgment any non-leviable interests;" citing *Smith v. Thompson,* Walk. Ch. 1; *Williams v. Hubbard,* Id. 28; *Tyler v. Peatt,* 30 Mich. 63.

The bill cannot be sustained as a judgment creditors' bill, and therefore it follows that the decree of the court below cannot stand. We express no opinion upon the merits of the controversy. The decree of the court below must be set aside, and decree entered in this Court in favor of defendant Francis Notley, dismissing complainant's bill, with costs of both courts, but without prejudice to the rights of the complainant in the premises.

The other Justices concurred.

LOUISA VANDERPOOL v. FRANCIS NOTLEY ET AL.

[See 71 Mich. 422.]

Chancery appeal bond—Judgment against sureties.

1. To authorize the rendition of judgment for costs against a surety in a chancery appeal bond under How. Stat. § 7663; a certified copy of the bond must be made a part of the return, to enable the Court to inspect it on the hearing, and ascertain as to its sufficiency for that purpose.
2. Sureties upon a chancery appeal bond are entitled to the earliest action possible after decree made, if the defendant wishes to avail himself of a statutory judgment against them, and avoid the necessity of a suit upon the bond.

Motion for judgment against surety on appeal bond under How. Stat. § 7663. Argued June 4, 1889. Denied June 13, 1889. The facts are stated in the opinion.

Dallas Boudeman, for motion.

Howard & Roos, contra.

PER CURIAM. The complainant brought her suit in the Kalamazoo circuit, in chancery, and was required by the court to give security for costs. She filed her bond, with L. K. Brody, Jr., as surety therein, in the sum of $200. She prevailed in her suit in the circuit against all the defendants, but on appeal of defendant Notley to this Court the decree was reversed, and bill dismissed as to him, and he was allowed to recover his costs at the last October term of this Court (*ante*, 422), and defendant's costs were subsequently taxed by the clerk at the sum of $218.75.

Defendant now asks for judgment in this Court on motion against the surety, Mr. Brody, under How. Stat. § 7663, for the amount of the bond. That statute reads as follows:

"That whenever any person shall become security for costs for another in any court in this State, whether such security be required by law to be given or be required by order of the court, in case the defendant in any such action shall recover final judgment or decree for costs against the plaintiff or complainant, thereupon 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."

The return to the appeal does not show any certified copy of the bond, and nothing appeared in the record to justify the entry of judgment against the surety. The decree was taken at the October term, 1888, and the

costs were taxed November 7, 1888. The defendant now bases his motion upon an affidavit showing the above facts, with a certified copy of the bond attached, and upon the return made in the cause.

Held, the motion comes too late; that the return should have contained a certified copy of the bond; that the sureties are entitled to the earliest action possible after decree made, if the defendant wishes to avail himself of the benefit of the statute, and avoid the necessity for a suit upon the bond. No effort was made for an amended or further return, bringing a certified copy of the bond into the record of the case here, and it is now too late to do so, judgment having been perfected, and the costs taxed, and the return remanded to the circuit. A certified copy of the bond must be in this Court when the case is heard, that it may be inspected by the Court, and ascertained whether or not it is sufficient to authorize judgment to be entered thereon as provided by the statute.

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OTIS E. M'CUTCHEON v. HENRY N. LOUD, GEORGE E. WASEY, AND HERBERT F. WHITING.

Attorney and client—Retainer—Trustees—Witness—Evidence—Testimony as to facts equally within knowledge of deceased party.

1. A contract made by the trustees of a copartnership with an attorney to prosecute and defend all suits for and against the firm growing out of the business being carried on by said trustees, is held not to cover a suit between the beneficiaries to settle their relative rights, in which the trustees are incidentally involved by reason of their trusteeship.

2. Where in a suit against the trustees of a copartnership upon a contract made by their business agent, who was also a member of the firm, the judgment, if one is recovered, must be paid out of the trust estate, the death of such agent renders the testimony of the plaintiff as to the terms of the contract inadmissible under Act No. 139, Laws of 1885, said trustees being the representatives of said deceased beneficiary.

Error to Iosco. (Tuttle, J.) Argued June 26, 1888. Decided October 5, 1888.

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

O. E. M'Cutcheon, in pro. per., for appellant.

William H. Simpson (*Benton Hanchett,* of counsel), for defendants.

MORSE, J. The plaintiff, who is an attorney at law residing at Oscoda, Iosco county, brings this suit against the defendants as partners and trustees doing business under the name of the Oscoda Salt & Lumber Company. He claims that under an agreement with them he is entitled to an annual retainer fee of $100 for each of the years 1882, 1883, and 1884, and an item of $1,000 for his non-employment in the case of *Henry M. Loud v. Charles Winchester and others.*

The plaintiff was the only witness sworn on the trial in the court below. He testified, in substance, that in February, 1878, he made an arrangement for permanent employment with Aaron F. Gay, the general manager of defendants' business. The plaintiff was to be the attorney of the company, and to take no business against them from that time. There was no time set when this agreement should end. Under this contract the plaintiff acted as attorney for the said Oscoda Salt & Lumber Company up to January 1, 1885. He submitted bills for

his services to the company from time to time, which were accepted and paid, being mostly credited upon his account at the company's store in Oscoda. Up to 1882 he charged for one or more years a general retainer fee of $25 per year, which was allowed. He notified Mr. Gay in October, 1881, that thereafter he should charge them $100 for such retainer fee, which Mr. Gay finally said would be all right. His contract and dealings were with Mr. Gay.

September 9, 1880, Henry M. Loud filed a bill in chancery against the defendants and one Charles Winchester, claiming that the business of the said company was held and being operated by them in trust for the said Henry M. Loud. The plaintiff testified that said Henry M. Loud solicited his services in said suit, but that he declined the same, because of his said arrangement and contract with the defendants. But the defendants did not employ him in said suit, as they ought to have done under the contract, by which failure to employ him he was damaged in the sum of $1,000.

Mr. Gay died early in the year 1884. After Mr. Gay's death, the defendant Henry N. Loud asked plaintiff for his bill. His settlements with the company had always been made by mail, and his bills were rendered to the Oscoda Salt & Lumber Company. February 21, 1884, after this request of Loud, he mailed his last bill to the company. It amounted in all to $1,920.17. The company credited him with $620.17, rejecting the $1,000 claim and the retainer charges.

The court, at the conclusion of the plaintiff's testimony, directed a verdict for the defendants, upon the ground that, as to the charges for retainer, the contract was made in October, 1881, and was void under the statute of frauds because the same was to continue longer than one year;

and that, as to the $1,000 item, the testimony showed that the defendants were trustees, and that the beneficiaries of such trust were Henry M. Loud, Aaron F. Gay, and Charles Winchester, and that therefore the contest in the suit of Henry M. Loud against Winchester and the others was a contest between those persons interested in the company, and really constituting the Oscoda Salt & Lumber Company; and that such a contest or suit did not come within the purview of the plaintiff's contract, which was to prosecute and defend the suits for and against the company, and not that he should be employed in litigation between the members of such company; that the suit of *Loud v. Winchester* was not in any respect a suit against the Oscoda Salt & Lumber Company, but a struggle between the beneficiaries of the trust held by said company, to determine the rights of such beneficiaries in the business and property of the company.

The court was right as regards the $1,000. The plaintiff himself testified that the defendants were trustees for H. M. Loud, Gay, and Winchester; that after Winchester "was paid what was coming to him, the balance was to go to Loud and Gay." The suit would not, therefore, come under the terms of his contract, which evidently related to suits for and against the company in the prosecution and operation of their business as trustees, and not to a contest between the beneficiaries of their trust, in which they were incidentally involved by reason of their trusteeship.

In relation to the $300 for retainers, it is claimed in support of the ruling of the circuit judge that, as the plaintiff's own evidence shows that Mr. Gay was interested in, and one of the chief beneficiaries in the property of, the Oscoda Salt & Lumber Company, and that he was dead at the time of the trial, the plaintiff's evidence as

to the contract with Gay was not admissible under the statute, and should have been stricken out, as moved by defendants' counsel on the trial.

We think this claim is correct. The Oscoda Salt & Lumber Company was in fact a copartnership, in which Winchester, Henry M. Loud, and Aaron F. Gay were the parties interested, and the real partners. The defendants were the trustees for this copartnership, and managing the business for the three persons above mentioned. The plaintiff made no contract with either one of the trustees. His contract was with Gay as the business agent of these trustees. He testifies that his contract was with the Oscoda Salt & Lumber Company; and all his bills were rendered to that company, and not to the defendants. He understood also whom he was dealing with, and that these trustees had no interest in the business of the company save the faithful execution of their trust.

If he obtains a judgment against these trustees, they must either pay the same out of their own pockets or out of the trust fund. If paid out of their own funds, they will pay for something they never had and never contracted for. If paid out of the trust fund, the estate of Gay must pay its share. We do not think these trustees are liable individually to the plaintiff. If he can recover against them at all it must be as trustees of the Oscoda Salt & Lumber Company, in which event the trust property must pay the debt. In such case they stand as the representatives of the beneficiaries, of which Gay was one. The testimony of the contract made with him, therefore, was not admissible under the statute. Laws of 1885, p. 156.

The judgment of the court below will be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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ROXIE A. PEARSALL v. THE BOARD OF SUPERVISORS OF EATON COUNTY.[1]

Board of supervisors—Authority to lay out or discontinue State roads—Damages to land-owner—Eminent domain.

1. In this case the proceedings of the board of supervisors of Eaton county, discontinuing a portion of a State road, are quashed, for reasons stated in the opinion.

2. The following propositions relating to the power of the board of supervisors to lay out or discontinue State roads, and the manner of its exercise, are summarized from the opinion of Mr. Justice CHAMPLIN:

a—A board of supervisors have jurisdiction under How. Stat. § 497, to discontinue a State road *without* the presentation of the petitions provided for by How. Stat. § 498 (*People v. Supervisors*, 20 Mich. 101), and when set in motion by such petitions their *insufficiency* is an *irregularity*, not going to the jurisdiction, but which will be considered on *certiorari* as affecting the validity of the proceedings in the particular case as injuriously affecting the rights of the petitioners for the writ.

b—The board of supervisors have not absolute and unlimited power to discontinue State roads. It is only when they deem it for the interest of the public that they are authorized so to do; and it must appear in some form in the record of their proceedings that their action is based upon what they deem for the interest of the public; and this fact cannot be gathered from the result of such action, when they are set in motion by the petition of interested parties.

c—When the exercise of authority is limited by statute, and it affects the rights of individuals by divesting them of property or valuable rights, the record of the proceedings must show that the act by which this is done is within the limits of the power conferred.

d—How. Stat. § 501, requiring every order, resolution, and determination of a board of supervisors, made in pursuance of the act authorizing them to discontinue State roads, to be recorded in the records of the board, and to be signed by the chairman and clerk of such board, is *mandatory*, and was

[1] For a second report of this case see 74 Mich. —— (42 N. W. Rep. 77).

enacted for the protection of both public interests and private rights; and in the absence of such authenticated record the presumption that public officers perform their duty cannot sustain the action taken, whatever it may be.

e—It is not conceded that the action of the board of supervisors in laying out or discontinuing a State road is so purely of a legislative character as to dispense with the safeguards of the Constitution for the protection of private rights, nor with notice to parties directly interested and affected by the proceedings, required to bring such proceedings within the requirements of due process of law.

f—When the right of eminent domain is exercised by any other authority than highway commissioners in laying out or discontinuing highways, the constitutional requirement of a jury is retained.

g—At time of filing the opinion in this case there is no law by which a party aggrieved can have his damages and compensation ascertained by a jury when the board of supervisors lay out or discontinue a State road, Act No. 179, Laws of 1887, not providing for a constitutional jury of twelve.[1]

Certiorari to review proceedings for discontinuing a State road. Argued June 26, 1888. Proceedings quashed October 5, 1888. The facts are stated in the opinion.

Alexander & Patterson, for petitioner.

Huggett & Smith, for respondents.

[The points of counsel are fully stated in opinion.—REPORTER.]

CHAMPLIN, J. The plaintiff sued out a writ of *certiorari* for the purpose of having this Court review the proceedings of the board of supervisors of the county of Eaton in discontinuing a portion of a certain State road in Eaton county, known as the "Lansing and Allegan State Road."

The plaintiff contends that the portion of the road so

[1] Act No. 250, Laws of 1889, repeals the act of 1887, and provides for a jury of twelve freeholders, etc.

discontinued is not a State or territorial road, but is a township road, duly laid out by the township authorities as early as 1840. She sets out in her petition a record of a survey made by the commissioners of highways, dated March 15, 1840, and established as such by the commissioners, May 5, 1841.

The return of the board of supervisors to the writ sets forth the proceedings had in reference to discontinuing the road, which they allege was laid out and established as a State road in pursuance of Act No. 83 of the Laws of 1848; and they deny that the road described in the survey, and laid out by the highway commissioners in 1841, is identical with the survey and road laid out under the authority of the aforesaid act. They include in their return the survey of that portion of the road discontinued as it was laid out under the authority of the act, and it is quite apparent that they do not run upon the same line.

The survey of the State road which has been discontinued commences 92 rods S. of the quarter-post between sections 18 and 19 in the township of Delta; thence S. 47 deg. and 45 min. W., 201 rods, to the town line between Delta and Oneida townships; then on the same course, 135 rods to the section line between sections 24 and 25 in Oneida township.

The survey of the highway commissioners commences on the county line near the N. E. corner of Delta township, and by various courses and distances runs to the S. W. corner of section 9; but from that point the survey mentions no known monument or line of the government survey until it reaches the quarter-post upon the W. line of section 25 in Oneida township. It gives the course of a line running through section 19 of Delta, and 25 of Oneida, as being S. 41 deg. and 30 min., but without saying whether E. or W., but presumably W., as the next course

reaches the W. line of the section; and the distance of this course is stated at 118 chains; so that it appears there is a difference of 6 degrees and 15 minutes in the course, and more than a hundred rods difference in the distance run upon such course. In the absence of testimony accounting for this discrepancy, we cannot presume that they are the same line, especially when the return denies that they are the same.

The plaintiff contends further that, if it be conceded that this is a State road, the board of supervisors acted without jurisdiction in discontinuing it, because—

1. They had no evidence before them that this was a State road.

2. The petition presented, asking for the discontinuance of this portion of the road, was insufficient, because it did not state of which of the two towns of Delta or Oneida the petitioners were freeholders.

The first objection to the jurisdiction is not tenable. It sufficiently appeared from the act of the Legislature, and the petition and papers before them, that the road which they discontinued was a State road.

The validity of the second objection depends upon whether any petition is necessary to confer jurisdiction upon the board to act in discontinuing a State road. This question was discussed in *People v. Supervisors*, 20 Mich. 95, and the conclusion reached that no petition was necessary in order to confer jurisdiction. It follows from that position that when the board is set in motion by the petition of at least 12 freeholders, as required by the statute, of each town through which the road passes, an insufficient petition would be an irregularity, not going to the jurisdiction, but to be considered in disposing of the case as affecting the validity of the proceedings in the particular case as injuriously affecting the rights of parties who sue out the writ.

The plaintiff shows that she is injuriously affected by the discontinuance of the road. By the exhibit, which is made a part of her petition, it appears that her house is located upon one side of this highway, and her barn upon the other, and near the east side of her 65-acre lot, and near its north end, thus leaving her a great distance from any public highway.

The supervisors did not act upon their own motion to take up this road, but upon petitions requesting them to take up and discontinue the—

"Highway known as the 'Eaton and Allegan State Road,' beginning at a point where said State road crosses the section line between sections 24 and 25 in Oneida, and running north-east across the S. E. $\frac{1}{4}$ of section 24 in Oneida, and section 19 in Delta."

The petition was signed by Isaac Munton and 30 others, who described themselves in the petition as "freeholders and residents of the townships of Oneida and Delta." There was nothing to show which township they were residents and freeholders of. Another petition, signed by C. Glenn and 16 others, describing themselves as "freeholders and residents of the townships of Oneida and Delta," was presented, asking the board to discontinue the same piece of road.

The petitions were referred to a committee on roads and bridges, who reported that they had had under consideration the petition of C. Glenn and 16 others from the township of Oneida, and of Isaac Munton and 30 others of the township of Delta, to discontinue a piece of State road described in the petitions, and recommended that the prayer of the petitioners be granted. The board then directed the commissioners of highways of the townships of Oneida and Delta to make a survey of this portion of the State road, and report the same to the board, which was done. This was referred to the committee on

roads and bridges, who reported the same back, with a recommendation that the portion of the State road described in the survey-bill be discontinued. The record of the action of the board upon the report of the committee is as follows:

"*Resolved*, that the report of the committee on roads and bridges recommending the discontinuance of the State road on sec. 24 of Oneida and sec. 19 of Delta, this day submitted, be adopted, and that the said road as described in the survey-bill set forth in said report be, and the same is hereby, discontinued."

Nowhere does it appear in these proceedings that the requisite number of freeholders of each of the towns subscribed either petition. The board of supervisors have not absolute and unlimited power to lay out or discontinue a State road. It is only when they deem it for the interest of the public that they are authorized to do so. This is a limitation upon their power to act; and it must appear in some form in the record of their proceedings that their action is based upon what they deem for the interest of the public. This fact cannot be gathered from the result of their action, where they are set in motion by the petition of interested parties. These petitioners may be influenced, and have in view purely private interests, which may be antagonistic to those of the public. Some may sign a petition to discontinue a highway simply to save the expense of keeping the highway, or may be a bridge upon it, in repair; others may be influenced by a desire to divert travel so as to bring it in front of their premises, and they may not take into account the convenience or inconvenience of the public at all in signing the petition. And it is possible for a board of supervisors to grant the prayer of such petitioners without themselves at all considering the interests of the public in the action they are taking.

It does not appear from the record in this case that

the interests of the public were thought of by the body composing the board of supervisors. Certain persons petitioned the board to discontinue the road; the committee on roads and bridges recommended that it be discontinued, without assigning any reason; and the board adopted the recommendation, and discontinued the road. There is nothing to show that this action was not in direct contravention of the public interests, unless it may be said that public officers may always be presumed to act honestly, legally, and in the interests of the public, and that the result must be taken as *prima facie* evidence that they have done so. But when the exercise of authority is limited by statute, and its exercise affects the private rights of individuals by divesting them of property or valuable rights, the record of the proceedings must show that the act by which this is done is within the limits of the power conferred.

Section 501, How. Stat., requires every order, resolution, and determination of such board of supervisors, made in pursuance of the act authorizing them to lay out or discontinue State roads, to be recorded in the records of the board, and to be signed by the chairman and clerk of such board. This section is mandatory, and was enacted for the protection of both public interests and private rights. This requirement would be needless if the presumption that public officers perform their duty would be sufficient to sustain their action, whatever it may be. The statute requires a record duly authenticated, not only that the result may be evidenced in an enduring form, but that it may be seen and known whether the board has acted within the limits of the power conferred or not.

There is another aspect of this case, not presented on the argument, that it may be well to notice. Article 10, § 11, Const., provides:

"The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

This section was construed in *People v. Commissioners*, 15 Mich. 347, and in *Attorney General v. Bay Co.*, 34 Id. 46. The grant of power by this section must be construed in connection with Article 18, § 2, of the same instrument, which provides that,—

"When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law."

Under this provision it has been held that neither the necessity nor the compensation can be determined by legislative or municipal authorities. *Powers' Appeal*, 29 Mich. 504, 509; *Paul v. City of Detroit*, 32 Id. 108; *Sheldon v. Kalamazoo*, 24 Id. 386.

I am not prepared to concede that the action of the board of supervisors in laying out or discontinuing a State road is so purely of a legislative character as to dispense with the safeguards of the Constitution for the protection of private rights, nor with notice to parties directly interested and affected by the proceeding, required to bring such proceedings within the requirements of due process of law. The statute under which these proceedings were had was a re-enactment in 1851 (Laws of 1851, Act No. 156) of Act No. 146 of 1846, which was passed before our present Constitution; and in the re-enactment the Legislature does not seem to have had in mind the provision from the Constitution last quoted. They retained the section relative to compensation contained in the old act, viz.:

"Any person feeling himself aggrieved by the laying out, altering, discontinuing, or opening of any road or roads may have his damages appraised, and obtain the same in the same manner, and under the restrictions, made and provided relative to township roads."

This section is entirely inappropriate for obtaining any relief by way of damages or otherwise. When this act was passed there was no law which authorized the laying out or discontinuing of township roads. This was so held in *People v. Kimball*, 4 Mich. 95, as late as 1856.

In 1857 the Legislature passed an act relative to laying out and discontinuing highways in townships, and therein provided for a jury of 12 freeholders, to ascertain the necessity, and appraise the damage; and such continued to be the law until the amendment to the Constitution, doing away with a jury in cases of laying out and discontinuing roads by highway commissioners. But when the right of eminent domain is exercised by any other authority, the constitutional requirement of a jury is retained. There is now, therefore, no law by which a party aggrieved can have his damages and compensation ascertained by a jury when the board of supervisors lay out or discontinue a State road. By Act No. 179 of the Laws of 1887 an attempt was made to provide a remedy, but the Constitution requires a jury of twelve, and this act only provides for a jury of six. *Campau v. Detroit*, 14 Mich. 276.

The proceedings of the board of supervisors in discontinuing the road in question must be quashed, with costs.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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THE PEOPLE v. ALEXANDER MONTAGUE.

[See 70 Mich. 157.]

Criminal law — Conduct of prosecutor — Argument — Opening of case.

1. In this case it is held that it is apparent from the whole record that the trial was had under circumstances very hostile to fair procedure, and that the jury had laid before them in a very offensive way considerations having no proper bearing on the issue which they had to try, and the conviction is set aside and a new trial granted.

2. The following general propositions are summarized from the opinion of Mr. Justice CAMPBELL:

a—It would not be conducive to justice, or at all practicable, to interrupt criminal trials to examine into charges of alleged improper conduct of the prosecuting officer and others, out of court, in furnishing refreshments to members of the jury, or conversing in their presence, with a view to the discharge of the jury if the charges are sustained.

b—There is great impropriety in a prosecuting officer consorting with jurors, and offering them entertainment of any sort.

c—The most dangerous form of influence is that which brings jurors and parties or counsel into familiar intercourse, which offers opportunity for insidious and indirect means of persuasion and conciliation, which operates sometimes unconsciously, but none the less forcibly; and if the court is satisfied that enough has happened to involve serious risk of undue bias, especially in cases where feeling is easily excited and prejudice aroused, the verdict should be set aside.

d—Under our laws it is settled that the public is as much interested as the defense in having no person unjustly condemned.

e—It is not legally presumed that a prosecuting officer will pursue a prisoner whom he believes to be innocent, or resort to any means to deprive any one of his legal rights, or to suggest false charges, or use improper testimony against him.

f—It has been held from time immemorial that the trial court itself is bound to see and provide affirmatively that no injustice is done the prisoner by the improper course of a prosecu-

tor; and when this goes so far that the right to a fair trial is evidently infringed, this Court will correct the wrong.

g—Under our practice the argument of the case belongs to the close of the testimony, and not to the opening, and must be based on what actually appears in proof.

h—The only legitimate purpose of an opening is so to explain to the jury the nature and elements of the issue they are to try, that they may understand the bearing of the testimony which is thereafter put in, and any misrepresentation of what is covered by such issue has a tendency to prevent them from giving to the testimony, when put in, a proper comprehension of its bearings, or of its real force.

Exceptions from Tuscola. (Beach, J.) Argued June 27, 1888. Decided October 5, 1888.

Respondent was convicted of adultery. Conviction set aside and a new trial granted. The facts are stated in the opinion

Wixson & Quinn and *C. P. Black*, for respondent.

Moses Taggart, Attorney General, *T. W. Atwood*, Prosecuting Attorney, for the people.

CAMPBELL, J. Respondent was convicted in the circuit court for the county of Tuscola of having, on the 8th day of November, 1887, committed adultery with the wife of Schuyler Arnold. He was, after exceptions had been allowed, admitted to bail, but subsequently sentenced. This sentence we held void, on *habeas corpus*, as beyond the power of the court at that stage of the proceedings. 70 Mich. 157 (38 N. W. Rep. 15).

The exceptions appear in a somewhat full form, including a history of the proceedings on trial, and on a subsequent motion for a new trial for improper dealings of the prosecutor during the trial in and out of court, in addition to the ordinary exceptions. Portions of the testimony do not appear.

After the trial was over a motion was made for a new

trial, based on a showing which alleged that, during the proceedings, members of the jury had been furnished liquor and cigars in public saloons by the prosecuting attorney. There was also some showing of conversations in the presence of the jury by different persons, tending to influence them. Counter-affidavits and showings were also made.

We are not called on to pass upon the facts upon this showing. It is sufficient to say that the circuit judge, in his written opinion on the motion, made this statement:

"My own impression is now that, if the matter had been presented in the shape it is presented now, as fully as it is presented now, I should have set aside the proceedings as far as they had progressed. I am of opinion that that would have been the remedy to have stopped the trial right at that point and discharged that jury, and put the respondent upon trial with another jury, either at this term or the succeeding term of this court; and I apprehend that that is the remedy of the party, if he thinks that the matter is of grave consequence enough to bring it to the attention of the court."

This is said in connection with the idea suggested that the matter should have been brought to the court's attention during the trial, and not after verdict.

Aside from the very positive statements, under oath, of defendant's counsel, that they were not in a situation to present the matter during trial, we do not think that it would be conducive to justice, or at all practicable, to interrupt criminal trials to examine into side issues of this kind. When a jury has once been sworn in a criminal case, and the trial begun, there are legal difficulties in the way of breaking it off, which are very serious. Such a practice is not to be encouraged.

If there was, as the judge found there was, reason enough to make it proper to have the case submitted to a different jury, a new trial should have been granted.

He has exercised his judgment on the facts, and there was testimony upon them which he was called on to weigh. We are therefore relieved from weighing it. But we are bound to say that there is great impropriety in a prosecuting officer consorting with jurors, and offering them entertainment of any sort. No one would suppose the pecuniary value of the trifling articles or civilities extended could of itself operate like bribery. But there is danger of influence in the intercourse which attends such affairs going much further than money or corruption. Very few jurors are corrupt, and probably very few persons would venture to offer them bribes. The most dangerous form of influence is that which brings jurors and parties or counsel into familar intercourse, which offers opportunity for insidious and indirect means of persuasion and conciliation, which operates sometimes unconsciously, but none the less forcibly. It may be no harm is intended, but it is not always easy to tell whether there is or not. If courts are satisfied that enough has happened to involve serious risk of undue bias, especially in cases where feeling is easily excited, and prejudice easily aroused, the mischief ought to be checked. As the circuit judge was so satisfied here, the verdict should have been set aside. While frivolous reasons should not prevail to destroy a verdict, yet the purity of jury trials should be preserved.

The exceptions and objections to what was done in the course of the trial relate very largely to similar questions of official conduct on the part of the prosecution. There are some, however, not confined to this subject. It will not, in the view we take of the case, be necessary to do more than refer to the general outlines of the case to explain all that we deem it necessary to say; for it is very apparent from the whole record that the trial was had under cir-

cumstances very hostile to fair procedure, and that the jury had laid before them in a very offensive way considerations having no proper bearing on the issue which they had to try.

The single issue was whether respondent, on the 8th of November, 1887, committed adultery with Mrs. Arnold. The testimony of the offense was the testimony of the husband and his brother, each of whom swore positively to seeing it. No other witness had ever seen any improper familiarities between the parties, and there are no circumstances which had any legal tendency to establish any other instance of guilt. Leaving out their testimony, the case would be without any plausible foundation. It all depended on whether that testimony was true. This being so, it was important both for the people, interested in doing justice, and for the respondent, entitled to be protected against injustice, to have the trial kept clear from extraneous matter, and the rules of law governing procedure substantially guarded.

Permission was given to associate Mr. Huston as counsel with the prosecution. It was objected to for reasons of personal bias. There was a showing that he had been more or less involved in political and legal controversies with respondent's brother. But he testified that he could act fairly in the prosecution, and it did not appear he had been employed against respondent in this or other difficulties. We do not think the action of the circuit court, in permitting him to be employed in the case, was beyond its discretion.

The first series of objections to the proceedings on the trial relate to the opening by the prosecutor, which, it is insisted, was calculated and intended to raise false issues, and excite the passions and prejudices of the jury so as to prevent them from understanding the real issues, and lead them to look at the case in a false light.

It is not necessary, under our repeated decisions, to explain over again the place and functions of the prosecuting attorney under our system. Under our laws it is settled that the public is as much interested as the defense in having no person unjustly condemned. It is not legally presumed that a prosecuting officer will pursue a prisoner whom he believes to be innocent, or resort to any means to deprive any one of any of his legal rights, or to suggest false charges, or use improper testimony, against him. Making all moral allowances for the excess of zeal and pride of success that are not always capable of removal from ambitious counsel, they are, nevertheless, excesses which are to be excused only, and not commended, and if carried very far are not allowable or excusable. It has been held from time immemorial that the trial court itself is bound to see and provide affirmatively that no injustice is done the prisoner by the improper course of a prosecutor. When this goes so far that the right to a fair trial is evidently infringed, we are bound to correct the wrong.

There can be no great difficulty in keeping within the legal bounds. Under our practice the argument of the case belongs to the close of the testimony, and not to the opening, and must be based on what actually appears in proof. The only legitimate purpose of an opening is so to explain to the jury the nature and elements of the issue they are to try that they can understand the bearing of the testimony which is thereafter put in. They usually have no knowledge of the precise issues, except as thus presented. Any misrepresentation of what is covered by the issues has a tendency to prevent them from giving to the testimony, when put in, a proper comprehension of its bearings, or of its real force. The prosecuting attorney is supposed, when he files an information, to know what testimony he can rely upon to support

it, and is prepared to try his case upon. He is also presumed to know the rules of evidence. There is no occasion and no reason for attempting to influence the jury in advance by false or exaggerated statements, which he knows he cannot prove or will not be permitted to introduce. It is the duty of the court and jury to remain impartial, and without bias, until they hear from both sides. Under the former English practice, where the prosecutor argued his case before proving it, much scandal at times arose from the unfairness resorted to, and juries were sometimes so worked upon as to indicate their views in advance of any proofs. The practice here was changed to prevent criminal procedure from being abused for private malice, and to secure, as far as may be, a trial where no undue advantage is taken of official influence. Of course, every one knows that all the participants in criminal trials have the usual imperfections of humanity, and may follow zeal into excessive anxiety to succeed. But it is the business of courts to see that this shall not be done, so far as reasonably practicable. Sometimes this overzeal raises sympathy for the prisoner. But when an officer addresses a jury, with the authority always deferred to more or less of a minister of justice, it will not do to permit any serious abuse of his position.

There was a good deal in the opening in the present case that ought not to have been there. Some of it, however, could not have been ruled out as inadmissible, because it related to things which might have been relevant if they had been proved. The fact that they were not proved throws into stronger relief the assertions and insinuations that were not relevant, but were very well calculated to excite feeling. The record shows a very disgraceful occurrence in the fact of an outbreak of laughter and applause at the outcome of an objection by respondent's counsel, which received a rebuke from the

court, but which fairly indicated the overbearing manner of the prosecuting officer in treating the case as if it were on final argument, and having in it for discussion the irrelevant matter and the fictitious defense which, it was asserted, would be presented, but was not. Great stress was laid on the industry and narrow means of Mr. Arnold, and the necessity he felt himself to be in of using peculiar means to obtain proof to overcome the danger that respondent's wealthy surroundings and influences might enable him to secure false testimony. There can be no excuse for such methods of prosecution. The only possible effect they could have would be to excite passions and prejudices that, if existing, would prevent the possibility of a fair trial. The court took notice of this as an unfair manner of opening, but it made no apparent difference, and was followed a few minutes after by the popular demonstration before referred to. Reference was also made, and repeated, under objection, to matters of hearsay, and to letters which, as stated, were of that character; and reference was also made to an imaginary proposed defense, which was never attempted, but the reference to which would itself be prejudicial.

The questions raised on the main issue are not numerous, as defendant denied the truth of the charge, which, so far as direct testimony was concerned, was maintained by that of the complaining witness and his brother, who also swore to the only other facts and circumstances having any particular corroborative force. An outline of this will be sufficient to explain the legal questions.

Schuyler Arnold, the complaining witness, testified to the effect that, having a suspicion of a proposed visit of respondent to his premises, he sent for his brother Augustus, who was in Northville, to come up to Caro, and, on his coming, about dark, on November 8, 1887, he met him at the street in front of his dwelling, and took

him around, and put him in concealment under the wing at the rear, where it made an angle with the main building in front. The main building was 24 feet square, fronting east to the highway, with some vacant room on the ground to the north. The wing was about 12 feet by 27 running north and south, and leaving an open angle about 2 feet deep at its north end, which did not go quite up to the north line of the main house. This angle does not seem to be lighted. The buildings were on posts raised from 18 inches to two feet from the ground, and with the foundations boarded up, except for a short distance under the wing. Schuyler Arnold, after going up town, and seeing that respondent was in his brother's store, where he was employed, went back, and crept in beside his brother under the building. He testified that in a few minutes he heard footsteps on the sidewalk, which he recognized as respondent's, and so told his brother. Soon respondent and Mrs. Arnold came around into the jog, and after some embraces she went and looked round the back of the house, and returned, and the parties had intercourse standing in the corner. Schuyler seized a stick and hit respondent in the leg, and Augustus flashed a dark lantern on them. Defendant jumped away, and the Arnolds came out, when he rushed back with threats; and he and Schuyler had a fight, the latter beating respondent with a stick into the street, where at length they separated. Schuyler testified to seeing what he took to be similar conduct on October 17 and November 4, and to seeing him about the premises on two or three other occasions, acting suspiciously. Augustus testified to the principal fact on November 8, and to seeing defendant once about the premises in October.

No one else testified to ever seeing improper familiarity or peculiar conduct between the parties at any time. Mr. Markham's name turns up several times as having acted

as agent or attorney of Schuyler to conciliate his wife early in the year after she had left him, and proposed to get a divorce against him for bad treatment, and as knowing some damaging facts; but he was not produced as a witness.

The only other testimony introduced by the prosecution, supposed to bear on the issue, was that of a woman, named Tillie Cork, who was a servant in the employ of Mrs. Arnold's mother, and who testified to some visits made by respondent at Northville while Mrs. Arnold was at the house. She does not testify to anything which she saw as occurring between them, and does not testify to anything as at that time appearing wrong to her. She testifies to respondent's asking a little girl whether she did not like him better than her father, and also that he would come when he did not have to keep so close. This was a witness whose name was indorsed on the information just before the trial. She had some hostility to the family, and had circulated reports of defendant's visits; but when and why does not appear.

The prosecution was rested on this testimony. Apart from impeaching testimony, the defense was confined to respondent's testimony denying or explaining the facts sworn to by the people's witnesses, and that of Mrs. Allen, Mrs. Arnold's mother, concerning the domestic relations of the Arnolds, and explaining defendant's acquaintance and conduct. The only pertinency of most of her testimony was to show that, instead of Schuyler Arnold's having any difficulty with his wife on Montague's account, and receiving her back on good behavior, the wife had left him, intending to seek a divorce for his own bad treatment of her, and he, chiefly through the intervention of Markham, was trying to get her back, and did get her back on promises of better treatment; that Montague's aid was appealed to for the purpose of

looking into the tampering by Arnold and Markham with Mrs. Arnold's correspondence, and that this was the explanation of his seeing Mrs. Arnold, and not doing so in her husband's presence.

In this connection Mrs. Allen was allowed to be cross-examined concerning certain communications between herself and her daughter, not in Montague's presence, or to which he was in any way privy. This was not proper, and the court seems to have been inclined to that opinion. The prosecution also managed to get before the jury and into the record a letter claimed to have been written by Mrs. Arnold to respondent, and stolen from him, which he is not proved to have read. It appears to have been written while the divorce proceeding was pending. These letters figured largely in the opening, and the prosecutor, in violation of proper rules of practice, succeeded in practically getting before the jury on these and other matters not admissible his own assertions and arguments. The frequency with which this method was resorted to was very reprehensible.

In the closing arguments both of the prosecuting counsel assumed to assure the jury of their own conviction that a clear case was made out against the prisoner. In the case of the prosecuting attorney this was done in the course of his address, in which he professed to give them instruction on the law of the case as one authorized to instruct them. While doing this he told the jury that no case ever presented in Tuscola county was stronger on the evidence; that in all his practice he never saw a witness who appeared to better advantage than Dr. Arnold; that there was not a single thing or circumstance going to discredit him in any particular; and he asked the jury to believe his testimony, because he felt it to be true; and that all the testimony corroborated him. There was more to a similar purport; and, among other things, he told

the jury that impeaching testimony which the court had admitted was incompetent, and should not be much considered by the jury. The prosecuting attorney further, in this connection, said that a deputy-sheriff then in court had been circulating round to raise some question, and get some one to assail the reputation of Augustus Arnold, and that the whole talk, if there was any, was caused by that officer's working. This was said after objection had been made, and the court's attention had been called to what was being said; but it was not stopped or censured, but was allowed to be repeated, and dwelt upon for some time. The prosecuting attorney, also, in spite of remonstrance from the court, persisted in stating that the defense could have contradicted Arnold on a collateral question on which he was cross-examined.

This address dwells upon several matters not in evidence, and not only undertook to raise feeling, as on a contest between rich and poor, but attacked defendant's brother for using influences to affect the jury, of which there was no testimony whatever in the case.

It would be an unnecessarily extended task to point out all the portions of this address that introduced irrelevant and prejudicial means to inflame the jury and the by-standers, and carry the verdict by exciting passion and prejudice. The record is remarkable and exceptional in the extent to which this course proceeded.

The charge is short, and the principal objection taken to it is that it failed to give a request, which was properly made, for an instruction that there was no direct evidence tending to show the commission of the alleged criminal act except the testimony of the two Arnolds, sworn as witnesses on this trial. The course of the argument rendered it important to prevent the jury from confounding issues; and the charge did not, in the matter pointed out, give the jury the necessary caution. It

was proper, however, to refuse the request that there was not sufficient evidence to convict. The testimony of the Arnolds, if true, made out an offense, and did not show that the adultery, if committed, was by Schuyler Arnold's procurement or consent.

It was, however, highly important that the issues should be kept clearly defined and distinguished. The facts sworn to were peculiar, and there was very little proof of antecedents to explain them. Whether respondent was guilty or innocent, it is certain the presentation of the case and the methods of trial were not calculated to give any assurance of a correct result.

The conviction should be set aside, and a new trial granted. Whether it should be in the same venue, is a question on which we cannot on this record make any suggestion.

The other Justices concurred.

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DELL WADE v. JOHN D. STRACHAN.

Chattel mortgages—Description—Growing crops—Renewal affidavit—Subsequent purchasers or incumbrancers.

1. A mortgage of "20 acres of wheat now sown and growing on the ground, and still to be sown, on the 20 acres, this present season of 1886," on a specified farm, is not void for uncertainty, but plainly indicates by its terms that it was intended to cover the *first* 20 acres of wheat which the mortgagor should sow on said farm, and that the 20 acres had not all been sown at the time of the execution of the mortgage; and it is the duty of a subsequent purchaser or incumbrancer to inquire and ascertain *what* portion of the 20 acres had been sown before purchasing.

2. The "subsequent purchasers and mortgagees in good faith," referred to in How. Stat. § 6196, are those who become so *after* the expiration of one year from the filing of the mortgage, and *before* its renewal.
3. While the filing of a chattel mortgage ceases to be constructive notice at the expiration of one year, its renewal preserves its lien as to all persons except those acquiring liens, and purchasers or mortgagees, in good faith, in the interim, with the like force and effect as if renewed prior to the expiration of said year.
4. The case of *Briggs v. Mette*, 42 Mich. 12, in so far as it conflicts with *Wetherell v. Spencer*, 3 Id. 123, is overruled.

Error to Ionia. (Smith, J.) Argued June 28, 1888. Decided October 5, 1888.

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

Davis & Nichols, for appellant, contended:

1. The mortgage is void for uncertainty of description; citing *Richardson v. Lumber Co.*, 40 Mich. 203; *Golden v. Cockril*, 1 Kan. 259; *Savings Bank v. Sargent*, 20 Id. 576; *Tootle v. Lyster*, 26 Id. 589; *Hires v. Hurff*, 39 N. J. Law, 4; *Fowler v. Hunt*, 48 Wis. 345; *Muir v. Blake*, 57 Iowa, 662; Jones, Chat. Mort. § 56.
2. Counsel contended for the rule laid down in *Briggs v. Mette*, 42 Mich. 12, citing also *Reynolds v. Case*, 60 Mich. 76, and distinguishing the case at bar from *Flory v. Comstock*, 61 Mich. 599
3. The property mortgaged was not in being when the mortgage was given, and it was therefore void; citing Jones, Chat. Mort. § 147; *Brownell v. Hawkins*, 4 Barb. 491; *Conderman v. Smith*, 41 Id. 404.

A. A. Ellis, for plaintiff, contended:

1. For the rule laid down in the opinion as to subsequent purchasers and incumbrancers.
2. A mortgage on crops to be sown on land owned by the mortgagor, or occupied by him, is good, and vests as soon as the crop is sown; citing *Oil Co. v. Maginnis*, 32 Minn. 193; *Anques v. Wasson*, 51 Cal. 620; 1 Parsons, Cont. 523; *Sanborn*

v. Benedict, 78 Ill. 309; Jones, Chat. Mortg. §§ 140–143; *Wheeler v. Becker*, 68 Iowa, 723; *Apperson v. Moore*, 30 Ark. 56; *Mayer v. Taylor*, 69 Ala. 403; *Macomber v. Parker*, 14 Pick. 497; *Moore v. Byrum*, 10 S. C. 452; *Cigar Co. v. Foster*, 36 Mich. 368; *Cadwell v. Pray*, 41 Id. 307; *Curtis v. Wilcox*, 49 Id. 427.

CHAMPLIN, J. On September 3, 1886, George W. Baldwin, Alida Baldwin, and Leonard J. Baldwin executed a chattel mortgage to Dell Wade, to secure a note which was given for a pre-existing indebtedness, due on or before September 1, 1887. The mortgage was duly filed on September 4, 1886. The property mortgaged was described therein as follows:

"Twenty acres of wheat now sown and growing on the ground, and still to be sown, on the (20) twenty acres, this present season of 1886, on the farm of George W. Baldwin, on section (12) twelve, in the township of Orange, Ionia county, Michigan; which said above described goods, chattels, and property, at the date hereof, are situate at the farm of George W. Baldwin, in the township of Orange, Ionia county, Michigan."

George W. Baldwin, being indebted to John D. Strachan in the sum of $225, on September 22, 1886, gave to Strachan the joint and several note of himself and L. J. Baldwin, due on or before 10 months after date, and to secure the payment thereof gave to Strachan a chattel mortgage executed by himself and L. J. Baldwin. This mortgage was duly filed. The property mortgaged was described as follows:

"Fifty (50) acres of wheat now growing on my farm, situate and being on the south half ($\frac{1}{2}$) of the south-east quarter ($\frac{1}{4}$) of section number twelve (12), in township number six (6) north, of range six (6) west, State of Michigan; the same being the farm on which I now reside with my family, and owned by me, in the township of Orange, in the county of Ionia."

The whole number of acres of wheat sowed by Baldwin in 1886 was 35. There was a dispute between the testi-

mony of the witnesses as to whether any wheat had been sown at all when the mortgage to the plaintiff was executed; some testifying that none at all had been sown, and others that one day's drilling had been done upon a certain field, which was variously estimated to contain from six to ten acres. The wheat was harvested by Baldwin in summer of 1887, and placed in the barn unthreshed.

On September 5, 1887, Wade filed with the township clerk of the proper township the statutory affidavit for renewal of his mortgage.

On September 16, 1887, defendant, claiming under his mortgage, took possession of the wheat in the barn, threshed and sold it, and applied the proceeds as so much paid on his mortgage, the amount realized not being sufficient to pay his mortgage in full. The declaration alleged that defendant converted to his own use the property of the plaintiff; being the wheat grown on the first 20 acres of land sown to wheat by George W. Baldwin on section 12, in the township of Orange, in the fall of 1886.

It was said in *Willey v. Snyder*, 34 Mich. 60, that written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time; that a subsequent purchaser or mortgagee is supposed to acquire a knowledge of all the facts so far as may be needful to his protection, and he purchases in view of that knowledge; that descriptions alone do not identify of themselves,—they only furnish the means of identification. The mortgage described the property mortgaged as 20 acres of wheat—

"Now sown and growing on the ground, and still to be sown, on the 20 acres, this present season," etc.

It is a plain inference from this language that the intention of the parties was that the mortgage should attach to and cover the first 20 acres sown that fall. The testimony of the attorney who prepared the mortgage,

and who was present at its execution, was to the effect that the parties so talked at the time it was executed, although the plaintiff testified that it did not attach to or cover any specified 20 acres of wheat; and he understood that he would have the right to select any 20 acres he chose growing on the section, and belonging to Mr. Baldwin.

Had the plaintiff's testimony been the only evidence in the case, and had it been competent for him to contradict and vary so plain an inference to be drawn from the language of the mortgage, it would clearly have been void for uncertainty. *Montgomery v. Wight*, 8 Mich. 143; *Richardson v. Lumber Co.*, 40 Id. 203.

The court submitted it to the jury to find from the testimony whether any wheat had actually been sown by Mr. Baldwin on the section named in the mortgage at the time it was executed, and he instructed them that if none was sown at that time the plaintiff could not recover, and that in any event he could only recover for the wheat that was actually sown at the time the mortgage was executed, and he excluded from their consideration any wheat sown on the 20 acres after the mortgage was executed.

The defendant's counsel submitted the following special question to the jury:

"If any wheat was sown before the mortgage was given to Wade, was it more than six acres?"

To which the jury answered:

"There was more than six acres sown at the time the mortgage was given to Wade."

They also found a general verdict for plaintiff.

The defendant insists that the mortgage to plaintiff is void as to him—

1. Because of uncertainty in the description of the property mortgaged.
2. Because the affidavit was not filed until after the

expiration of a year from the time the mortgage was filed.

As above intimated, we think the mortgage indicates by its terms very plainly that it was intended to cover the first 20 acres of wheat which Baldwin should sow on his farm on section 12. It also shows that the 20 acres had not all been sown at the time the mortgage was executed. A subsequent purchaser or incumbrancer would not know how many of the 20 acres had been sown at that time, but it would be his duty to inquire and ascertain the facts before purchasing. The uncertainty is not in the instrument, for that covers, without question, all the wheat then sown, but in applying the instrument to the subject-matter, as in all cases of this kind, the identification must be made out by evidence *dehors* the instrument. The principles adverted to in *Willey v. Snyder* sustain the validity of this mortgage as against the first objection stated. *Curtis v. Martz,* 14 Mich. 510; *Fordyce v. Neal,* 40 Id. 705; *Austin v. French,* 36 Id. 199; *Giddey v. Uhl,* 27 Id. 94.

The second objection is based upon the fact that plaintiff's mortgage was not renewed by the filing of the required affidavit within one year from the time the mortgage was filed. The mortgage was filed September 4, and the renewal was not filed until September 5 of the year following. By this omission the defendant claims the mortgage ceased to be valid as against his mortgage, which was given by Baldwin on September 22, 1886, and was filed the same day.

Section 6196, How. Stat., reads as follows:

"Every such mortgage shall cease to be valid, as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing of the same or a copy thereof, unless, within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney,

shall make and annex to the instrument or copy on file as aforesaid an affidavit, setting forth the interest which the mortgagee has, by virtue of said mortgage, in the property therein mentioned, upon which affidavit the township or city clerk shall indorse the time when the same was filed: *Provided*, That such affidavit, being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received or lien obtained thereon, in good faith, shall be as valid to continue in effect such mortgage as if the same were made and filed within the period as above."

It is not claimed by defendant that he acquired any lien, or became a purchaser or mortgagee in good faith, after September 4, 1887, which was Sunday, and Monday, the 5th, when the renewal was filed. The effect of the renewal then to him was the same as if the affidavit had been filed within 30 days before the expiration of the year, and, if it had been so filed, it would not be claimed that it had ceased to be valid as against him.

It was held in *Wetherell v. Spencer*, 3 Mich. 123, that a second mortgagee of property, where the first was duly filed at the time the second mortgage was taken, is not a mortgagee in good faith. The Court, speaking by Mr. Justice DOUGLASS, said:

"Now, the plaintiff was a subsequent mortgagee of the same property; but, having notice of the prior incumbrance, he was not a subsequent mortgagee in *good faith*, within the meaning of the statute, which was merely designed to protect those who might otherwise be injured by want of notice."

The learned judge then refers to the decisions of the court of the state of New York, under a statute which is substantially like our own, and approves of the opinion in *Gregory v. Thomas*, 20 Wend. 17. Later decisions in that state support the doctrine laid down in the opinion of *Lewis v. Palmer*, 28 N. Y. 271; *Benjamin v. Railroad Co.*, 54 Id. 675; *Trust Co. v. Hendrickson*, 25 Barb. 484;

Hill v. Beebe, 13 N. Y. 556; *Meech v. Patchin,* 14 Id. 71; *Marsden v. Cornell,* 62 Id. 215; *Thompson v. Van Vecten,* 27 Id. 568; *Latimer v. Wheeler,* 30 Barb. 485; *Wray v. Fedderke,* 43 N. Y. Super. Ct. 335; *Manning v. Monaghan,* 23 N. Y. 539.

The language of our statute, referring to subsequent purchasers and mortgagees in good faith, refers to those who become so subsequently to the expiration of the year, and before the renewal affidavit is filed. A person who takes a second mortgage within the year is affected with notice of the mortgage on file; but after the year has expired, and there has been no renewal, a person who then takes a mortgage is not affected by notice created by the filing of the first mortgage. The office and effect of filing as notice expires with the year, and remains so until renewed by filing the affidavit, and then, by force of the proviso, as to all persons except those acquiring liens in good faith, or purchasers or mortgagees in good faith, in the interim, the lien of the mortgage is preserved with the like force and effect as if filed prior to the expiration of the year.

The defendant cites the case of *Briggs v. Mette,* 42 Mich. 12 (3 N. W. Rep. 231), as supporting the contrary doctrine. From the opinion of Mr. Justice GRAVES in that case it appears that the Court was not entirely unanimous in the views expressed. He says:

"The opinion is held by the other members of the Court that the reasoning of the New York cases is not apposite or agreeable to the view which has prevailed here, not only with the business public, but with the bench and bar."

I suggest that the view of the bench is best voiced from the decision above quoted from this Court in the case of *Wetherell v. Spencer,* which had then been the expression

of what the law was in this State for nearly 30 years. The case of *Wetherell v. Spencer* was not referred to in *Briggs v. Mette*, and, so far as the latter case conflicts with the former, I think the latter case should be overruled. See, also, *Manwaring v. Jenison*, 61 Mich. 117 (27 N. W. Rep. 899).

The judgment must be affirmed.

SHERWOOD, C. J., MORSE and LONG, JJ., concurred.

CAMPBELL, J. I agree with all the doctrine of my Brother CHAMPLIN, except as to what he says of *Briggs v. Mette*, which was decided on full consideration, and I think properly decided.

ABRAM L. STEBBINS, RECEIVER, v. JOSEPH E. WATSON ET AL.

[See 67 Mich. 507.]

Mortgage—Execution and delivery with conditions in blank—Parol authority to mortgagee to insert terms.

Complainant filed a bill to foreclose a mortgage, executed in blank as to conditions of payment, which blanks were filled in after delivery by direction of the mortgagor, as alleged. The court below dismissed the bill on the grounds that the authority was not shown by a preponderance of proof, and that *parol* authority would not be sufficient for that purpose; which decree is affirmed on the *first* ground stated, with an intimation that, under our statute and the weight of authority, the *second* ground is also tenable.

Appeal from Wayne. (Jennison, J.) Argued April 5, 1888. Decided October 12, 1888.

Foreclosure case. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

Hoyt Post, for complainant, contended:

1. That the authority claimed is established by the testimony and surrounding circumstances.
2. That such parol authority is sufficient; citing *Drury v. Foster*, 2 Wall. 24, 33, approved in *Allen v. Withrow*, 110 U. S. 119; *Burnside v. Wayman*, 49 Mo. 356; *Field v. Stagg*, 52 Id. 534; *McQuie v. Peay*, 58 Id. 56; *Bank v. Railroad Co.*, 30 Conn. 231, 273; Redf. Railw. § 35; *Owen v. Perry*, 25 Iowa, 412; *Swartz v. Ballou*, 47 Id. 188; *McClain v. McClain*, 52 Id. 272; *Pence v. Arbuckle*, 22 Minn. 417; *Manfg. Co. v. Davis*, 7 Blackf. 412; *Duncan v. Hodges*, 4 McCord, 239; *Ex parte Kerwin*, 8 Cow. 118; *Chauncey v. Arnold*, 24 N. Y. 330; *Ragsdale v. Robinson*, 48 Tex. 379; *Smith v. Crooke*, 5 Mass. 538; *Wiley v. Moor*, 17 Serg. & R. 438; *Vliet v. Camp*, 13 Wis. 198, 204; *Van Etta v. Evenson*, 28 Id. 33; *Schintz v. McManamy*, 33 Id. 299; *Berwick v. Huntress*, 53 Me. 89; *Lockwood v. Bassett*, 49 Mich. 546, 549.

Edward W. Pendleton, for defendants Joseph E. and Ida M. Watson, contended:

1. The mortgage is void, an essential addition having been made by the mortgagee in his favor after its execution, and without the authority or knowledge of the mortgagors; citing 1 Jones, Mort. §§ 90, 91, 94 (notes); Boone, Mort. § 12, 13, and cases cited; *Smith v. Fellows*, 41 N. Y. Super. Ct. 36; *Marcy v. Dunlap*, 5 Lans. 365; *Ayres v. Probasco*, 14 Kan. 175.
2. The great weight of authority is opposed to the validity of instruments, essential portions of which were filled in after execution and delivery by *parol* direction; citing *Cross v. Bank*, 5 Pike, 525; *Upton v. Archer*, 41 Cal. 85; *Ingram v. Little*, 14 Ga. 173; *People v. Organ*, 27 Ill. 27; *Ayres v. Probasco*, 14 Kan. 175; *Clough v. Clough*, 73 Me. 487; *Lindsley v. Lamb*, 34 Mich. 509; *Burns v. Lynde*, 6 Allen, 305; *Byers v. McClanahan*, 6 Gill & J. 250; *Chauncey v. Arnold*, 24 N. Y. 330, 337; *Graham v. Holt*, 3 Ired. 300; *Ayres v. Harness*, 1 Ohio, 368; *Gilbert v. Anthony*, 1 Yerg. 69; *Preston v. Hull*, 23 Gratt. 600.

Conely, Maybury & Lucking, for defendants Lynch and Donaldson, contended:

1. The paper was not a mortgage when delivered to Scranton, and never became such afterwards, because no authority was verbally given to fill in the blanks, and, if so, such authority was not sufficient in law.
2. As to insufficiency of *verbal* authority, counsel cited How. Stat. § 6179; 1 Jones, Mort. §§ 90, 91; Boone, Mort. § 12, where the cases are collected.

Charles K. Latham, for defendant Stoepel, contended:

1. The mortgagee could not by verbal authority fill up the blanks in the mortgage; citing 1 Pars. Cont. 46.
2. A material alteration in a mortgage, without the written consent of the mortgagor, annuls it; citing 1 Jones, Mort. § 94; *Warring v. Smyth,* 2 Barb. Ch. 119; *Marcy v. Dunlap,* 5 Lans. 365.
3. Written consent is requisite for the filling up of blanks in mortgages and deeds; citing numerous authorities, which in the main are referred to in prior summary of briefs.

SHERWOOD, C. J. This action was brought by the complainant to foreclose what purports to be a mortgage given by the defendants Watson to the Scranton & Watson Lumber Company, which is represented by the complainant, covering seven lots on Second street, in the city of Detroit. All the defendants, except the Watsons, are subsequent purchasers or incumbrancers. The bill is the ordinary foreclosure bill, with the usual averments where filed by a receiver. All the defendants appeared and answered the complainant's bill.

Joseph E. Watson and wife, the makers of the alleged mortgage, filed their joint answer, in which they deny all indebtedness to the Scranton & Watson Lumber Company, and deny making the mortgage in question; and they neither admit nor deny that the complainant was appointed receiver of the Scranton & Watson Lumber Company, as claimed in the bill. And they further say and aver that no sum of money is due from them upon said mortgage, and that said mortgage is fraudulent, without consideration, and void. And the defendants, further answering,

give the history of said mortgage in their own language, as follows:

"On the 31st day of May, A. D. 1886, said Joseph E. Watson, and Ida M. Watson, his wife, executed, and partly filled out, a mortgage blank, of the form in ordinary use, and known as the 'short form' mortgage blank, with nothing written in said blank excepting the said date, their names and residence, as parties of the first part, 'Scranton & Watson Lumber Company, of the same place, a corporation,' as party of the second part, 'ten thousand dollars ($10,000)' as the consideration, and the description of the premises, as hereinbefore described; that the provisions and conditions of payment were left wholly in blank; that said consideration of $10,000 was written in said mortgage only for the purpose of mentioning some amount for a consideration, and not at all because said Watson was indebted to said Scranton & Watson Lumber Company in that amount, or in any amount whatsoever.

"That said Joseph E. Watson was, at the time of executing said mortgage blank, a member of said Scranton & Watson Lumber Company, and had also theretofore been a member of the Stoepel Lumber Company, and he was giving and taking credit with various parties in large amounts; that at the time of the execution of said mortgage blank, as aforesaid, it was understood and agreed by and between said Joseph E. Watson and said Ida M. Watson and James P. Scranton, of the Scranton & Watson Lumber Company, acting for said company, that said Joseph E. Watson and Ida M. Watson should execute said mortgage blank, as aforesaid, and if said Joseph E. Watson should thereafter become indebted or obligated to said Scranton & Watson Lumber Company for money or credit thereafter furnished him by said company, and he should, after contracting such indebtedness, become insolvent, the said Joseph E. Watson would prefer the said Scranton & Watson Lumber Company, by completing and filling out said mortgage blank, by writing therein the amount to be paid to said Scranton & Watson Lumber Company to discharge the obligation of the said mortgage, which should be the amount of the debt thereafter contracted by said Watson to said company, and by delivering said mortgage, so filled out and completed, to said company.

"That, after the said execution of said mortgage blank by said Joseph E. Watson and said Ida M. Watson, the

said Joseph E. Watson did not contract any debt or obligation to said company; that neither the said Joseph E. Watson nor the said Ida M. Watson ever filled out said mortgage blank, or authorized said Scranton or any other person to fill it out, or consented to have it filled out, or had any knowledge whatever of its being filled out, until they learned of its having been filled out and recorded; that said mortgage blank, signed and executed as aforesaid, was left by said Watson in care of said Scranton & Watson Lumber Company, of which said Watson was then a member, but was never delivered to said Scranton or to said company.

"That on, to wit, the 15th day of June, A. D. 1886, in the absence of said Watson, and without the authority, direction, consent, or knowledge of said Joseph E. Watson or said Ida M. Watson, the said James P. Scranton took said mortgage blank, executed as aforesaid, and wrote or caused to be written therein the provision, obligation, and condition of payment referred to in said bill of complaint, and as follows, to wit: 'All liabilities which they may have contracted or incurred for said Joseph E. Watson, as sureties, indorser or indorsers, or any book-accounts, or choses in action, or any unliquidated amounts, due from said Joseph E. Watson to said Scranton & Watson Lumber Company, now due or to grow due,' and the subsequent parts of said mortgage blank, in accordance with said conditions of payment.

"That after filling out said mortgage blank, by writing or causing to be written therein the amount and conditions of payment as aforesaid, the said James P. Scranton, for the said Scranton & Watson Lumber Company, on the 16th day of June, A. D. 1886, caused the same to be recorded in the office of the register of deeds for said county of Wayne."

Defendants further say that the premises described in the mortgage constituted their homestead at the time the said blank mortgage was executed, and at the time it was so filled out and recorded by the plaintiff; and that Mrs. Watson signed the blank when she did upon the express agreement that it was not to secure any present or then existing obligation of her husband; that there

was no understanding or agreement whatever that the blank mortgage should ever be filled out or delivered or used in any manner whatever, and no credit or money was ever advanced or furnished to either of the makers when the blank was signed, or when it was filled out and recorded, which was fraudulently done, without the consent or knowledge, and contrary to the agreement, of the defendants.

Defendant William C. Stoepel answers, and, upon information and belief, states, in substance, the same facts as are contained in the answer of Mr. and Mrs. Watson, and, in addition thereto, says that on September 17, 1886, he purchased the premises described in the complaint, of defendants Watson, in good faith, paying therefor full value, not taking into consideration said mortgage, because of its alleged invalidity, and received therefor a warranty deed; and that he still owns the title thereto. He also claims the benefit of a cross-bill, and asks that the mortgage be declared to be void, and an order that the same be delivered up to be canceled.

The defendants Lynch and Margaret Donaldson filed their joint and several answer. The Lynches claim to have a lien by virtue of an execution levy upon the property, upon a judgment rendered in their favor for the sum of $141.91 damages, and $29.15 costs, against the said Joseph E. Watson. Margaret Donaldson says, in said answer, she claims a lien against said property for the sum of $399.51; being the amount of a judgment rendered against Joseph E. Watson, and which is now levied upon said property by virtue of an execution issued upon said judgment.

These defendants all deny the validity of the mortgage; aver that it was never executed and delivered to the lumber company, and was fraudulently made and recorded.

They also claim the benefit of a cross-bill, and pray that said mortgage may be declared void, and that it may be removed from record.

The cause was heard before Judge Jennison, upon pleadings and proofs, a part of which were taken in open court, who on December 31, 1887, made the following decree:

"This cause coming on to be heard upon the pleadings and depositions of Joseph E. Watson and Ida M. Watson, and upon proofs taken in open court, and Hoyt Post having been heard in favor of said complainant, and Charles K. Latham having been heard in favor of said defendant Stoepel, E. W. Pendleton in favor of said defendants Joseph E. Watson and Ida M. Watson, and Alfred E. Lucking in favor of said defendants Lynch and Donaldson, and it appearing to the court that said complainant has not, by preponderance of proof, showed what authority was given complainant to have the mortgage filled up after it was executed and delivered, and that parol authority would not be sufficient for that purpose, it is ordered, adjudged, and decreed that the bill of complaint in said cause be, and the same is hereby, dismissed, with costs."

On leave being duly granted by the circuit court, the complainant took an appeal to this Court.

We have examined the record in this case carefully, and we are satisfied the learned circuit judge came to the correct conclusion, and that the mortgage must be held void, for the reason that it was never executed and delivered by the Watsons containing the material provisions it now does. When the alleged mortgage was delivered by Watson to the Scranton & Watson Lumber Company, if it ever was delivered, it is conceded it contained no conditions. And the defense in the case is that the conditions in the mortgage were left blank when it was signed, and that those now appearing in the mortgage were written in afterwards, and without authority of the makers. Watson and his wife were both sworn, and both say they gave

no authority to any one to have the conditions put into the mortgage; and we do not find from any source that Mrs. Watson ever gave any person authority to fill out the blanks. Watson says the design of the mortgage was to secure the company for any personal advances made to him afterwards, provided his share of the profits did not equal the advances; and that the signed blank was left with Scranton personally in trust, and not to be used until he (Watson) should consent and direct; and Mrs. Watson testifies she so understood it, and signed it with such understanding.

Scranton was sworn, and testified that Mr. Watson handed him the paper, and told him to take it to Davock, and have him fill it out. (Davock was the notary who took the acknowledgment.) Scranton took the paper to Davock, at his office, who filled in the conditions as Scranton dictated. Scranton says the mortgage was given to secure past as well as future indebtedness to the company. In stating what Mr. Watson authorized him to do, he says, in substance, that he was authorized by Watson to take the mortgage to Davock, and have him write in the conditions, so worded as to cover all past and future indebtedness and liabilities from Watson to the company, says:

"I never saw Mrs. Watson with reference to this mortgage until after it had been filled up;" further says: "Had no further conversation with Mr. or Mrs. Watson subsequent to the giving of this mortgage, with reference to its validity."

Mr. Davock, in his testimony, says that he filled out the condition of the mortgage as requested by Mr. Scranton; that the Watsons were not present, and he never had any authority from them to fill in the conditions; that the conditions that were afterwards filled in were not mentioned at the time the mortgage was executed.

We have now given the names of all the witnesses who can give or do give us any positive knowledge of the facts upon which the vital question in this case is raised, and as to these facts it will be noticed that Scranton and the Watsons are in direct conflict in their testimony.

Was the change in the instrument, made after it was executed and delivered, with or by the authority of the Watsons? This is the only question of any importance in the case. It is not a question whether, if Mr. Scranton's testimony is to be believed, the parol authority which he swears to would be sufficient (which we think it would not, under our statute and the weight of authority); but did the makers of the blank mortgage give Mr. Scranton any authority at all to fill out the mortgage? If the testimony of the Watsons and the notary is to be credited, they never gave any such authority.

We think the preponderance of the testimony is clearly with the Watsons, and that the decree must be affirmed, with costs.

The other Justices concurred.

GEORGE P. SMITH AND HENRY B. SMITH v. MILES AYRAULT.

Partnership — Contribution — Amount of recovery—Joint wrong-doers—Judgment—Evidence—Dormant partner—Patent—Jurisdiction of State courts.

1. The rule that no contribution can be claimed as between joint wrong-doers is inapplicable to partners, in the general form in which it is stated.

2. The claim of a partner to contribution, in respect of a partnership transaction, cannot be defeated on the ground of illegality, unless the partnership is itself an illegal one, or unless the act relied on as the basis of the claim is not only illegal, but was committed by the partner seeking contribution when he knew or ought to have known of its illegality.

3. The rule seems to be well settled that where the money sued for was paid pursuant to a judgment recovered by a third person against the plaintiff, such judgment is competent evidence against the defendant of the *fact* of the judgment and of the *amount* paid.

4. In a suit for contribution by members of a firm against a member who was joined with them as defendants in a suit for a wrong for which the firm was primarily liable, but who was not served with process, being out of the jurisdiction of the court, but who was notified of the pendency of the suit by the defendants who did appear and defend, and refused to join in such defense, although a member of the firm at the time the wrong was committed, the judgment recovered is conclusive evidence against said defendant, both as to damages and costs.

5. A *dormant* partner may be joined as a party in a suit by or against the firm at the option of the plaintiffs.

6. Where two copartners paid a judgment recovered in an action of tort for which the firm was primarily liable, the liability of a third member, against whom judgment is recovered in a suit for contribution, is measured by his interest in the firm business, and the profits resulting therefrom.

7. The question of an invention, and its alleged use, and what is covered by it, may be litigated in the State courts, so long as the question of the validity of the patent or its infringement is not in issue. *Nichols, Shepard & Co. v. Marsh*, 61 Mich. 509; *Manfg. Co. v. Iron-works*, 63 Id. 195; *Garver v. Bement*, 69 Id. 149.

Error to Bay. (Green, J.) Argued April 20, 1888. Decided October 12, 1888.

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

Hatch & Cooley, for appellant, contended:

1. The record of the judgment was not evidence of the facts found;

citing How. Stat. §§ 7730, 7731; U. S. Rev. Stat. (2nd. ed.), § 737; 3 Rev. Stat. N. Y. p. 660, § 2.

2. A judgment against two or more joint debtors on a citation served on but one, though authorized by the statutes of the State, is not binding on the defendants who were not served within the State, and who did not appear in the action; citing Freem. Judg. § 574; *D'Arcy v. Ketchum*, 11 How. 165; *Phelps v. Brewer*, 9 Cush. 390; *Thompson v. Richards*, 14 Mich. 172, 184; *Dean v. Chapin*, 22 Id. 275; nor will mere knowledge of the pendency of the suit be sufficient to compromise the rights of the unserved defendant in another state; citing *Ewer v. Coffin*, 1 Cush. 24; *McEwan v. Zimmer*, 38 Mich. 765; *Smith v. Grady*, 68 Wis. 215.

3. As to the exclusive jurisdiction of United States courts in patent cases, see Rev. Stat. U. S. (2d ed.) § 629, p. 111; *Smith v. McClelland*, 11 Bush, 523; *Hovey v. Pencil Co.*, 57 N. Y. 119; *Dudley v. Mayhew*, 3 Id. 9.

4. There are but few cases in which a recovery can be had at law by way of contribution between partners, the remedy being usually in equity, where an accounting can be had; citing Wait's Act. & Def. 300; *McGunn v. Hanlin*, 29 Mich. 476; *Wheeler v. Arnold*, 30 Id. 304; *Fletcher v. Grover*, 11 N. H. 368.

5. As to right to maintain joint action in this case, see *Kelby v. Steel*, 5 Esp. 194; *Graham v. Robertson*, 2 T. R. (D. & E.) 282; *Brand v. Boulcott*, 3 Bos. & P. 235; *Birkley v. Presgrave*, 1 East., 220; *Parker v. Ellis*, 2 Sand. (N. Y.) 223; 1 Pars. Cont. (7th ed.) 35; *Gould v. Gould*, 8 Cow. 168, 6 Wend. 263; *Boggs v. Curtin*, 10 Serg. & R. 211.

Holmes & Collins, for plaintiffs, contended for the rules laid down in the opinion.

LONG, J. This is an action of *assumpsit*, brought in the circuit court for the county of Bay by the plaintiffs, to recover contribution from the defendant. The cause was tried by jury, and the plaintiffs recovered a verdict and judgment for the sum of $2,360.54. The defendant brings error.

The facts appearing from the record, and undisputed, are substantially that prior to June, 1876, Miles Ayrault, the defendant, and George P. Smith, Eugene H. Smith, Henry B. Smith, and Warren Ayrault, resided in the state

of New York. Miles Ayrault and Warren Ayrault are brothers. George, Eugene, and Henry B. Smith are brothers. George, Henry, and Eugene Smith were lumbermen, and prior to that time had no experience in the manufacture and sale of Wyckoff water and gas pipe. The defendant had had experience in that line of business.

On June 2, 1876, the parties above named executed a written agreement for the manufacture and sale of Wyckoff patent water and gas pipe; the firm name being Ayrault, Smith & Co. By the terms of this copartnership agreement Miles Ayrault was to have a half interest in the business, the Smiths were to have two-sixths, and Warren Ayrault was to have one-sixth. Under said articles the copartnership was to continue one year, and the firm at once commenced work under this agreement.

On September 28, 1877, a new written copartnership agreement was entered into for the purpose of carrying on business under the same name. The parties to this agreement were the defendant, Miles Ayrault, George P. Smith, Henry B. Smith, and Warren Ayrault. Under these articles Miles Ayrault was a half owner and had a half interest in the business. George P. Smith, Henry B. Smith, and Warren Ayrault each had a one-sixth interest in the property and business. The business of Ayrault, Smith & Co. was carried on under the last articles until January, 1880, when the firm was dissolved, and that spring its business was wound up and settled. In that settlement no mention was made by either of the parties to the claim of the Hobbies, hereinafter referred to, on account of infringement of the patent.

The plaintiffs in this case made proof on the trial that Ayrault, Smith & Co. had the right to manufacture this water and gas pipe at Bay City, and had a license to sell in the states of Ohio, Indiana, Illinois, Missouri, Iowa,

Minnesota, Wisconsin, and Michigan. This right was shown by successive assignments, which were put in evidence.

Isaac S. Hobbie and John A. Hobbie succeeded to the right of the patentee for the manufacture and sale under this patent in the states of Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, and West Virginia.

The firm of Ayrault, Smith & Co., after the signing of the second articles of copartnership, continued the manufacture of water and gas pipe. They also commenced to manufacture an article known as steam-pipe casing. This was a new article of commerce, the manufacture of which was commenced in the spring of 1878 or winter of 1877 and 1878. They manufactured some of this steam-pipe casing, and sold some of it within the territory reserved to the Hobbies under the Wyckoff patent. All the sales in the territory of the Hobbies was this steam-pipe casing, all manufactured at Bay City, and all sold by correspondence, except one lot.

On account of such sales, Isaac S. Hobbie and John A. Hobbie brought suit in the United States circuit court for the Northern district of New York against Henry B. Smith, George P. Smith, Eugene H. Smith, Miles Ayrault, and Warren Ayrault. Personal service was had upon Eugene H. Smith, and there was an appearance and answer in the case on behalf of the three Smiths. No service was had upon Miles Ayrault and Warren Ayrault, although Warren Ayrault was a resident of the same town with Isaac S. Hobbie, one of the plaintiffs. Isaac S. Hobbie is a brother-in-law, and John A. Hobbie is a nephew, of the defendant. This suit was contested, and resulted in a judgment against Henry B. Smith, George P. Smith,

and Eugene H. Smith, which judgment was paid by Henry B. Smith and George P. Smith.

The testimony shows that Eugene H. Smith had a one-third interest in the property and profits of the interest of Henry B. Smith and George P. Smith in the firm of Ayrault, Smith & Co. This was an arrangement by themselves.

Having paid this judgment, the plaintiffs brought suit in this cause, and recovered the sum of $2,360.54; being the one-half of the amount so paid by them on said judgment.

The contention of defendant's counsel is that the judgment in the United States circuit court for the Northern district of New York has no tendency to establish any liability of Miles Ayrault, defendant, to the plaintiffs in this case, for the reasons that it is incumbent upon the plaintiffs in this suit to show, by proofs outside of the record in that case, that defendant Ayrault is liable for the acts for which the Messrs. Hobbie recovered; that defendant Ayrault was not served with process, or summoned to appear as a defendant in the case, and did not appear therein; that he is not in any way bound by the judgment of that court, and his liability to the plaintiffs cannot be established by the judgment thereof.

Certified copies of the record of the proceedings had in the case in the United States circuit court for the Northern district of New York were offered by plaintiffs, and received in evidence, from which it appears that the process issued in that cause was served upon Eugene H. Smith alone; that George P. Smith and Henry B. Smith subsequently appeared in the cause; and all three of the Smiths defended the action. The two Ayraults were made parties defendant, but no service of process was had upon them, and they did not appear in the cause.

Upon that trial the circuit court of the United States found as follows:

"1. That the letters patent of the United States granted to Arcalous Wyckoff, dated November 22, 1864, numbered 45,201, for an improvement in pipes for gas, water, etc., on which this suit is brought, are good and valid in law.

"2. That from the 31st day of May, A. D. 1876, to the expiration of the said letters patent, on November 22, 1881, the plaintiffs in this cause were vested with the title of, in, and to the said letters patent, within and for the states of Maine, New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, and West Virginia, pursuant to a grant from said Arcalous Wyckoff, dated July 31, 1874, recorded in the patent-office, August 29, 1874,—the interest of Miles Ayrault under such grant having been assigned to the plaintiffs by a transfer thereof in writing dated May 31, 1876.

"3. That the defendants have infringed upon said letters patent, and upon the exclusive rights of the plaintiffs under the same, by selling within the above-specified territory, while the said letters patent for such territory were so as aforesaid held and owned by said plaintiffs, pipe manufactured in accordance with the specifications and claims of said letters patent, and embodying the invention thereby secured to said Wyckoff and to his said grantees, in violation of the provisions of said letters patent, and without the license of said plaintiffs.

"4. That plaintiffs' damages for such infringement were and are the sum of $3,825."

This sum was afterwards increased by $300 for damages, and the interest, $24.21, and costs, taxed at the sum of $225.64,—making a total of judgment against defendants, for damages and costs, of $4,374.85, which was paid in full by George P. and Henry B. Smith.

Plaintiffs in this cause also offered in evidence the several patents under which the Messrs. Hobbie claimed to recover in the suit in the United States court, and the various assignments thereof from Arcalous Wyckoff to the Hobbies. Plaintiffs also gave testimony in the present

case showing that sales were made by Ayrault, Smith & Co., during the continuance of their partnership under their second articles, of this patent-pipe-casing, within the territory in which the Hobbies had the exclusive right to sell under the Wyckoff patent

It also appears in the present case that after the commencement of the suit in the United States circuit court for the Northern district of New York against Eugene H. Smith, George P. Smith, Henry B. Smith, Warren Ayrault, and Miles Ayrault, by Isaac S. Hobbie and John A. Hobbie, by service of process upon Eugene H. Smith, and the appearance in the cause by George P. Smith and Henry B. Smith, these plaintiffs requested Miles Ayrault, defendant in this suit, to appear in the suit in the circuit court of the United States for the Northern district of New York, and to join with them in making defense to the plaintiffs' action; giving him full notice of the claim made by the Hobbies in that suit, and urging upon him the necessity of a defense. The defendant utterly declined to appear in the cause, or to assist in any way in its defense.

After the cause was at issue in the United States court, it appears that the testimony of the defendant Miles Ayrault was taken in that cause; and he testified to sales made of this steam-pipe casing by Ayrault, Smith & Co. within the state of New York, and other states covered by the Wyckoff patent, in which the Hobbies had the exclusive right to sell. The testimony of Miles Ayrault, taken in that case, was read in evidence by plaintiffs' counsel in the present case.

Plaintiffs also gave evidence tending to show that they had no knowledge that they were in any way infringing the rights of the Hobbies in making sales of this steam-pipe casing within the territory claimed by them; that they consulted Mr. Leggett, a patent attorney, and was

advised by him that the Wyckoff patent, under which the Hobbies claimed, did not cover this steam-pipe casing; and that they were acting in good faith in its sale, and in entire ignorance of any claim, or pretense of a claim, on the part of the Hobbies, that their rights were being infringed by such sales; and that the whole affair of the firm of Ayrault, Smith & Co. were settled and closed up before they had any knowledge or intimation that any such claim was made or to be made.

The defendant, Miles Ayrault, however, claimed that this matter of the claim of the Hobbies was frequently discussed between him and the Smiths during the continuance of the partnership, and while these sales were going on, and that the plaintiffs had full knowledge of such claim during the time of such partnership; but this question was settled by the verdict of the jury in this case under the charge of the court, and we must take it as settled, so far as the present case is concerned, that neither the plaintiffs, nor any of the Smiths, had any knowledge of the claim made by the Hobbies that their rights were being infringed by the sale of this steam-pipe casing, and that the plaintiffs were acting in good faith in making sales.

It is a well-settled rule that no contribution can be claimed as between joint wrong-doers. If a plaintiff, who has recovered judgment against two defendants for a joint trespass, levies the whole damage on one of them, that one has no claim for a moiety of the damage from the other; but this doctrine is certainly inapplicable to partners, in the general form in which it is enunciated.

It is true that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief against any other member; but there is no authority for saying

that, if one of the members of a firm sustain a loss owing to some illegal act not attributable to him but, nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. The claim of a partner to contribution from his copartners, in respect of a partnership transaction, cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership, or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution when he knew or ought to have known of its illegality. In any of these cases, he can obtain no assistance against his copartners, and must abide the consequences of his own willful breach of the law. 1 Lindl. Partn. 377. This was the view taken by the trial court, and the jury were instructed that no recovery could be had by plaintiffs if they had knowledge that these sales were made in violation of the rights of the Hobbies, and that they were trespassers upon their territory.

The judgment obtained against these plaintiffs in the United States court is evidence of the facts upon which it was founded. The firm of Ayrault, Smith & Co. was primarily liable for the wrong upon which the action was brought; and Miles Ayrault, being a member of that firm at the time the wrong was committed, was made a party defendant in that action, though no process was served upon him, he being out of the jurisdiction of that court. Notice was given him of the pendency of the suit by the defendants who did appear. He refused to appear or defend. Judgment was obtained, and plaintiffs paid it. This judgment must be held as conclusive evidence against the defendant.

The plaintiffs were permitted to show that these sales

were made in violation of the rights of the Hobbies, by introducing in evidence the patents and assignment under which the Hobbies claimed, as well as of sales by the firm of Ayrault, Smith & Co., made within their territory, and the payment of the judgment by them, as well as the partnership agreement between them and the defendant, together with testimony showing that plaintiffs were innocent of any intended wrong in making these sales. This testimony was competent, as explaining the relation of the parties to the cause of action in the judgment, and for the purpose of showing that defendant was liable for this contribution.

The rule seems to be settled that where money sued for is paid pursuant to a judgment recovered by a third person against the plaintiff, the judgment is competent evidence against the defendant to prove the fact of the judgment and the sum paid. If the action was defended by the plaintiff, the judgment is evidence of the facts on which it was founded in the following cases, viz.: If defendant was joined with the plaintiff as a co-party in the action, or had agreed to abide the result, or covenanted against the consequences, of such an action, or was primarily liable as the one for whose debt or actual default the action was brought, and had notice from defendant of its pendency, and reasonable opportunity to assume the defense if he desired. In these cases the judgment recovered is conclusive evidence against the present defendant, both as to damages and costs. Abb. Tr. Ev. 261; *Mayor, etc., v. Railroad Co.*, 49 N. Y. 657; *Smith v. Compton*, 3 Barn. & Adol. 408, approved in *Ins. Co. v. Wilson*, 34 N. Y. 275.

In *Welch v. McKane*, 10 Atl. Rep. 168, it was held that under the Connecticut act of May 9, 1883, providing that upon conviction of a person holding a liquor license for the violation of certain of its provisions, and no appeal

therefrom, his bond shall become forfeited, the record of such conviction is sufficient proof of the breach of the bond in a civil action upon it.

In *Davis v. Smith*, 10 Atl. Rep. 55, the supreme court of Maine laid down the rule that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if attained without fraud or collusion, will be conclusive against him, whether he has appeared or not. Citing *Veazie v. Railroad Co.*, 49 Me. 124; *Hardy v. Nelson*, 27 Id. 530; *City of Boston v. Worthington*, 10 Gray, 498; *Littlejohn v. Richardson*, 34 N. H. 187. The notice to appear and defend was sufficient. *Carpenter v. Pier*, 30 Vt. 81; *City of Boston v. Worthington*, 10 Gray, 496.

In the present case the judgment grew out of the wrongful sales of this steam-pipe casing, made by the firm of Ayrault, Smith & Co., in the territory of the Hobbies. Defendant Miles Ayrault had notice of this suit, and the claim being made therein, and the judgment must be held conclusive against him, and the action for contribution maintained, unless some other objections arise than those already noted.

The undisputed evidence in the case shows that the judgment rendered by the United States court was against Henry B. Smith, George P. Smith, and Eugene H. Smith, and that this judgment was paid by all of them jointly. It is therefore contended by defendant's counsel that, if there is any obligation for contribution on the part of defendant, Miles Ayrault, that obligation is owing by him

to all three, namely, Henry B., George P., and Eugene H. Smith, and no action for contribution can be maintained against the defendant, Ayrault, by either two of the three; that if the defendant is liable to make contribution therefor, the liability arises upon a contract, express or implied, to which contract the said three Smiths would be parties on one side, and the defendant, Ayrault, party on the other; that to enforce the liability of the defendant upon such contract the action would have to be brought in the name of the three Smiths, or by some assignee of one or more of them; that the plaintiffs cannot recover upon the ground that they are assignees of Eugene H. Smith, no such ground being alleged in the declaration, and no such proof being given on the trial of the cause. The declaration alleges that—

"George P. Smith and Henry B. Smith, for themselves and for the use and benefit of Eugene H. Smith, plaintiffs herein, * * * complain of Miles Ayrault, defendant," etc.

The declaration then sets out the two partnership agreements, the business carried on thereunder, and the close of the partnership in 1880, and the settlement of all the business of the firm of Ayrault, Smith & Co. in that year. The declaration alleges an agreement between Miles Ayrault and the Hobbies, by which Miles Ayrault rendered valuable service to the Hobbies in the circuit court of the United States against the plaintiffs, and in consideration of which the Hobbies were not in any manner to enforce collection against Miles Ayrault.

The declaration further alleges that in the first articles of copartnership Eugene H. Smith was named as a member of the firm of Ayrault, Smith & Co.; that in the second articles he was not named as a partner; but the plaintiffs aver that, as between themselves and Eugene H. Smith, who were all brothers, they were equal partners in

all matters connected with the firm of Ayrault, Smith & Co., and that said moneys, when paid in defending said suit, and to satisfy the judgment thereon, were paid by George P. Smith and Henry B. Smith, plaintiffs herein, for the use and benefit, and on account, of themselves and Eugene H. Smith, and that by reason of the payment so made the said Miles Ayrault became indebted to the plaintiffs for the use and benefit of themselves and Eugene H. Smith for one-half of the amount paid by plaintiffs to satisfy said judgment, and on account of attorney's fees and expenses in the conduct of said suit.

Proofs were given, on the trial, of the fact of the existence of the partnership between the three Smiths, and also as to the relations of the three Smiths to the firm of Ayrault, Smith & Co.; and it satisfactorily appears that the three Smiths, as between themselves, were partners in all their business affairs, and in relation to the interests which George P. and Henry B. Smith had in the firm of Ayrault, Smith & Co., though Eugene H. Smith was not a partner as to the two Ayraults in the firm of Ayrault, Smith & Co. Eugene H. Smith was not a party to the contract of September 28, 1877, under which the firm of Ayrault, Smith & Co., carried on the business and made the sales upon which the action was founded in the United States court. There was no privity or contract relation between him and the defendant as to such business. Whatever interest Eugene H. Smith had in the firm of Ayrault, Smith & Co. he had as a resulting interest in the profits of the business, which would be worked out only through the interest of George P. and Henry B. Smith, and as a result of a settlement between them.

Neither of the Ayraults understood that Eugene had any interest in the partnership. They were so advised by the contract, and the testimony shows they so under-

stood it outside of the contract. It appears that Eugene had nothing to do with the business of Ayrault, Smith & Co., or with George P. and Henry B. Smith. His name was not used nor was he held out as a partner in either concern, though in fact he was a partner with George P. and Henry B. Smith in all their transactions, including the sharing of profits and losses with the two Smiths in the firm of Ayrault, Smith & Co. Under the contract and the facts proven Eugene was a dormant partner of George P. and Henry B. Smith to the Ayraults and to the world. The suit in the United States circuit court for the Northern district of New York was brought against Henry B. Smith, George P. Smith, Eugene H. Smith, Miles Ayrault, and Warren Ayrault; and in the declaration in that case it is alleged that—

"The defendants were copartners in business in the manufacture and sale of water and gas pipe, doing business at Bay City, in the State of Michigan, under the firm name and style of Ayrault, Smith & Co."

The fact that he was a dormant partner with George P. and Henry B. Smith, sharing the profits and losses with them in their partnership relations with the firm of Ayrault, Smith & Co., was sufficient in law to charge Eugene in the action in the United States circuit court, and he was bound by the judgment of that court. The judgment was paid by George P. and Henry B. Smith for themselves and for Eugene Smith; he, Eugene, still remaining a dormant partner in the firm of George P. and Henry B. Smith when the judgment was so paid, and when this present action was brought. This judgment having been paid by the firm of George P. and Henry B. Smith, of which Eugene was a dormant partner, if Miles Ayrault was liable for contribution, the suit for such could be brought in the name of the two Smiths.

It is a general rule that in all suits at law all the partners must join. The rule, however, undergoes or may undergo an exception in cases of dormant partners; for it is at the option of the plaintiffs in such cases either to join the dormant partner in the suit, or to omit him (as, in the corresponding case of the partners being sued as defendants, it is at the option of the plaintiff to join the dormant partner or not), and the joinder or non-joinder will not constitute any objection to the maintenance of the suit in any manner whatever. Story, Partn. § 241; 1 Lindl. Partn. 276; 2 Bates, Partn. § 1052.

Eugene H. Smith consented to the bringing of this suit in the manner in which it was brought. He was produced as a witness on behalf of the plaintiffs, and testified in the case, and, under the circumstances of his connection with the parties to the record, he would be bound by the judgment. The words in the declaration, "for themselves and for the use and benefit of Eugene H. Smith," may be treated as surplusage. The action could properly have been brought under the circumstances in the name of the two Smiths who were recognized as members of the firm of Ayrault, Smith & Co. We think the suit was properly brought as to parties.

This judgment was paid in full out of the partnership funds of George P. and Henry B. Smith, of which partnership Eugene H. Smith was a dormant partner. It was a judgment which the firm of Ayrault, Smith & Co. should have paid. Miles Ayrault, as it appears by this record, was bound by that judgment as well as the three Smiths. He had full notice of the suit, and the claim made by the Hobbies therein; was requested to appear and join the three Smiths in its defense, and declined. His testimony was taken by the plaintiffs in that suit, and it appears from his own testimony that he had knowledge that the Hobbies were making claim that their rights

were being interfered with in the sales within the territory claimed exclusively by them. He was a member of the firm of Ayrault, Smith & Co., having a half interest in its business and its profits; and upon a settlement of the affairs of the firm, in the spring of 1880, presumably took one-half of the profits made on these very sales for which the action in the United States court was brought. If this judgment in the United States court had been obtained and paid, as shown here, by the Smiths, before the dissolution of the firm of Ayrault, Smith & Co., on such dissolution and final settlement of its affairs no doubt could arise but that the judgment would have been the loss of the firm, and charged up as such, and that loss met by the individual members of the firm in proportion to their respective interests in the partnership.

The judgment was for wrongful sales made by the firm, and the action was brought against the individuals as members of and composing the firm. The firm had the profits from the sales, if any were made; and each member of the firm had in the settlement of the affairs of the partnership a share of these profits according to the interest which he had therein. Miles Ayrault had a half interest in the business and profits, and it would be inequitable to say that he should not share losses in proportion as he took the profits, and we know of no rule of law that would limit the amount of recovery in this case to less than that proportion.

If the parties to the action stood in the position of joint wrong-doers, then no recovery could be had, upon the principle that one shall not be permitted to profit by his own wrong; but the plaintiffs are found not to have had knowledge of any wrong in the premises, and to have acted in good faith in making these sales. The claim made by defendant's counsel, that each partner would be liable for one-fifth of the judgment only, has no force.

Defendant's counsel contend, further, that the circuit court of Bay county had no jurisdiction; that the right of a patentee under a patent cannot be tried in a state court.

The trial court, in its instruction to the jury, said:

"Now, the question arises here whether the court and jury can pass upon the rights under the patent. The court has no jurisdiction to determine the validity of a patent. That must be done in the United States court. So far as the question was involved in the case of the Hobbies against the Smiths, the United States court in New York determined that it was a valid patent. That is not questioned here. This court does not decide anything about it. That is already decided by the competent court, and there is nothing shown here to invalidate the patent,—no attempt here to invalidate the patent; so that that question does not arise. I see nothing involved here in regard to the patent but what this court can pass upon. Assuming that the patent was valid, and that it covered the articles manufactured and sold in those states, then we can pass upon the rights of the parties growing out of this set of circumstances."

There can be no doubt that the United States courts have exclusive jurisdiction when the case involves the validity of a patent. But that question was not involved in this case. The validity of the patent, or of an infringement upon it, was not in question on the trial. It was conceded by defendant that the Hobbies had the exclusive right to sell in the territory mentioned, and defendant testified that he knew at the time the sales were being made in the Hobbies' territory that it was claimed they were infringing upon the rights of the Hobbies; but no question was raised as to the validity of the patent, and the defendant could not question the validity of these patents under the circumstances of this case. If he desired to question their validity, he had the opportunity to do so in the United States court. This he declined to do; and it is too late for him, when suit is brought for con-

tribution, to make that objection. This question, we think, was properly settled by the trial court.

It is settled in this State that the question of an invention, and the alleged use of a patent invention, and what is covered by the patent, so long as the question of the validity of the patent or an infringement of a patent right is not in issue, may be litigated by the State courts. *Manufacturing Co. v. Iron-works,* 63 Mich. 195 (20 N. W. Rep. 582).

We find no error in the record, and the judgment of the court below must be affirmed, with costs.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

THE PEOPLE, EX REL. CHARLES T. FLETCHER ET AL., v. NEWTON D. LEE AND ARTHUR HILL.

[See 65 Mich. 557.]

Replevin—Insufficient bond—Liability of coroner—Evidence—Exempt property.

1. In a suit against a coroner for his failure to require a new bond in a replevin suit for attached property, on exceptions being taken to the one first given, he may defend by showing that the property was exempt from attachment.
2. The instructions to the jury on the question of exemption are held warranted by the testimony and statements of counsel.

Error to Saginaw. (Gage, J.) Argued April 26 and 27, 1888. Decided October 12, 1888.

Debt on coroner's bond. Plaintiffs bring error. Affirmed. The facts are stated in the opinion.

Wheeler, McKnight & Grant, for appellants.

D. P. Foote and *Trask & Smith,* for defendants.

SHERWOOD, C. J. This is an action brought by plaintiffs against defendants for an alleged violation of the conditions of the official bond of defendant Lee, as coroner of Saginaw county, the defendant Hill being a surety upon the bond. The violation charged was the failure of the coroner to take a sufficient bond, after exception had been taken to the one given, in a replevin suit; the coroner taking no new bond, but accepting the one already given, which proved to be worthless.

The defendants, as part of their defense, offered evidence to prove, and were allowed to prove, that the property claimed by the plaintiffs, by virtue of the writ of attachment under which it was taken, was exempt from execution or attachment. Nearly all of the assignments of error relate to receiving evidence offered for this purpose, or to the charge of the court as to the effect of this evidence. The court held in his charge—

"That where the coroner is sued, the plaintiff in the case claiming that he is damaged because the coroner took insufficient security in an action of replevin, the case in replevin being a case where the title to the property was not determined on its merits and return of the property was asked for, the coroner may show that the defendants in the replevin suit, the sheriff or his deputy, had only a lien or special interest in the property replevined. He may also show that the defendants' lien was by virtue of a writ of attachment issued at the instance of the plaintiff in his suit against him, and that the property attached and replevied was property belonging to the plaintiff in the replevin suit, and was in part or entirely exempt from seizure under the attachment writ."

The testimony in regard to the property being exempt which was taken on the attachment, and which is sub-

stantially conceded to be undisputed, as stated by the court in his charge, is as follows:

"The statute designs to exempt property to enable a person to carry on the business in which he is wholly or principally engaged. The testimony in the case shows that Mr. Frees had been educated a farmer; that for three or four years he had left that business, and engaged in the business of hardware merchant; that he had sold out that business, and had taken the team in question in part payment for the stock of goods; that from the time he ceased to be a hardware merchant he intended, as soon as he could do so, to resume farming, and he was in the act of carrying out that intention; that from the time that he ceased to do business as a hardware merchant he was seeking to purchase a farm in Saginaw county, or in some other part of the State, where he might obtain one,—a satisfactory farm; and he continued in the pursuit of that until he arrived in Ohio, and there he actually purchased a farm.

"The actual purchase of a farm by a resident of this State is pretty good evidence that he had not only the intention to farm, but that he had taken the permanent preliminary step, viz., the purchase of the farm, to carry out his intention. He says that he needed the team in that business; kept it for that purpose, as I understand the testimony; and, after the property was replevied, used it in that business on that farm. The property was not attached until after he made this purchase of the farm. I think at that time, although he was still a resident of Michigan, and a voter here, he was practically a farmer; was, in fact, a farmer, although his farm was over the border."

The court further said, in closing his charge:

"I think it is the policy of the statute to protect exempt property until he could reach that farm with his family. The exemption laws are not designed for the benefit of the husband alone, but they are designed for the benefit of his family; and the law even permits a wife to sue and recover the value of property that is exempt, certain classes of it, at least, that cannot be sold without her consent, even in case the husband waives his exemption. He cannot waive it without his wife's consent,—certain classes of exempt property. She was in Michigan

with her children, and had a right to be protected; and I therefore hold that, under the evidence in this case, the property was exempt, being worth less than $250, and that class of property that is embraced in the eighth subdivision of the exemption laws."

The court then directed the verdict for the defendants.

We have no doubt of the defendants' right to make the defense offered in this case, and, if they could show that the property attached was exempt at the time it was taken by the sheriff; it would be a good defense. The merits of the defense now made were never passed upon. The right of the sheriff to take the property upon the attachment was not litigated in the replevin suit or elsewhere. The judgment for a return of the property in that suit was not upon the merits, but upon default, and upon the voluntary discontinuance of suit by the plaintiff. It will not do to say that a plaintiff has had his day in court, when he discontinues his suit. The question now made was for the first time litigated in the present case, and was in no wise barred by any action taken before in any of the proceedings had.

If the plaintiffs were liable to Frees in damages for taking this exempt property on the attachment, it is difficult to see how the coroner and his bondsman could be made liable to the plaintiffs for assisting Frees in retaking his property. This cannot be unless Frees or the coroner have in some way, which does not appear in this record, barred themselves from questioning the claim now made upon them. If the property was exempt, neither the sheriff nor the plaintiffs had any right to meddle with it. By taking it from Frees against his will, they acquired no rights in it; and if Frees, by the assistance of the coroner or any other persons, could retake the property, it was his right so to do, without giving bonds to the plaintiffs, and no liability would be incurred to the plaintiffs by the coroner or his bondsman. And there can be no doubt,

we think, in such a case, but that the owner of the property, the coroner, or his bondsman, may show the facts in any suit brought by the plaintiffs, based upon any claim to such property or interest therein. Crock. Sher. § 852; *Case v. Babbitt,* 16 Gray, 278; *Bonnell v. Bowman,* 53 Ill. 460; *Terrell v. State,* 66 Ind. 570; *State v. Hamilton,* 9 Mo. 794; *Henry v. Quackenbush,* 48 Mich. 415; *Dunphy v. Whipple,* 25 Id. 10; *Lindner v. Brock,* 40 Id. 618; *Pearl v. Garlock,* 61 Id. 419 (28 N. W. Rep. 155).

The objections to testimony were mainly based upon the theory that defendants could not show that the property replevied was exempt, and therefore need not be considered. It is claimed by counsel for plaintiffs that whether or not the property was exempt was a fact that should be found by the jury. The facts upon this point, and testimony given to establish them, were undisputed, and, upon the statements of counsel for the parties in relation thereto, fully warranted the court in giving the direction he did to the jury. *Fisher v. McIntyre,* 66 Mich. 681 (33 N. W. Rep. 762).

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

CHAMPLIN, MORSE, and LONG, JJ., concurred. CAMPBELL, J., did not sit.

JEROME EDDY v. ARTHUR C. MCCALL, SHERIFF OF GENESEE COUNTY.

Chattel mortgages—After-acquired property—Husband and wife—Evidence.

1. The testimony of a wife as to matters of which she has no knowledge except as informed by her husband is incompetent.
2. In this case, after the purchase by a husband of a saw-mill plant and other property, and the execution by him of a real-estate mortgage to secure the purchase price, his wife joined with him

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in a chattel mortgage, as collateral security for a portion of the same debt, upon the lumber and other stock, worked and unworked, in the lumber-yard carried on in connection with said mill, which business was operated in the wife's name, but managed by the husband, up to a certain date, when she transferred whatever interest she had to her husband, after which the mortgage was duly renewed. A creditor, who had sold lumber to the husband *after* such renewal, attached the lumber in the yard which had been purchased *since* the transfer by the wife, claiming that *prior* to that time she was the sole owner of the business, and that the execution of the chattel mortgage by the husband was formal, while the mortgagee claimed the *reverse* to be true, and sued the sheriff in trover for the attached property, claiming to hold the same under a clause in the chattel mortgage extending its lien to all lumber, stock, or material of every kind which the mortgagors might add to said business, which business was fully identified and located, and was the same hereinbefore referred to. The circuit judge instructed the jury that said clause was valid as between the parties, but, as to lumber purchased by the husband after the transfer to him by his wife, it gave the mortgagee no superior rights to the attaching creditor, if they found that prior to such transfer the business and property belonged to her, of which fact the mortgagee had knowledge.

The jury found a verdict for the defendant, and in reversing the judgment the Court hold that it was immaterial what financial relations existed between the mortgagors; that, if the wife's signature was merely formal, it was of no consequence, and, if she had any interest in the business or mortgaged property, it was immaterial, as both executed the mortgage, and so long as it was unpaid, and they carried on the business, it made no difference to plaintiff in what name it was conducted; that the clause was valid and effectual as between the parties, and where such an agreement is written into the mortgage plain and specific, and there is no question but that the property sought to be held is within the description given, there is no reason why it should not be valid as to third persons.

Error to Genesee. (Newton, J.) Argued May 2, 1888. Decided October 12, 1888.

Trover. Plaintiff brings error. Reversed. The facts are stated in the opinion, and are summarized in head-note 2.

Baldwin & Eddy, for appellant, contended as stated in the opinion.

Edget, Brooks & Conway, for defendant, contended for the rule laid down in the charge.

Sherwood, C. J. This action was trover to recover for a quantity of lumber alleged to be of the value of $1,500, and situated, at the time of the claimed conversion, in the Third ward in the city of Flint. The declaration is in the usual form, containing one count, and alleging damages in the sum of $2,000. The plea is the general issue, with notice that on the trial the defendant will show that, on May 27, 1886, J. L. Littlefield commenced a suit against Samuel J. Lewis, of the city of Flint, and that said property was seized upon the writ as the property of said Lewis; that judgment was subsequently obtained by the plaintiff in said suit for the sum of $1,200.61, and under the execution issued thereon the property was sold, and proceeds disposed of as directed by said execution; that the defendant, as sheriff of said county, had the right to do what he did in the premises; and will further show that plaintiff had no interest in, or lien upon, said goods, at the time defendant took them, nor any possession thereof.

That the mortgage executed by said Lewis and his wife, under which the plaintiff claims, was void, as against the execution levy, because it was given for a larger sum by $5,000 than was actually owing from the mortgagor to the mortgagee, and with the fraudulent intent of both to prevent other creditors from making levies thereon, and to hinder and delay them in the collection of their debts; and will further show that the mortgage was not kept properly renewed within a year from the time of filing the same, and the lien as against creditors did not, therefore, continue; also that the property levied upon was acquired by Lewis after the mortgage was made, and was never subject thereto.

Such was the issue presented by the pleadings. A trial was had in the Genesee circuit, by jury, before Judge Newton, and judgment was given for defendant.

The plaintiff brings error.

But one assignment of error relates to the taking of the testimony. The deposition of Sarah A. Lewis was taken, and, when offered in evidence, was objected to on the ground that the interrogatories called for incompetent testimony; the witness does not state facts within her knowledge, but her testimony contained in the deposition is hearsay, derived from information obtained from her husband, except as to a portion of the fifth and sixth interrogatories.

The court ruled:

"I think I shall have to receive the testimony. There are some things she stated about what Arthur Eddy said, in regard to transferring the property back to Jerome Eddy, that I think should be left out."

Counsel for plaintiff excepted, and the deposition was then read in evidence, except certain portions, which the judge had ruled were improper.

The testimony shows that on August 1, 1884, the plaintiff sold to said Samuel J. Lewis the mill plant and property, including the land on which the same was situated, in Flint, for $9,000. Lewis paid $800 down, and gave a mortgage on all the property, which was real estate, to secure the payment of the balance, $8,200, payable in 16 semi-annual payments, the last of which would fall due in 1893. The testimony further shows that the said Samuel J. Lewis and Sarah A. Lewis, his wife, on February 13, 1885, executed to the plaintiff a chattel mortgage as collateral security for the payment of $5,000 of the amount secured by the real-estate mortgage, and $998.28 secured by three notes which Lewis had given, and which were

indorsed by the plaintiff, at the bank. The property mortgaged is described as follows:

"The following goods, chattels, and personal property, to wit: One span gray horses, about eight years old; one bay horse; one double harness; one single harness; one two-seated carriage (canopy top); two heavy wagons; one single wagon; one Fay double surfacer and matcher; one Fay seesaw and frame; one No. 6 Detroit safe; also all the lumber, worked and unworked, bill stuff, timber, rough lumber, lath, shingles, cedar posts, doors, window-sash, moulding, and other like material, now in mill, sheds, buildings, and yard, occupied by parties of the first part, north of Kearsley street, and west of Smith-street bridge, in Third ward of city of Flint; and also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business; which said above-described goods, chattels, and property, at the date hereof, are situated at the Third ward in the city of Flint, Genesee county, Michigan, and are free and clear from all liens, conveyances, incumbrances, and levies, except mortgage to C. M. Hill & Co., of E. Saginaw, on lumber, shingles, lath, cedar posts, sash, and doors, in the sum of 2,042 14-100 dollars."

It will be noticed that this chattel mortgage was dated February 13, 1885, and was filed the day after. It was renewed by the plaintiff, by filing the proper affidavit, on February 1, 1886, and it is under this mortgage that the plaintiff makes his claim to the property.

The other creditor, under whose judgment and execution the defendant seeks to defend, it will be noticed, claims under an attachment levy made May 28, 1886, and the contest is between these two creditors and these two claims.

It is claimed by the defendant that Mrs. Lewis had an interest in the lumber-yard connected with the mill business, and that until January 1, 1886, while the business was conducted entirely at the yard by Mr. Lewis, he was only acting as agent of his wife; but the plaintiff claims

that the business was Mr. Lewis', and, although he might have at times acted in doing it as agent for Mrs. Lewis, it was in fact his, and he had the only interest therein, and that when the chattel mortgage was given it was for his own debt and upon his own property, and that all after acquired was his; that on January 1, 1886, Mrs. Lewis transferred to her husband whatever interest she held in the mortgaged property.

Of course, in regard to the exception we are considering, it may well be said that testimony giving the circumstances surrounding and accompanying the transactions above stated might properly be given in evidence; and, so far as the deposition objected to does this, the objection ought not to be allowed to prevail. It is a little difficult from the record to ascertain the course pursued. We think, however, that so much of the deposition of Mrs. Lewis as was read, relating to the negotiations between Mr. Eddy and her husband, of which she knew nothing only as informed by the latter, should not have been received.

The principal question involved, and the only one we deem it necessary to discuss in the further consideration of the case, is, was the clause contained in the chattel mortgage, wherein it described the property mortgaged, and in which it says,—

"And also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business,"—

Of force and effect as to defendant? Such property was to be included in the mortgage. There is no question as to what business was referred to. It was the lumber business in the city of Flint, which included the running of a saw-mill in the manufacture of lumber, and the purchasing and selling of lumber at their lumber-yard.

It was immaterial what financial relations this husband and wife, carrying on this business, sustained to each other. If her signature was merely formal to the mortgage, it then was of no consequence. If she had any interest in the business or property mortgaged, it was immaterial, as the mortgage was made by both; and so long as the mortgage was unpaid, and they carried on the business, it made no difference to the plaintiff in what name it was conducted. The clause was valid and effectual between the parties; and where the agreement is written into the mortgage plain and specific, and there is no question but that the property sought to be held is within the description given, I can see no reason why the clause should not be held valid as to third persons,—*Gay v. Bidwell*, 7 Mich. 525; *People v. Bristol*, 35 Id. 29; *Caldwell v. Pray*, 41 Id. 307; *Cigar Co. v. Foster*, 36 Id. 368; *Curtis v. Wilcox*, 49 Id. 425 (13 N. W. Rep. 803); *Phillips v. Both*, 58 Iowa, 499 (12 N. W. Rep. 481); *Leland v. Collver*, 34 Mich. 418; Jones, Chat. Mortg. 347,—and the circuit judge erred in holding otherwise in his charge.[1]

There is no hardship to a creditor in adopting this rule

[1] The court, after instructing the jury that as between the parties to the mortgage the clause covering after-acquired stock was valid, further charged them as follows:

"If you come to the conclusion from the evidence that the business of lumber dealing was carried on by Mrs. Lewis at the time the mortgage was given, with plaintiff's knowledge, who took his mortgage from her recognizing her as the owner of such property, and that the signing of the same by the husband was known by plaintiff to be only formal, who also knew that the husband was not interested in the ownership of the business, said mortgage would cover all property in the yard January 1, 1886, and which had been acquired by Mrs. Lewis in her business after the execution of the mortgage up to that date. But as to property acquired *after* Samuel J. Lewis became the owner of the property and the business, January 1, 1886, unless you find that, prior to defendant's attachment, Samuel J. Lewis had turned out the lumber acquired by him to the plaintiff under his mortgage claim, and that plaintiff had taken possession thereof under said mortgage, and by agreement with or the assent of Samuel J. Lewis, plaintiff would have no superior right or claim as to such lumber over the attaching creditor."

of law. The record informs him at all times of the situation of the debtor's property; and that which the mortgage covers is always tangible, and open to the observation of all persons with whom the debtor may have dealings; and when any person sells to such a debtor or mortgagor he is fully advised of the fact that the property he parts with may at once become subject to the lien of another, whose claim is to be satisfied from such property before his claim can reach it. And so long as he is advised of this fact from the beginning he cannot say he has been misled to his injury, or be allowed to urge that such lien is a fraud upon his rights.

We think the judgment, for the errors herein stated, should be reversed, and a new trial granted.

CHAMPLIN and MORSE, JJ., concurred. CAMPBELL and LONG, JJ., did not sit.

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SARAH T. BUSSEY v. MARK T. BUSSEY AND WILLIAM H. BUSSEY.

Equity—Reference—Hearing in open court—Discretion of circuit judge—Bill to annul forged deeds.

1. Where the proofs in a chancery suit are taken in open court, and the only question in the case is brought to the attention of the court, a reference as to a defendant who is brought in by publication is unnecessary.
2. The discretion exercised by a circuit judge in granting or refusing interlocutory applications in a chancery suit will not be reviewed unless clearly abused.
3. The decree in this case is held fully supported by the testimony, and is affirmed.

Appeal from Jackson. (Gridley, J.) Argued May 11, 1888. Decided October 12, 1888.

Bill to annul forged deeds. Defendant Mark T. Bussey appeals. Decree affirmed. The facts are stated in the opinion.

Gibson & Parkinson and *Thomas A. Wilson,* for complainant.

Loud & Kenny (Austin Blair, of counsel), for appellant.

SHERWOOD, C. J. Complainant filed her bill in the circuit court for the county of Jackson, to procure the surrender and cancellation of two deeds,—one bearing date May 29, 1885, purporting to be executed by the complainant to William H. Bussey, of the state of Maine, a brother of the defendant Mark T. Bussey, in trust for the latter, who is the husband of complainant; and the other bearing date July 6, 1885, purporting to be executed by complainant to the said William H. Bussey. They both purport to convey land owned at the date of the deeds, lying in the city and county of Jackson.

The first of said deeds is in the form of a quitclaim, and contains a provision that said deed should never have the effect to deprive the complainant of her interest in said land, and the right to occupy the property, as the wife of her husband Mark T. Bussey, and in no other manner. The other is in form a warranty deed. Both deeds were duly recorded in the register's office in the county of Jackson. The lands conveyed included her homestead, upon which she then lived and still resides. The bill charges that the deeds were forgeries, and void; and upon that ground the relief she asks is prayed.

The defendant Mark T. Bussey filed his answer, and admitted that the deeds appear of record, and averred that they were genuine, and not fraudulent or forged; but that they were executed by the complainant voluntarily, and for the purposes therein stated, and convey the title to the lands therein described to the said William H. Bussey.

The defendant William H. Bussey did not appear, and was brought in under the statute as a non-resident defendant, and the bill was taken as confessed as against him.

The bill was filed in October, 1885. The proofs were taken in open court in the month of May, 1887, before Judge Gridley. The defendant cross-examined the complainant's witnesses, but put in no testimony on his part; and upon the hearing the circuit judge rendered a decree in favor of the complainant, adjudged the deeds forgeries and void, and granted the relief prayed. Defendant Mark T. Bussey asks a review of the case in this Court.

On May 14, before the hearing, counsel for the appellant made an application to the court for a postponement, for the purpose of obtaining the testimony of an absent witness. The application was contested by the complainant, and denied by the court. When the cause was called for hearing on May 19, 1887, counsel for defendant Mark T. Bussey objected to the case being heard, for the reason that no reference of the case had been made as to William H. Bussey. This objection was overruled by the court, and the case was allowed to proceed. The circuit judge made his decree in the case on June 7, after the cause was heard.

On July 19, 1887, on the petition of defendant Mark T. Bussey, and the affidavits accompanying, an order for a rehearing was granted, upon condition that Bussey should pay costs of trial, to be taxed, within 10 days

after notice of taxation, and that he might produce and examine witnesses during that term of the court which was then in session. On September 1, 1887, defendant made a motion to further continue the case for rehearing. This motion was opposed by complainant's counsel, and the motion was denied. In the order made denying the motion the court recites the fact that defendant had not paid the costs directed in the former order, and permitted defendant another day in which to put in proofs. No proofs were, however, ever put in by the defendants, or either of them. It was claimed by Mark T. Bussey that one of the material witnesses he wished to use was a subscribing witness to the deeds, whose name was Case, and that the other was a Mr. Jenks; but it appears Jenks was not used, though residing in Jackson at the time, and a portion of the time he was in the court-room.

Upon the point that no reference was made as to William H. Bussey, it only need be said none was necessary. The proofs were taken in open court, and the only question in the case was brought to the attention of the court, and proofs taken upon it.

The several motions were all in the discretion of the court. It seems from the record that part of them were in favor of complainant, and part for the defendant, so far as the action of the court shows. Judge Gridley's acquaintance with the parties, and the credibility of the affiants, in all these proceedings, gave him superior advantages for information in passing upon these motions, and his decisions ought not to be disturbed unless a clear abuse of the discretion used appears; and we have failed to discover any such misuse of judicial discretion.

In regard to the decree upon the merits, we are clearly of the opinion the testimony justified the conclusion reached by the circuit judge. We think the case presented by the record is one appealing strongly for the

exercise of the equity power of the court in behalf of the complainant, and we feel very certain the court has committed no error in the decree rendered; and, without referring any more particularly to the testimony as it is presented, we will only say, further, that the fraud attempted in this case can never fail to fall under the condemnation of a court of equity when its consideration is challenged, under the circumstances appearing in this case.

The decree will be affirmed.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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THOMAS P. SHELDON ET AL. v. THE CITY OF GRAND RAPIDS.

[See 61 Mich. 144.]

Municipal corporations—Dedication of lands to public use—Adverse possession.

In this case it is held that the use of the land in suit by the defendant for public purposes, for more than thirty years, under an original dedication to public use, is a bar to the present action.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued May 23, 1888. Decided October 12, 1888.

Ejectment. Plaintiffs bring error. Affirmed. The facts are stated in the opinion, and in 61 Mich. 144.

Andrew T. McReynolds (More & Wilson, of counsel), for appellants.

James W. Ransom, city attorney, for defendant.

SHERWOOD, C. J. The plaintiffs bring ejectment against the city of Grand Rapids to recover possession of the undivided one-fourth part of the south half of what is known as "Court-house" or "Public" square. They claim the title to the premises as heirs at law of Thomas C. Sheldon, deceased. The declaration is the ordinary one in ejectment, and the defendant's plea is the general issue, with notice that the plaintiffs' suit is barred by the adverse possession of the defendant. The cause was tried in the superior court at Grand Rapids, before the judge without a jury, who found, as a conclusion of law upon the facts shown by the testimony, that the right of possession of said premises was in the defendant at the time of the commencement of this suit, by dedication to the public, and by adverse possession held by the city for more than 15 years prior to the commencement of suit by the plaintiffs; and thereupon caused judgment to be entered for the defendant accordingly.

The plaintiffs bring error.

The square in question is situated on the W. ½ of the N. W. ¼ of section 30, in town 7 N., range 11 W. It is bounded on the south by East Fulton street; on the east by East Park place; on the north by Park street; and on the west by West Park place,—the north half of the square being in what is known as the "Campau Plat," and the south half in Bostwick & Company's addition to the city of Grand Rapids. In 1833 commissioners were appointed, under a territorial act, by the Governor of Michigan, to locate the seat of justice for Kent county, and the commissioners selected the square in question for that purpose, and made their report to the Governor of their doings, who filed the same in the office of the Secretary of State. The report is dated November 3, 1833.

The land was entered by Samuel Dexter. The land, including the square in question, was deeded December 2, 1833, to Samuel Dexter. Dexter sold and conveyed, by deed dated April 25, 1835, to Louis Campau, a parcel of the land embracing the north half of the square. Campau platted this parcel, and upon the north half of the square designated it upon the plat as "Public Square." This plat was recorded on June 6, 1835.

On August 1, 1835, Dexter conveyed to Lyman I. Daniels and Thomas C. Sheldon a parcel of land, including the south half of the square; and in 1836 Sheldon conveyed to Thomas Tileston an undivided quarter of Daniels and Sheldon's purchase of Dexter.

On February 3, 1836, a plat was made by John Almy, and recorded in the office of the register of deeds. It was called a plat of the village of Kent. It outlines the Campau plat, and upon this plat the whole square is designated as "Court-house Square."

Daniels died August 6, 1837. The title to the south half of the square, so far as the record shows, was at this time in Daniels, Sheldon, and Tileston. About the year 1837 the lands owned by these proprietors were platted by E. B. Bostwick, and the plat was called and known as "Bostwick & Co.'s Addition to Grand Rapids." There can be no question, we apprehend, but that this map or plat was authorized by the proprietors of the land, as it has ever since been recognized in making disposition of lots, streets, and public grounds. This plat has marked upon it the land in question, and upon which is placed the words "Court-house Square."

In 1838 the county of Kent occupied the square with a court-house, which it erected thereon during the year, and which was occupied until the year 1844, for the purpose of holding courts and residence of the sheriff, when it was destroyed by fire. The building stood in the center

of the square, partly on the north and partly on the south half of the same. While the square was thus being occupied, and in December, 1842, Tileston obtained partition of the lands contained in the Bostwick & Co. plat (and which he held as a tenant in common with the heirs of said Lyman I. Daniels and the said Thoms C. Sheldon), in the circuit court for the county of Kent. The partition was made by commissioners, who made their report January 4, 1843. The following is a part of their report:

"And we do further certify and return that we, upon examination and inquiry, found that the above-described lands and premises had heretofore, by the said parties owning the same, been allotted and surveyed out into streets, lots, and blocks, as an addition to the village of Grand Rapids, and designated as 'Bostwick & Co.'s Addition to Grand Rapids,' a map of which we have hereto attached and made a part of this, our report, and by which we have caused this partition to be made."

The partition and report, together with the map, were recorded in the office of the register of deeds of the county of Kent, September 29, 1843.

In 1844 or 1845 the county built another court-house upon the old site, and held its court there until about the year 1850 or 1851.

Louis Campau, who owned and platted the north half of the square, had questioned the title, it would appear, to that part of the square, and on June 22, 1847, notified the board of supervisors of Kent county to vacate it, upon the ground that it was never dedicated for a court-house, but for a public park; and when the court-house became unfit for use, in June, 1852, he purchased the same of the county, he having before then inclosed the north half by fence. At this time he was offering it to the city, and it purchased it of him for the sum of $500. The deed contains the following clauses in stating the purposes for which it was deeded:

"To be and remain public ground for the free and uninterrupted use of the inhabitants of the said city of Grand Rapids, as public ground, forever, and for no other purpose."

From this time forward the record shows the city has been the owner and in possession of the said north half, and, in connection with the other half, has controlled, improved, and ornamented it. At the time of the sale of the court-house to Campau it stood partly on one half and partly on the other of the square. Daniels, sometime in August, 1857, quitclaimed their interest in the premises in question to Evert B. Dyckman, and on February 25, 1880, Dyckman conveyed by quitclaim his interest therein to George E. Pantlind; the fee of one-quarter of the south half still remaining in the Sheldon heirs, the plaintiffs in this suit, subject to the interest in the defendant.

This Court decided in the case of *Supervisors v. City of Grand Rapids*, 61 Mich. 144 (27 N. W. Rep. 888), that, when the county recognized the removal of the county-seat from the square, and sold its court-house thereon to the owner of the fee, it lost its interest in both land and building; and further held that the possession of the city, as to the county, was adverse. When the county abandoned its interest, the city at once assumed control. What then has been the situation of the property since that time, as between these parties, is really the only question, as the record now presents the case, that needs to be inquired after. The judge of the superior court of Grand Rapids, in the decision of this case, finds that the city,—

"From 1850 down to the present time, has claimed and rented the premises in question as public grounds, devoted to public uses;"—

And that on October 18 of that year the citizens petitioned the common council of that year for an appropria-

tion to fence and ornament court-house square, and the city passed a resolution instructing the city surveyor to survey the public square, leaving on each side a space four rods wide for streets, and that he make a record of the same;—

"And it was further ordered that the petitioners have leave to proceed and inclose the same with a suitable fence."

That such survey was afterwards made, the streets laid out on the east, west, and north sides, and improved; that the fence was built between 1853 and 1855, under the auspices of the common council, and painted, and it remained there until sometime in 1856, when a plan was adopted by the common council for the improvement of the public square, and the city then constructed walks through the same, and in October of that year authorized and instructed its marshal to take charge of the public square, and of any animals trespassing thereon; that at this time the city took possession under its deeds, and the dedication made by the owners to the public for its use, and appointed a committee of five to take charge of the improvements, and make such as it might deem advisable, and receive donations therefor from citizens, and a large amount of the improvements made were by donations from citizens.

That from that time to the present the city has been in possession, improving it for a public park or square; that, in consequence of the action of the common council, a new fence has been built around the park, with proper gates in the same at the points of entrance; they have planted it with shade trees; the grounds were enriched and properly prepared for the growth of the grass upon the lawn; walks and driveways have been constructed and graveled; a permanent and substantial speak-

er's stand has been built upon it, and a flag-staff erected; and all by the city, and with its public moneys; gas and water have also been put in and supplied to it by the city.

That such use by the city has been open, adverse, and hostile, and adverse to the claim of the plaintiffs, for a period of more than 30 years; and that the city is now well entitled to the square for the use now being made of it, both by dedication and possession.

We think the conclusion reached by the judge of the superior court fully sustained by the uncontradicted evidence in the case. The property was dedicated to public use beyond question by the original proprietors, Daniels, Sheldon, and Tileston; and it has constantly been in use for that purpose, against those now claiming the same, for more than 30 years.

This must be held a sufficient bar to their action, and the judgment below must be affirmed.

CAMPBELL and LONG, JJ., concurred.

MORSE, J. I concur in the result.

CHAMPLIN, J., did not sit.

GEORGE E. PANTLIND v. THE CITY OF GRAND RAPIDS.

[See 61 Mich. 144.]

Dedication of lands—Adverse possession.

This case is ruled by the decision in *Sheldon v. City of Grand Rapids, ante,* 508.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued May 23, 1888. Decided October 12, 1888.

Ejectment. Plaintiff brings error. Affirmed. The facts are stated in the opinion, and in *Sheldon v. City of Grand Rapids, ante,* 508, and in 61 Mich. 144.

More & Wilson, for appellant.

James W. Ransom, for defendant.

SHERWOOD, C. J. This suit is an action of ejectment against the city of Grand Rapids to recover possession of an undivided one-half of the south half of court-house square, in that city.

The case was tried in the superior court of Grand Rapids, before the judge thereof without a jury. Judgment was rendered upon the findings of the court for the defendant, and the plaintiff brings error.

The circumstances of this case are so nearly like those in the case of *Sheldon v. City of Grand Rapids, ante,* as to be ruled by it. The only difference between the two cases is that one involves the title to one-half and the other to one-quarter of the same property,—it being the public park in the city of Grand Rapids. The same judgment must therefore be given.

The judgment in the superior court will be affirmed.

CAMPBELL and LONG, JJ., concurred.

MORSE, J. I concur in the result.

CHAMPLIN, J., did not sit.

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ROLLIN A. KEYES v. CECELIA I. SHERWOOD AND ISAAC S. SHERWOOD.

Mortgage—Partial release—Statutory foreclosure—Sale in parcels.

1. The provision of How. Stat. § 8503, requiring a sale in parcels on statutory foreclosure, is not merely directory (*Lee v. Mason*, 10 Mich. 403; *Udell v. Kahn*, 31 Id. 195), but is for the benefit of the mortgagor and purchasers from him, and is intended to protect important rights in the redemption of the premises, as well as being best calculated to bring a better price at the sale.
2. Where a mortgagee releases a portion of the mortgaged premises, and thereby severs the unreleased portion into two separate parcels, which are owned and occupied in severalty, such unreleased portion cannot be advertised and sold as one parcel on a statutory foreclosure. *Durm v. Fish*, 46 Mich. 312.

Error to Berrien. (O'Hara, J.) Argued June 13, 1888. Decided October 12, 1888.

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

Clapp & Bridgman, for appellant.

Edward Bacon, for defendants.

CHAMPLIN, J. This action is ejectment to recover the N. E. ¼ of the N. W. ¼ of section 20, in town 4 S., range 18 W.; and also a right of way on the west side of the S. E. ¼ of the N. W. ¼ of said section. The plaintiff's right to recover depends upon the validity of a sale made under a foreclosure of a mortgage by advertisement, covering the lands in question. The mortgage was executed on June 1, 1868, by Charles R. Brown, Celinda L. Brown, Henry M. Brown, and Delia Brown,

to Jane G. W. Taylor; and among other lands contained the description following:

"The east half of the north-west quarter of section twenty, in town four south, in range eighteen west."

In June, 1875, the mortgagee executed a release and discharge of a portion of the mortgaged premises described as follows:

"The south one-half of the east one-half of the north-west quarter of section twenty (20), town four (4) south, of range eighteen (18) west; excepting forty-four (44) rods square on the south-east corner of said forty acres, which is conveyed to Silas Allen (it being the intention hereby to discharge said mortgage as far only as it covers twenty-seven and 88-100 acres of land deeded by Isaac S. Sherwood and Cecelia I. Sherwood to William D. Sherwood, by deed dated February 7, A. D. 1865)."

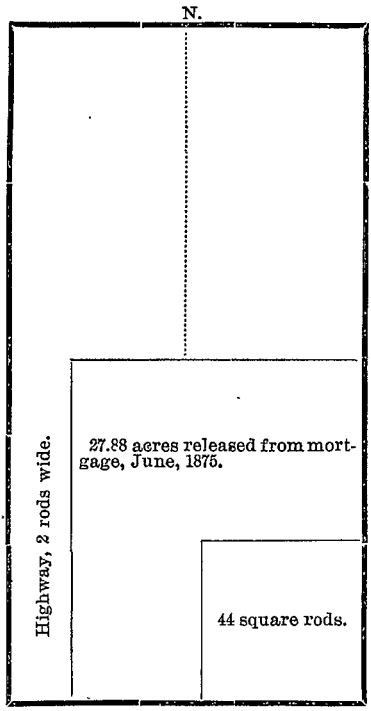
The proceedings to foreclose the mortgage were begun August 18, 1877, and the description covering the lands in question is as follows in the notice published:

"The east half of the north-west quarter of section twenty, in town four (4) south, of range (18) west; but excepting and reserving from the said mortgage sale the south half of the east half of the north-west quarter of section 20, in town 4 south, of range 18 west; excepting forty-four rods square in the south-east corner of said forty acres, which is conveyed to Silas Allen, and the right of way on the west side of said forty acres to the north forty-acre lot adjoining said land, reserved free from said sale; being twenty-seven and eighty-eight one hundredths of land deeded by Isaac S. Sherwood and wife to William D. Sherwood, by deed dated February 7, 1865, having been released and discharged from the lien of said mortgage."

The mortgagee became the purchaser at the sale, at which all the land covered by the mortgage on the E. ½ of the N. W. ¼ of section 20, except the portion released, was sold as one parcel. The sheriff's deed to the purchaser follows substantially the description in the notice of sale.

The annexed plat shows the situation of the mortgaged premises at the time of sale:

East half N. W. quarter, Sec. 20, *T.* 4 *S., R.* 18 *W.*



At the time of the mortgage foreclosure, each of the parcels appearing on the plat were owned by different persons, and were in the actual occupancy of such separate owners, and were separated by division fences.

The statute authorizing foreclosure of mortgages by advertisement provides as follows:

"If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as one parcel, they shall be sold separately; and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest, and the costs and expenses allowed by law; but, if distinct lots be occupied as one parcel, they may in such case be sold together." How. Stat. § 8503.

We have heretofore held that the provisions of this statute are not merely directory. *Lee v. Mason,* 10 Mich. 403; *Udell v. Kahn,* 31 Id. 195. When the mortgagee has, by releasing a portion of the mortgaged premises, severed a parcel of land described in the mortgage into two separate and distinct parcels, the parcels so separated by the released portion cannot under this statute be advertised and sold as one tract or parcel. The provision for sale in distinct parcels is for the benefit of the mortgagor and purchasers from him, and is intended to protect important rights in the redemption of the premises, as well as being best calculated to bring a better price at the sale.

This case is ruled by the case of *Durm v. Fish,* 46 Mich. 312 (9 N. W. Rep. 429), and the judgment of the circuit court must be affirmed.

SHERWOOD, C. J., MORSE and CAMPBELL JJ., concurred. LONG, J., did not sit.

August Hockmoth v. Bartholomew Des Grand Champs.

Adverse possession—Boundary lines—Division fence—Evidence—Surveyor—Expert testimony.

1. A surveyor, who testifies to finding all of the corners pertaining to a given description of land, may be asked "if he found them according to the government survey," it being a matter on which he is authorized to testify as an expert, and any evil resulting from his answer can be remedied by a cross-examination, showing his sources of information, or by other testimony if his opinion is not correct.
2. In a suit involving plaintiff's alleged adverse occupancy of land up to a division fence, which defendant claimed was not built by the plaintiff with the expectation of holding all of the land inclosed within it, it is competent for the defendant to show, in support of said claim, that after a survey of the land, which disclosed that a portion of the fence encroached on defendant's land, the plaintiff removed it so as to conform to the division line as located by said survey.
3. In a case involving a claim of title to land by adverse occupancy up to a division fence, which when built commenced on the true line, and by a deviation inclosed the land in dispute, which fence was composed in part of logs and brush,—the adjoining land being wild, and the owner not living in the neighborhood,—the evidence of adverse holding should be so strong and conclusive as to convince the jury that the fence was built as a *permanent* assertion of title to *all* of the land inside of it, which was thereafter held for the statutory period under such circumstances, and in such a way, as to plainly give notice to the community that the occupant claimed title thereto as against all persons, and this so notoriously that the original owner, if he did not know of such hostile occupation, ought to have known of it.

Error to Macomb. (Stevens, J.) Argued June 14, 1888. Decided October 12, 1888.

Trespass to land. Defendant brings error. Reversed. The facts are stated in the opinion.

Eldredge & Spier, for appellant.

F. P. Monfort, for plaintiff.

MORSE, J. This is an action of trespass upon lands, originally brought in justice's court, and certified to the circuit court for the county of Macomb upon a plea of title.

The plaintiff, September 11, 1869, acquired title by deed from one Philetus W. Norris to the E. ½ of the S. W. fractional quarter of section 19, in the township of Warren, in said county, excepting the east 40 acres thereof.

The defendant occupies the W. ½ of said S. W. fractional quarter, having purchased the south half of the same upon contract dated December 23, 1884, and leased the N. ½ January 7, 1885. Previous to his occupation, the land now held by him was unoccupied and uncultivated. It was owned at the time of plaintiff's purchase of the east half by Edwin Jerome, Sr., who willed the same to Edwin Jerome, Jr., and Frank H. Jerome. Defendant acquired his title of the Jeromes.

Plaintiff claims that he moved upon his land, and commenced clearing the same, in August, 1869; and that in the winter and summer of 1870 he completed a fence upon his west line, which he has ever since adversely maintained, until March, 1885, when the defendant took it down upon the north 80 rods, and built a new fence in its place. This was done in pursuance of an agreement between them dividing the line fence; it being agreed that defendant should thereafter maintain the north 80 rods, and the plaintiff the south 80 rods, of the division fence between them.

In 1885 a survey of this quarter section was made by one Charles Adair. He claims to have found the quarter post on the west side of section 19, and that its location conformed to the records of the survey of the same sec-

tion made by his father, George E. Adair, in 1869. He testified that he found all the corners pertaining to the S. W. ¼ of the section to his satisfaction. He was then asked to state if he found the corners according to the original survey of the government of this fractional quarter. Plaintiff's counsel objected, and he was not permitted to answer. This is made one of the assignments of error. In this survey Charles Adair divided the quarter section, and ran a line between the premises of the contending parties in this suit, giving to each half of said quarter section 75.49 acres. He found the plaintiff's fence at the south end, nearly, if not quite, upon the line established by him, but it ran northerly to the west, so that at the north end it was from 12 to 13 rods over the line. In November, 1885, the defendant moved his part of the line fence—the north 80 rods—over onto the line established by Adair. This was not done with the consent of plaintiff, who brought this suit.

Upon the trial the accuracy of Adair's survey does not seem to have been seriously disputed, and the plaintiff rested his case entirely upon his alleged adverse occupancy of this strip of land for 15 years. The plaintiff had judgment for six cents damages.

Several errors are assigned in relation to leading questions put to Charles Hockmoth, a witness for plaintiff; but we do not consider that any harm was done to defendant by them. The same may be said of the ruling of the circuit judge in permitting Adam Bloom to state that he had examined the tract-book in the United States Land-office at Detroit, and that such book gave the number of acres in this fractional quarter as 154.32. It does not appear by the record that the number of acres, as given in the original government survey of this quarter, became at all material upon the trial. The plaintiff did

not claim the strip of land in dispute by reason of his title deeds, but by his adverse occupancy.

The question propounded to the witness Adair would have been proper if he could have testified that he found the government monuments of the corners, or any indications upon the ground that the corners located by him were the same as located by the government survey; and we are inclined to think that he should have been allowed to answer it. It is claimed by the counsel for the plaintiff that the answer would have been only a conclusion of the witness, which was for the jury; but we are of the opinion that the question was competent. This was a matter upon which Adair was authorized to testify as an expert, and any evil resulting from it could have been remedied by a cross-examination, showing his sources of information, or by other testimony, if his opinion was not correct.[1]

Evidence was offered tending to show that after the survey by Adair the plaintiff changed his fence upon his part of the line, the south 80 rods, to conform to the division line as located by such survey. This was ruled out, as we think, improperly.

It was claimed by the defense that Hockmoth did not build his fence in the first place, or maintain it afterwards, with the expectation or intent of holding or claiming all the land inclosed within it, but that he built it supposing it to be on the line; that he started correctly at the south end, but inadvertently ran it too far to the west, as it went to the northward; that he did not at any time intend to insist upon his fence as located as the true line of boundary between him and Jerome, but erected it more particularly to protect his crops, leaving the true

[1] Counsel for appellant cited Rogers, Exp. Test. § 113; *Toomey v. Kay*, 62 Wis. 104 (22 N. W. Rep. 286).

location of the line to be afterwards established; and that the fact that, after Adair's survey, he moved his part of the fence upon Adair's line, had some bearing towards supporting this proposition. We agree with the counsel for defendant that this evidence was important, and should have been admitted.[1]

It was shown upon the trial that previous to the commencement of this suit the plaintiff and his wife, Ann Hockmoth, lived upon the land embraced within the plaintiff's deed, and occupied the same as a homestead, but the dwelling was not upon the land in dispute. July 11, 1885, the plaintiff and his wife deeded to one Elizabeth Lefever the premises, describing them as—

"All of the east half of the south-west fractional quarter of section No. nineteen, of town one north, of range twelve east, save and except the east 40 acres, heretofore deeded to Peter Kline; the part hereby intended to be conveyed being about forty (40) acres of land, be the same more or less."

On the same day the said Elizabeth Lefever conveyed the same premises back to the plaintiff and his wife, who now hold the same as joint tenants. It is insisted that by these two conveyances the plaintiff is precluded from maintaining this suit, his wife not being joined with him. But, as has been heretofore said, the claim of the plaintiff was not brought and did not rest upon the trial on his title by deed. Both in the declaration and upon the trial he based his right to recover upon his 15 years of adverse occupancy. These conveyances, therefore, were immaterial, and of no avail as against plaintiff in this suit. The deeds do not include this strip of land in controversy. The case stands in the record as it was put to the jury by the circuit judge. The land in question here belongs to the

[1] Counsel for appellant cited Angell, Lim. §§ 384 (note 4), 390, and cases cited; *Skinner v. Crawford*, 44 Iowa, 119 (6 N. W. Rep. 144).

defendant, unless the plaintiff has acquired it by his adverse possession.

The counsel for the defendant presented the following requests, which were refused:

"1. When a party claims to have acquired title to the lands of another by having held possession a length of time sufficient to bar the owner from retaking possession, he must, to succeed, show that his possession has been of that exclusive, permanent, open, hostile, and adverse character as to put the owner in the position of failing to assert his rights, knowing, or having reason to know they were encroached upon, for full fifteen years.

"2. The owner need not move to retake possession till he learns or ought to know that his lands are taken possession of.

"3. The fence claimed to inclose the lands must be a permanent one. The mere inclosing a portion of the lands of an adjacent owner with a pole or brush fence does not amount to taking exclusive possession. Such a fence does not indicate an intention to claim to own the land, and does not show adverse possession.

"4. You cannot presume that the owner of the W. ½ of the S. W. fr. quarter of 19, in going along the highway where the fence is shown to be nearly on the line, and seeing a fence extending north, has thereby notice that the fence incloses any portion of his land. On the contrary, he is justified in assuming that his neighbor is only inclosing what he is entitled to."

It is claimed, and we find it so from the record, that the circuit judge, in his charge to the jury, ignored the propositions contained in these requests; and substantially instructed them that if the plaintiff inclosed the land with a fence, and commenced clearing and cultivating the premises, and thereafter—

"Maintained such possession by continued, visible, and notorious acts, such as would plainly indicate to any one desiring to investigate the premises that he was occupying, cultivating, and using the land as a part of his farm, and treating it as his own," and if his occupancy had been "distinct and hostile, in other words, adverse to, and not

by permission or in subserviency to, the rights of the defendant, or those under whom he claimed title,"—

For a period of 15 years before the date of the alleged trespass, then he could recover. It is argued that the court should have given these requests of the defendant, or at least have plainly informed the jury that they must find that plaintiff inclosed this land, not by mistake, but with the intent to claim title thereto, and under such circumstances and such *indices* of his claim as would have notified the owner of such intent.

The testimony on the part of the plaintiff shows clearly enough that he did not build all of this fence at one time, and that no line was run out or established when he built it. There was also testimony tending to show that for many years a portion of this fence was made of brush and poles. The Jeromes did not live near this land, but evidence was given on behalf of the plaintiff tending to show that the elder Jerome passed by the premises several times during the plaintiff's occupancy. There was also testimony upon behalf of the defendant tending to show that from 1870 to 1872 there was no fence along a portion of plaintiff's west line.

We think there is justice in the complaint of the defendant in this respect. All of the requests above noticed should have been given, or their substance, with the exception of the third. This as presented was too broad, but the defendant was entitled to a fair presentation of his defense to the jury. They should have been instructed that the land inclosed by plaintiff must have been so inclosed, and held afterwards by him, as an assertion of title to the land; that if the fence was a temporary one, not built with the intention of holding the land, but as an inclosure until the true line could be ascertained, he could not recover. And the jury would have a right, in determining this question, to take into

consideration how and when the fence was built, and of what materials it was composed. When it is shown that at the point where the fence was commenced it was nearly, if not exactly, upon the true line, and the land in dispute was inclosed by a deviation as the fence proceeded, and the fence was partially composed of logs and brush, and the adjoining land was wild and uncultivated, the owner not living in the neighborhood, the evidence of adverse holding should be so strong and conclusive as to convince the jury—

1. That the fence was built as a permanent assertion of title to all the land inside of it.

2. That it was held thereafter, for the necessary number of years, under such circumstances, and in such a way, as to plainly give notice to the community that he claimed title thereto as against all persons, and this so notoriously that the original owner, if he did not know of such hostile occupation, ought to have known it.

The circuit judge erred in failing to properly place before the jury the full elements of the claim of the defense that the occupancy of the plaintiff over the true line was not intended by him as a hostile one against the Jeromes. The jury was not specifically directed to the facts claimed to make up this defense, or their bearing, if found to exist, upon the question of adverse possession; and by the ignoring of defendant's requests they might easily have been misled into the notion that the mere building of the fence, and its maintenance and occupancy of the land up to it for 15 years, was a sufficient adverse and hostile possession of such land, without regard to what the purpose or idea of the plaintiff might have been when he inclosed it.[1]

[1] Appellant's counsel cited *Bird v. Stark*, 66 Mich. 654, in support of the rule stated.

Plaintiff's counsel referred to same case, and to *Murray v. Hudson*, 65 Mich. 670, as supporting the charge as given.

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

SHERWOOD, C. J., CHAMPLIN and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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WILLIAM H. GRIDLEY v. THE GLOBE TOBACCO COMPANY.

Contract of sale—Fraud—Rescission—Reasonable time.

1. The rule that certain acts shall be performed in a reasonable time requires that the party should exercise such reasonable diligence as under all then and *subsequently existing* circumstances might be fairly expected. *Clark v. Mowyer*, 5 Mich. 472; *Stange v. Wilson*, 17 Id. 347; *Grant v. Bank*, 35 Id. 515.
2. To entitle a party to rescind a contract on the ground of fraud or false representations he must act promptly after he has discovered the fraud or falsity of the representations; but he is entitled to a reasonable time to investigate and ascertain whether the representations made are true.
3. When the *facts* are undisputed, what is a reasonable time is a question of law; but when they are controverted, or where motives of a party are involved, it is a proper question for a jury.
4. In this case it is held that defendant's first four requests to charge should have been given, and that the court erred in taking the case from the jury.

Error to Wayne. (Gartner, J.) Argued June 20, 1888. Decided October 12, 1888.

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

Dickinson, Thurber & Stevenson, for appellant, contended:

1. There was no unreasonable delay in offering to return the horse and in rescinding the sale; citing *Felt v. Evaporating Co.*, 52 Mich. 602, 604.
2. Had Wagner, the real defendant, elected to keep the horse, he could recover damages for breach of warranty, as, according to plaintiff's testimony, his representations amounted to a warranty that the horse was sound, kind, and gentle; citing *Daniels v. Aldrich*, 42 Mich. 59.

Palmer & Palmer, for plaintiff, contended:

1. A breach of warranty does not give the right to rescind; citing *Thornton v. Wynn*, 12 Wheat. 189.
2. There is no testimony tending to prove fraud in the transaction; citing Cooley, Torts, 499, 500.
3. As to duty of Wagner if he desired to rescind on the ground of fraud, counsel cited *Wilbur v. Flood*, 16 Mich. 45; Cooley, Torts, 504; and on the question of reasonable time, cited Cooley, Torts, 503, 504; *Wilbur v. Flood*, 16 Mich. 45; *Druse v. Wheeler*, 26 Id. 195, 196.

CHAMPLIN, J. This action was brought to recover the amount of a promissory note given by defendant for the accommodation of Robert Wagner upon the sale of a horse by plaintiff to Wagner.

The defense was made by Wagner, who claimed that the plaintiff, at the time of the sale of the horse to him, warranted such horse to be sound, whereas he was unsound; and that, soon after he discovered the horse was unsound, he tendered the horse back to plaintiff, and demanded the note; and that said plaintiff then and there admitted that he had deceived said Wagner, and agreed to receive back the horse, and return the note, upon payment of $20; and thereafter he tendered the horse and $20, which plaintiff refused to receive, and also refused to return the note.

Upon the trial there was no dispute as to the fact of the sale and warranty of soundness as claimed by defendant. The fact of unsoundness was disputed, and evidence upon this point was introduced by both parties. There

was no conflict in the testimony that Wagner notified plaintiff that the horse was unsound, and wanted him to take him back, and give up the note. The testimony was conflicting as to whether plaintiff admitted the unsoundness, but plaintiff admits that he offered to take the horse back, and give up the note, upon Wagner's paying him for the use of the horse, which plaintiff claims was agreed upon at $30, while defendant says it was $20.

They also disagreed in their testimony upon the trial as to the time when Wagner notified plaintiff that the horse was unsound, and offered to return him. The testimony of Wagner tended to show that as soon as he became satisfied that the horse was unsound he offered to return him to plaintiff; that he found, after using him, he became lame, and showed a stiffness in his shoulders; that plaintiff had told him that the horse had not been used at heavy work, but merely as a carriage horse, and he must be careful with him at first; that on this account he let the horse lay off from work and rest two or three times for two or three days at a time, and at two different times a week at a time, but after using the horse a day or so he would be as bad as ever.

The sale was made on December 11, 1886, and the plaintiff's refusal to take the horse back on account of the disagreement as to the amount which should be paid for his use was in the latter part of February.

The defendant's counsel requested the court to charge the jury as follows:

"1. The plaintiff, by his own testimony, establishes the fact that at the time he sold the horse to Wagner he represented that the horse was sound, kind, and gentle, and that he, the plaintiff, knew that Wagner purchased the horse relying upon this representation. This being established by the plaintiff's own testimony, it follows that defendant had a right, within a reasonable time

after he became satisfied that the representation as to soundness was untrue, to return the horse, and demand the note he gave in payment for it.

"2. That in considering the question whether Wagner offered to return the horse within a reasonable time after he became satisfied that the representation as to soundness was not true, you are to understand that it was Wagner's right to retain the horse a sufficient length of time to fully establish, by trying the horse, whether or not the horse was unsound, and, if unsound, whether the unsoundness was of such a nature as to seriously affect his value for the use for which he purchased him; and, if he took no longer time for this than was reasonable under the circumstances, his offer to return the horse was seasonable.

"3. That even though others than Wagner might have known that the horse was unsound earlier than Wagner did, it could not affect Wagner's right to return the horse. He is only bound to act within a reasonable time after he had personal knowledge or information upon the matter in question.

"4. If you find that Wagner did retain the horse while he did in good faith try him with a view to ascertaining whether he was all right, as represented, and only became satisfied that he was unsound within a short time before he offered to return him, and you find that he then offered to return the horse, and demanded his note, and you believe that the horse was not sound when sold, defendant is entitled to a verdict.

"5. That delay in offering to return the horse after Wagner had become satisfied that he was not sound, as represented, which was not either serious or injurious to the plaintiff, would not bar the defendant's right to return the horse and demand the note."

Each of these requests was refused, and the court instructed the jury that, the purchase having been made December 11, and Wagner having discovered that the horse was unsound within a week or 10 days thereafter, by his own testimony, and made no complaint about it, until about February 22, he did not act within a reasonable time, and could not come in on February 22 and rescind

the contract; and on this ground he directed a verdict for the plaintiff.

We do not think the court can be justified, under the testimony in this case, in taking it from the jury. What is a reasonable time must depend upon the circumstances of each particular case. What would be reasonable under one state of facts would not be under another. The rule that certain acts shall be performed in a reasonable time requires that the party should exercise such reasonable diligence as under all then and subsequently existing circumstances might be fairly expected. *Clark v. Mowyer*, 5 Mich. 472; *Stange v. Wilson*, 17 Id. 347; *Grant v. Bank*, 35 Id. 528. The testimony of Mr. Wagner was that he knew nothing about horses, and took this horse entirely upon the strength of the representations which Mr. Gridley made to him at the time of sale; that, among other things, Mr. Gridley said, when he told him that he wanted the horse to drive on a peddler's wagon:

"This horse has not been used, and you want to use him carefully, and work him in gradually, so that he won't be hurt."

He further testified that he noticed within a week or 10 days that something was the matter with the horse; that he appeared to be stiffened up; and so he thought the work was too hard for him, and he laid him off for a day to rest; and it went on from time to time, and he laid him off for a week at one time, and when he came out he acted quite bright, and he thought he was all right again; and so it went along for about 10 weeks. On cross-examination the following testimony was elicited from the defendant:

"*Q.* The first time you ever spoke to Mr. Gridley about it was about three months after the horse was bought?

"*A.* No; about ten weeks. I spoke to him as soon as I found out he was a bunged-up horse when I got him.

"*Q.* Did it take you ten weeks to find out that he was a bunged-up horse when you got him?

"*A.* Yes, sir; it did,—that is, to find out positively he was."

To entitle a party to rescind a contract on the ground of fraud or false representations he must act promptly after he has discovered the fraud or the falsity of the representations. He would, however, be entitled to a reasonable time to investigate and to ascertain whether the representations made were true. When the facts are undisputed, what is a reasonable time is a question of law; but where they are controverted, or where motives of a party are involved, it is a proper question for a jury. Here was testimony that the court had no right to ignore that defendant spoke to plaintiff about the horse not being as represented as soon as he found that he was unsound when he purchased him.

Defendant further testified that when he spoke to plaintiff about it he admitted that he knew the horse was unsound when he sold him; that he had previously been ailing, but that he had him treated, and he supposed he was all right. This testimony was also disputed by the plaintiff.

We think the defendant was entitled to have the first four requests above noticed given to the jury, and that the court erred in taking the case from the jury. The question whether the defendant offered to return the property should also have been submitted to the jury; and, if they should find the defendant's version of that portion of the transaction true, it was sufficient in law. The testimony disclosed that the horse was kept at a boarding stable, but the keeper had no lien, as defendant paid for his board to March 1.

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

The other Justices concurred.

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THE FARMERS' BANK OF GRASS LAKE v. JOHN M. QUICK AND ALEXANDER BELLER, ADMINISTRATOR, ETC.

Equity—Foreclosure of mortgage—Confirmation of sale—Appeal—Bill of review.

1. Where the confirmation of a foreclosure sale is objected to as effected secretly, and without notice to the defendant or his solicitors, and it appears that the defendant had such notice, it was his duty to inform his solicitors.
2. On appeal from the confirmation of a foreclosure sale, the bill cannot be attacked, nor the decree reviewed, if the court had jurisdiction of the subject-matter and the defendant.
3. An objection to the confirmation of a foreclosure sale on the ground that the premises were bid in by the complainant at a great sacrifice, is overruled in the absence of a showing that if a new sale was ordered a larger or even as large a price could be obtained.
4. The refusal of the circuit judge to grant leave to file a bill of review in this case is held to have been within his discretion, fairly exercised.

Appeal from Jackson. (Gridley, J.) Argued June 22, 1888. Decided October 12, 1888.

Appeal from order of confirmation of a foreclosure sale. Order affirmed. The facts are stated in the opinion.

Lewis M. Powell, for complainant, contended for rules stated in the opinion.

Blair, Wilson & Blair, for appellant, John M. Quick, contended:

1. The appeal brings up the whole case for review, with all matters of discretion open for consideration; citing *Ins. Co. v. Renz,* 33 Mich. 298.
2. Leave to file a bill of review should have been granted, because the original bill does not show who owned the mortgaged premises; citing *Middlesworth v. Nixon,* 2 Mich. 425; *Brown v.*

Thompson, 29 Id. 75, 76; and because the decree undertakes to dispose of the homestead of Caroline Quick, and the interest of the heirs therein, without making any of them parties; citing *Shoemaker v. Collins*, 49 Mich. 595; and because the bond and mortgage do not appear in the enrollment; citing *Hungerford v. Smith*, 34 Mich. 300; and because it is a proper remedy; citing *Mickle v. Maxfield*, 42 Mich. 304.

3. Under the circumstances, the sale is to be regarded as secret. The appellant had reason to think that no sale could be made until his petition was disposed of; citing *Nugent v. Nugent*, 54 Mich. 557.

MORSE, J. The defendant John M. Quick appeals from the order entered in this cause in the circuit court for the county of Jackson, in chancery, confirming a sale made in pursuance of a foreclosure decree.

The bill was filed to foreclose a mortgage, dated January 13, 1879, executed by the deceased, John Quick, to one Alonzo Bennett. A bond accompanied the mortgage. Alonzo Bennett assigned this bond and mortgage to the complainant, May 5, 1886. The bill was filed May 13, 1886.

At the time of the commencement of this suit, John Quick was dead, and the defendant Alexander Beller had been appointed administrator of his estate with the will annexed. John M. Quick was in possession of the lands described in the mortgage as residuary legatee of the deceased, John Quick. John Quick left surviving him a widow, Caroline Quick. She was not made a party to the bill, nor were any of the heirs or legatees save the said John M. Quick. The defendant John M. Quick did not appear, and the bill was taken as confessed by him. The defendant Beller answered, and the cause was heard upon pleadings and proofs taken in open court. The decree was entered July 8, 1887, and it was declared by such decree that the mortgage was void against a certain portion of the premises, decreed to have been a homestead

at the time the mortgage was executed, which mortgage the wife did not sign. The sum due upon the mortgage was found to be at the date of the decree $3,901.06, and it was declared that the said John M. Quick was personally liable for the payment thereof, and a sale was ordered of the remaining lands as described in the mortgage, if such sum was not paid on or before August 1, 1887.

November 7, 1887, the property was advertised for sale under this decree by J. W. Blakely, a circuit court commissioner. December 15, 1887, the defendant John M. Quick filed his petition for leave to file a bill of review, and thereafter the sale was adjourned until January 5, 1888. It was further adjourned until January 19, 1888, when the property was sold, and bid in by the complainant at the sum of $4,075. The usual order *nisi* was entered to confirm the sale. The defendant John M. Quick filed exceptions to such confirmation, which were heard and overruled, and the sale confirmed March 5, 1888.

It appears that upon the petition for leave to file a bill of review the then circuit judge, Hon. G. T. Gridley, was not ready, on the last day of his official term, December 31, 1887, to pass his opinion; and it was agreed by the solicitors of the parties that he might take time to decide upon the petition, and file his opinion at any time thereafter as of that date, and that in the mean time the sale of the mortgaged premises should be adjourned from time to time, until such decision was made. The circuit judge afterwards filed an opinion denying the prayer of the petitioner, but it is claimed that such opinion bears no date; and that no notice of the same, or of the sale of the premises, was given to the defendant John M. Quick, or his solicitors; and that they had no information of the same until after such sale. This is denied, however, and showing is made by the affidavit of the commissioner

that he notified said Quick of such sale on January 16, 1888, three days before it took place. The affidavit of the solicitor for the complainant also shows that on January 12, 1888, he informed Quick that the sale had been adjourned one week, and that there would probably be no further adjournment of the same. The claim of the defendant is supported by the affidavit of himself and one of his counsel. One of the objections to the confirmation of the sale is that such sale was effected secretly, and without notice to the defendant Quick or his solicitors. We think the defendant Quick had full notice of the sale. It was his duty to inform his solicitors.

Ten exceptions were filed. Two of them are disposed of by the ruling above. Three are aimed at the bill of complaint and the decree. These cannot be considered here. The decree cannot be reviewed in this proceeding, nor the bill attacked. The court below had jurisdiction of the subject-matter and of the person of the defendant Quick. No appeal from the decree was taken; and this appeal, which is from the order of the court confirming the sale, cannot be used to review such decree. *Benedict v. Thompson,* 2 Doug. 299; *Burt v. Thomas,* 49 Mich. 463 (12 N. W. Rep. 911); *Bullard v. Green,* 10 Id. 268.

Another exception alleges that the premises were sold and bid in by the complainant at a great sacrifice, and in equity and justice ought to be resold. No showing is made, however, that if a new sale is ordered a larger or even as large a price can be obtained at such new sale. We are not satisfied that the sale was unfair, and do not feel disposed to disturb the order of confirmation for this reason. The refusal of the circuit judge to grant leave to file the bill of review was, we think, within his discretion, fairly exercised. The other exceptions are without merit.

The order appealed from will be affirmed, with costs.

CHAMPLIN, CAMPBELL, and LONG, JJ., concurred. SHERWOOD, C. J., did not sit.

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WILLIAM E. AVERY v. THE BOARD OF SUPERVISORS OF IONIA COUNTY ET AL.

Board of supervisors—Public buildings—Bond to secure payment of laborers and material-men—Failure of committee to require—Liability for neglect—Subcontractor.

1. A *subcontractor* is not one of the persons sought to be protected by Act No. 94, Laws of 1883, requiring a bond by contractors securing the payment of claims for labor and materials furnished in the erection of public buildings.

   So *held*, where plaintiff contracted in writing with the original contractor to furnish cut stone for a court-house, according to the plans and specifications, which were made a part of the original contract, which provided that neither the building committee nor the county should be held liable for material furnished or labor performed in and about its performance.

2. A resolution by a board of supervisors to save a building committee appointed to superintend the construction of a court-house harmless from all suits growing out of the erection of said court-house will not create a right of action against the board of supervisors for the failure of the committee to require the contractor to execute the bond required by Act No. 94, Laws of 1883, for the payment by the contractor for labor and materials furnished in the erection of said building.

Error to Ionia. (Smith, J.) Argued June 22, 1888. Decided October 12, 1888.

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

Corliss, Andrus & Leete (*S. V. R. Trowbridge*, of counsel), for appellant.

A. A. Ellis, for defendants.

[The positions of counsel are stated in the opinion.—REPORTER.]

LONG, J. At a session of the board of supervisors of Ionia county, in 1882, a committee was appointed to present a resolution at the January session of said board, in 1883, submitting to the voters of the county the proposition to build a court-house. On January 11, 1883, this committee made a report to the board of supervisors, and on the same day a resolution was passed by the board appointing a committee of three as a building committee. This committee are the three defendants in this case. These defendants at once caused plans and specifications to be prepared, and advertised for proposals to build the court-house; requiring the party who was the successful bidder to give bonds, according to the terms of the resolution of the board, in the sum of $30,000, for the faithful performance of the contract. The specifications provided, among other things, as follows:

"Sealed bids will be received up till 12 o'clock noon on the 1st day of October, 1883, at the office of the probate judge of Ionia county. They must be upon blanks furnished by the committee, and accompanied by a guaranty, which must be signed by the bidder and acceptable surety or sureties. The successful bidder will be required to furnish an acceptable bond in the sum of $30,000 for the faithful performance of the same."

The bids were received and opened, and Claire Allen was the successful bidder. On November 1, 1883, the committee entered into a contract with Claire Allen for the building of the court-house. Annexed to this contract, and executed at the same time, was the bond as

provided in the notice. Plans and specifications were made a part of the contract, and were signed by the contracting parties.

Shortly after the execution of this contract, and sometime in December, 1883, the plaintiff, William E. Avery, made an oral contract with Claire Allen, the contractor, to furnish cut stone for the court-house according to the plans and specifications, which were a part of the original contract between Claire Allen and the building committee. On December 8, $1,000 was paid to Avery on the order of Claire Allen, on this contract. On February 11, 1884, Avery and Allen reduced their contract to writing. Avery was paid according to the terms of this contract between him and Allen, in estimates from time to time, until the last payment of $1,165.55. This was June 15, 1885. He received an order from Claire Allen directed to "C. Waterbury, Superintendent of the Building Committee of the Ionia County Court-house, Ionia, Mich.," for the above amount. This order was not accepted in writing by Waterbury, and, after retaining it for some time, Waterbury returned it to Avery. This claim of Avery was presented to the board of supervisors at the January session, 1887, and the board absolutely refused to pay it.

At the same session the board of supervisors passed the following resolution:

"*Resolved*, that the county of Ionia, and the board of supervisors thereof, shall and do hereby agree to save harmless the building committee heretofore appointed, to wit, Chauncey Waterbury, Levi Shotwell, and Edson P. Gifford, and the members thereof aforesaid, from all suits and proceedings, claims and demands, growing out of the erection of the court-house, or in any way relating thereto."

On March 29, 1887, this action was brought against the board of supervisors of Ionia county and the committee.

The plaintiff seeks to recover against the committee, because they neglected to require a bond to protect labor and material-men, and joins the county as defendant, because the board of supervisors passed the resolution above set forth.

The declaration in this cause alleges:

1. The adoption of a resolution, for submission to the voters of Ionia county a proposition to raise $45,000, with which to build a county court-house.

2. That in case the resolution was carried, it was provided that Chauncey Waterbury, Edson P. Gifford, and Levi Shotwell should act as building committee, to secure and adopt plans and specifications, and enter into a contract with the lowest responsible bidder or bidders giving proper security for the performance of the contract.

3. By inference it charges that the resolution was adopted by the people.

4. That on November 1, 1883, the committee entered into a contract with Claire Allen for the construction of the court-house; that Allen entered upon the performance of the contract; that by virtue thereof it became the duty of the defendants, and each of them, as a board of officers and agents, contracting for and in behalf of said county of Ionia, who so hold themselves out to the public as a properly constituted board of officers and agents for said county for the purpose of contracting in behalf thereof, to require security, as required by section 1 of Act No. 94 of the Public Acts of 1883.

5. That afterwards, on February 11, 1884, relying upon the bond provided for by said section, and believing a bond had been required of Claire Allen, plaintiff made a contract with Claire Allen to furnish him the stone to be used in constructing said court-house, to the value of $8,425, which said stone were built into the court-house.

6. That the court-house was never finished by Allen, but he failed to do so, and was financially unable to finish the same; and that afterwards, on July 29, 1885, after the material had been furnished, the court-house was taken off the hands of the contractor by the committee, and finished by them.

7. That, at the time said court-house was taken off the hands of Claire Allen by the committee, Allen was indebted

to the plaintiff in the sum of $1,165.55, which sum said Claire Allen had hitherto wholly neglected and refused to pay.

8. That at the time said debt became due, to wit, June 15, 1885, Claire Allen was, and still is, financially irresponsible, so that the debt, or no part thereof, could be collected of him.

9. That at the January session, 1887, the board of supervisors adopted a resolution, and in other ways did ratify and confirm the acts of said building committee, and assumed the responsibility and liability incurred by them, and agreed to save harmless said building committee from all suits, proceedings, claims, and demands growing out of the erection of said court-house, or in any manner relating thereto; and that, by reason of the neglect of said committee and board of supervisors to require said bond, an action had accrued to the plaintiff to demand and recover the sum of $1,165.55, and interest thereon.

The declaration in the case nowhere alleges or attempts to rely upon any misconduct of the defendants, excepting the one fact of the omission to take the statutory bond. It does not allege fraud or deceit, or that the committee intentionally or purposely committed any wrong against the plaintiff. On the trial, so far as the county was concerned, the circuit judge held the resolution offered in evidence, and above quoted, did not bind the county of Ionia so far as to give the plaintiff an action on the case against the county. The court found that the plaintiff, under his contract with Claire Allen, was a subcontractor, and, being such, the bond required by the statute, even if given, would have been no protection to him; that a subcontractor was not one of the class of persons sought to be protected by this statute, but laborers and material-men; and, in view of this fact, directed a verdict in favor of the defendants.

Judgment being entered in favor of defendants, plaintiff brings the case to this Court by writ of error.

The act above referred to provides:

"SECTION 1. That when public buildings, or other public works, are about to be built, repaired, or ornamented under contract, at the expense of this State, or of any county, city, village, township, or school-district thereof, upon which buildings or works liens might attach for labor or materials, if belonging to private persons, it shall be the duty of the board, officers, or agents contracting on behalf of the State, county, city, village, township, or school-district, to require sufficient security, by bond, for the payment by the contractor, and all subcontractors, for all labor performed or materials furnished in the erection, repairing, or ornamenting of such building.

"SEC. 2. Such bond shall be executed by such contractor to the people of the State of Michigan, in such amount and with such sureties as shall be approved by the board, officer, * * * and conditioned for the payment by such contractor, or any subcontractor, as the same may become due and payable, of all indebtedness which may accrue to any person, firm, or corporation, on account of any labor performed, or materials furnished," etc.

Section 3 provides that such bond may be prosecuted and recovery had by any person, firm, or corporation to whom any money shall be due and payable on account of having performed any labor or furnished any materials in the erection, repairing, or ornamenting of such building or works, in the name of the people of this State, for the use and benefit of such person, firm, or corporation, etc.

The plaintiff's claim is—

1. That the building committee, defendants in this case, in neglecting to require a bond for the protection of material and labor men, neglected the performance of a plain ministerial duty imposed by this statute, and are answerable in damages to plaintiff.

2. That the court erred in holding that plaintiff, upon the facts in the case, was a subcontractor, and therefore could not recover.

3. That the court erred in excluding the evidence showing the conduct of the building committee in paying the contractor large sums of money while holding the order of plaintiff under a verbal promise to pay it from the first moneys due the contractor.

4. That the court erred in holding that the board of supervisors were not liable, notwithstanding that it was shown that they assumed by resolution the liability of the committee to plaintiff.

If the court below is correct in ruling that plaintiff was a subcontractor, and therefore not entitled to recover, we need not discuss any other of the questions raised, as we are satisfied that no recovery could be had against the board of supervisors. There is no pretense of claim against the board of supervisors, except upon the ground of their having passed the resolution to indemnify the building committee, and that the board thereby became liable for any claim plaintiff might have against the committee for their neglect of duty in not taking the bond required by statute. No such liability can attach by reason of the resolution. The board had appointed the committee. The board, as well as the committee, it appears, were entirely ignorant of this statute. When it appeared that suit was about to be commenced against the committee, not for any willful violation of duty or for any fraud or deceit, or that the committee intentionally or purposely committed any wrong against the plaintiff, but that the committee had acted in good faith, but in ignorance of a duty required by statute, the board resolved to save them harmless if they were compelled to pay damages for having been in ignorance of this statute. This action upon the part of the board could impose no obligation upon it to pay, so far as the plaintiff is concerned. If he had no cause of action before this resolution was adopted, which it is not claimed he had, certainly this resolution gave him no greater right to make the board parties defendant to an action he had or claimed to have against the committee.

But has the plaintiff any right of action against the other defendants, the building committee? His contract

made with the principal contractor, Claire Allen, was reduced to writing, and provides, substantially, that plaintiff was to deliver all the stone cut and fitted, all ready for the stone-setter, free on the ground where the building is to be erected for Ionia county court-house; said stone to be in every respect as per plans and specifications furnished by D. W. Gibbs & Co., of Toledo, Ohio; plaintiff to furnish the stone as fast as needed, and not to hinder or delay the workmen on the building in any way; in consideration for which the contractor was to pay plaintiff the sum of $8,425, to be paid as follows, viz., plaintiff to be given an estimate each month of all stone furnished during that month, and to receive 90 per cent. of the estimate, and the remaining 10 per cent. at the completion of the building. The plans and specifications adopted were to be followed in cutting the stone, and those plans and specifications were made a part of the contract between the building committee and Claire Allen, the principal contractor. Plaintiff was to furnish all the cut stone to be put into the building under the original contract, and in accordance with the plans adopted. Reference must be had by the plaintiff in cutting this stone to the plans and specifications. These plans and specifications were, then, made a part of the contract with plaintiff, and he was as much bound by the terms thereof as the principal contractor.

Plaintiff's contract could not be interpreted or understood without having recourse to these plans. He was compelled to look to these specifications to find what his obligations were. His position was not that of a materialman, who furnishes so much material to be manufactured and placed in the building without reference to the plans and specifications. He stands in the position of a subcontractor, advised as to the principal contract, its terms

and conditions, and his own contract dependent upon the principal contract.

Plaintiff testified that he never asked to see the principal contract; never asked about the bond; made no inquiry about its condition. It was agreed between the committee and Claire Allen that neither the committee nor the county would be liable for work or material furnished for the court-house.

In *Shaver v. Murdock*, 36 Cal. 208, in discussing the relative rights of parties under a lien law, the court says:

"Upon a compliance on their part with the terms of the statute above referred to, the right of a subcontractor, laborer, or material-man to the lien which, through the original contractor, inures primarily to the benefit of persons in that relation, must be determined and controlled by the terms of the original contract between the owner and the original contractor."

All such persons are presumed to have notice of the existence of such contract, a knowledge of its terms, and the rights and obligations of the parties thereto; and to have taken subcontracts, contributed labor, and furnished materials in furtherance of the work, in strict subordination to such terms, relative rights, and obligations. Plaintiff did not claim to have entered upon the work under his contract in reliance upon the fact that the bond provided by the statute had been given. The object and purpose of this statute was the protection of labor and material-men; those who furnished material to be used in building, without reference to plans and specifications, and furnished either to the principal contractor or subcontractor, and labor done for either. The condition of the bond required by this statute is—

"For the payment by such contractor, *or any subcontractor*, of all indebtedness which may accrue to any per-

son, firm, or corporation, on account of any labor performed or materials furnished in the erection," etc.

The subcontractor is an under contractor,—one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract. This bond is not required by this statute for the protection of that class, but to protect material-men and laborers at the hands of the contractor and subcontractor.

Much stress is laid by counsel for plaintiff upon the ruling of this Court in *Owen v. Hill*, 67 Mich. 51 (34 N. W. Rep. 649). And claim is made that this case falls within the ruling in the opinion of Mr. Justice CHAMPLIN, in that case. In that case no question was raised but that the party complaining was a material-man. The case, however, was ruled upon another point. It appeared that the plaintiff was surety upon the contractor's bond for the faithful performance of his contract. This bond referred to the contract; and it was held by this Court that the plaintiff was so intimately connected with the contractor and his undertakings that he is not in a position to charge the board with negligence for not requiring the bond; and it was said in that case:

"His relation to the school-district is certainly closer than that of a subcontractor would be, and it would seem inconsistent to place him in a better position than a subcontractor. His relations to the parties to the contract were such that he must be held to be chargeable with notice that no bond was required by the board of trustees; and if he furnished material, not upon the presumption that such bond existed for his protection, but knowing the contrary, and upon the credit of the contractor, he is not in a situation to hold the individuals composing the board liable for negligence in not requiring the bond."

Applying the same principles to the present case, the plaintiff must be presumed to know the conditions of the

contract between his principal and the committee. It was made a part of the contract under which he furnished the cut stone. His contract had special reference to it, and he made no claim that he furnished these stone in reliance upon the statutory bond. The original contract provided that neither the committee nor the county should be held liable for material furnished or labor performed. Plaintiff was bound to take notice of these conditions. *Sherwood v. Railroad Co.*, 53 Mich. 317 (19 N. W. Rep. 14). In any view of the case, the plaintiff was not entitled to recover.

We need not discuss, and we do not express any opinion upon, the question of the right of a material-man or laborer to maintain action against such officers for negligence in requiring this statutory bond. It is not necessary to a decision of this case.

The judgment of the court below is affirmed, with costs.

The other Justices concurred.

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THE PEOPLE v. WALLACE WELCH.

Liquor traffic—Sale to minor—Intent.

1. There must be an *intent* to violate the law in order to convict for a sale of liquor to a minor, under section 13 of Act No. 313, Laws of 1887.

2. In a prosecution under section 13, Act No. 313, Laws of 1887, proof of the sale of liquor to a minor in a place where liquor was kept for sale makes out a *prima facie* case for the people, which the respondent may rebut by showing that the alleged minor was of full age, or by satisfying the jury that the size and appearance of the boy, coupled with his statement that he was over 21 years of age, led the respondent in *good faith* to believe that he was *not* a minor.

3. When a statute does not make *intent* an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation.
4. In *People v. Roby*, 52 Mich. 577, the conviction was for not keeping a saloon closed on Sunday, which statutory offense belongs to that class where the *fact* of a violation is conclusive of the *intent* to violate the law.

Exceptions from Berrien. (O'Hara, J.) Argued June 27, 1888. Decided October 12, 1888.

Respondent was convicted of selling liquor to a minor. Conviction reversed and a new trial granted. The facts are stated in the opinion.

C. B. & A. H. Potter, for respondent.

Moses Taggart, Attorney General, and *George W. Bridgman,* Prosecuting Attorney, for the people.

CHAMPLIN, J. Defendant, who was bartender in a saloon at Benton Harbor, where intoxicating liquors were sold, was convicted of selling spirituous liquors to one Sidney Phillips, a minor under the age of 21 years, and of the age of 17 years. The selling was not controverted.

The only question in the case is whether it is competent for a person charged with this offense to show what the person alleged to be a minor said regarding his age at the time the sale was made; and whether, if he represented himself to be of full age, and the seller made the sale in good faith, relying upon the representations that the minor was of full age, it would be a defense to the action. The statute (section 13, Act No. 313, Laws of 1887) reads as follows:

"It shall not be lawful for any person * * * to sell, furnish, or give any spirituous * * * liquor * * * to any minor. * * * The fact of selling, giving, or

furnishing any liquid in any place where intoxicating liquors are sold, or kept for sale, to any minor, * * * shall be *prima facie* evidence of an intent, on the part of the person so selling, giving, or furnishing such liquid, to violate the law."

The inhibition against the sale of liquors to minors has found a place in all the legislation of this State regulating the traffic since 1875. Until 1881, false representations by the purchaser, in order to obtain liquor, was made a misdemeanor, and punishable as such. In the legislation of 1881 this feature of the law was omitted, and a clause then appeared, for the first time, making the fact of selling, etc., to minors *prima facie* evidence of intent to violate the law. This has since been retained, with slight modification, until it appeared in the law of 1887, above quoted. When the person selling has knowledge that the person purchasing is a minor, the presumption is conclusive that he intended to violate the act.

It is evident, however, that the Legislature had in view that there might exist facts and circumstances attending a sale of liquor to a person, who was in fact a minor, which would show that the seller had no intent of violating the law. A minor who is just approaching his majority may have the appearance of persons much older than 21 years, and if, on being inquired of, should assert that he was of full age, a dealer might sell him liquor in good faith, and without any intention of violating the law.

The plain inference from the language of this section of the statute is that there must be an intent to violate the law in order to convict; otherwise it would be idle to provide that selling to a minor in a certain place should be deemed *prima facie* evidence of an intent to violate the law. If a sale to a minor in a saloon or elsewhere, in ignorance of his being a minor, and under such

facts and circumstances as would warrant an honest, prudent, and cautious man to believe that he was an adult, constitutes an offense punishable under this statute, then the last clause of section 13 had better be stricken out as entirely needless. But the rules of construction require us to give effect to every clause of a statute where it can be done without destroying the sense or effect of the law; and, giving effect to this clause, the people made a *prima facie* case when they proved that the liquor was sold to Phillips in a place where liquors were kept for sale.

But the defendant had a right to rebut and overcome this *prima facie* case by showing that Phillips was in fact 21 years of age, or by satisfying the jury, if he could, that the size and appearance of the boy, coupled with his statement that he was over 21 years of age, led him in good faith to believe that Phillips was not a minor, and that the facts and circumstances were such as would warrant the jury in arriving at the conclusion that the defendant did not intend to violate the law. Phillips was a witness for the prosecution. He was then before the jury, and they had an opportunity of observing his appearance as to age and size. He testified that he was only 17 years of age the June previous. It was competent on the question of age, for the purpose of contradicting the witness, and thus affecting his credibility, to show that he stated at the time he purchased the liquor that he was over 21 years of age.

We think, also, that the defendant had a right to show all that transpired between him and Phillips at the time the liquor was sold as a part of the *res gestæ*, and as bearing upon the criminal intent. What he said concerning his age would not, in and of itself, justify defendant in selling liquor to a minor, and exculpate him from liability for an infraction of the law; but it was testi-

mony which the jury might consider in arriving at their verdict, and they could give it such weight as, under the facts and circumstances, they should consider it entitled to.

In *People v. Garrett,* 68 Mich. 487 (36 N. W. Rep. 234), the defendant knew the boy was a minor and gave him the liquor. This Court held that the intent was plain from this fact; that there could be no mistake about the boy's age. The boy was 14 years old, and it could not be considered that the defendant supposed the boy was 21.

The case of *People v. Roby,* 52 Mich. 577 (18 N. W. Rep. 365), is cited to support the doctrine that intent to violate the statute is not an ingredient of the offense, and that it is immaterial whether the accused intended to violate the law or not. That was a conviction for not keeping a saloon closed on Sunday, and I think was rightly decided. It belongs to that class of offenses created by this act where the fact of violation is conclusive of the intent to violate the law. When a statute does not make intent an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation. *State v. Hartfiel,* 24 Wis. 60, and cases cited in the opinion; *McCutcheon v. People,* 69 Ill. 601; *Farmer v. People,* 77 Id. 322; *Com. v. Boynton,* 2 Allen, 160; *Com. v. Emmons,* 98 Mass. 6; *Com. v. Finnegan,* 124 Id. 324. The cases cited in *People v. Roby,* with reference to sales of liquors to minors, were of this class, and were cited in support of the conviction in that case. The statutes under which those cases arose contained nothing to show that intent constituted an element of the offense.

The question which confronts us here is whether the

Legislature, in making it unlawful to sell liquors to minors, created an offense for which the person selling would be culpable, irrespective of his intent to violate the law. Had the last clause of section 13, above quoted, been wholly omitted, it would not be material to the offense. But the language of that clause plainly infers that the offense cannot be made out without there exists on the part of the accused an intent to violate the law.

The case of *Faulks v. People,* 39 Mich. 200, held that under the act of 1877 an instruction of the court, that it was no defense to a charge of selling intoxicating liquor to a minor that the seller had reason to believe and did believe him to be of age, was clearly wrong; and it was said that "there can be no crime where there is no criminal mind." This opinion was announced in 1878. Then followed the act of 1881 (No. 259), in which the following clause was inserted in the section forbidding the sale of liquor to minors, viz.:

"The fact of selling, giving, or furnishing any of said liquors to any minor, or to any intoxicated person, or to any person in the habit of getting intoxicated, shall be a *prima facie* presumption of an intent on the part of the person so selling, giving, or furnishing such liquor, to violate the law."

I think it is a fair presumption that this clause was inserted in the act of 1881, because of the above holding in *Faulks v. People;* the Legislature recognizing the law to be as so enunciated with respect to this offense that a criminal intent was necessary to constitute the crime, and hence they prescribed a rule as to what should be *prima facie* evidence of such intent.

This, being a criminal offense, and having received both a judicial and legislative construction, must be interpreted in accordance therewith, until the Legislature shall see fit to amend the law. We cannot, in justice, interpret the law one way as to Faulks, and the contrary way as to

Welch; especially after the Legislature have, by inference, said that the intent to violate the law may be disproved.

It follows that the holding of the court below that criminal intent was immaterial, and excluding testimony tending to rebut the *prima facie* case made by proof of selling in a saloon where liquors were kept for sale, was erroneous, and the conviction must be set aside, and a new trial granted.

The other Justices concurred.

WILLIAM H. PHELPS v. HENRY BEEBE.

Building contract—Non-completion—Measure of damages.

In a suit by a contractor upon a non-apportionable building contract not fully performed, the measure of damages is what the building is reasonably worth in the condition in which it is turned over to the defendant, not exceeding the contract price, less the reasonable cost of completing it in accordance with the contract. *Allen v. McKibbin*, 5 Mich. 449; *Wildey v. School-dist.*, 25 Id. 426.

Error to Alpena. (Emerick, J.) Argued June 28, 1888. Decided October 12, 1888.

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

Turnbull & Dafoe, for appellant, contended for rule of damages laid down in the opinion.

R. J. Kelley, for plaintiff.

LONG, J. This action of *assumpsit* was brought by plaintiff in the circuit court for the county of Alpena to

recover a balance claimed to be due on a written contract between himself and defendant for the furnishing of materials and the building of two brick stores on defendant's land in the city of Alpena. The contract was dated April 24, 1884, and provided, in substance, as follows:

1. The plaintiff was to furnish all materials (except Beebe was to pay difference between plate and ordinary glass, and to furnish grating over cellar windows), build and construct two brick stores in block 76, on defendant's land, facing Dock street, according to a certain plan known as the "Smith Plan," except as therein otherwise provided. Said two stores to be finished so as to present a front similar to the store occupied by Field & Gray. The basement wall to be 18 inches thick, provided with suitable bond-timbers for furring out. Cellar bottoms to be finished with concrete and cement; cellar to each store to be ceiled overhead, etc. A suitable stairway from second story to ground to be built at rear, with platform six feet wide extending entire width of the two stores. Front to be furnished with plate-glass, but defendant to pay the difference between plate and ordinary glass.

2. The second story to be built according to plan.

3. All excavations to be made by defendant.

4. All wood-work to be well painted, etc. Entire work to be done in a good and workman-like manner; completely finished in accordance with Smith plan. No alterations or modification to be made unless assented to by each in writing.

5. For faithful performance of contract defendant agreed to pay $4,620.

Plaintiff recovered verdict and judgment for the sum of $934.54. Defendant brings the case to this Court by writ of error.

It appeared upon the trial that the "Smith Plan," so called, to which the contract refers, had become lost, and could not be produced, and parol evidence was given of its contents.

The plaintiff's claim in the case was that he fully performed the contract, and is entitled to recover the full

price agreed upon of $4,620; and that, in addition, he is entitled to recover for extra work not provided for in the contract, but which he performed under the direction of the defendant. Plaintiff admits payment on the contract of $4,166.94, and also an item of $205, received from Bolton & McRae, which plaintiff claims was for Bolton & McRae's half of the party-wall. The extra work plaintiff claims amounted to something over $500.

The contention on the part of the defendant is that plaintiff has not performed all the work required by the contract; that much of the extra work claimed for was not outside of and beyond the contract and plan; and that the $205 item for building the party-wall of the Bolton & McRae store adjoining his was an item for which he, defendant, should have credit upon the contract price; and that, aside from this party-wall, the plaintiff was to furnish material for and build the two stores for the sum of $4,400. Defendant claims to have made payments to the amount of $4,647, including the $205 which plaintiff received from Bolton & McRae.

Considerable testimony was taken on the trial, several witnesses being examined upon the questions in controversy. Plaintiff and defendant were each called, and gave testimony. At the close of the testimony, the court, among other things, instructed the jury as follows:

"1. Was there a substantial compliance with, and completion of, the contract by the plaintiff?

"2. Were these various items for which he charges as extra work outside of and beyond the requirements made by the plan and by the contract?

"There is where the case hinges. In the first place, gentlemen, you must determine whether the plaintiff has complied substantially with the contract. If he has, then he would be entitled to recover the contract price, less what has been paid. In determining whether he has complied substantially with the contract in building these two stores, you have reference and you are remitted to

the evidence in the case upon that point, and to the points in which the defendant claims he has not.

"You will remember the points in which the defendant has attempted to show defects in the completion of this building in accordance with the contract and plans. A part of these are the basement floors, some defects in the painting, some shortcomings in the casings in the basement of the stores, and also around the front windows and the base-boards. You have heard read the requirements of the contract that the wood-work was to be well painted with two coats, and the floors in the basement were to be concrete and cement; and it is for you to say from the evidence in the case whether the work that the plaintiff did was in substantial compliance with the terms of the contract in these particulars. So it is for you to say whether the failure to put in the base-boards in the stores was in substantial compliance with the contract.

"If you find that the plaintiff has substantially completed the contract in this case in these particulars, the plaintiff would be entitled to recover the contract price provided in this contract, subject to a reduction of what has been paid by the defendant. On the other hand, if you find that the plaintiff has been so deficient in the execution of these requirements of the contract that he has failed to comply substantially with his contract, then he would not be entitled to recover the contract price, but he would be entitled to recover what the building, as he turned it over to Mr. Beebe with these shortcomings which you find to exist, would be reasonably worth; that is, what the building, so far as the work done upon it was provided for by the contract, would be reasonably worth.

"I do not know as I make myself entirely clear upon that point. I will repeat it again: That, if you find that the defects which have been pointed out in the evidence in this case show a substantial failure upon the part of the plaintiff to comply with the requirements of the contract and the plan, still, the plaintiff would be entitled to recover, for work done under the contract, what that work in the condition in which he left it would be reasonably worth. Of course, if he had done extras outside of and beyond the contract, he would be entitled to recover what it is reasonably worth. But if you find that the plaintiff failed to comply with the requirements of the contract, and you proceed to determine by your verdict

what the work required by the contract in the condition in which he turned it over was reasonably worth, you could not give him any more than the contract provides for doing the work in any event."

Error is assigned upon this rule of damages as laid down by the court. We think the rule correctly stated, so far as it went; but that the court omitted an important element in the measure of recovery. The contract was not apportionable. It was an entirety. The completion of the contract by the defendant might cost a considerable sum of money; and, while the plaintiff should be permitted to recover in the action what the building was reasonably worth in the condition in which he turned it over, yet such recovery must be limited to the contract price, less what it would reasonably cost to complete them in accordance with the contract.

In *Allen v. McKibbin*, 5 Mich. 455, Mr. Justice CAMPBELL says:

"The defaulting plaintiff can in no case recover more than the contract price, and cannot recover that if his work is not reasonably worth it, or if by paying it the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it; and the price thus determined is the true amount recoverable on a *quantum meruit*."

This rule was followed and approved in *Wildey v. School-dist.*, 25 Mich. 426.

Error is also assigned upon the ruling of the court in reference to the item of $205 paid plaintiff by Bolton & McRae. The court charged the jury as follows:

"Considerable evidence has been taken in the case in reference to a $205 item; and in this bill that the defendant has rendered here, he has charged Mr. Phelps with the $205, which he gave by an order which he drew on Bolton & McRae. The plaintiff is not claiming for that

item in this case, and the defendant, Mr. Beebe, is not entitled to it. I let it go upon the record squarely and fairly that the parties may have the advantage of an absolutely correct decision hereafter, either here or somewhere else. It is a matter you have nothing to do with, except as this bill of Mr. Beebe comes to you; and that amount will have to be deducted from what he claims as payment."

It appears that on May 8, 1884, about 15 days after the contract for the erection of defendant's building was entered into between the parties to this suit, Bolton & McRae proposed to erect a building adjoining these stores, and entered into a written contract with plaintiff and defendant of that date, agreeing that if plaintiff and defendant would build the whole of the party-wall between the buildings to be erected, and furnish materials therefor, they (Bolton & McRae) would pay the parties for the one-half thereof the sum of $205. This contract was signed by Bolton & McRae of the one part, and by William H. Phelps and Henry Beebe of the other part.

It is claimed by the plaintiff, and no contention is made upon it, that he furnished the materials and did the work for this and half of the party-wall, and that it had no reference to his contract with the defendant; that it was a separate and independent contract, for which he had been paid by Bolton & McRae; and that the defendant had no right to deduct that amount as a payment under this contract on his (defendant's) building.

It is contended on the part of the defendant that the building of this party-wall was to be taken into account on his contract; that he had a private agreement with the plaintiff that his buildings should be erected and completed for $4,400. On his cross-examination, however, the defendant testified:

"*Q.* What I want to know is, who paid Phelps for building that party-wall?

"*A.* Bolton & McRae; and that should be deducted from my payments.

"*Q.* Now you get right down to it right. It should either be deducted from that amount, or it should be credited to Mr. Phelps?

"*A.* If Mr. Phelps charges me with $205 for building that wall, why should I not have it charged?

"*Q.* That is what I am getting at. It is a stand-off; but you haven't made it so here. When you charge it to him he should charge it to you, and that would be just a stand-off?

"*A.* Yes, sir."

We find no error in the charge of the court upon the item of $205. From the defendant's own testimony it appears that this one-half of the party-wall was built by plaintiff, and he was only charging that item in his account because the plaintiff had charged it to him in his account. It appears that the plaintiff made no charge to the defendant for it, but had looked to Bolton & McRae for it, and they had paid it; and we think the court very properly directed the jury to deduct that item from defendant's claim of payments.

We find no other error in the case. The case went to the jury under a very fair and impartial charge of the court, except as we have noted on the question of damages.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

ARNSTINE BROTHERS & MIER v. JOHN E. TREAT.

Fraudulent purchase—Replevin—Evidence—Practice—Notice to produce papers—Secondary evidence.

1. It is not commendable practice to allow a witness to be interrupted without some substantial reason; and such a practice, which can have no effect except to break up the course of testimony, has a direct tendency to confuse witnesses, and cannot help a jury in its duties.
2. In a suit involving an alleged fraudulent purchase of goods, where the order was sent to the vendors by mail, one of the vendors, who went to the vendee's place of residence to investigate his pecuniary condition, may testify to the forwarding of the order to him by his firm, as explaining why he went to see the vendee.
3. An essential element of *actionable* fraud is the *fact* that it is relied and acted on, and it is competent for the party claiming to have been defrauded to testify to *such* fact.
4. In a case involving an alleged fraudulent purchase of goods by means of false representations made by the vendee as to his financial condition, his whole conduct at the time in any way concerning his business and property is material, and, instead of drawing close lines to exclude facts, a very full inquiry into all of the circumstances should be allowed.
5. Single facts are seldom enough in themselves to show fraud, while the surroundings, although each may be, standing alone, not intrinsically serious, will, when looked at together, be very important, if not decisive, as they usually are.
6. In a replevin suit, a witness having personal knowledge of the value of the property may be asked to state it, and it is certainly very unnecessary strictness to prevent his stating the amount of the appraisement.
7. In a suit involving the alleged fraudulent purchase of goods by means of false representations as to the vendee's financial standing, it is not irrelevant to show that the defendant was already indebted to the plaintiffs; and the entire amount of defendant's indebtedness is pertinent, both as bearing on the truth of his representations, and also on the question of insolvency.
8. A notice to produce all letters and papers from a certain date to the time of the trial, covering a period of five years, none of

which are indicated by date or subject, or reference to any particular transactions, is too vague to be used as a basis for evidence of their contents.

Error to St. Joseph. (Loveridge, J.) Argued October 2 and 3, 1888. Decided October 12, 1888.

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

S. M. Constantine (*W. G. Howard*, of counsel), for appellants.

H. O. Bliss and *Dallas Boudeman*, for defendant.

CAMPBELL, J. Plaintiffs, who are jewelers in Cleveland, Ohio, sold a bill of goods to defendant at Three Rivers, on June 10, 1887, and upon his failure, about a week thereafter, replevied such of the goods as they could find, claiming a right to rescind. This suit is the action of replevin brought for the property. Upon the trial the defendant obtained judgment, and plaintiffs bring error.

The controversy, of course, turned on the question whether the sale was or was not made under such circumstances as to be legally voidable by the plaintiffs. The principal inquiry turned on defendant's financial condition, and alleged unfairness in a purchase made with actual misrepresentation, direct and indirect, as to his position.

It will not be important, as the record stands, to attempt a full recital of circumstances, especially as there is some disagreement concerning facts. There seems to be no difficulty in discovering that defendant was in bad condition. But the errors relied on chiefly relate to what plaintiffs claim to have been obstacles thrown in the way of getting out the facts, by adverse rulings.

The case made by plaintiffs, so far as their testimony

goes, was to the effect that in the beginning of June, 1887, defendant applied to them for a bill of goods, which they did not care to furnish without investigation; that one of plaintiffs' firm went to Three Rivers, and saw defendant, who gave a statement of his property and debts, agreeing with a written statement which he had given during the previous December, which he re-affirmed. This made his assets, in addition to a $5,000 life policy, amount to $9,000, and his debts to only $1,200. Upon this statement the sale was made upon June 10. Upon the 20th of the same month, the same plaintiff, having heard of his failure, went again to Three Rivers, and demanded the goods, but was refused. Having sued out the writ in this cause, he again went, and, after some difficulty, got into the store, where, after some parleying, and attempts to induce the plaintiff and sheriff to go out of sight, defendant agreed if they would turn their backs to produce so much of the property as was left. He then, when their backs were turned, picked out a package from a heap of rubbish where it was hidden, and produced a part of the property. Plaintiff Arnstine had seen in a mirror what defendant was doing, and proceeded himself to make further search, and found about $1,000 worth more of jewelry, including a considerable part of the goods in question, concealed in the same place.

Before proceeding to the more important questions presented by the record, we cannot overlook the fact that the plaintiff Arnstine, who was the first witness in the case, was stopped repeatedly by frivolous objections to a perfectly proper course of narrative, which introduced very little which could by any fair construction be regarded as improper or capable of mischief. It is not commendable practice to allow a witness to be interrupted without some substantial reason; and such a practice, which can have

no effect except to break up the course of testimony, has a direct tendency to confuse witnesses, and cannot help a jury in its duties. Some of these objections which were allowed went far enough to require us, if there were no other grounds for doing so, to set aside the verdict.

The order from defendant to plaintiffs, under which the goods were sold, was dated at Three Rivers, June 1, 1887, and directed to Cleveland. Henry W. Arnstine, one of the firm, was then in Bay City. For what reason we cannot imagine, his statement that this letter was sent to him at Bay City, and that he thereupon came to Three Rivers for the purpose of seeing defendant, was stricken out as irrelevant. It was a proper explanation why he went there, and it was certainly material and proper.

The witness then related the conversation he had with defendant about his pecuniary condition, and was proceeding to state that he acted in reliance upon it, when he was stopped, and that was shut out. As the case was one of fraud, and an essential element of actionable fraud is the fact that it is relied on and acted on, it was very material to know whether such reliance was given, and it was error to rule otherwise.

It was also error to refuse to let the witness testify that information of defendant's failure a few days after led him to go again to Three Rivers to see defendant. And it may also be remarked that what was relevant or irrelevant to the issue was usually as much so when offered on one side as on the other. There are some instances where this seems to have been overlooked.

Mr. Constantine, who called on defendant to see him about some claims he had in charge, was not allowed to state that he actually held the claims, or that he found defendant making an inventory, although he was allowed to say he told defendant he held the claims, and that defendant said he proposed to make an inventory, and

see if he could not procure a compromise. The fact that he actually held claims was important, as making his errand a proper one, and the fact that an inventory was in progress was more significant than a statement of a purpose to make one. And it was certainly pertinent, on the question of fraudulent intent and conduct, to explain all the circumstances apparent in defendant's conduct. His whole conduct at that period in any way concerning his business and property was material, and, instead of drawing close lines to exclude facts, a very full inquiry into all the circumstances should have been allowed. Single facts are seldom enough in themselves to show fraud, while the surroundings, although each may be, standing alone, not intrinsically serious, will, when looked at together, be very important, if not decisive, as they usually are.

It was proper to ask the witness Arnstine the value of the property which he found in the store. He had personal knowledge of it, and it does not appear to us that the question related to the appraisement. Had it done so, it is certainly very unnecessary strictness to prevent a person from answering what is in the files of the case, and may be produced on the spot, if it becomes important.

We do not think it was irrelevant to show that defendant was already indebted to plaintiffs. If it had been, there was no more reason why defendant should have been allowed to go into previous dealings than the plaintiffs. An existing or recent transaction of a similar character may have some tendency to explain a course of dealing. But transactions entirely distinct in their nature, as well as remote in time, while there may be some connecting link between them, are not universally relevant. In this connection, objection was made by plaintiffs to the introduction of secondary evidence by a copy of a letter claimed

to have been written by defendant to plaintiffs, two days after the date of his December statement of liabilities and assets.

A notice appears to have been given to produce all letters and papers from January, 1883, to the date of trial, covering a period of five years. No papers were indicated either by date or subject, or reference to any particular transaction. This notice was altogether too vague. A party who is prepared with secondary evidence knows what he wishes to prove. To compel a business man to rummage his files for several years without any indication of what is wanted is unreasonable. The notice should always be such as to reasonably enable the party notified to understand what is wanted. Without such knowledge, he cannot prepare to meet or explain the facts sought to be shown by the documents. There is no authority for making a drag-net out of such a notice. In this particular case the only supposable relevancy of this letter was a withdrawal of the statement made on December 6, 1886, and an attempt to rescind the sale made on the faith of it. The letter does not attempt to correct or explain it, and that would be the only legitimate purpose for which it could be admissible. But the bulk of the letter consists of assertions of defendant's business credit and standing, which could not be allowed to make testimony in his own favor. The letter had no apparent relevancy to anything which had appeared in the case, either by explanation or contradiction. Had it corrected or explained the statement of December 6, it would have been relevant.

Defendant's amount of indebtedness was pertinent, both as bearing on the truth of his representations, and also on the question of insolvency. Direct fraud and insolvency, which would bear on fraud as a strong circumstance, were equally relevant, and the several rulings which limited or shut out this inquiry were erroneous, and the

more so that the charge refers to insolvency, the proof of which was shut out. Upon such an issue as appeared in this case, these matters were all legitimate subjects of cross-examination, as well as of direct proof.

The charge was probably meant to comply with the requests to charge, but was made inoperative by the great amount of rulings excluding pertinent evidence.

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

The other Justices concurred.

WILLIAM P. YERKES v. THE ESTATE OF HIRAM M. PERRIN, DECEASED.

Uses and trusts.

The statutes of uses and trusts are not complied with except by a contract or declaration of trust, signed by the holder of the legal title, and needing nothing outside of the papers to show the entire arrangement.

Error to Wayne. (Reilly, J.) Argued October 4, 1888. Decided October 12, 1888.

Claimant filed a claim for money had and received by the deceased in his life-time upon the sale of lands in which claimant had one-third interest, the title to which the decedent held in trust for him. The claim was disallowed by the commissioners on claims, whose decision was affirmed in the circuit court, and claimant brings error. Affirmed. The facts are stated in the opinion.

Wilkinson & Post, for appellant.

Corliss, Andrus & Leete, for estate.

CAMPBELL, J. This case, as presented in this Court, comes up to review the action of the circuit court for the county of Wayne, had on an appeal from commissioners on claims against the estate of Hiram M. Perrin, deceased. The circuit court directed a verdict for the estate.

Judge Yerkes, the claimant, presented two items of claim before the commissioners. One was for the value of one-third of the southerly two and one-fifth acres of lot 48, Porter farm, Detroit, included in H. M. Perrin's subdivision of outlot 48, and part of outlot 49, George B. Porter farm. The other was for one-third of the proceeds of sale of certain lots included in said plat; being lots 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, and the lot lying south of said lot 26. The claims demanded, respectively, $3,000 and $2,000, and interest; without specifying date or other elements of the causes of action. The second item is the only one urged. This claim was demurred to as not maintainable without showing and trying title.

The circuit court allowed the claim to be tried. The statement in the claim filed throws no light whatever on the origin or nature of the claim. As far as it means anything, it means that Perrin had received $2,000 as the proceeds of the sale of one-third interest in the lots mentioned, belonging to Yerkes; but whether sold or received as attorney, agent, or otherwise, the claim does not indicate.

We do not think any case was made which could go to the jury. Upon the argument, the ground of the claim seems to have been, in substance, that, several years before 1861, Yerkes had an arrangement with one Frazer for an interest in this property; that by some mutual arrangement it was bid off by Perrin, in February, 1861,

on a sale in foreclosure proceedings, to which all these were parties; and that subsequently Yerkes paid Perrin his share of the money needed. This whole transaction is so shadowy as to convey from the papers in the cause no definite knowledge. But it is enough to say that Perrin's purchase is now relied on as a source of title, and that it was on its face so made as to vest in Perrin an absolute title. The plat, which is also relied on, was made by Perrin alone, with his wife, immediately after the purchase. This being so, it came very clearly within the statute declaring no resulting trust to arise from the purchase in one person's name at the expense of another; and such a title could only be made subject to rights in other persons, either by some executory contract, or some valid declaration of trust, either of which must have been entirely in writing, and signed by Perrin.[1]

There is no letter or other paper showing, or tending to show, the terms of any agreement whereby Perrin was to buy this property for the benefit of Yerkes, or on what terms. The only papers in the case which identify the property as in any way concerning Yerkes are certain letters, only one of which contains anything like a definite description, and neither of which can, on the

[1] Counsel for appellant contended that no particular formality is required or necessary in the creation of a trust; that it may be by an express declaration, or by any informal memorandum; citing *Bellamy v. Burrow*, Cas. Talb. 97; *Fisher v. Fields*, 10 Johns. 495; *Corse v. Leggett*, 25 Barb. 389; *Urann v. Coales*, 109 Mass. 581; or by letters; citing *Foster v. Hale*, 3 Ves. Jr. 696; *Montague v. Hayes*, 10 Gray, 609; *Kingsbury v. Burnside*, 58 Ill. 310; *Loring v. Palmer*, 118 U. S. 321; or by a pamphlet; citing *Barrell v. Joy*, 16 Mass. 221; or a receipt; citing *Faxon v. Falvey*, 110 Mass. 392; or a deposition or affidavit; citing *Pinney v. Fellows*, 15 Vt. 525; or a recital in a bond; citing *Gomez v. Bank*, 4 Sandf. 102; or in a deed; citing *Wright v. Douglass*, 7 N. Y. 564; or an answer in chancery; citing *Patton v. Chamberlain*, 44 Mich. 5, and cases cited; in short, by any writing in which the fiduciary relation between the parties can be clearly read; citing Perry, Tr. § 82, and cases cited. Nor is it necessary that such letters, *memoranda*, or recital should be addressed to the beneficiary, or should have been intended when made to be evidence of the trust; citing Perry, Tr. § 82; Browne, Stat. Frauds, §§ 88, 109.

most liberal construction, be construed as a declaration of trust.

On April 25, 1861, Perrin wrote to Yerkes as follows:

"Jas. Frazer has not paid to me anything more than was paid by Mr. Hawley on the Porter-street property since the sale, February 5. Will it be possible for you to pay for me at Mich. Ins. Bank the amount of money that will be required on your interest in said tract by the fifth of next month? I have a note falling due then that must be paid somehow, and I cannot collect money here at present. Please answer this, directing to me at Ypsilanti, upon receipt."

The answer of Yerkes does not appear, except as it is referred to in a letter from Perrin to him of May 2, as follows:

"Yours of April 29, directed to me at Ypsilanti, reached me at that place, saying that the money would be ready for me when called for. You have not yet informed me to whom you would have the deed made. Another thing I have thought to be best, which is to have a *divided* interest, instead of an 'undivided,' so that each can look after and dispose of and otherwise control his own. I have thought perhaps it would be as well for me, upon closing up all that I may do about passing titles to the parties that I purchased at chancery sale, to have all that I finally own in one patch. Perhaps if you and Frazer are interested in fixing, you and he may make some arrangement where each would be located on the tract, so as to leave my interest in one lot or parcel. This, however, may or may not affect the payment of the money by you, as we can fix that satisfactorily afterwards, if my neck is not broken to pay my notes at bank, Will you please do me the favor to deposit the money in Mich. Ins. Co. Bank to credit of my account, that I may check for it to pay my note? And please write me how you will have the deed pass, or to whom it shall be made. As I now understand it, you will be entitled to a deed, in clearing up this thing, to one-third of the southerly two acres, and one-fifth (2 1-5) of lot 48. I shall be willing, if it please you and Frazer, that you shall be located on the extreme southerly portion of the tract, although that

will perhaps be more valuable, as it will be a little nearer the city."

On May 6, 1861, Yerkes answered this letter, as follows:

"Your favor of May 2 was received by me this morning. I have waited all day to see Frazer, and make a last effort on him; but find out to-night that he has been absent in the country for near a week. I will deposit to-morrow (I can't get into bank to-night) $192, the amount of my share, to your credit, as you desire, and take your note for the amount, until I can find a purchaser. I will make this all right with you when I see you. You understand that I am not purchasing, and the reason therefor."

There are some more recent letters indicating that Yerkes had some interest in the property which may possibly have been this, but none showing what that interest was.

It has been uniformly held in this State that the statutes are not complied with except by a contract or declaration of trust signed by the party, and needing nothing outside of the papers to show the entire arrangement.[1]

It is manifest, from this correspondence, that Perrin's letter of May 2 refers to some arrangement, written or unwritten, whereby Yerkes and Frazer were, upon some terms not mentioned, to have a third interest in a part of Perrin's foreclosure purchase. It does not appear what the rights were as between Frazer and Yerkes, or how much money was to be paid by either or both of them "in clearing up this thing." The letter in reply from Yerkes, while it mentions $192 as his share, does not propose to make it a payment, but as a loan to Perrin, which was to be rectified by subsequent arrangement, which does not appear.

[1] Counsel for defendant cited *Bumpus v. Bumpus*, 53 Mich. 346; *Weare v. Linnell*, 29 Id. 227; *Linsley v. Sinclair*, 24 Id. 382; *Hooker v. Axford*, 33 Id. 457; *Groesbeck v. Seely*, 13 Id. 329; *Newton v. Sly*, 15 Id. 396.

While it may be inferred, by guessing from circumstances and parol evidence, that Yerkes became in some way entitled to some interest, there is no writing, by way of contract, declaration, or otherwise, executed under Perrin's hand, and signed by him, whereby Yerkes is shown to have had a third or any other interest, or on what terms he was entitled to obtain it.

This being so, no case was made out, and the court below properly charged the jury.

The judgment must be affirmed.

The other Justices concurred

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THE DELTA LUMBER COMPANY v. THE BOARD OF AUDITORS AND THE BOARD OF SUPERVISORS OF WAYNE COUNTY.

Highways — Townships — Control and maintenance of bridge upon State road—Liability for failure to repair.

1. By the settled policy of this State, the care and supervision of all public highways and bridges is in the hands of the highway commissioners of the several townships, respectively, in which they are situated.
2. It was held in *Sharp v. Evergreen*, 67 Mich. 443, that it was the duty of townships to keep the highways known as "State Roads" in repair, they being placed under their care and control by the Legislature in 1836, under which act, and subsequent legislation, the townships were liable, under the statutes, for not keeping such roads in repair, and in a condition reasonably safe and fit for public travel, the same as for a like neglect as to roads laid out by the highway commissioners.
3. The fact that the law forbids the altering or discontinuance of any State or Territorial road by highway commissioners, and vests such power in the board of supervisors, does not interfere.

with or diminish the duty of the townships to keep such roads and the bridges upon them in good repair while such roads are used as public highways, and have not been altered or discontinued.[1]

4. Without concluding the townships of Springwells and Ecorse by this decision, they not being parties, the Court find that the record fails to show any liability on the part of Wayne county to maintain and operate the bridge in question in this proceeding, and deny the writ asked for by relator.

Mandamus. Submitted April 4, 1888. Denied October 19, 1888.

Relator applies for *mandamus* to compel respondents to maintain and operate a bridge. The facts are stated in the opinion.

Moore & Moore, for relator.

George F. Robison, for respondents.

Henry M. Duffield, for townships of Ecorse and Springwells.

MORSE, J. Application for *mandamus.* The relator is a corporation existing under our laws, and has its principal office in Detroit. It is the owner of a tract of land in the township of Springwells, in Wayne county, fronting on what is known as the "Monroe Road." Here it has a planing-mill and lumber-yard and dock, and is engaged in the manufacture and sale of lumber.

A public highway runs from the city of Detroit to the city of Monroe, known as the "Monroe Road," and between the townships of Ecorse and Springwells it passes over the river Rouge. This highway was originally a Territorial road, and was built, constructed, and used before the year 1816, and has been from that time until the present, and is still, used as a public road. The

[1] See *Pearsall v. Supervisors,* 71 Mich. 438, as to power of supervisors to discontinue State roads.

river Rouge is a navigable stream, and the bridge upon the Monroe road is a draw-bridge. At the present time there is no public authority operating this bridge, and private parties for some time have been operating it by voluntary subscriptions. The relator claims that it is the duty of the county of Wayne to maintain and operate this bridge, and asks for a *mandamus* to compel such maintenance and operation. The facts in relation to the building, maintenance, and operation of this bridge in the past are as follows:

About the year 1816, Solomon Sibley, Henry J. Hunt, and Benjamin Woodworth were granted a franchise for a toll-bridge over the Rouge on this road. This franchise ran 25 years from December 16, 1816. The bridge was required to be built so as to permit the passage of boats without masts, and to contain a draw, through which all vessels with masts, which could not be unshipped, ascending or descending the river, might pass. It was made the duty of the grantees of this franchise to keep the draw, and open it, when necessary, for the passage of such vessels. At the expiration of the 25 years the bridge was to revert to the Territory. The franchise was never renewed. How long this bridge was maintained is not shown, but it was destroyed by a freshet before 1833. In that year the legislative council of the Territory passed an act authorizing the board of supervisors of Wayne county to rebuild this bridge, or erect a new one, and the act appropriated $300 to aid the county. The bridge was rebuilt about this time, and it would appear that the board of supervisors maintained the same up to the year 1837, and perhaps later.

In 1848 the Legislature of this State passed an act authorizing the board of auditors of Wayne county to repair or rebuild this bridge. See Act No. 293, Laws of 1848, pp. 432, 433. In accordance with this act, the

board of auditors, July 7, 1848, entered into a contract with Giles B. Slocum for the erection of a draw-bridge at this point. The bridge was built by Slocum, and accepted April 3, 1849, on which day Slocum was paid for the same by the board of auditors. It is not shown who maintained and operated this bridge from 1849 until 1867. In 1867 the bridge was again rebuilt jointly by the townships of Springwells and Ecorse, in Wayne county, since which time it has been operated and maintained alone by the said townships until about 1886, when the township of Springwells abandoned its care of the same.

The authorities of Springwells, upon October 16, 1886, notified the board of supervisors of such abandonment; and on the receipt of such notice the matter was referred by such board to its committee on roads and bridges. No further action was taken that year. October 24, 1887, the supervisors received another communication from the supervisor of Springwells, calling their attention again to this bridge, and requesting them to take action in the premises. The board of supervisors thereupon referred the matter to the same committee, who, upon the advice of the prosecuting attorney, reported that they were unable to determine who was liable for the maintenance of the bridge, but that it was a matter of no interest to the county of Wayne. This report was adopted by the board.

We have now given all the facts laid before us in the record. The respondents deny any liability upon the part of the county to maintain or operate this bridge.

We have been furnished with no brief or argument on the part of the respondents. Henry M. Duffield files a brief on behalf of the townships of Ecorse and Springwells.

We think the writ must be denied. It seems now to be the settled policy of this State that the care and super-

vision of all public highways and bridges in this State shall be in the hands of the highway commissioners of the several townships, respectively, in which such highways and bridges are situated. It was held by this Court in *Sharp v. Evergreen*, 67 Mich. 443 (35 N. W. Rep. 67), that it is the duty of the townships to keep the highways known as "State Roads" in repair; that such State roads, by the act of the Legislature in 1836, were placed under the care and control of the townships; and by such act and subsequent legislation the townships were liable, under the statutes, for not keeping them in repair, and in a condition reasonably safe and fit for travel, the same as they would be for injuries occurring by their neglect upon roads laid out and established by highway commissioners. Laws of 1836, p. 103; How. Stat. § 1321. See, also, Id. §§ 1442, 1445; *Sharp v. Evergreen, supra.*

The statute also provides that it shall be the duty of the townships to keep in good repair, etc., all public bridges within their jurisdiction, as well as the highways; and another statute makes them liable for neglect of this duty. How. Stat. §§ 1442, 1445, The Territorial roads became State roads when Michigan was admitted as a State, and come within the ruling of *Sharp v. Evergreen.* The fact that the law forbids the altering or discontinuance of any State or Territorial road by highway commissioners, and vests such power in the supervisors, does not interfere with or diminish the duty of the townships to keep such roads and the bridges upon them in good repair while such roads are used as public highways, and have not been altered or discontinued. The present bridge upon this Monroe road, and crossing the river Rouge, which at this point is the dividing line between the townships of Ecorse and Springwells, it seems, both from the petition and answer of respondents, was built jointly by these townships in 1867, and maintained and operated by them

until 1886, when they undertook to abandon the care and control of the bridge, and to turn the same over to the county. The county refused to accept it. Whether or not this bridge was built, maintained, and operated by these townships recognizing that it was their duty to do so, I am clearly of the opinion that until this highway is legally vacated or discontinued this bridge ought to be and must be maintained by these townships.

It is claimed by relator that the county is liable for the maintenance of this bridge, because it built the same in 1833, and again in 1848 or 1849, under authority from the Legislature, as before stated; that by these acts the Legislature intended to place the burden of building and maintaining the draw-bridge upon the county, and that the county accepted such burden by taking the appropriation and building the bridge in both instances We do not think that the Legislature intended to take the bridge out of the operation of the general laws of this State by the act of 1848. This act simply authorized the board of auditors to repair and rebuild two draw-bridges, of which this was one, and appropriated 1,600 acres of internal improvement lands for that purpose. It placed no command or burden upon the county as to its maintenance, nor is there anything to be found in the act incompatible with the idea that the care and control of the bridge, and the duty of maintaining, repairing, and operating the same, should devolve upon the townships within whose limits it might be situated.

There is nowhere in the record any proof that from the time the bridge was built by Slocum, in 1849, up to the present time, the county of Wayne has had any care or control of this bridge, or expended a dollar upon it. Nor is there any proof that the county has paid anything towards the maintenance or operation of the bridge since

1837, save the $700 it paid to Slocum, over and above the State land appropriation, for building this bridge and another in the township of Greenfield upon a contract let under the act of 1848. The probabilities seem to be that the townships have kept up this bridge, at least from 1849 to 1886.

We do not intend to conclude the townships of Springwells and Ecorse by our action in a case where they are not parties, but from the showing before us upon the facts, and under the law as we view it, the maintenance and operation of this bridge belong to them. At any rate, we find no liability fixed upon the county as the record appears. The writ must be denied, with costs.

The other Justices concurred.

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ALVIN MALTBY ET AL. v. CHARLES H. PLUMMER.

Contract—Logs and logging—Pleading—Notice of recoupment—Damages—Charge to jury.

1. Where a contract provides for the delivery, upon the cars, of all of the merchantable white pine on certain descriptions of land that the owner should deem fit for a specified market, and for the delivery of the remainder of the timber at the owner's mill, it is his duty to designate in some proper manner the *first* class of logs, and if he gives a *general* description, and leaves the *particular* designation to the *judgment* of the contractors or their foreman, or the scaler agreed upon by the parties, *which* is fairly and honestly exercised, he is bound thereby.

2. A notice of recoupment which alleges that, by reason of the plaintiffs' failure to deliver logs in sufficient quantities to keep the defendant's mill constantly supplied for sawing purposes,

defendant was compelled to shut down said mill a large number of times, and keep a large number of men idle, whereby he was prevented from putting his lumber on the market, and from filling his orders and performing his contracts, and lost great gains and profits, states defendant's claim for damages in no other than the most speculative way, and fails to present a fact to be tried as to damages.

3. In such a case it is not error for the court to exclude from the consideration of the jury the alleged loss of profits, and to instruct them that if defendant had men permanently employed, and was obliged to and did pay them while thus compelled to remain idle, the amount paid would be a legitimate item of damage; but that the employés who worked by the day, and who were not paid for such lost time, he could not charge for. *Allis v. McLean*, 48 Mich. 428.
4. The provision in the contract in this case for "keeping logs of particular lengths by themselves," as delivered on the skids at the mill, is construed to mean that the logs to be used for bill stuff should be kept separate from the other shorter logs.
5. In a case involving an alleged double payment to a witness for work, which he denied, an expression by the court in his charge to the jury of doubt as to the honesty of the witness in receiving such double pay is held prejudicial error.
6. Where the testimony as to a given fact is direct and positive on both sides, and plainly irreconcilable, it is the province of the jury to determine which party is right, and it is error for the court to instruct them that there is an entire misapprehension between the parties upon the disputed question.

Error to Bay. (Green, J.) Argued April 26, 1888. Decided October 19, 1888.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion and foot-notes.

Tarsney & Weadock (*T. A. E. & J. C. Weadock*, of counsel), for appellant, contended as stated in the opinion.

J. L. Stoddard (*Benton Hanchett*, of counsel), for plaintiffs, contended:

1. The contract being silent as to the manner in which the timber was to be cut, it will be presumed that the parties contemplated

that it would be cut in the usual and customary manner; hence it was competent to show what was the usual and customary way of doing that work; citing *Walls v. Bailey*, 49 N. Y. 464; *Phelps v. Whitaker*, 37 Mich. 72; *McLennan v. McDermid*, 50 Id. 379; *Machine Co. v. Gaertner*, 55 Id. 453; *Morningstar v. Cunningham*, 110 Ind. 328; *Meriam v. Field*, 29 Wis. 592; *Fornette v. Carmichael*, 41 Id. 200; *Nilson v. Morse*, 52 Id. 240.

2. Evidence of the usual and customary manner of delivering logs at defendant's mill, as to keeping and delivering them in separate lengths, was admissible to aid the court in construing the contract, and interpreting the meaning of the words "particular lengths," as used therein; citing *Tuxbury v. French*, 41 Mich. 7; *Morningstar v. Cunningham*, 110 Ind. 328; Wood, Prac. Ev. § 25, and notes.

3. On the question of the measure of damages, and in support of the charge of the court on that subject, counsel cited *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, Id. 106; *Wetmore v. Pattison*, 45 Id. 439; *Petrie v. Lane*, 67 Id. 454; *Pennypacker v. Jones*, 106 Penn. St. 237.

4. If the words "particular lengths" are to be considered as ambiguous, the meaning of the parties was properly shown by proof of their conversation on the subject at the time the contract was made, which evidence did not contradict or vary the terms of the written contract; citing Wood, Prac. Ev. § 25; *Swett v. Shumway*, 102 Mass. 365; *Sampson v. Gazzam*, 6 Porter, 123; *Ganson v. Madigan*, 15 Wis. 144, 154; *Lyman v. Babcock*, 40 Id. 503, 511; *Sargent v. Adams*, 3 Gray, 72.

LONG, J. The plaintiffs began two suits in the circuit court for the county of Bay against the defendant on November 16, 1886,—one by declaration containing the common counts only, and to which declaration was appended a copy of a promissory note given by defendants to plaintiffs on September 2, 1886, for $2,164.11, payable 30 days after date, and the other by summons, in which a declaration containing two special counts and also the common counts was afterwards filed. These two suits were tried as one case.

In these special counts a copy of a contract, dated July 17, 1885, made between Smith & Guilford, plaintiffs' assignors, and the defendant is set forth. This contract provides substantially as follows:

"1. Said second parties [Smith & Guilford] hereby agree that they will skid, haul, and deliver upon the cars of the Michigan Central Railroad Company, at the Ogemaw village switch, at Ogemaw village, Ogemaw county, Mich., all the merchantable white pine logs that said first party shall deem proper for the Saginaw market, situate and being upon sections 21 and 28, town 22, N., range 1 E., Michigan, at and for the price of $2.50 per thousand feet, and also, that they will skid, haul, and deliver at the mill of said first party [Mr. Plummer], at Ogemaw village aforesaid, all the remainder of the white and Norway pine and hemlock standing and being upon said sections, at and for the price of $2.30 per thousand feet.

"2. That they will deliver said logs in sufficient quantities to keep the saw-mill of said first party constantly supplied with logs for sawing purposes at Ogemaw village, and place the same upon skids at said mill, keeping logs of particular lengths by themselves.

"3. That they will deliver of said logs required by said first party for the Saginaw market not less than three million, nor more than five million, feet between the date of this contract and the 1st day of December, A. D. 1885.

"4. That he will suspend operation from said 1st day of December next until the 1st day of April, 1886, or until said first party shall have time to cut and save such timber as may have been damaged by fire upon lands owned by him in the neighborhood of said above sections.

"5. That he will board the men of said first party engaged in cutting said timber free of cost.

"6. That they will do all such work in a good and workmanlike manner, and use all due diligence in delivering and forwarding the timber intended by said first party for the Saginaw market upon the recommencement of operations in the spring of 1886, and thereafter"

In consideration whereof first party agrees:

"1. That he will pay said second parties for skidding, hauling, and delivering logs intended for Saginaw market, $2.50 per thousand feet, etc.

"2. That he will allow said second parties the use of all the railroad cars and equipments now belonging to said railroad running to and from said lands to do such work.

"3. That he will cut a sufficient amount of timber from said lands per day to mutually assist said second parties in doing said work, and keep said mill supplied with logs, and that he will keep a sufficient space clear for the unloading of the same, and take care of such logs, after unloaded, so as not to delay said second parties in delivering the same."

The logs were to be scaled by a competent scaler to be agreed upon by the parties, each party to pay one-half of scaler's wages. This contract was signed by defendant, Plummer, and by Smith & Guilford.

The defendant pleaded the general issue, and gave notice of set-off, and also notice of several matters of defense.

The parties subsequently entered into a stipulation covering certain matters of account, and showing that the plaintiffs and their assignors had earned in skidding, hauling, and delivering logs,.....$52,570.02

Due plaintiffs for camp supplies and van bills,..... 339.14

For certain items of interest and protest fees,..... 86.13

Making a total for which plaintiffs were entitled to credit of.....$52,995.29

The amount for which it was stipulated the defendant is entitled to credit is.....$41,890.88

Thus leaving a balance, exclusive of interest, *prima facie* due the plaintiffs according to stipulation, of.....$11,104.41

In addition to this balance and interest thereon the plaintiffs claimed in their declaration and at the trial damages for the increased expense in skidding occasioned by the manner in which the cutting was done by the defendant, in skipping or moving about from place to place, instead of cutting the timber substantially clean as the work progressed, which it was claimed is the usual and customary manner in which timber is cut upon lands that are being lumbered.

The plaintiffs also claimed damages caused by the alleged failure of the defendant to "keep a sufficient space clear for the unloading" of the logs, and to take

care of them "after unloaded, so as not to delay said second parties in delivering the same." They also claimed damages for alleged failure of defendant at certain times to cut the timber fast enough to enable them properly to do the work, but no question arises upon this branch of the case. The declaration alleges the assignment of the contract declared upon from Smith & Guilford to the plaintiffs.

Defendant in his notice of recoupment alleged, and insisted upon the trial, that plaintiffs and their assignors did not perform the contract sued upon; that they failed and neglected to load 5,000,000 feet of logs for the Saginaw market before December 1, 1885; that, by reason of the default in the delivering of said logs for the Saginaw market, the expense of handling, taking care of, and receiving them was largely increased; that they failed and neglected to deliver on the cars of the Michigan Central Railroad Company at Ogemaw village all the white pine saw logs suitable for the Saginaw market, but on the contrary delivered logs that were coarse and unsuitable for the Saginaw market, thereby increasing the expense of handling the coarse logs, including the freight, to a large amount; that, by the admixture of the coarse logs with the white pine logs suitable for the Saginaw market, it depreciated the value of the logs suitable for the Saginaw market to a large amount.

That they failed and neglected to furnish a sufficient quantity of logs to keep defendant's mill running, and by reason thereof defendant was compelled to and did shut down his saw-mill at Ogemaw village a large number of times, and was compelled to keep a large crew of men idle, and was thereby unable to put upon the market his said lumber, and was unable to fill his orders or perform contracts entered into by him, and thereby lost great gains and profits; that they did not regard the terms of

said contract whereby they agreed to keep logs of particular lengths upon skids by themselves at defendant's saw-mill, but that they piled upon skids at the mill of defendant logs of all lengths, including hard wood, hemlock, and pine, both white and Norway.

That at the time of making said contract, and during its continuance, the defendant was engaged in the manufacture of special bills; that his mill is what is known as a special bill timber mill; that it was in the contemplation of the filling of such special orders that the contract declared on was entered into, and that plaintiffs and their assignors had full knowledge of these facts, and that by reason of their failure to so pile said logs he was compelled to saw his logs into lumber of miscellaneous lengths, and was unable to fill special orders and contracts, and was compelled to cancel numerous contracts and orders entered into by him; that the lumber manufactured from the logs, by reason of being so mixed and sawed into miscellaneous lengths, was rendered almost valueless; that he was deprived of great gains and profits he would have enjoyed had logs of particular lengths been piled at his said saw-mill in separate lengths from each other; that by reason of the admixture of the logs he was compelled to and did ship a large quantity of the lumber green, which brought a much smaller price by reason of having been placed on the market green, and the cost of transportation was greatly increased.

That they did not remove to defendant's mill at Ogemaw a large quantity of saw-logs cut clean by him as they went, but left a large amount, about 2,000,000 feet, on the skids in the woods and on the ground, which by reason of being so left subject and exposed to the weather became rotten, worm-eaten, and greatly damaged; that a large quantity, some 500,000 feet of said logs, by reason of being so left in the woods, was burned by forest fires.

Defendant further claimed that neither plaintiffs nor their assignors built a suitable and proper railroad track and spurs in suitable places, but attempted to construct a railroad track and spurs over which to convey said logs from said land in unsuitable, improper, and impracticable places; that a portion of said railroad track and spurs was abandoned and could not be used; that other tracks and spurs were built in their stead, and that while attempting to operate said imperfect and improperly constructed railroad, large quantities of said saw-logs accumulated along the line of said railroad track and spurs, and were there left and abandoned, and by reason thereof became valueless to defendant.

That the plaintiffs and their assignors failed to properly use and manage a certain steam locomotive belonging to defendant, and included in the terms of the contract declared upon; that said locomotive was injured and damaged; and that in all, by reason of the neglect and failure of the plaintiffs and their assignors, defendant was damaged to the amount of $50,000.

The jury returned a verdict in favor of the plaintiffs for the sum of $11,080.77, and defendant brings error.

The record contains substantially all the evidence in the case. The case was fully submitted by the court to the jury upon the respective claims of the parties for damages growing out of this contract under the special counts of the declaration.

It is now claimed by defendant's counsel that the stipulated amount, aside from these respective claims for damages, being $11,104.41, is so near to the amount of the verdict rendered by the jury of $11,080.77, that it is evidence that the jury did not allow damages to the plaintiffs under their declaration, nor did they allow any damages by way of recoupment to the defendant, in finding the amount of their verdict.

One hundred and fifteen errors are assigned.

The case was very fully tried, and a large number of witnesses examined, and a large amount of testimony taken. The charge of the court is very full and explicit upon the claims of the respective parties.

Some thirty of the assignments of error relate to the refusal of the court to permit certain questions put either upon the direct examination of defendant's own witnesses or upon the cross-examination of plaintiffs' witnesses to be answered, and some 49 of the assignments of error relate to the admission of evidence offered by plaintiffs under objection of defendant's counsel. The other assignments of error relate to the refusal of the court to charge as requested by defendant's counsel and to the charge as given.

At the close of the testimony the defendant requested the court to charge the jury as follows:

"By the terms of the contract between Smith & Guilford and the defendant, dated July 17, 1885, Smith & Guilford were bound to deliver upon the cars of the Michigan Central Railroad at Ogemaw village switch all the merchantable white pine on sections 21 and 28, town 22 north, range 1 east, that defendant should deem proper for the Saginaw market. If, from the evidence, you find that Smith & Guilford or plaintiffs delivered, among the white pine logs that defendant deemed proper for the Saginaw market, against the protest of the defendant, coarse and cull logs that defendant did not deem proper for the Saginaw market, the defendant is entitled to recover such damages as he sustained by reason of such default."

Error is assigned upon the refusal of the court to give this request in charge to the jury specifically. The court, in its special charge to the jury, fully covered this question, and, as we think, very fairly. Among other things, in relation to this part of the case, the court stated to the jury that—

"Under this contract both parties had a duty to perform. Mr. Plummer would have no right to come in here and say, 'I deem certain logs proper for the Saginaw market and certain other logs not proper for that market, but these plaintiffs delivered logs that I deem not suitable for that market,' and claim damages, unless he shows that he had indicated to them in some proper manner what logs he did not deem suitable for that market.

* * * * * * * * * * * *

"If these men, in violation of their contract and their good judgment, and the judgment which they ought to have applied to the distinction which he pointed out to them as their guide, if they disregarded it, and sent logs to Saginaw that they had reason to suppose Mr. Plummer did not deem proper for that market, then they are liable for the consequences and the damages that resulted to him from securing that kind of logs there. But if he left it to the judgment of these men, and these men exercised that judgment fairly and honestly, he must be bound by that judgment. But if they frequently disregarded his directions, and did put timber upon the cars and send it to Saginaw that they knew was not suitable for that market, and knew that he deemed unsuitable, then they ought to pay damages."

It is clear by the contract that defendant was required to designate the logs which were to go to Saginaw. He should do it in such manner as it would be profitable for plaintiffs to work by. If he left it to plaintiffs' judgment, or to the judgment of the scaler or foreman, and gave only a general description, so that it involved judgment, and that judgment was fairly exercised, he could not complain, and we think this part of the charge fully covered all that defendant had any right to ask.

Defendant further requested the court to charge:

"If you find from the evidence that plaintiffs' assignors did not keep defendant's mill at Ogemaw village constantly supplied with pine logs for sawing purposes, the defendant is entitled to all damages sustained by him by reason of such failure."

This the court also refused to give. The claim made

by the notice under his plea does not set forth any particular bills lost. His claim is that he might have obtained orders for special bills. He does not name a single bill which he thus failed to get. The claim is presented in no other than the most speculative way, and does not present a fact to be tried as to damages. The court instructed the jury upon this question, and we find no error in those instructions.[1] The case in principle falls directly within the ruling of this Court in *Allis v. McLean*, 48 Mich. 428 (12 N. W. Rep. 640).[2]

Defendant further requested the court to charge the jury:

"Keeping logs of particular lengths by themselves, in the contract of July 18, 1885, means that logs of different lengths should be placed on skid-ways at defendant's mill, each length separate from every other length; as an illustration, all logs twelve feet in length together, all logs fourteen feet in length together, and so on throughout the various lengths of logs under the contract. If they were not delivered so that logs of particular lengths were kept by themselves, the defendant is entitled to recover all damages sustained by reason of this breach of the contract."

The contention of the defendant is that the random logs, that is logs of different lengths, though cut for bill stuff, should have been separated by their lengths at the mill, and put on different skid-ways at the mill, and

[1] The court instructed the jury that if the plaintiffs failed to deliver the logs so as to supply defendant's mill with logs for sawing, according to the contract, they would be liable for any legitimate damage that he might claim in consequence of such non-delivery, but excluded "*loss of profits*" from the consideration of the jury; that if defendant had men permanently employed, and was obliged to and did pay them while thus compelled to remain idle, the amount so paid would be a legitimate item of damage; but that the employés who worked by the day, and who were not paid for such lost time, he could not charge for.

[2] Counsel for appellant cited, in support of defendant's claim to recover as damages loss of profits, *Atkinson v. Morse*, 63 Mich. 276; *Leonard v. Beaudry*, 68 Id. 312.

because that was not done the defendant has suffered damages which he is entitled to recover.

The contract cannot be so construed, and it is apparent from the conduct of the defendant and his employés that no such construction was thought of at and during the time the work was in progress. The logs cut varied in length from 12 to 36 feet, and it would have required 13 different skid-ways at the mill to place separately these different lengths of logs. It was the duty of defendant to provide these skid-ways, and as appears by the evidence only two were provided for long timbers, and defendant's foreman directed them placed on these skid-ways. The language of the contract itself does not bear any such construction. The language in the contract, "keeping logs of particular lengths by themselves," was employed to designate a class, and conveys the same idea as the words "special lengths." If the intent had been to keep each length of logs by itself, that language would have been used. It is an idea easy to express.

The actual business of lumbering, about which the contract was made, does, in fact, make use of two general classes, viz., the usual or customary lengths, which are from 12 to 22 feet, and cut so as to save timber, and lengths which are cut with reference to particular bills or orders. There can be no doubt that it was intended by the contract that the logs for bill stuff should be kept by themselves, and the other classes of logs by themselves. This was the interpretation given by the court to the contract, and we think it is the true construction.

Some contention was had upon the trial, and considerable evidence introduced by each party, under a claim made by the plaintiffs that the defendant, in cutting the timber, did not do so in the usual and ordinary way, but went from place to place, so that plaintiffs were put to large expense in hauling. There is no provision in the

contract as to the manner in which the plaintiffs should do the work, except that it should be done in a workmanlike manner, and keep the mill supplied. The defendant was to do the cutting in such manner as to mutually assist the plaintiffs "in doing the work and keeping the mill supplied." Under these terms it was no matter how fast logs were cut, or what kinds. The plaintiffs fulfilled by keeping the mill supplied with every kind of logs, and might elect for themselves which kind to load first, and from what points to work to the best advantage for themselves.

The defendant claimed the right to skip about, cut here and there, and compel hauling in the same way. The plaintiffs denied this, and claimed that it added to the expense in hauling. The contract was made in reference to the work of logging as actually and customarily done, unless it could be otherwise shown by competent evidence. The plaintiffs gave evidence tending to show the custom was to cut clean. The defendant gave evidence tending to show an understanding, before and when the contract was made, to cut as he did. The plaintiffs gave evidence in rebuttal, and the whole question was submitted to the jury by the court in its general charge, and gave the defendant the benefit of this understanding if they so found. We think the matter was fully and fairly submitted to the jury, and the defendant has no reason to complain of this part of the case.

The defendant requested the court to charge:

"If you find from the evidence that defendant, by order of Guilford, paid to Angus Bedour the sum of $615.32 for work done by him for Guilford, under verbal contract between defendant and Guilford, the defendant is entitled to credit for such amount as payment."

The court refused this request, but charged the jury, substantially as follows:

"Here is an amount claimed to have been paid by Mr. Plummer to Bedour for skidding a quantity of logs that Mr. Guilford was under contract to get out. The claim is for payment made by defendant for loading these logs. It is conceded that Mr. Plummer did pay for the skidding and hauling. The only dispute is whether he was authorized to pay it. * * * You may have no sort of doubt that this payment was made by Mr. Plummer, who had no particular interest in paying it to Mr. Bedour, because he so understood his authority and the direction. Mr. Bedour may have received it with that understanding, and it may be supposed, it is suggested, that Mr. Plummer would not have paid this man Bedour unless he thought and believed he was authorized by Guilford to do so. And Guilford's good faith is attested in the same way, to a certain extent. He testified that he paid Bedour, and Bedour received from him, some four hundred and ninety-four dollars of this same amount. What you may think of Bedour for receiving from these two parties double payment for his labor is another question."

The court, in another portion of its charge, stated to the jury:

"Assuming that these witnesses are equally honest, and perhaps you may be satisfied they are, it indicates that there was an entire misapprehension between the parties."

It appears from the record that Plummer and Bedour testified that Guilford authorized this payment, while Guilford denied giving Plummer any such authority. Plummer testified that he paid Bedour $615.32 for loading the logs, and that that amount included nothing but for logs loaded under the contract, and that the payment was directed by Guilford in the presence of Bedour. Mr. Bedour testified that Plummer was at Ogemaw, and that he went down with him to West Branch; that the conductor held the train at his request; that he went to the hotel, and got Guilford to come down to the train, and talk the matter over with Plummer; that Plummer was to pay him; that Mr. Plummer asked Guilford if he should pay Bedour for the work, and he said, "Yes." Mr. Guil-

ford denied making any such statement, or ever authorizing Plummer to pay for loading those logs.

The issue was thus made between the parties, and it was a question of fact for the determination of the jury.

Defendant's claim is that the court voluntarily passed upon one of the most important questions of fact in the case, and clearly informed the jury what his opinion of the testimony upon the payment was; that this statement of the court was a finding of fact that, conceding both parties to be equally honest, they misapprehended each other. Another claim is also made that defendant's case was prejudiced by the remarks of the court upon the witness Bedour, in that the court said,—

"What you may think of Bedour for receiving from these two parties double payment for his labor is another question,"—

As Bedour had testified that he had done other work for Guilford, and that this $615.32 included no part of the other work. Mr. Bedour testified:

"This work I did for Mr. Guilford was on that deal, for sections 10 and 11. I had a separate transaction with Mr. Guilford, apart from that, but this was all done on sections 10 and 11. * * * The payments that I have received from Mr. Guilford and Mr. Plummer pay me in full for all the work I did for Mr. Guilford on sections 10 and 11. It does not overpay me."

It is evident that Bedour's testimony was important upon this $615.32 item. Plummer claimed to have paid it under authority from Guilford; and claimed a credit for it on this account. Guilford denied giving any such authority to Plummer, and further insisted that he had paid that item for the identical work to Bedour himself. Bedour was called by defendant, and gave testimony squarely contradictory to Guilford, and claiming that, while Guilford paid him the $615.32, it

was for other work done for him, and that what he received from Guilford and Plummer only balanced his claim, and he was not overpaid.

The remark of the court,—

"What you may think of Bedour for receiving from these two parties double payment for his labor,"—

Would naturally and necessarily have great weight with the jury. It was an expression of doubt by the court as to the honesty of Bedour for receiving double pay. It must have made an impression upon the minds of the jury, which they would carry into the jury-room; and where the case was so evenly balanced between Plummer and Guilford, who so squarely contradicted each other upon the question of the authority for the payment, Bedour's testimony was of much moment, and might be decisive of the question. We think this remark prejudiced the defendant's case upon this $615.32 item.

We think, also, the court was in error in charging the jury that there was an entire misapprehension between the parties upon this question of authority to Plummer to pay the $615.32. The testimony was direct and positive, and plainly irreconcilable, and it was a question of fact for the jury to determine which was right. If Plummer and Bedour were right in their version of it, then Plummer was entitled to the credit, and, if Guilford was correct, the credit should not have been allowed.

In view of the issue made in the case by the pleadings, the court allowed great latitude in the examination of witnesses. We think this was proper, and we find no error in the record upon the reception or rejection of evidence. The case was fully tried and submitted to the jury under a very full and fair charge by the court.

We find no error in the construction given to the con-

tract by the court. The only error we find in the case relates to this $615.32 item, and in the charge of the court upon that subject we think there was error.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

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FREDERICK S. AYRES ET AL. v. LANGDON HUBBARD.

[See 57 Mich. 322.]

Principal and agent—Statements of agent—Evidence—Trover—Damages—Pleading—Statute of limitations—Burden of proof.

1. Where the acts of an agent bind the principal, his declarations and admissions, respecting the same subject-matter, made at the same time, and constituting a part of the *res gestæ*, are also binding.

   So *held*, in a suit to recover the value of timber cut by defendant's contractor on land not belonging to the defendant, who received the proceeds of the trespass, which was casual and involuntary.

2. Where, in a suit to recover for timber cut from plaintiff's land by defendant's contractor, the defendant denies the trespass, and gives notice of the statute of limitations, testimony of a third party showing a settlement by defendant with him for a trespass committed on his land at the same time as the one charged by plaintiffs, and by the same contractor, which cutting extended onto plaintiff's land, is admissible as tending to establish plaintiff's claim, and as showing that it was not barred by the statute of limitations.

3. Under a plea of the statute of limitations the burden is upon the plaintiff to show the commencement of suit within the statutory period.

4. Where, in trover to recover the value of logs cut from plaintiff's

lands, it appears that the trespass was neither willful nor negligent, the measure of damages is the value of the timber on the land.[1] *Ayres v. Hubbard*, 57 Mich. 322.

Error to Huron. (Beach, J.) Argued May 3, 1888. Decided October 19, 1888.

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

James H. Hall (Isaac Marston, of counsel), for appellants, contended:

1. If an act may be proved, statements accompanying it may also be proved; citing Stephen, Ev. Art. 8; 1 Greenl. Ev. § 113.
2. If Montgomery was a willful trespasser, and his acts were binding on defendant, the measure of damages is the value of the timber at the mill; citing *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Id. 201; and if defendant is liable in consequence of the receipt and subsequent use of the timber, he is liable for the value in the stream; citing *Ripley v. Davis*, 15 Mich. 75; and his ignorance of the trespass cannot protect him; citing *Tuttle v. White*, 46 Mich. 485; nor the fact that the trespass was unintentional; citing *Mining Co. v. Hertin*, 37 Mich. 332.
3. When a defense is grounded on a negative allegation, it must be proved by the party alleging it; citing 1 Greenl. Ev. §§ 78, 81, which doctrine counsel applies to the plea of the statute of limitations; citing 1 Arch. *Nisi Prius*, 611; *Philpot v. Kelley*, 3 Adolp. & Ellis, 106; and especially Patteson and Coleridge, JJ., 114, 117; and the question seems settled in this State by *White v. Campbell*, 25 Mich. 463, 471, 475.

Winsor & Snover, for defendant, cited no authorities upon the points decided, excepting the former decision in this case as to the measure of damages.

LONG, J. This cause has once been heard in this Court, and is reported in 57 Mich. 322 (23 N. W. Rep. 829). On that trial plaintiffs prevailed, and the defendant brought the case to this Court by writ of error, where it was reversed and a new trial ordered.

[1] See *Gates v. Rifle Boom Co.*, 70 Mich. 309.

The only question then involved was the proper measure of damages, and this Court then held that there was—

"Nothing in the case indicating any willful or negligent trespass on the part of the defendant or the company's employés. The general rule of damages is the value of the property lost, under such circumstances, at the time and place of conversion. * * * Each case, however, must necessarily, to a very great extent, depend upon its own peculiar circumstances and equities."

The case was again tried in the circuit court for Huron county, and the defendant prevailed. Plaintiffs bring the case to this Court by writ of error.

Plaintiffs were, during the transactions involved in this case, lumbermen and mill-owners in Huron county. The defendant was a member of the firm of R. B. Hubbard & Co. during this time, also doing a lumber business in said county.

This firm, in the month of December, 1874, let a contract to one John Montgomery to cut logs and timber during that winter on their lands in Huron county, and haul and put the same afloat in Willow creek, for the agreed price of $3.50 per thousand feet. Montgomery proceeded under his contract, and cut, hauled, and placed in the creek a large quantity of logs. It is claimed that neither the company, of which defendant was a member, nor the defendant knew that logs were taken from any other than lands of the defendant.

On August 14, 1880, this suit was brought, in trover, to recover for a quantity of timber claimed to have been cut by Montgomery from plaintiffs' lands, while he was so lumbering for R. B. Hubbard & Co., in the winter of 1874-5. The plaintiffs' lands were 80 acres on section 15, town 17 N., range 13 E. One Luther Ripley owned lands immediately adjoining plaintiffs'. Defendant owned other lands near, but not adjoining, these. These lands of

defendant were those lumbered by Montgomery in the winter of 1874–75.

The logs taken from these lands by Montgomery were put in Willow creek, and run from there to Huron City, where they were sawed. It is admitted that defendant had the avails of all these logs so put into Willow creek by Montgomery. Plaintiffs claim that among the logs put by Montgomery into Willow creek, and delivered over to defendant, was a large quantity of logs taken by Montgomery from their lands on section 15 during that winter. This action is brought to recover the value of such logs.

The declaration is in the ordinary form in trover. The plea is the general issue, with notice of the statute of limitations.

Plaintiffs claim that the action was brought as soon as the trespass and loss of timber was discovered.

Defendant denies the taking of anytimber from plaintiffs' lands; alleges that Montgomery never had any direction to cut from any but defendant's land, and if he did so cut it was wholly unknown to defendant. Defendant also claims that, if any timber had been cut from plaintiffs' lands, it was some time prior to the winter of 1874–75; that these timbers were cut by one Thompson, who was lumbering along-side of these lands in the winter of 1868–69.

It was claimed on the trial by the plaintiffs that, while so lumbering for defendant, Montgomery also trespassed on Ripley's lands as well as on plaintiffs', and cut and delivered to the defendant a quantity of timber therefrom, and that for this trespass on Ripley's land defendant afterwards settled with Ripley; that part of Ripley's land cut over was contiguous to plaintiffs'; and that plaintiffs afterwards discovered that a quantity of their timber had been cut just over the line between their lands and Ripley's.

Ripley was called as a witness for plaintiffs, and testified that in the fall of 1874 he was on his land, and no timber had been cut, nor, so far as he observed, on the plaintiffs' land, though he was not at that time on plaintiffs' land; that in 1875, going there again, he found timber cut. Plaintiffs then offered to show by Ripley that in the winter of 1874–75 he found Montgomery on this land, and that Montgomery then told him he had cut and delivered to defendant timber from Ripley's and what turned out to be plaintiffs' land. This was excluded by the court, and upon this ruling plaintiffs assign error.

Ripley testified further that, upon this statement from Montgomery, he went and saw defendant, and demanded pay for the timber taken, supposing at that time it had all been taken from his land. Defendant accordingly sent a Mr. McFadden, a surveyor, to examine the trespass with Ripley. In this examination they found that part of the timber had been cut from plaintiffs' land; that they estimated the timber cut from Ripley's land, and that defendant afterwards paid him for it.

McFadden was also called on the same question, and gave testimony; but on motion of counsel for defendant the court struck out all the testimony relative to the cutting on Ripley's land, and the settlement therefor.

At the time this statement was made by Montgomery he was in the employ of defendant, lumbering on his land, and defendant had all the timber taken, whether it came from his own or Ripley's or plaintiffs' lands. Plaintiffs had shown by the witness that he found in the year 1875 certain timber cut on his own and plaintiffs' lands; that Montgomery was lumbering there on defendant's land, near by, for defendant; and that he then and there stated he had cut this timber, and delivered it with other timber to defendant in Willow creek. Acting upon this information, Ripley called upon defendant, informed him

of the facts, and defendant settled for the trespass on the lands of Ripley.

We think this testimony was competent. The acts of the agent, Montgomery, in taking this timber, were binding upon the defendant, who had the fruits of his agent's trespass, and where the acts of the agent will bind the principal, then his representations, declarations, and admissions, respecting the subject-matter, will also bind him if made at the same time, and constituting a part of the *res gestæ*. These declarations are in the nature of original evidence, and not hearsay. 1 Greenl. Ev. § 113.

The transaction between Ripley and defendant in the settlement of trespasses on Ripley's land was also competent, when taken in connection with Ripley's testimony, that a part of the timber taken at that time was from plaintiffs' land. It had a tendency to show that the trespass was committed on plaintiffs' land as well as on Ripley's, by Montgomery, while acting as the agent of defendant, and that the same was taken within the six years next preceding the commencement of this suit. It was error to exclude this testimony.

The court charged the jury that—

"The burden of proof is on the plaintiffs in this case to show by a preponderance of evidence the time when the timber was taken; that is, within the six years, and the quantity taken, if any, within that time."

Exception is taken by plaintiffs' counsel to this part of the charge. It is claimed by plaintiffs' counsel that, the defendant having pleaded the statute of limitations, the burden would be upon him to prove his own allegations, and this, too, though it is negative in form. The rule, however, is well settled that, under a plea of the statute of limitations, the burden is on the plaintiffs to show the commencement of action within the statutory period. 2 Greenl. Ev. § 431.

We see no reason, under the circumstances stated in this record, for reconsidering the question as to the measure of damages. The facts appear as they appeared in the former record, that neither the defendant, the company of which he was a member, nor Montgomery intended any trespass, and if the plaintiffs were entitled to recover, the measure of their damages would be the value of the timber on the land.

For the errors pointed out the judgment of the court below must be reversed, with costs, and a new trial ordered

SHERWOOD, C. J., CHAMPLIN and MORSE, JJ., concurred. CAMPBELL, J., did not sit.

ISAAC PFORZHEIMER ET AL. v. ALFRED T. SELKIRK ET AL.

Fraud—Conspiracy—Pleading—Declaration.

1. In an action for fraud, the declaration must definitely and issuably set forth the facts complained of, and relied upon for a recovery.
2. In an action against more than one defendant for alleged false statements by which the plaintiff was defrauded, the declaration should aver a conspiracy, and enumerate the false statements and circumstances relied upon as creating the liability, with particularity; and, if not made by all of the defendants, it should be averred that they all colluded and conspired together in such a manner as to authorize those actually making them to do so, and that they were in furtherance of the common design and fraudulent purpose.
3. In an action for false representations or statements, the declaration must aver that the plaintiff believed them to be true, and, so believing, relied upon them, and was thus induced to take the action claimed to have resulted to his damage.

Error to Eaton. (Hooker, J.) Submitted on briefs May 17, 1888. Decided October 19, 1888.

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

Manly C. Dodge and *Lyman H. McCall,* for appellants, contended:

1. The rule laid down in *Jewett v. Petit,* 4 Mich. 508, that a creditor who is induced by the fraudulent representations of his debtor to compromise his claim may, on discovery of the fraud practiced, retain the amount paid and maintain an action on the case for damages, has never been departed from by this Court; citing *Walsh v. Sisson,* 49 Mich. 423.
2. Persons who combine in the perpetration of a fraud may be sued jointly; citing *Bridge Co. v. Van Etten,* 36 Mich. 210; *Creed v. Hartmann,* 29 N. Y. 591; *Low v. Mumford,* 14 Johns. 426.
3. Technicalities raised by demurrer are no longer looked upon with favor by the courts; citing *Hanselman v. Carstens,* 60 Mich. 187.
4. The cause of action in this case is the successful use by defendants of false representations to induce plaintiffs to assign their claim for one-third of the amount due them, and the declaration must show the pretenses made; that they were made by defendants in person, or by their authority; that they were material; that they were false and fraudulent, and deceived plaintiffs; and what the defendant obtained by them; citing *Parker v. Armstrong,* 55 Mich. 176.
5. If a declaration in a civil action for conspiracy does not show the specific means to be used, it must accurately describe the illegal purpose aimed at, and definitely and issuably set forth the facts complained of; citing *Schwab v. Mabley,* 47 Mich. 572.
6. A declaration alleging the false statements of defendants as inducing to the injury of plaintiffs should aver a conspiracy, and enumerate the false statements; citing *Jackson v. Collins,* 39 Mich. 557.
7. Counsel contend that an application of the foregoing rules shows the sufficiency of the declaration.
8. The words "falsely and fraudulently" of themselves imply knowledge of the falsehoods, to render defendants liable for the consequences of the fraud; citing *Beebe v. Knapp,* 28 Mich. 53.

9. Whoever falsely pretends to have positive knowledge of the existence of a particular fact makes a willful representation which he knows to be false, and if made with intent that another shall rely and act upon it, and it is acted upon, the maker is guilty of deception and fraud; citing 2 Add. Torts, § 1177; *Beebe v. Knapp*, 28 Mich. 53; *Stone v. Covell*, 29 Id. 359.
10. Fraud lies in a representation made with the knowledge that it is received in a sense that makes it deceptive; citing *Match v. Hunt*, 38 Mich. 1.
11. Under a general allegation of damage, plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; citing 1 Suth. Dam. 763, and cases cited.
12. An erroneous claim of damages does not make a declaration demurrable; citing 1 Suth. Dam. 762, 763; and it is enough on demurrer if plaintiff state a case entitling him to nominal damage: Id. 759.
13. The declaration is sufficiently specific to enable plaintiffs to recover under the general allegation the damages resulting from the fraud, to wit, 66⅔ per cent. of their full claim; citing *Russell v. Phelps*, 42 Mich. 377; *Heiser v. Loomis*, 47 Id. 16.

Phillip T. Van Zile, for defendants Almeda Whitford and John Levy.

D. P. Sagendorph, for defendant Levy.

[Counsel for defendants contended for the rules stated in the opinion.—REPORTER.]

SHERWOOD, C. J. This action was brought by the plaintiffs against the defendants to recover damages alleged to have been sustained by the plaintiffs by means of the fraudulent acts and pretenses of the defendants, by which the plaintiffs were induced to accept 33⅓ per cent. of their claim against the firm of Alfred T. Selkirk and James L. Whitford, in full settlement of such claim. The allegations and averments in the declaration are as follows:

The defendants Selkirk and Whitford were a firm, and for some time previous to December 17, 1885, were engaged

in the business of retail dealers in jewelry and silver and plated ware, in the city of Charlotte, in Eaton county, and were at that time indebted to the plaintiffs in the sum of $623.99, which was then due to said plaintiffs, and which they had requested the said firm to pay, but they had refused.

The plaintiffs aver that at this date the firm was doing a safe and prosperous business, and that their stock of goods would then have inventoried at the cost price from $8,000 to $10,000, and against which there was no incumbrance. Plaintiffs further aver that the defendants Selkirk & Whitford, fraudulently intending to deceive the plaintiffs, on December 18, 1885, gave a mortgage to the defendant Almeda Whitford upon all their stock of jewelry, merchandise, and fixtures, for the payment to her of the sum of $2,886.45 on or before March 1, 1886; and that the said firm of Selkirk & Whitford on the same day gave another mortgage, purporting to be subject to the other, on the same property, to defendant John Levy, for the payment of $2,000 on or before December 28, 1885; and that both of said mortgages were duly recorded in the city of Charlotte.

That the said Selkirk & Whitford, after contriving together with the said Almeda Whitford and John Levy, and with the intention to cheat and defraud the said plaintiffs, did, on December 26, 1885, make an assignment of all their property, except that which was exempt from execution, which they owned, to Elzey Flora, for the benefit of the creditors of Selkirk & Whitford, and filed the same with the clerk of Eaton county; that, including said mortgages, it was made to appear by the assignment that said firm's total indebtedness was $16,740.82, and the assets so assigned were appraised at $4,248 22.

That on March 13, 1886, said indebtedness then being due and owing to the plaintiffs from the said firm, the

defendants, well knowing the premises, falsely and fraudulently represented to the plaintiffs that said firm were wholly insolvent and unable to pay any part of these debts; that said mortgages were made and delivered in good faith, and for the consideration expressed, and were valid subsisting liens upon the property therein described; that the assignment was made in good faith, and without preferences.

And the plaintiffs further aver that they,—

"Confiding in said defendants, and the representations made to them by said defendants, as aforesaid, and the facts set forth in said chattel mortgages and the said assignment,"—

Afterwards, on March 13, 1886, did agree with the said Selkirk & Whitford and the other defendants to release and discharge the plaintiffs' indebtedness to said firm by the payment by said Levy to plaintiffs of the sum of 33⅓ per cent. of the said claim, and at the request of the defendants they assigned their said claim to defendant Levy, receiving such payment therefor.

And plaintiffs further aver that said mortgages were not made in good faith, nor was either of them a valid and subsisting lien upon the property described, and was well known so to be by the defendants; that they were not given to secure any indebtedness of said firm, but to hinder and delay plaintiffs in the collection of their debt; and the assignment was not made in good faith, and was not of all the assignors' property, and was not made without preferences, and was fraudulent and void, and was made with the fraudulent design to obtain a release of the claims against said firm at a less sum by far than was due thereon.

That at the time of the assignment to Levy said firm owned, in their own right, a large amount of other property and goods and choses in action and money, held by

some other person for them, to the amount of $25,000, not mentioned in the assignment, and which said firm fraudulently concealed from the plaintiffs. And they further aver that said defendants represented to plaintiffs that the money paid on said release was the money of said Levy. And they further aver that said money was not Levy's, but that of said firm, and that this fact was known to all the defendants; and that by such fraudulent representations and concealments of defendants they have been damaged to the amount of $2,000.

The foregoing is the substance of the first count in the declaration, and the second count sets up the same representations and facts which are relied upon to maintain the action in the first count.

To the declaration the defendants Selkirk & Whitford pleaded the general issue. The defendants Almeda Whitford and John Levy appeared separately in the cause, and each filed a general demurrer to the declaration. The demurrers were argued before Judge Hooker, who made the following decision in the case:

"The declaration is in case, charging defendants with combining, and by means of certain false pretenses and tokens inducing the plaintiffs, who were creditors of defendants Selkirk and James L. Whitford, to assign their claim to defendant Levy for a sum much less than its face. A declaration of this kind should show:

"1. That the representations were made by all the defendants, or that by reason of their collusion they may be treated as participating in them.

"2. That they were made with the design of influencing the plaintiffs' conduct.

"3. That they were believed to be true by plaintiffs, and were relied upon by them, and that they induced the desired action on their part.

"4. That the representations were known to be untrue by the defendants when made.

"5. That the plaintiffs suffered damage from the action that they were induced to take, which, being special, should be specially pleaded.

"6. That the damage followed proximately the deception.

"As the declaration fails to sufficiently state these things, the demurrers will be sustained, with costs, to be taxed.

"Plaintiffs may file an amended declaration within thirty days, upon payment of costs."

Judgment was entered according to the foregoing conclusions, and the plaintiffs bring the case to this Court by writ of error.

It is only the sufficiency of the declaration, as against the defendants Almeda Whitford and John Levy, that is now before us for consideration. We think the circuit judge made a proper disposition of these demurrers.

It appears from the record that Mrs. Whitford's mortgage was made on December 18, 1885, and the same day the other was made to Mr. Levy; that on the 26th day of the same month the assignment of the property was made to Elzey Flora; and not until March 13 thereafter the alleged fraudulent transaction occurred which is made the subject of this action.

It is the fraudulent obtaining of the settlement of the plaintiffs' claim for 33⅓ cents on the dollar that constitutes the grievance in this case complained of; and there is no averment in the declaration that the mortgages and assignment were made with the knowledge of the parties demurring, for any such purpose, nor that the making of the mortgages was a part of the same transaction had by defendants Levy and Mrs. Whitford with a view to bringing about the claimed fraudulent compromise.

It must be recollected the indebtedness claimed against these demurring defendants was not contracted by reason of the alleged false representations, or of any representations, made by said defendants demurring. They were under no legal or equitable obligation to pay the debt compromised, or any portion thereof; and, had they

made all the representations charged in regard thereto, they could not have been made liable. Especially must this be so as long as the declaration does not allege that the plaintiffs were ignorant of the facts represented, and there is no averment in the declaration that the plaintiffs were misled by the representations, whatever they were. The representations are alleged to have been made by Selkirk and Mr. Whitford, and it is not averred that the plaintiffs believed them.

It is not sufficient to charge a person with cheating and defrauding another only, or with contriving and confederating with others to defraud, to make out a case of fraud, but the declaration must definitely and issuably set forth the facts complained of, relied upon for a recovery; and a declaration alleging as the cause of action false statements, where there is more than one defendant, should aver a conspiracy, and enumerate the false statements and the circumstances which are supposed to create the liability, with particularity; and, if not made by all the defendants, it should be averred that they all colluded and conspired together in such manner that the false representations by those who did not participate in making them were authorized by them, and in furtherance of the common design and fraudulent purpose.

It should also be averred that the false statements were believed to be true by the plaintiffs, and, thus believing, were relied upon by them, and that they induced the action taken by the plaintiffs, which resulted in damage to them. In examining this declaration, we find an absence of nearly all of these essential requisites, so far as it relates to these defendants, and we think their demurrers must be sustained.

The judgment at the circuit will therefore be affirmed.

The other Justices concurred.

THE LANSING TURNVEREIN SOCIETY v. LORENZO CARTER.

Contract to loan money on real estate—Action for breach—Performance on part of plaintiff—Corporations—Resolution passed on Sunday.

1. To authorize a recovery for the breach of a contract to loan money on mortgage security, it is necessary for the plaintiff to show the tender to the defendant of a valid mortgage upon the land agreed upon, duly acknowledged, and in proper form.
2. A resolution adopted on Sunday by a society not a religious or charitable association, authorizing the mortgaging of the society's real estate, is void, and it is a question of law for the court whether the character of the society brings it within the exception to the statute upon that subject.

Error to Ingham. (Peck, J.) Argued May 18, 1888. Decided October 19, 1888.

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

Frank L. Dodge, for appellant, contended:

1. The defects claimed to exist in the mortgage are cured by How. Stat. § 5727.
2. This case is ruled by *Demill v. Moffat*, 45 Mich. 410.
3. Title may pass without witnesses or acknowledgement; citing *Dougherty v. Randall*, 3 Mich. 581; *Munroe v. Eastman*, 31 Id. 283; *Price v. Haynes*, 37 Id. 487; *Baker v. Clark*, 52 Id. 22.
4. A deed should not be held void for uncertainty, unless all means to sustain it have failed; and the party is bound by the record it discloses; citing *Dwight v. Tyler*, 49 Mich. 614.
5. A mortgage will be construed most favorably to the mortgagee. Equity requires substance rather than form, and enforces the actual intent if lawful and just; citing *Stuart v. Worden*, 42 Mich. 154.

Kilbourne & Humphrey, for defendant, contended for doctrine stated in the opinion.

SHERWOOD, C. J. The plaintiff brought this action before a justice of the peace to recover damages for an alleged breach of an oral agreement, by which it is claimed the defendant promised to loan the society the sum of $1,200, which plaintiff agreed to secure by note and mortgage.

The declaration is verbal—*First*, upon the common counts; and, *second*, for the violation of an agreement, the substance of which is that the defendant, on October 26, 1885, was engaged in loaning money, and the plaintiff on that day contracted with the defendant that it would hire of him $1,250, for the period of five years, and for the use of the same pay semi-annual interest thereon at the rate of 7 per cent., and secure the payment thereof by the note of said plaintiff, secured by a mortgage duly executed by plaintiff, upon the following described property, situated in the city of Lansing, and according to the recorded plat of said city, being the north half of lot 7, in block 66; and that the said defendant did, in consideration of the premises, agree to loan to the said plaintiff the said $1,250 for the length of time, and at the rate of interest, and to be paid as above stated; the payment of said principal upon the note and mortgage to be made by the plaintiff as above promised.

The money was to be so paid to the plaintiff by the defendant when the plaintiff should make, execute, and deliver the said note and the said mortgage, duly acknowledged and recorded in the register's office, to the defendant; and the declaration then avers the making, executing, and delivering of the said note and mortgage according to the laws of the State, and in compliance on the part

of the plaintiff with the terms of the contract, and that the defendant wholly neglected and refused to perform the same upon his part, or let the plaintiff have the money promised, to the plaintiff's damage of $300. There is also a special clause in the declaration, including damages sustained by plaintiff in being obliged to postpone building upon its lot by reason of such default of the defendant. Defendant pleaded the general issue.

Upon the trial, which occurred in the circuit, on appeal from the justice's court, the circuit judge directed the verdict for the defendant, holding that, in order to enable the plaintiff to recover, it was necessary for the society to show that it had caused to be executed by its lawfully authorized agent or attorney, and acknowledged, a mortgage upon said land, which was in proper form, and valid; that this was a condition precedent to receiving the money from the defendant, and until such performance the defendant cannot be charged; and this it is shown by uncontroverted testimony the plaintiff did not do, and therefore the verdict was directed as stated.

There is no question or dispute but that the mortgage was dated October 26, 1880, five years before it was made, and that it was never acknowledged; that it was illegally recorded on October 26, 1885, in the office of the register of deeds for the county of Ingham; and that the persons making and signing the mortgage do not appear to have been empowered so to do. This was the mortgage offered to the defendant, together with a note made by the same parties, and indorsed by several others, and which said mortgage purported to secure, and upon which the $1,250 was demanded by the plaintiff, and which the defendant declined to receive. It was no compliance with the contract under which the plaintiff claims to recover, and we think the direction complained of was properly given by the court.

It further appears beyond dispute, we think, that it was understood between the parties that John Hermann, whom the testimony shows to be a man entirely responsible, was to sign the note that was to be secured by the mortgage, but that, instead of his signature appearing upon the note, his son, Henry Hermann, a young man without any property, and under the age of 21 years, indorsed the note, and that, as soon as the defendant became aware of that fact, he notified the plaintiff that he declined to make the loan altogether.

So far as the records of the society show, if it gave any authority to execute a mortgage upon its property, it was to the building committee; that, if the resolution mentioned in the mortgage was ever adopted by the society, it was done on Sunday, and is therefore void, as the society was not a religious or charitable association, and whether its character brings it within the exception of the statute upon that subject is always a question for the court, and not for the jury.

It is true, presumably, the president and secretary of the society are authorized to make ordinary agreements on behalf of the corporation when transacting its ordinary business, but this presumption does not extend to making transfers of real estate.

The judgment must be affirmed.

The other Justices concurred.

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JAMES CROLY v. JAMES C. POLLARD.

Sale—Implied warranty of title—Mortgage—Failure of Consideration.

1. The question in this case is whether a mortgage was given for the purchase price of property claimed to have been purchased of defendant by complainant, or to secure a loan used in making such purchase, and the finding of the circuit judge in favor of complainant's claim is not disturbed.
2. A sale of personal property implies an affirmation by the vendor of its ownership, and he therefore warrants the title, unless it is shown by the facts and circumstances accompanying the sale that he did not intend to assert ownership, but only to transfer such interest as he might have in the property.

Appeal from Wexford. (Fallass, J.) Submitted on briefs May 18, 1888. Decided October 19, 1888.

Bill to annul a mortgage. Defendant appeals. Decree affirmed. The facts are stated in the opinion.

Sawyer & Bishop, for complainant, contended:

1. Complainant's theory is fully sustained by the bill of sale from Christensen to Rosevelt, together with the assignment indorsed thereon, and those writings cannot be contradicted by parol testimony; citing *Sutherland v. Crane,* Walk. Ch. 523; *Adair v. Adair,* 5 Mich. 209; *Martin v. Hamlin,* 18 Id. 364; *Kimball v. Myers,* 21 Id. 284.
2. Where one of two innocent parties must suffer by the fault of a third, he shall sustain the loss who put it in the power of the third to occasion it; citing *Burson v. Huntingdon,* 21 Mich. 432; *Holmes v. Trumper,* 22 Id. 431.
3. In support of the claim that defendant is estopped from making the defense set up, counsel cited *Gibbs v. Linabury,* 22 Mich. 479; *Smith v. Osborn,* 33 Id. 411; *Peake v. Thomas,* 39 Id. 589; *Stebbins v. Walker,* 46 Id. 10; *Maxwell v. Bridge Co.,* 41 Id. 467.
4. Estoppel *in pais* results from acts, and not from the intention, of the party; citing *Venneter v. Crossman,* 42 Mich. 465; *Stebbins v. Walker,* 46 Id. 11.

C. C. Chittenden, for defendant, contended:

1. Parol testimony may be introduced to aid in interpreting a contract, and to show the nature of the transaction; citing *Picard v. McCormick*, 11 Mich. 75.
2. A bill of sale does not embody the preliminaries or essential terms of a contract in such a way as to exclude parol evidence; citing *Rowe v. Wright*, 12 Mich. 289; and the real nature of the transaction may be shown; citing *Fuller v. Parrish*, 3 Mich. 211; *Trevidick v. Mumford*, 31 Id. 467; *Sirrine v. Briggs*, Id. 443; *Phelps v. Whitaker*, 37 Id. 72.
3. If the transaction was a sale, it amounts to only a quitclaim of defendant's interest; citing 2 Add. Cont. 251; and the facts and circumstances show that defendant did not intend to assert ownership, but only to transfer what interest he might have in the property; citing Benj. Sales, §§ 613, 622, 639.
4. Complainant, by his failure to defend the Simons replevin suit, is estopped from his recovery from defendant.

SHERWOOD, C. J. This case is an appeal from the Wexford circuit court, in chancery, and appears from the record as follows:

The complainant bought a locomotive boiler, and engines belonging thereto, of the defendant, November 27, 1883, for $300, and took a bill of sale for the same, making payments therefor by two notes, one for $100, payable in six months, and the other for $200, payable in one year. These notes complainant secured by a mortgage on real estate in the county of Wexford.

Complainant placed the boiler and engines in a shop, and about two years thereafter the property was taken from him by writ of replevin under a claim made by a Mr. Simons of paramount title. Complainant thereupon notified the defendant of the suit and of the claim made therein, and requested him to defend the title to the property. This the defendant refused to do, claiming that he never had any title thereto, and never sold the same to the complainant, and, the complainant making

no defense, Simons succeeded in his suit, and complainant lost his property under the title made by Simons.

The only consideration received by the complainant for his mortgage given to defendant was the boiler and engines. The consideration having wholly failed, the complainant requested the defendant to discharge the mortgage, which he refused to do, and thereupon defendant foreclosed the mortgage by advertisement, and bid off the property upon the sale. Complainant prays for a decree setting aside the sale and annulling the mortgage.

The defendant, in his answer, avers that he did not sell the boiler and engine to the complainant, but that complainant purchased them from John Rosevelt and Robert Christensen, and that defendant loaned complainant the money with which to make the purchase, and took the mortgage above mentioned as security for his loan; that he had never seen the boiler and engines in question until a long time after complainant made his purchase of Rosevelt and Christensen.

The case was heard upon pleadings and proofs, and the circuit judge granted a decree in accordance with the prayer of the bill, and defendant appeals.

The testimony in the case was taken before the circuit judge in open court. Upon the material point in the case there is a contradiction between the parties in their testimony. The circumstances of the case, and the written testimony, however, are corroborative of the testimony of the complainant. The question in the case is, was the mortgage given by the complainant to the defendant for the loan of $300, or was it given to the defendant as the purchase price of the boiler and engines mentioned?

The title to the property which the complainant received came originally from Rosevelt and Christensen. Christensen, on September 7, 1883, transferred the property to

Rosevelt, by written bill of sale, with warranty of title, and Rosevelt sold and transferred the property by a like bill of sale and warranty to the defendant, on November 27, 1883; and the defendant, in his testimony, says he supposed that, when he conveyed by his bill of sale the property to the complainant, he got title thereto. That bill of sale reads as follows:

"For a valuable consideration to me in hand paid by James Croly, I hereby sell, transfer, and set over to the said James Croly all my right, title, and interest in the locomotive boiler and engines mentioned in the within bill of sale."

This was written on the back of the bill of sale from Rosevelt to the defendant, and was duly signed by the defendant, and dated the day complainant made his purchase. It is claimed, however, by counsel for the defendant, that this bill of sale never gave the complainant any warranty of title to the property, either express or implied. The complainant testifies that he bought the property of the defendant, and gave his notes, secured by the mortgage, therefor, and the defendant, when asked for a bill of sale of the property, gave the complainant the one above quoted.

There is no doubt, I apprehend, but that a sale of personal property implies an affirmation by the vendor that the property is his, and he therefore warrants the title, unless it is shown by the facts and circumstances accompanying the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the property. It is claimed on the part of the defendant that such facts and circumstances were shown in this case, and there is testimony to that effect. It is, however, contradicted upon the other side by the testimony of the complainant.

The circuit judge heard all the testimony. The wit-

nesses were before him. His means of judging of the credibility of the testimony offered was far superior to ours, and it appears from the decree rendered he found against the defendant, and I do not think we should be justified in disturbing that finding. The preponderance of the testimony is clearly with the complainant.

The decree at the circuit must be affirmed, with costs.

The other Justices concurred.

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JOEL W. HAMILTON v. GEORGE E. FROTHINGHAM.

[See 59 Mich. 253.]

Pleading—Bill of particulars—New trial—Inconsistent positions.

1. The office of a bill of particulars is to inform the opposite party of the cause of action to be relied upon, which is not specially set forth in the declaration. *Davis v. Freeman*, 10 Mich. 188; *Nugent v. Teachout*, 67 Id. 571; *Wright v. Dickinson*, Id. 580.
2. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of the Court, and squaring their case with it.
3. In this case it is held that, if plaintiff can recover at all, he must do so under the contract claimed upon the two former trials.

Error to Washtenaw. (Grant, J., presiding.) Argued May 18 and 22, 1888. Decided October 19, 1888.

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

Noah W. Cheever (*Sawyer & Knowlton* and *William P. Wells*, of counsel), for appellant.

John F. Lawrence (*E. D. Kinne*, of counsel), for plaintiff.

LONG, J. This action was brought in the circuit court for the county of Washtenaw, to recover for services in the sale of a printing establishment in Ann Arbor, known as the "Ann Arbor Register."

The defendant, Dr. Frothingham, in 1882 purchased the machinery and stock of the plant known as the "Ann Arbor Printing & Publishing Company," and carried on the business of job printing, and edited and published, in connection therewith, a newspaper called the "Ann Arbor Register," until the latter part of August, 1883.

Plaintiff claims that, having had some experience in selling property for other people, he was approached by the defendant sometime in April, 1883, on the subject of making a sale for him of his printing establishment. After considerable general talk, and many interviews in reference to the matter, on or about July 18, 1883, plaintiff and defendant made an agreement, by which the plaintiff was to endeavor to find a purchaser for the defendant's newspaper and printing concern; and, in case of his being able so to do, he was to have for finding a purchaser all he could get for the property over $8,000

Plaintiff claims on making this agreement he immediately wrote to one Kittredge, of Eaton Rapids, requesting him to come to Ann Arbor, and look over the property; that in response to this letter Kittredge came the next day after it was received, and looked over with Hamilton the press, machinery, stock, and other property, and was introduced by him to the defendant as a possible purchaser of it; that, after some negotiations in reference to the purchase, Kittredge said he could not pay cash entirely,

but was desirous of turning in some city property he owned in Minneapolis; and defendant consented to entertain this proposition, provided he might have an opportunity to make inquiries in reference to the real estate owned by Kittredge in Minnesota, to which no objection was made by Kittredge, and he returned to Eaton Rapids to await the result of defendant's investigations.

That when it became evident that Kittredge, in order to purchase, would have to apply this Minneapolis property towards the purchase price, defendant told plaintiff that he could not afford to pay him all over $8,000, and take the Minneapolis property at Kittredge's valuation; that thereupon plaintiff suggested to defendant that the matter could be arranged so as to meet the overvaluation on the part of Kittredge, by defendant taking out the accounts, amounting to $2,800, and valued at from $2,000 to $2,500; also the book known as "Prof. Hennequin's Book," valued at $500, and one of Prof. Vaughn's, valued at $400, and blank-books, and some stock, valued at $300 or $400,—amounting in all to over $3,000.

That the defendant, immediately after Kittredge had returned to Eaton Rapids, wrote to parties in Minneapolis in reference to the value of the real estate there owned by Kittredge, and a few days after, and on July 27, 1883, he received an answer to his inquiries, and on July 29 a new contract was entered into between the defendant and plaintiff, in which it was agreed that, if plaintiff could induce Kittredge to buy the printing establishment after the defendant took out the accounts, books, etc., the defendant would take in part payment therefor the Minneapolis property at a valuation of $4,000, and pay the plaintiff $1,000 as his commission; that Hamilton immediately entered into correspondence with Kittredge, and in the course of two weeks or thereabouts he induced Kittredge to again come to Ann Arbor, and

consider the new proposition of the defendant; that the sale was finally made through the efforts of the plaintiff on the terms above stated, to wit, Kittredge to pay $1,500 in cash, put in the Minneapolis real estate at $4,000, and give a mortgage to the defendant on the property purchased for $3,500, making in all $9,000; that the defendant took out the property above mentioned, valued at over $3,000. That shortly after the sale plaintiff saw defendant, and requested payment of $1,000 under the contract; and defendant declined to pay him, and Hamilton at once brought suit.

The case was first tried before Judge Joslin, in the Washtenaw circuit court, and the plaintiff obtained a verdict. A new trial was granted, and Judge Jennison heard the case, and the jury rendered a verdict for plaintiff for $1,000. Judgment was entered thereon. This judgment was reversed by this Court, and is reported in 59 Mich. 253 (26 N. W. Rep. 486).

It appears from the record of that case that plaintiff's claim on the former trials was that defendant agreed to give plaintiff all that he should receive beyond $8,000, and that the property was sold for the sum of $9,000; that on the final arrangement a sale was made for a consideration which included some lands in Minnesota, which were called by the purchaser as worth $4,000, which at that rate would bring the whole price up to $9,000. The parties were directly at issue upon the fact of any agency of plaintiff by defendant's employment in this sale, as well as to several of the more important facts bearing on the merits of the case. The action was on the common counts. No bill of particulars was presented in that record.

From the testimony on both sides, it appeared on the former record that if there was any employment at all it was for so much as exceeded $8,000 on the sale. And

this Court held that a very large part of the testimony, consisting of the opinions of witnesses as to what commission and compensation would be proper in such a case to a land broker, was erroneously admitted.

This Court (at p. 255) further said, in the absence of a bill of particulars,—

"We are unable to say whether the claim set out in it was or was not one which should have been declared on specially, but it is clear that damages for preventing the plaintiff from carrying out an express contract could not be recovered under the common counts. And we do not see on what basis there could be any estimate of the value of services in introducing a purchaser with whom defendant made his own terms, which could be sued for on a *quantum meruit*. All of this part of the case, and the instructions allowing such an inquiry, must be regarded as involving error."

After reversal in this Court the case was again tried at the October term, 1887, in the circuit court, and a verdict of $1,280 rendered in favor of the plaintiff. Judgment was entered thereon, and the defendant brings the case to this Court by writ of error.

At the close of the testimony defendant's counsel asked the court to charge the jury as follows:

"1. The plaintiff cannot recover under the pleadings and evidence in this case.

"2. The plaintiff cannot recover in this action on the agreement for a cash sale made July 18, 1883.

"3. If the jury shall find that an agreement was made between the parties after July 18, 1883, and that such agreement was that plaintiff should undertake to effect a sale of the property in question, and defendant to pay him all that should be realized on such sale over and above $8,000, then the plaintiff cannot recover in this action.

"4. If the jury believe that the plaintiff was authorized to sell the property in question according to the agreement of 18th of July, 1883, and that plaintiff was prevented from making such sale, or that agreement was

terminated by the act of defendant, plaintiff cannot recover in this action.

"5. If the jury find that the alleged promise to pay $1,000, relied on as plaintiff's ground of recovery, was in any way dependent upon a sale of the property in question, the plaintiff cannot recover in the present action.

"6. If the jury find that, in order to fix plaintiff's claimed compensation at $1,000, a sale of the property in question was to be consummated, plaintiff cannot recover in this action.

"7. If the jury find that plaintiff was instrumental in making the sale, and may have rendered valuable services for the defendant, still this fact will not entitle him to recover in this action. He must recover, if at all, a fixed compensation of $1,000.

"8. That under the bill of particulars in this cause, and the testimony given in the trial, plaintiff cannot recover.

"9. This case having been twice in this court, and having been carried to the Supreme Court, upon the claim upon the part of the plaintiff that if there was any employment at all it was for so much as exceeded $8,000 on the sale, plaintiff cannot now change his cause of action, and recover upon a new and different contract, wherein he was to receive a fixed compensation of $1,000 cash for the performance of certain services."

The court refused to give these requests in charge to the jury, except as covered by the general charge, and upon such refusal the defendant assigns error. The court instructed the jury that there were three principal questions for the jury to pass upon in arriving at a verdict in this case:

"1. Was such a contract made as plaintiff claims?

"2. If made, was it revoked by defendant?

"3. If not, did the efforts on the part of the plaintiff, in pursuance of the contract, result in effecting a sale between defendant and Kittredge?"

And it was upon this theory that the case was submitted to the jury for their consideration.

The bill of particulars upon which the plaintiff relies for recovery is as follows:

"To services in July and August, 1883, in procuring a sale of the Register property to Kittredge for said defendant, one thousand dollars."

To this bill of particulars was attached a notice to the defendant that—

"The following is the bill of particulars of the plaintiff's demand in this cause, and for the recovery of which this action is brought."

On the trial of the case it was admitted by plaintiff's attorney that the foregoing was the bill of particulars served in the cause before the first trial.

From the former record presented in this Court, it appears that the claim then made by the plaintiff was that he acted as agent for the defendant in the sale of this property, under an agreement with him that he (plaintiff) should have as compensation all he could obtain for it over $8,000, and that he might offer the property for sale at $9,000; that in pursuance of this agreement he procured one Kittredge, who was at Eaton Rapids, to come to Ann Arbor, and look the property over; that Kittredge came, when it was learned that Kittredge desired, if he took the property at $9,000, to turn out certain real estate in Minneapolis in exchange, which he valued at $4,000; that defendant desired time to investigate the value of the Minneapolis property, which was granted by Kittredge; that thereupon defendant told the plaintiff he could not afford to take the Minneapolis property, and pay him (plaintiff) $1,000, when plaintiff advised him to make another agreement with Kittredge, and not give him the whole property; that there were some things which could be kept out, and make the difference. The talk was that the accounts, amounting to some $2,000 or $2,500, Prof. Hennequin's book, worth about $500, and Prof. Vaughn's book, worth from $400 to $500, and some blank books and stock, worth in all about $3,000 to $3,500,

could be kept out; Kittredge to take the balance of the property, and defendant to take the Minneapolis property in exchange therefor. This proposition was considered by the defendant, and, after having investigated the value of the Minneapolis property, Mr. Kittredge came again to Ann Arbor, at plaintiff's request, and there the exchange was made, on or about August 17, 1883, by Kittredge taking the property, except that above enumerated, and the defendant taking in exchange the Minneapolis property, valued at $4,000, a mortgage back on the property sold, for $3,500, and a cash payment of $1,500; thus making what was called $9,000. After the sale was made plaintiff made demand for his compensation of $1,000, the amount he claimed defendant had received over the $8,000. This the defendant refused to pay.

The defense was—

1. That the plaintiff did not effect the sale, but that the negotiations were carried on by defendant himself, and sale made by him.

2. That defendant simply made plaintiff an offer to sell the property at $8,000 cash; that this offer was made on Wednesday, and was to be kept good until the Friday following; and that he gave plaintiff no authority to make an exchange for other property, and did not make him his agent to negotiate an exchange.

3. That plaintiff having failed to effect the sale of the property at $8,000 cash, within the time limited, defendant had the right to withdraw the offer, and terminate the agency, if one existed; and if he did so, and subsequently effected a sale of the property himself, the fact that the purchaser was one that the plaintiff introduced, and that the sale was in some degree aided by the plaintiff's previous unsuccessful efforts to effect a cash sale, would not entitle the plaintiff to commissions on the sale made.

4. That the plaintiff's claim being for the amount realized over $8,000 cash, the plaintiff could not recover anything unless the property received in exchange exceeded in value, in cash, $8,000.

5. That inasmuch as no actual value of the Minneapolis

property had been proven, no recovery could be had, as commissions could only be based upon actual value, and not at what the Minneapolis property was called in the trade.

As appears from the former record, plaintiff's counsel requested the court to charge the jury,—

"If the jury find from the evidence that the defendant agreed with the plaintiff to pay him all over $8,000 which might be obtained for the property, * * * and find that the plaintiff was the means of making such sale of such property to Kittredge for $9,000, or what was taken as $9,000, then the plaintiff is entitled to recover $1,000."

And it appears by that record the court charged the jury, in accordance with plaintiff's request, as follows:

"If you think that defendant did employ plaintiff to sell the property in question, and agreed that he should have for his services all he could get over $8,000, that through his efforts he induced Kittredge to enter into negotiations with defendant for the purchase of said premises, and that it finally resulted in a sale for $9,000 in the manner stated, then plaintiff is entitled to recover $1,000."

The further claim was made by plaintiff on the former trial that, if the contract to pay plaintiff all he could get over $8,000 had not been complied with by plaintiff, yet if the defendant consented to allow the plaintiff to continue negotiations for the sale, and if such negotiations were carried on by plaintiff with his knowledge and permission, and finally resulted in a sale, then plaintiff is entitled to recover what his services were reasonably worth. The court adopted this theory also, and charged the jury substantially as requested. It was in view of these facts presented by that record that this Court (at page 255) held that—

"From the testimony on both sides, it appears that, if there was any employment at all, it was for so much

as exceeded $8,000 on the sale. There was no testimony tending to prove an agency without fixed compensation, or an agency to do anything but sell the property. A very large part of the testimony consisted of opinions of witnesses as to what commissions and compensations would be proper in such a case to a land-broker, and all of this was erroneously admitted. It was not only irrelevant, but it showed that the price which plaintiff claims he was to receive was very much beyond any usual commission, and could not be based on anything but an express contract; * * * and we do not see on what basis there could be any estimate of the value of services in introducing a purchaser with whom defendant made his own terms, which could be sued for on *quantum meruit*. All of this part of the case, and the instructions allowing such an inquiry, must be regarded as involving error. * * * So far as we can infer from the testimony, we have very great doubt whether there was enough to go to the jury indicating that defendant ever made any promise to allow plaintiff the excess over $8,000 upon any but a sale on a cash basis."

As appears by the former record presented to this Court, the whole claim on the part of the plaintiff was for the amount the property sold for above $8,000, and, if that claim was not established, then, having brought about the sale, he was entitled to recover what his services were reasonably worth; and a large amount of testimony, consisting of the opinions of witnesses as to what commissions and compensation would be proper in such a case to a land-broker, was introduced.

Nowhere throughout the whole record does it appear (and from the record it appears that all the testimony was returned) that after July 18, 1883, a new contract was made by defendant with plaintiff to allow him $1,000 as a fixed compensation if plaintiff could induce Kittredge to buy the printing establishment after the defendant took out the accounts, books, etc., and that the defendant would take the Minneapolis property at $4,000, the mort-

gage of $3,500, and the cash payment of $1,500. Such an arrangement or agreement is not even hinted at in the record, either in the testimony of the plaintiff, the requests to charge, or in the charge of the court.

In the present case the whole claim of plaintiff for recovery is stated by the court in its charge to the jury as follows:

"The plaintiff claims that some days subsequent to this, this cash arrangement having fallen through, a modified agreement was made between him and the defendant, Frothingham, and that by that arrangement the price was $9,000; that Kittredge was to pay Frothingham $9,000, $4,000 of which was to be by the sale of land in Minneapolis, $1,500 in cash, $3,500 in a mortgage back upon the stock, and that he (Kittredge) was to receive the property of the Register, taking out the accounts, Dr. Vaughn's book, Prof. Hennequin's book, and certain blank-books that were in the establishment; and it is conceded that this arrangement was finally carried out, and the sale of the property on that basis made. On this agreement, if at all, the plaintiff in this case must recover; and the plaintiff claims that he was to receive $1,000 for negotiating this sale."

Further on in the case the court instructed the jury:

"Plaintiff has sued under the contract for $1,000. He is entitled to receive this or nothing. There is no ground —no testimony—in this case for any other claim than that; and you, of course, will not be influenced by the fact that you cannot apportion this amount. It is not a suit for apportionment; it is a suit to recover upon the contract that it is claimed has been made. Plaintiff has planted himself in this action to recover that sum, and by that he must be bound."

Plaintiff went through two trials, and was under examination from his own counsel, and cross-examination by the opposing counsel, and was asked by each to detail the whole transaction of his arrangement with defendant as to his compensation for making this sale, and upon each

of those trials he fixed the agreement as made July 18, 1883, and his agreed compensation or commission to be the excess of $8,000 realized from the sale; and at the same time his counsel making the claim on each of these trials that if this arrangement was terminated by the defendant, by reason of the sale not being made or completed within the time limited, then the plaintiff would be entitled to recover a reasonable compensation as commission, by reason of defendant permitting him to go on with the negotiations thereafter so that sale was completed, though not on a cash basis.

It is a somewhat peculiar circumstance that not until the third trial, and after this Court had said there was grave doubt whether there was enough to go to the jury indicating that defendant ever made any promise to allow plaintiff the excess over $8,000 upon any but a sale on a cash basis, then for the first time in the history of the case the plaintiff remembers that some other and different contract had been made as to his compensation; not the contract of July 18, 1883, under which he claimed to recover upon the other trials; not a compensation of the excess over $8,000; but a contract made some time subsequent to July 18,—one made about July 29,—and for a certain and specific sum,—the sum of $1,000,—a certain fixed and definite amount; this claim made under the same pleadings, the same bill of particulars, as in the former trials.

The declaration was upon the common counts. A bill of particulars was demanded and furnished before pleading, and before the first trial. The office of a bill of particulars is to inform the opposite party of the cause of action to be relied upon, which is not specially set out in the declaration. *Davis v. Freeman,* 10 Mich. 188.

It is probably true that the single item,—

"To services in July and August, 1883, in procuring a sale of the Register property to Kittredge for said defendant."—

Would support a cause of action upon the *quantum meruit*, and upon an express contract to pay all that should be realized above a certain sum in the sale of the property. Even if it were true that such a bill of particulars might support a cause of action upon an express contract to pay $1,000 for furnishing a purchaser of the property upon specified terms, yet the plaintiff himself, by his own testimony and claims upon the two former trials, had given the interpretation to it that it was for services rendered in procuring a purchaser for this property, and to recover the amount for which it sold in excess of $8,000, or for what his services were actually worth. This construction, to which plaintiff had adhered upon two trials, the defendant had a right to expect would be the one given to it upon the third trial. The plaintiff, having claimed a recovery under it upon one express contract, must be estopped from seeking a recovery upon any other contract under the same item. The bill of particulars in no way indicates to the defendant that the plaintiff seeks to recover upon an express contract to pay a fixed sum for finding a purchaser of the property upon definite terms. If the plaintiff sought to recover upon any such contract, there should have been some reference to it in the bill of particulars.

Even if this were not so, the plaintiff cannot be permitted to take a position now wholly inconsistent with that taken on the former trials. The contract now claimed under is wholly inconsistent with that claimed upon the former trials. If this contract was made, then the one upon which the former recovery was had did not exist, and no recovery could have been had thereunder. If the contract was to pay all over $8,000, then an express

contract to pay a certain and specific sum did not exist.

If such inconsistent positions were allowed to be taken in courts of justice, there would be no end to litigation. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of this Court, and squaring their case with it.[1]

There is great doubt, on the facts shown by this record, whether there was any testimony supporting plaintiff's theory to go to the jury, that the sale was made by his efforts pending his employment, if any such employment ever existed. From the view we take of this case, it is not necessary to discuss the other questions raised. The plaintiff, if he is entitled to recover at all, must do so under the contract claimed upon the two former trials.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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[1] Counsel for appellant cited, in support of this proposition, *Thompson v. Howard*, 31 Mich. 309; *Wetmore v. McDougall*, 32 Id. 278; *Nield v. Burton*, 49 Id. 53; *Berringer v. Cobb*, 58 Id. 559.

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JOHN JENKINSON v. MONROE BROTHERS & CO. (A CORPORATION.)

[See 61 Mich. 454.]

Contract—Pleading—Denial of execution—Parol evidence—Interpretation.

The *law* of this case is held to have been settled in the former opinion (61 Mich. 454), to which the trial court conformed on the second trial, and the judgment is affirmed.

Error to Iosco. (Tuttle, J.) Argued June 14, 1888. Decided October 19, 1888.

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

Atkinson & Vance, for appellant.

Shepard & Lyon, for defendant.

CHAMPLIN, J. This is the same case as that reported in 61 Mich. 454 (28 N. W. Rep. 663), where a judgment for the plaintiff was set aside and a new trial ordered. It has again been tried, and resulted in a verdict and judgment for defendant.

The facts of the case are not materially variant, as presented by the plaintiff, from those which appeared upon the former trial, and a restatement of them here is unnecessary. In the opinion then delivered the law of the case was settled, and the circuit judge has upon the retrial conformed to that opinion. We do not think that any of the rulings upon the admission of testimony, to which the plaintiff has taken exception, were erroneous.

The only new position assumed upon the trial of this case, which was not raised upon the other trial, was that the plaintiff, having declared upon the contract, and set it out in his declaration in what purported to be its very terms, and the defendant having pleaded the general issue without denying its execution under oath, must be held to have admitted the execution of the contract in manner and form as alleged.

The circuit court held with the plaintiff upon this proposition, and charged the jury that the contract, as set out in the declaration, must govern them; and that the plaintiff was entitled to recover $14 a thousand feet for all lumber sawed and piled on the dock, and which, in the usual course of trade, could have been shipped by the defendant in the fall of 1883.

That the fact that the defendant's dock at Cleveland was so situated that vessels of ordinary draft could not deliver a cargo of lumber at it was no excuse for the defendant not shipping the lumber in the fall of 1883; and if they should find from the evidence that the defendant shipped lumber from the same port where this lumber was, and procured vessels that fall for its lumber after this lumber was ready for shipment, that fact might be considered in determining whether or not the defendant could have shipped this lumber that fall; and the fact that freights were high or higher than usual during the fall of 1883 would not excuse the defendant for not shipping the lumber after it was ready for shipment, in the fall of 1883.

He further instructed them that they should charge the defendant with all the lumber that was sawed and piled on the dock during the fall of 1883, and which, under the terms of the contract, should have been shipped by the defendant, and credit it with all the payments, and also the fair market value of the lumber that was

ready for shipment that fall, which the plaintiff afterwards sold.

He also charged the jury, substantially as requested by the plaintiff's counsel, that in determining what the parties meant by that clause in the contract which reads,—

"And said lumber shall be shipped within 30 days after the same is sawed and piled on the dock,"—

They might consider the testimony bearing upon what the original talk, agreement, or understanding between the parties was before the contract was drawn; and, again, that the time when the lumber should be shipped must be determined by the jury, upon consideration of all the circumstances and proofs in the case, and payment could only be had for such lumber as should be shipped three months after the time shipments should be made, and that might apply to only a part of the lumber.

In the opinion of the Court, when the case was before us on the former occasion, Mr. Justice MORSE said:

"With this clause out, the time of shipment would not be stated in the written contract; but the law would imply that it must be shipped in a reasonable time; and the agreement claimed to have been made at Cleveland, and which was proposed to be shown by this excluded testimony, would be, as before suggested, in our opinion, not only a reasonable interpretation of the contract with the clause retained, but a reasonable performance of the contract without the clause; so that, in no sense, can it be said to alter, vary, or modify the terms of the written contract itself."

The excluded testimony referred to was admitted upon the last trial, and the circuit judge submitted the facts to the jury under the law as laid down by this Court in the opinion referred to. The jury have found those facts against the plaintiff, and we cannot, without overruling our former decision as to the law of the case, reverse the judgment.

It will be affirmed, with costs.

SHERWOOD, C. J., MORSE and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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HENRY W. SMITH, EXECUTOR, ETC., v. EUSEBIA SMITH ET AL.

Deed—Construction—Granting clause—Habendum.

1. The object to be arrived at by courts in construing deeds or other contracts is to ascertain the intention of the parties.
2. All grants must be construed reasonably, and in the light of surrounding circumstances. *McConnell v. Rathbun*, 46 Mich. 305.
3. It is well settled by numerous cases that when the *habendum* in a deed is repugnant and contrary to the granting clause it is void, and that it can only affect the grant when it can be construed as consistent with the premises. It cannot divest the grantee of the legal estate already granted him in the premises, nor can it frustrate a grant complete before, or abridge or lessen the estate granted.
4. In this case a deed executed by an aged father to his son (being one of twelve executed at the same time to the grantor's children and grandchildren, and differing only as to the names of the grantees and description of land conveyed), by which he granted, bargained, sold, remised, released, and quitclaimed unto the son and to his heirs for the use, benefit, and support of himself and his family, and the proper education of his children (the grantee being childless, but some of the other grantees having children), certain land, etc., to have and to hold for the period of his natural life, and after his death to his children in fee-simple, for the purposes and uses set forth in the deed, which was signed by the grantee, and contained covenants on his part to take, keep, and use the property in the manner and for the purposes for which it was conveyed, and to keep it free from levies, liens, and incumbrances during his natural life, and not to convey it or any interest

therein during the life-time of any of his children, or the life-time of any of his brothers or sisters, is held under the circumstances set forth in the opinion, and the authorities cited, to have vested the *fee* in said grantee, and the *habendum*, being repugnant to the granting clause, must be rejected.

Error to Cass. (O'Hara, J.) Argued June 6, 1888. Decided October 19, 1888.

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

Howell & Carr and *Edward Bacon*, for appellants.

Harsen D. Smith (*C. I. Walker*, of counsel), for plaintiff.

LONG, J. This is an action of ejectment, brought by plaintiff, as executor of the last will and testament of Joseph Smith, deceased, to recover possession of about 300 acres of land in the township of Calvin, Cass county, said to be worth about $9,000. There is no dispute as to the facts, and the whole question turns upon the construction of the following deed:

"This indenture, made this second day of February, in the year of our Lord one thousand eight hundred and eighty, between Joseph Smith and Jemima Smith, his wife, both of Cassopolis, Michigan, of the first part, and Thomas J. Smith of the second part, witnesseth: that said parties of the first part, for and in consideration of the sum of one dollar, and in further consideration of natural love and affection and of promises made by the parties of the first part to the party of the second part, and of improvements made on the land herein described by the party of the second part, and for services rendered to the parties of the first part by the party of the second part, having granted, bargained, sold, remised, released, and quitclaimed, and by these presents do grant, bargain, sell, remise, release, and quitclaim unto the said party of the second part and to his heirs for the use, benefit, and support of himself and his family, and the proper education

of his children, the following described land, situated, lying, and being in the township of Calvin, county of Cass, and State of Michigan, to wit:

"The east half of the north-east quarter, and the north-east quarter of the south-east quarter, and fifty-eight acres off the north end of the west half of the north-east quarter, of section seven; and the north-west quarter of the south-west quarter, and the south-east quarter of the south-east quarter, and the west half of the north-east quarter of the south-west quarter, and the east half of the south-west quarter of the south-east quarter, of section eight; all in township seven south, of range fourteen west, in said county of Cass, intended to be the same lands deeded to me by Henry W. Smith; to have and to hold for the period of his natural life, and after his death to his children in fee-simple, for the purposes and uses above set forth; and in consideration of the aforesaid grant and conveyance the party of the second part doth covenant and agree to and with the parties of the first part, their heirs, executors, administrators, and assigns, to take, keep, and use the premises and property above described in the manner and for the purposes for which it is hereby and herein conveyed.

"That he will, during the period of his natural life, keep and preserve the same free and clear from levies, liens, and incumbrances.

"That the rents, profits, and incomes therefrom, so far as the same shall be necessary, shall be during his said life-time devoted to the support of his family and the proper and suitable education of his children.

"That he will make no conveyance of any interest therein during the life-time of any of his children, or of any of his brothers or sisters.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"Signed, sealed, and delivered
in the presence of

"MARTHA E. DAVIS,	JOSEPH SMITH,	[Seal.]
"L. D. SMITH.	JEMIMA SMITH,	[Seal.]
	"THOMAS J. SMITH.	[Seal.]"

This deed was acknowledged in due form of law before a notary public, and placed upon record in the office of the register of deeds of said county on August 16, 1887.

The facts and circumstances surrounding the giving of this deed, as shown by the record, are that the testator, Joseph Smith, of Cassopolis, was in 1870 the owner of the premises in question, and of a large amount of other lands in Cass county. There is no claim but that such ownership continued until 1880. He was the father of eight children, six of whom were living at the time of his death, in April, 1880. Two of them had deceased, each of them leaving three children. He also left a widow, who is still living.

Previous to his death, and as early as 1872 or 1873, he permitted his son Thomas J. Smith, with his wife, to go into occupation of the premises in question, and to continue in the occupation thereof, taking the rents and profits, and paying the taxes, until February, 1880, when the deed in question was executed. His other children were permitted to occupy other of his lands in the same way, receiving the rents and profits thereof.

At the commencement of 1880 he was in very poor health, and had been for a number of years, and for six months had been confined to his home. He was then 71 years of age.

In February, 1880, he made provision for the distribution of his property among his children and grandchildren, he himself preparing the form of transfer of a portion of his real estate to each of his children and grandchildren upon the conditions therein named. They were drawn under his special direction by his granddaughter, May Armstrong, and he carefully examined each paper. They were all precisely alike, except as to the names of the grantees, and the description of the property conveyed.

On February 5, 1880, he and his wife executed and acknowledged, jointly with his son Thomas J. Smith, the instrument hereinbefore set forth, and it is upon the construction of this instrument that this case depends. This

deed was not recorded until 1887. At the same time, and as a part of the same transaction, said Joseph Smith executed to each of his six living children a note payable in real estate. The note executed to Thomas J. Smith was in the following words:

"$3,713.00. CASSOPOLIS, Febry. 5, 1880.

"On or before ten years from date, for value received, I bind myself, my executors, administrators, and assigns, to pay to Thomas J. Smith the sum of three thousand seven hundred and thirteen dollars, with one per cent. interest, in such real estate as I may have on hand, at a fair valuation. JOSEPH SMITH."

The notes to the other children were precisely like this, except as to the amount, being each of them for the sum of $5,000. On March 22 following he executed his last will and testament, appointing his brother, Henry W. Smith, plaintiff herein, sole executor, with—

"Full power to sell and convey any and all of my real estate in the settlement of my estate."

This last will was subsequently admitted to probate, and the plaintiff qualified as executor.

Joseph Smith died April 18, 1880. The plaintiff, as executor, took possession of all the real estate of the testator, except the home farm occupied by the widow, and the lands thus transferred to the several children and grandchildren as hereinbefore set forth, and he has sold and conveyed all said lands of which he thus took possession. An inventory was made of the real and personal property of the estate, but it did not include the lands mentioned in the several transfers to the children and grandchildren referred to, which were drawn by said May Armstrong, and executed in February, 1880. The lands described in these papers were in the possession of the several grantees. He assumed no control over them. The real estate inventoried $36,300, and the personal property $47,193.90.

The estate has never been fully settled; no commissioners on claims have been appointed, and no claims allowed by the probate court. Part of the real estate notes, including the one going to Thomas J. Smith, have been paid in full, others in part. The home farm, being occupied by the widow, is still undisposed of, and contains 150 acres, and was inventoried at $10,000. Thomas J. Smith conveyed to his wife, Eusebia, the lands in question on August 12, 1887, and she claims to be the owner thereof. On August 22 thereafter she leased the same to the defendant Longsduff, for one year, with the privilege of three.

Thomas J. Smith was married in 1869, and never had any children. He died September 30, 1887, leaving a last will and testament, by which he devised all of his property, both real and personal, to his wife, Eusebia Smith, defendant herein, which will has been duly probated. This suit is brought by the executor of Joseph Smith, to recover possession of the premises thus referred to, which the defendant Eusebia Smith claims by virtue of said deed and by the will of her husband.

On the trial the defendants made seventeen distinct requests to charge, and the plaintiff four. These requests were all refused, and the court charged the jury that under the facts proved in the case the plaintiff was entitled to recover, and instructed them to return a verdict accordingly, which was done.

Defendants bring the case into this Court by writ of error.

We need not discuss these several assignments of error separately, as the case must depend upon the construction to be given to the deed. The object to be arrived at by courts in construing deeds or other contracts is to ascertain clearly the intention of the parties. It is said by the court in *French v. Carhart*, 1 N. Y. 102:

"It is a cardinal rule in the construction of contracts that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated. Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and the subject matter of the instrument."

It was said by Mr. Justice COOLEY in *McConnell v. Rathbun*, 46 Mich. 305 (9 N. W. Rep. 426):

"All grants must be construed reasonably, and in the light of surrounding circumstances."

And in that case the circumstances proved by parol testimony controlled the construction of the deed. In ascertaining the true meaning of the parties, the entire instrument is to be examined, and provisions apparently inconsistent with each other are to be reconciled, if possible.

In *Smith v. Packhurst*, 3 Atk. 136, Lord Chief Justice Willes laid down the rule:

"Such a construction should be made of the words in the deed as is most agreeable to the intention of the grantor. * * * We have no power, indeed, to alter the words, or to insert words which are not in the deed; but we may and ought to construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible."

It is contended by the plaintiff that the granting clause in the deed does not point out the extent or nature of the estate to be granted, nor does it use the ordinary expression "forever;" that the term "heirs" is qualified and controlled by the expression which immediately follows it, showing that it was not a simple estate in fee, but qualified by the words,—

"For the use, benefit, and support of himself and his family, and the proper education of his children."

That these peculiarities show that no estate in fee was conveyed by the granting clause, especially when considered in connection with what follows. Plaintiff's counsel further contend that if there had been a simple conveyance to the grantee and his heirs forever, in the granting clause, it would be controlled by the subsequent portions of the deed, which clearly indicate the purpose of conveying a life-estate; that the *habendum* is not only not repugnant to the granting clause, but is in full accord with it, when the pecularities of the granting clause are considered; that at the death of Thomas J. Smith the property reverted to the devisees under the will of the grantor, of which the plaintiff is the sole executor; that, ejectment being a mere possessory action, not necessarily involving the title to the property, the executor could maintain ejectment by the provisions of the will, which gives the executor—

"Full power to sell and convey any and all of my real estate in settlement of my estate."

It is well settled by numerous cases that when the *habendum* is repugnant and contrary to the granting clause it is void. It can only affect the grant when it can be construed as consistent with the premises. It cannot divest the grantee of the legal estate already granted him in the premises, nor can the *habendum* frustrate a grant complete before, or abridge or lessen the estate granted. *Nightingale v. Hidden,* 7 R. I. 118; *Pynchon v. Stearns,* 11 Metc. 316: 4 Kent, Comm. 468; 2 Bl. Comm. 298; *Canal Co. v. Hewett,* 55 Wis. 105 (12 N. W. Rep. 382); *Huntington v. Lyman,* 138 Mass. 205; *Hafner v. Irwin,* 34 Amer. Dec. 390; *Warn v. Brown,* 102 Penn. St. 352; *Flagg v. Eames,* 40 Vt. 23.

It must be conceded that the *habendum* cannot perform

the office of divesting the estate already vested by the granting clause, and it is void if repugnant to the estate granted.

The grantor, Joseph Smith, at the time of the execution of the deed in question, was, as is admitted in the record, a man some 71 years of age, and possessed of a large estate. He was a farmer, and had been in quite poor health for a number of years, and was confined to his house for the last six months before his death. He had eight children, six of whom were living. A son, John H., had died some 20 years before, leaving three children, who were all living at the time of the execution of this deed. His daughter Sarah had died some 10 years before, also leaving three children, who were living at the date of the deed.

This deed was drawn by May Armstrong, a granddaughter, from a draft made by the grantor, and under his direction. Eleven other deeds were also drawn at the same time. The grantees in these deeds were the six children of the grantor and his six grandchildren. These deeds were all drawn from the same draft; the only difference in them being the names of the grantees and the description of the property. Joseph Smith examined all of them after they were drawn. They were all executed by the parties named therein, and delivered at the same time as the deed to Thomas J. Smith.

At the death of the grantor all his children then living were married and had children, except Thomas J. Smith and James P. Smith. None of the grandchildren had issue at that time.

At the death of the grantor he was possessed of real estate valued at $36,300, exclusive of the real estate conveyed by these 12 deeds, and his personal estate amounted in value to over $47,000.

Thomas J. Smith and wife had occupied these lands since 1872 or 1873, and had the use and profits therefrom since that time, and the other children had the use and profits of the lands so conveyed to them by said deeds. Thomas J. Smith was married to Eusebia in 1869, and during the years after their marriage lived near the grantor.

That Thomas J. Smith and James P. Smith and the grandchildren mentioned in these deeds had no children was well known to Joseph Smith, the grantor, at the time of the execution and delivery of these deeds. None of the deeds executed at that time were ordinary deeds poll, but were executed also by the grantees. The consideration expressed is—

"The sum of one dollar, and in further consideration of natural love and affection, and of promises made by the parties of the first part to the party of the second part, and of improvements made on the land herein described by the party of the second part, and for services rendered to the parties of the first part by the party of the second part."

These circumstances and the recitals in the deed must have weight in construing this instrument.

Is it to be presumed, taking into consideration all the surrounding circumstances, that Joseph Smith intended that these lands should revert to his estate upon the death of the grantees without issue? This does not seem probable, in view of the fact that at the time of the execution and delivery of these deeds eight of the grantees had no children.

The deed is, in its terms, plainly contradictory. It cannot be construed as one harmonious whole. The *habendum,* is, as contended by defendants' counsel, repugnant to the granting clause, and the condition or agreement following is repugnant to the *habendum,* and both are repugnant to the grant or premises, and the deed cannot

be upheld so as to give effect to all its parts. The granting clause is:

"Have granted, bargained, sold, remised, released, and quitclaimed, and by these presents do grant, bargain, sell, remise, release, and quitclaim, unto the said party of the second part and to his heirs for the use, benefit, and support of himself and his family, and the proper education of his children, the following described land," etc.

Had the granting clause been followed by the usual *habendum* found in quitclaim deeds, no one would deny that it conveyed an estate in fee; but it is insisted on the part of the plaintiff that there are words of limitation in the *habendum* which must control the granting clause, and that such words limit the estate for life in the grantee, Thomas J. Smith, and at his death it must revert to the grantor.

If this construction is given this deed, in our opinion, it would entirely defeat the intention of the grantor. That he intended to convey these lands absolutely and in fee to his children and grandchildren there can be no doubt. That he desired his children and grandchildren to retain possession of these lands, and hold the title thus conveyed, and not dispose of them, is equally evident. But that he intended, if any of these children or grandchildren died without issue, to deprive the *family* left surviving of every dollar of the estate, cannot be gathered from the surrounding circumstances, or from the language employed in the deed itself. The word "family," used in the deed, has some significance. The only family of James P. and Thomas J. Smith, the two sons, was the wife. It is also apparent that the only family of the six grandchildren was husband or wife.

The record does not disclose whether these grandchildren were all married, but it is disclosed that none of them had issue; and yet in each of these deeds it is expressly stated that the conveyence is,—

"For the use, benefit, and support of himself and his family,"—

And the covenant upon the part of the grantee contained in the deed is—

"That the rents, profits, and income therefrom, so far as the same shall be necessary, shall be during his said life-time devoted to the support of his family and the proper and suitable education of his children," etc.

We are of the opinion that it was the intention of Joseph Smith to convey this land to Thomas J. Smith in fee. We are also of the opinion that the granting clause in the deed conveyed the fee to Thomas J. Smith, and the *habendum*, being repugnant to the granting clause, must be rejected. Thomas J. Smith being vested in fee under this deed, it passed to the defendant Eusebia Smith under the deed from the husband. This rule is fully sustained by the authorities above cited. We need not discuss the other questions raised, as this must dispose of the case.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

A. BACKUS, JR., & SONS (A CORPORATION) v. THE DETROIT WESTERN TRANSIT & JUNCTION RAILWAY COMPANY AND THE DETROIT UNION RAILROAD DEPOT & STATION COMPANY.

Railroad companies—Operation of road by lessee—Liability for damages.

1. The operation of a railroad by a lessee does not change the relations of the original company to the public.
2. Where the use of a railroad right of way is restricted to certain purposes, its more general use, resulting in damage to the grantor, is actionable.
3. Upon the facts stated in the opinion, the defendants are held to be jointly liable for the unlawful use by the Wabash Company of the right of way acquired of the plaintiff; and, as an examination of the opinion is essential to a correct understanding of the case, reference is had thereto.

Error to Wayne. (Brevoort, J.) Argued June 15, 1888. Decided October 19, 1888.

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

F. A. Baker (E. G. Stevenson, of counsel), for appellant, contended:

1. The Union Depot Co. and the Western Transit Co. are liable in this action, because the Wabash, St. Louis & Pacific Ry. Co. is their agent in the operation of the Transit Co. road, and in the performance of the legal duty of the Transit Co. to so use this right of way as not to violate the rights of Mr. Backus, and those holding under him; citing *Nelson v. Railroad Co.*, 26 Vt. 717; *Railroad Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Brown*, 17 Wall. 445; *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railroad Co. v. Mayes*, 49 Ga. 355.

2. Where a railroad company is required to fence its road, and in default is made liable for injuries resulting from such neglect, a lease of the road will not relieve the company from liability; citing *Whitney v. Railroad Co.*, 44 Me. 362; and the same rule prevails as to statutory liability for fires communicated by engines; citing *Stearns v. Railroad Co.*, 46 Id. 95; nor will legislative authority to make the lease of itself release the lessor; citing *Singleton v. Railroad Co.*, 70 Ga. 464; *Balsley v. Railroad Co.*, 119, Ill. 68; *Railroad Co. v. Morris*, 68 Tex. 49; and see, also, *Lakin v. Railroad Co.*, 13 Or. 436; *Freeman v. Railway Co.*, 28 Minn. 443; *Railway Co. v. Curl*, 28 Kan. 622; *Railroad Co. v. Hambleton*, 14 Amer. & Eng. R. Cas. 126; *Railroad Co. v. Black*, 79 Ill. 262.

3. The Union Depot Co. is liable in this action, because it so constructed its yard that it cannot be used by the Wabash Co., or any other tenant, without violating the rights of Mr. Backus, and those claiming under him; citing *Fish v. Dodge*, 4 Denio, 311; *Todd v. Flight*, 9 C. B. (N. S.) 377 (note 390); *Shipley v. Associates*, 101 Mass. 251; *Owings v. Jones*, 9 Md. 108; *Jackman v. Arlington Mills*, 137 Mass. 277; *House v. Metcalf*, 27 Conn. 631.

Charles M. Swift (*Otto Kirchner*, of counsel), for defendants, contended:

1. The defendants are not liable jointly or severally for the acts of the Wabash Co. in using the Transit Co.'s road, such acts being in no sense the acts of the defendants, nor do they become such because the Wabash Co. is the lessee of the Depot Co., which in turn is the lessee of the Transit Co.

2. The rule that makes the lessor company answerable for the acts of its lessee is based upon the theory that the lessor company owes certain duties to the public in the running and operation of its railway, and that it cannot absolve itself from responsibility by delegating its functions to another; citing *Railroad Co. v. Brown*, 17 Wall. 450; *McMillan v. Railroad Co.*, 18 Mich. 102; Redf. R. R. 616, chap. 22, § 1.

3. The Wabash Co., in using said track, whether in the running of its trains, or in switching or making up trains, was not discharging any duties that devolved upon either of the defendants, but exercised its own franchises, and discharged the duties that devolved upon it.

4. In furnishing to the Wabash Co. the necessary right of way and track, the Depot Co. lawfully exercised its principal function as a corporation; citing How. Stat. § 3458; and it had no option in the matter, being bound under its charter so to do; citing How.

Stat. § 3485; and what it did, therefore, it did in obedience to law, and it delegated to the Wabash Co. no franchise that it was itself required to exercise.

5. The Transit Co. was authorized to lease its road to the Depot Co. (How. Stat. § 3490, as amended by Act No. 14, Laws of 1882), and the road thus acquired might be used by the lessee in the exercise of the franchises of the lessor, or of its own franchise, "to do a local and suburban passenger business" (How. Stat. § 3487), or "to make suitable and proper connections with all railroads terminating in or passing through" the city of Detroit "that might desire access to its depot" (How. Stat. §§ 3458, 3485), in the exercise of which last-named franchise the leased road was used by the Depot Co., and by the Wabash Co. in the exercise of its *own* franchise.

SHERWOOD, C. J. The plaintiff brought an action on the case against the above-named defendants, and also against the Wabash, St. Louis & Pacific Railway Company, to recover damages for the unlawful and wrongful use of the plaintiff's land in the city of Detroit (over a part of which the defendants, for certain purposes, had a right of way for their engines and cars to pass over, and for no other purpose), and by which wrongful use the plaintiff claims to have been damaged in the use of its premises, and in the enjoyment of the same, to its great injury.

Plaintiff also claims in its declaration that by defendants' wrongful use of its premises and said right of way it was obliged to hire persons to protect its property, which consisted of a factory and large accumulations of lumber and material, from fire proceeding from engines wrongfully used on such right of way, in switching and making up trains thereon, greatly to its damage.

Also, by such wrongful use of such premises, a large quantity of lumber standing on plaintiff's property was covered, and the fibers thereof filled, with soot and cinders escaping from the engines, and scattered through the piles, which became saturated with coal dust, and was

greatly injured thereby for the purposes for which it was used; and by reason of the unlawful use of said right of way, and the danger caused thereby from fire, the plaintiff's rates of insurance have been greatly increased, and its rented premises adjoining have been greatly injured by said unlawful use, consisting as it does of a wharf and lumber-yard. And plaintiff claims as its damage for its said several injuries the sum of $100,000 in its declaration. To the plaintiff's declaration the defendants pleaded the general issue.

The plaintiff discontinued on the trial as to the Wabash road.

The case was tried in the Wayne circuit court before Judge Brevoort, by jury. At the close of the trial the circuit judge directed the jury to render a verdict for the defendants, and plaintiff brings error.

But two errors are assigned:

"1. The court erred in refusing to receive evidence tending to show the nature and extent of the damages suffered by plaintiff at the hands of the defendants.

"2. The court erred in directing the jury to render a verdict for the defendants."

There can be no doubt but that the plaintiff's declaration states a cause of action, which, if proved, would entitle it to recover damages. If there is any proof legally in the case tending to show the facts set out in the declaration there must be a reversal; and beyond this there is no other question before us for consideration, except, perhaps, it may be whether or not legal proof was offered, and rejected by the court, to prove such facts.

The defendant the Detroit Union Railroad Depot & Station Company was organized June 10, 1881. It acquired the land lying between Woodbridge street west, in Detroit, and the Detroit river, and extending from the grounds of the Michigan Central Railroad, at Twelfth street, to the

east line of the property of the plaintiff. The original and amended articles of association express the intention of the corporation to construct railroad tracks from the station grounds, so acquired, to the junction of the Wabash, St. Louis & Pacific Railway with the Lake Shore & Michigan Southern Railway, in the township of Springwells, and to there connect with the Wabash, St. Louis & Pacific road.

On October 20, 1881, the Detroit Union Railroad Depot & Station Company entered into a contract with the Wabash, St. Louis & Pacific Railway Company of the second part, whereby the Union Depot Company agreed to furnish the Wabash road with terminal facilities on said station grounds, the exact nature of which, and of the accommodations and facilities, it is unnecessary here to state. The instrument is called by the maker a "lease" or "demise." In substance, however, it is a contract by which the grounds, buildings, and tracks are to be used in common by both corporations, and such other roads as might thereafter see fit to join them, intending a union depot in the future, evidently.

Some of the provisions of this contract are that the tracks constituting the railroad yard on said grounds should be constructed by the Union Depot Co., for the Wabash road, and on such a plan and in such a manner as would be satisfactory to it. A map is referred to in the contract, and annexed to it, showing the general plan of the tracks or yard that had been agreed upon, and to which express reference is frequently made. Thus: The passenger-house and the tracks leading thereto are mentioned as follows:

"Also the right to use jointly with other railroad companies the proposed passenger-house to be built upon the grounds of said first party, and the tracks leading thereto, or, rather, two southerly tracks leading thereto, as indi-

cated on the map attached hereto, and including a strip of land," etc.

A reservation is made of a strip 400 feet by 100 feet for an elevator "about as indicated on said map." A reservation is also made of—

"A space for a double track to and from said elevator, about as indicated on said map."

And said first party agrees—

"To obtain the right of way from the westerly boundary of said station grounds, wide enough for four tracks, in as direct a line as is practically consistent with economy, to or near the point where the right of way of the party of the second part from the west approaches and touches and becomes parallel with the right of way of the railroad owned by the Lake Shore & Michigan Southern Railroad Company in fee simple ownership, and lease the same to the said second party, subject to the reservations herein made.

"And the said first party agrees to build upon such right of way a railway track or tracks from the point of junction with the railroad of said second party, at or near said points where said rights of way come together, single or double, as the said second party shall desire, to said station grounds," etc.

The rent shall be the interest at 7 per cent. on the cost of the grounds, right of way, and the improvements, or a *pro rata* part thereof, as particularly described, and the lease shall be a perpetual one. The rights of occupancy to be enjoyed by the Wabash shall be that of an owner. This intention is expressed as follows:

"And the said parties agree that when the property is ready for use, and the improvements, tracks, station-houses, and other necessary buildings and erections are once complete, then and thereafter the said second party shall have the full and complete use of the same, and shall as absolutely control and manage the same as if the owner thereof," etc.

The defendant the Detroit Western Transit & Junction

Railway Company was organized May 2, 1881. On March 17, 1882, the location was fixed as follows:

"Beginning at such point as shall be found most admirable on the east line of water lot number ten, on the Thompson farm, so called, and between Woodbridge street and the Detroit river, in the city of Detroit, Wayne county, Mich., and running thence in a direction southerly and westerly on such line as shall be found most convenient and practicable to and into the town of Springwells, in said county, until said line shall intersect the railroad of the Wabash, St. Louis & Pacific Railroad Company, at some convenient point near its crossing of the Dearborn road, so called, and between said crossing and the river Rouge in said town of Springwells; all of said railway of this company being in said county of Wayne, and the entire length thereof being about four miles, as is estimated."

On April 12, 1882, the Detroit Western Transit & Junction Railway Company, as the party of the first part, entered into a contract with the Detroit Union Railroad Depot & Station Company, as the party of the second part, by which the Union Depot Company agreed to furnish and advance to the Western Transit all the money necessary to acquire its right of way and to construct its railroad, and in consideration thereof the Western Transit leased the whole thing to the Union Depot Company forever, at an annual rental equal to the money so furnished and advanced.

The Western Transit agreed to keep up its organization and preserve its franchises, and use them for the condemnation of a right of way. It also agreed if desired to issue its capital stock to the Union Depot Company to the amount of said debt, so that the Union Depot Company should—

"Just become the holder of its stock, and also through it the absolute owner of the property represented by it, and from that time to manage it as such owner."

In addition to furnishing and advancing all the money needed, the Union Depot Company agreed as follows:

"And the said second party agrees to provide for the working and management of the said railroad and branches, and to maintain the same and all necessary structures and fences thereon, and to assume all the responsibilities of such management, and to indemnify and save harmless the said first party from and against all and every kind of liability which may arise or grow out of the management and operation of said road and branches."

With these contracts and agreements referred to existing between these parties defendant, the Detroit Western Transit & Junction Railway Company, in July, 1882, took proceedings to condemn and acquire the right of way across the land known as the "Backus Property," lying immediately west of the Union depot grounds. This property has a frontage of about 400 feet on the Detroit river, and extends from the river to Woodbridge street.

The petition described a piece of land across the property 60 feet wide, as the parcel sought to be acquired as a right of way, and it contains the following clause:

"The right of way hereby sought is sought and to be used only for the passage of trains, and not for the switching and making up of trains."

The strip was condemned under this petition. There was a slight change made from the line condemned, agreed upon by the parties, and the parties conveyed to the company the land by deed containing the following clause:

"The right of way hereby conveyed is to be used only for the passage of trains, and not for the switching or making up of trains, and is to be subject to the right of the owner, A. Backus, Jr., and those claiming under him, to have convenient crossings over said railroad provided and maintained by said railroad company."

The Union Depot Company immediately went on and constructed its railroad until it connected with the Wabash

road, as agreed upon, and the evidence tends to show it carried out its agreement with the Western Transit Company, and when the road was done and the depot completed it commenced to operate the road. The Wabash took it immediately as soon as it was ready, and has done switching and making up trains on the Backus grounds ever since.

At appears that the firm of A. Backus, Jr., & Sons occupied the Backus property prior to the condemnation proceedings, and held a lease of the same. This firm, July 31, 1885, was organized as a corporation, and on August 1, of that year the firm assigned all of its assets and claims to the plaintiff.

There can be no question, we think, under the foregoing facts, of the plaintiff's right to bring suit if it has a cause of action, or if the firm had a cause of action, against the defendants. There was testimony showing or tending to prove all the foregoing facts stated. It also appeared that the plaintiff had objected to and remonstrated with the defendants against the illegal use claimed to have been made of the right of way over the Backus ground, but without avail. As early as May 14, 1885, the plaintiff's assignor called attention to this subject in the following letter:

"MAY 14, 1885.

"HON JAMES F. JOY,
"Prest. Transit Co.

"*Dear Sir:* My attention has been called repeatedly to the violation of A. Backus, Jr., & Sons' rights by the constant switching and making up of trains across their yard and Eighteen and one-half street, and your attention has been called to the subject repeatedly, with the request that the obstructions might be removed. My deed for right of way for through trains is ample to cover your rights, and will be respected, but this switching of cars across above premises must come to a stop, or I shall insist on knowing why, and shall take steps to protect my rights.

"Your immediate attention to above complaint will save much trouble. Yours respectfully,

"A. BACKUS, JR."

It appears from the testimony that Mr. Joy, who was president of the Union Depot Company, and the firm of A. Backus, Jr., & Sons, understood the rights secured in the Backus property, and the use to be made of it, alike, and that switching cars and making up trains of cars were not to be done there; and it further appears that when the lease was given to the Wabash road Mr. Joy informed that road of the manner in which it could do business over the Backus grounds; that the agreement with Mr. Backus was that no switching should be done upon these grounds or making up trains, and Mr. Joy says: "I felt that we never acquired the right of way for it."

I do not think it would be questioned, had the Depot Company used its tracks in the manner the testimony tends to show they were used by its lessee, but that it would be liable to the plaintiff or its assignor. At least I do not think it could be contended otherwise.

The Depot Company could not so lease or transfer its interest under its franchises as to rid itself of its liability to the plaintiff for the improper use of them, and when the Transit Company made its arrangement with the Depot Company it seemed to understand this, and had inserted in the agreement a clause making the latter assume all the responsibility of the management of its property, and to save the Transit Company harmless against all liability arising out of such management and the operation of its road.

The agreement between the two companies was such, however, as to have the effect of consolidation as to the liability to third parties for the unlawful use of their property in the operation of their road, for damages consequent thereon, and they were liable also for such dam-

age as was done to third parties by the unlawful use of the right of way allowed by them, done by lessees or other persons. Otherwise all responsibility for such damage could be avoided, when an enterprise of doubtful success was about to be undertaken, by a simple transfer of the use of the property to parties who were insolvent until the result of the enterprise could be determined. The law did not intend this, and it should not receive such a construction or application.

I think in these views we are sustained, not only by reason, but by authorities, so far as we have any. *Nelson v. Railroad Co.*, 26 Vt. 717; *Railroad Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Brown*, 17 Wall. 445.

In this case it is said: "The operation of the road by the lessees does not change the relations of the original company to the public." *Abbott v. Railroad Co.*, 80 N. Y. 27; *Railroad Co. v. Mayes*, 49 Ga. 355; *Whitney v. Railroad Co.*, 44 Me. 362; *Stearns v. Railroad Co.*, 46 Id. 95; *Singleton v. Railroad Co.*, 70 Ga. 464; *Railroad Co. v. Morris*, 68 Tex. 49 (3 S. W. Rep. 457); *Lakin v. Railroad Co.*, 13 Or. 436 (11 Pac. Rep. 68); *Freeman v. Railway Co.*, 28 Minn. 443 (10 N. W. Rep. 594); *Railway Co. v. Curl*, 28 Kan. 622; *Railroad Co. v. Hambleton*, 14 Amer. & Eng. R. Cas. 126; 1 Redf. R. R. 588, chapter 22, § 1; *McMillan v. Railroad Co.*, 16 Mich. 102.

The plaintiff has shown by its proofs the unlawful use of its property by the defendants, and when it undertook to show its damages the court refused to allow it to do so, and directed the verdict and judgment for the defendants.

In this he erred, and the judgment must be set aside, and a new trial ordered.

CHAMPLIN, MORSE, and CAMPBELL, JJ., concurred. LONG, J., did not sit.

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JUDSON J. DIKEMAN AND ORVILLE DOUGHERTY v. OTIS ARNOLD.[1]

Deed—Delivery—Escrow—Husband and wife—Mortgage—Homestead—Land contract—Damages—Charge to jury.

1. Whether a deed has been delivered so as to pass title depends upon the intention of the parties.
2. It is competent for a grantor to show by parol that a deed which he had executed and acknowledged was not to be delivered until the happening of certain contingencies, or that it was left in escrow until the happening of some subsequent event, and a delivery contrary to such an agreement is not binding upon him.
3. A party has the right to have his theory of the case submitted to the jury, if supported by testimony, with proper instructions in relation to the law in case they find the testimony preponderates in favor of such theory.
4. A husband cannot mortgage land for which he exchanges his homestead, and which is to be occupied in lieu thereof as a homestead, to secure a loan from a third party with which to pay the difference agreed to be paid on such exchange, without his wife's signature to the mortgage.
5. The wife's homestead rights will be protected in whatever form they may come in question, whether at law or in chancery.
6. An instruction that, if a given state of facts is found by the jury, the plaintiff is entitled to a verdict, but which ignores the theory of the defendant, which his testimony tends to support, and which is a complete defense if accepted by the jury, is erroneous.
7. Under a land contract stipulating for a good and sufficient deed the grantee has a right to a good title, and one not clouded or incumbered by an outstanding life-estate in a portion of the land conveyed.
8. In *Allen v. Atkinson*, 21 Mich. 361, it was held that the vendee had an undoubted right to a good title, and to a deed with proper covenants; and he had a right also to insist that the title should be a marketable one, not open to reasonable objection.

[1] For a second report of this case, see 44 N. W. Rep. 407.

9. The measure of damages for a willful refusal by the defendant to convey land agreed to be received by the plaintiff on an exchange of farms, as *part* payment for the farm deeded by him to the defendant, is the fair, market value of the defendant's farm at time of the breach.

Error to St. Joseph. (Loveridge, J.) Argued June 19, 1888. Decided October 19, 1888.

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

O. F. Bean and *Howard & Roos*, for appellant, contended:

1. There can be no delivery and acceptance of a deed unless the minds of both grantor and grantee meet in such delivery and acceptance; citing Mart. Conv. § 206, and cases cited.
2. To have the effect of a delivery so as to give force to a deed, it must have been completely executed; citing 3 Washf. Real Prop. (4th ed.) 286; Mart. Conv. §§ 206, 220; 1 Dev. Deeds, § 310; *Steel v. Miller*, 40 Iowa, 402; *Stiles v. Probst*, 69 Ill. 382; *Williams v. Sprigg*, 6 Ohio St. 585; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485; and to the same effect in principle is *Pierson v. Spaulding*, 61 Mich. 90.
3. There can be but one delivery of the same deed, and that only after it is fully completed; citing *Stiles v. Probst*, 69 Ill. 382; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485.

Howell, Carr & Barnard and *Dallas Boudeman*, for plaintiffs, contended:

1. No legal impediment existed to the delivery of plaintiffs' deed on June 16, 1887, without the signature of Mrs. Orville Dougherty, which deed passed the legal title, and was accepted by defendant relying upon the agreement of a third person to procure her inchoate dower, which he had a right to do; citing *Brooks v. Isbell*, 22 Ark. 488; *Travis v. Tyler*, 7 Gray, 147; *Brittain v. Work*, 13 Neb. 347; 1 Dev. Deeds, § 306; *Towery v. Henderson*, 60 Tex. 291.
2. A party may make a complete execution and delivery of a deed as to himself, whether the others sign or not; citing *Gilmore v. Morris*, 13 Mo. App. 114; *Colton v. Seavey*, 22 Cal. 496; *Tustin v. Faught*, 23 Id. 237; *Jackson v. Stanford*, 19 Ga. 14.

3. The question of delivery and acceptance is one of intent, which should be submitted to and decided by the jury; citing 1 Dev. Deeds, §§ 262, 308; *Rivard v. Walker*, 39 Ill. 413; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *McCullough v. Day*, 45 Mich. 554; *Parker v. Dustin*, 22 N. H. 424; *Ela v. Kimball*, 30 Id. 127; *Warren v. Swett*, 31 Id. 332; *Hurlburt v. Wheeler*, 40 Id. 73.
4. The defendant is estopped from claiming that the title did not pass to him through this deed, as the other parties acted on his acceptance of it as it was, without which acceptance the transfer from plaintiffs to the Shaws would not have been made. He is also estopped by giving the $5,000 note to borrow the money to pay upon the purchase, and by the execution and delivery of the mortgage, which he could not legally do without such acceptance, of which fact he was advised.
5. The intention as to delivery and acceptance should be determined by what had occurred, and by the surrounding circumstances, as in other cases; citing *French v. Carhart*, 1 N. Y. 96; *Fellows v. Fellows*, 37 N. H. 75; 1 Dev. Deeds, § 263.
6. The rule that parol evidence is admissible to explain and apply a writing is universal in its application; citing *Emery v. Webster*, 42 Me. 204; *Barnebe v. Suaer*, 18 La. Ann. 148; *Pierson v. Bank*, 77 N. Y. 309; *Spencer v. Babcock*, 22 Barb. 326; *Reader v. Helms*, 57 Ala. 440; *Keough v. McNitt*, 6 Minn. 513.
7. Pre-existing and contemporaneous facts and circumstances attending the negotiations of the parties in making the contract may be shown; citing *Pierson v. Bank*, 77 N. Y. 309; *Barnebe v. Suaer*, 18 La. Ann. 148; *Reader v. Helms*, 57 Ala. 440; *Sigerson v. Cushing*, 14 Wis. 526.
8. The surrounding circumstances, and subsequent conduct and acts of the parties, are material and competent to show the interpretation which they put on the agreement; citing *Knight v. Worsted Co.*, 2 Cush. 283; *Pierson v. Bank*, 77 N. Y. 309; *Acker v. Bender*, 33 Ala. 230; *Cross v. Pearson*, 17 Ind. 612; *Emery v. Webster*, 42 Me. 204; *Grant v. Lathrop*, 23 N. H. 67; *Haldeman v. Chambers*, 19 Tex. 1; *Conner v. Carpenter*, 28 Vt. 237; *Ratcliffe v. Allison*, 3 Rand. (Va.) 537; *Sigerson v. Cushing*, 14 Wis. 527.

CHAMPLIN, J. On June 16, 1887, the plaintiffs were the owners of a farm of 210 acres in Sherwood, Branch county, upon which Richard Dougherty, the father of Orville, and the father-in-law of Dikeman, held a mortgage of a little over $7,000.

Jasper Shaw and Elsie, his wife, owned two farms,—one of 124½ acres, near Three Rivers, Mich., and the other in Indiana.

The defendant was the owner of a farm adjoining the Shaw farm, near Three Rivers, and was also the owner of several lots in the village of Three Rivers. Upon this farm were good houses and barns, and he had resided thereon with his wife and family several years.

The plaintiff Dikeman resided in Three Rivers, where he carried on a bakery and ice-cream parlors.

Orville Dougherty, with his family, resided upon the farm in Branch county, and the Shaws resided upon their farm near Three Rivers.

The plaintiffs were desirous of making some disposition of their farm in Branch county, whereby they could reduce their indebtedness, and had talked of trading farms with Shaw, who informed them that defendant had been desirous of purchasing about 40 acres from him. They thereupon called upon defendant to learn if he would purchase a part of the Shaw farm in case they should trade with Shaw. They found that he was not anxious to purchase, but had talked with Shaw about it sometime previous. He suggested, however, that he might take the whole of the Shaw farm if he could trade his village lots and some other land for it. They returned the next day, when a more definite proposition was made. This was on June 11, and was embodied in the following writing:

"THREE RIVERS, MICH., June 11, 1887.

"Agreement between Otis Arnold and son, party of the first part, and Dougherty and Dikeman, party of the second part.

"We, the party of the first part, agree to sell to the party of the second part 25 acres for $6,000, which will include all buildings and Arnold's house, and all buildings of whatsoever nature, except one barn, which must

be moved to the Shaw farm by the party of the second part, where the party of the first part designates. The party of the first part also agrees to sell all the balance of land east of the hedge fence for $100 per acre. The party of the first part also agrees to buy of the party of the second part the Shaw farm at $13,000, in exchange for the above-described property. The party of the second part agrees to take said property of Arnold in exchange for the 'Shaw farm' by June 16, 1887.

"[Signed] OTIS ARNOLD AND SON.
"DOUGHERTY AND DIKEMAN."

It was claimed on the part of the plaintiffs that Mrs. Arnold, wife of Otis Arnold, was cognizant of the trade which was being talked up with her husband, and assented thereto. On the other hand, defendant claims that Mrs. Arnold objected to the trade, and distinctly told plaintiffs that she would not assent thereto. Testimony was introduced in support of the claims made. On the evening of June 15, plaintiffs informed defendant that they were ready to carry out the trade the next day. The defendant claims that Mrs. Arnold again told them she was opposed to the trade, and would not consent to it; and they then said to her that, if she did not want the trade to go any further, it should go no further. This is disputed by plaintiffs.

On the morning of the 16th, Dikeman again went to Arnold's, and told him that they were ready to draw the papers. The plaintiffs, defendant, Shaw and his wife, and Richard Dougherty, met at the law-office of Newton H. Barnard, of the law firm of Howell, Carr & Barnard, to have the papers drawn. There is considerable conflict in the testimony as to what took place on this occasion. All agree, however, that Mr. Barnard drew up the following papers, viz.:

A deed from plaintiffs and their wives to Jasper Shaw of an undivided half of their farm in Branch county; a like deed of the other undivided half to Mrs. Shaw; a

deed from Mrs. Shaw to plaintiffs of the Shaw farm; a deed from Mr. Shaw to Dikeman of the land in Indiana; a deed from Mr. and Mrs. Dikeman and Mr. and Mrs. Dougherty to Otis Arnold of the Shaw farm; a discharge of the mortgage held by Richard Dougherty on the Branch county farm; a mortgage from Otis Arnold and his wife to Richard Dougherty for $5,000 on the Shaw farm, and notes secured thereby to that amount; and a contract between Otis Arnold and plaintiffs.

Certain abstracts were produced, and there is no dispute that Mr. Arnold took the abstract of the Shaw farm to his attorney, Mr. Bean, for his examination and advice. What was said and done on his return is controverted.

The plaintiffs claim that defendant announced that he was satisfied with the abstract of title, and that all parties were anxious to close up the transaction; that the deeds from the plaintiffs to the Shaws of the Branch county farm were duly executed, delivered, and accepted; but such deeds lacked the signature of Mrs. Dougherty, who was not present, but was at home on the farm, and the question came up, what should be done under the circumstances?

That defendant had arranged with Richard Dougherty to borrow $5,000 from him on the Shaw farm, that being the amount he was to pay plaintiffs on this purchase, and Richard Dougherty refused to discharge his mortgage on the Branch county farm until he had got from Mr. Arnold the notes and mortgage on the Shaw farm which he was to receive.

That Barnard stated to the parties that, in order for Mr. Arnold to execute the notes and mortgage to Mr. Dougherty on the Shaw farm, it was necessary that the defendant first accept the deed made to him by the plaintiffs.

That defendant then took the deed, and looked it over,

and said it was all right, except Mrs. Dougherty had not signed it, and then asked Richard Dougherty if he would become responsible for the execution of the deed by Mrs. Orville Dougherty, provided he (defendant) would accept the deed in the condition it then was; that Richard Dougherty said he would become responsible that she should sign the deed; that he would take it himself to her, and have her sign it, and send it back, and that he would become responsible for her signing it; that defendant then said he would accept the deed as it was, and told Mr. Dougherty to leave the deed after obtaining such signature at Mr. Barnard's office for him.

That defendant then executed three notes, which were drawn by his direction, aggregating $5,000, and then delivered them to Mr. Dougherty; and also executed a mortgage upon the Shaw farm to secure the payment of such notes, and delivered that to Richard Dougherty.

After that was done it is further claimed by the plaintiffs Mr. Barnard drew a contract, which was duly witnessed, and signed, sealed, and acknowledged by the parties to this suit, and which reads as follows:

"*This agreement*, made this 16th day of June, A. D. 1887, by and between Otis Arnold, of Three Rivers, St. Joseph county, State of Michigan, party of the first part, and Judson J. Dikeman, of Three Rivers, Michigan, and Orville Dougherty, of Sherwood, Michigan, of the second part, *witnesseth:*

"That the party of the first part, for and in consideration of the sum of five thousand seven hundred dollars, to him in hand paid by the transfer to him of the farm known as the 'Shaw Farm,' situated on sections 13 and 24, Fabius township, St. Joseph county, State of Michigan, agrees to sell and convey unto said parties of the second part all of the following described pieces and parcels of real estate, situated, lying, and being in the village of Three Rivers, St. Joseph county, and State of Michigan, to wit: Lots 1, 2, 3, 4, 5, 6, 7, and 8, in block 7; lots 1, 2, 3, 4, 5, and 6, in block 6; lots 5 and 6, in block 4; lots

5 and 6, in block 5; lots 1, 2, 3, and 4, in block 3; all of blocks 8, 9, 10, and 11; all of block 12, excepting lots 5 and 6, in said block; all of block 13, except lots 1 and 2; and all of block 14, except lots 1, 2, 3, 4, 5, and 6, and a narrow strip off the east end of lots 10, 11, and 12, owned by Albert Ackenback;—all in Otis Arnold's addition to the village of Three Rivers, according to the recorded plat thereof, also lots 4, 5, and 6, in block 18 of Yawney's addition to the village of Three Rivers, according to the recorded plat thereof.

"It being expressly understood and agreed by and between the parties hereto that all of said lands shall be surveyed, and that the parties of the second part shall receive the first twenty-five acres for said sum of five thousand seven hundred dollars; and for that all said land shall overrun said amount of twenty-five acres, said parties of the second part shall pay at the rate of one hundred dollars per acre for each and every acre which the same shall overrun; and that in surveying and measuring said land the same shall be surveyed and measured to the center of all streets and highways adjoining the same.

"Also that he will sell and convey to said parties of the second part a string of land extending in width from the township line between Lockport and Fabius townships, west to a hedge fence running north and south, parallel with said section, supposed to be about twenty rods in width, and extending from the section-line highway on the south to six North street on the north.

"And it is expressly understood and agreed by and between said parties that the parties of the second part shall pay to said party of the first part the sum of one hundred dollars per acre for all of said above-described land, the same to be credited on the purchase price of the farm this day bought by the party of the first part of the parties of the second part, known as the 'Shaw Farm;' and the parties hereunto expressly agree that a survey shall be made of said land above described at the earliest possible moment, and that as soon as completed said party of the first part shall make, execute, and deliver to said parties of the second part a good and sufficient deed of conveyance (containing full warranties) for all of above-described land, free and clear from all liens and incumbrances whatsoever.

"It is further expressly understood and agreed by and between the parties hereto that the party of the first part

is to reserve the barns on the south end of said last-mentioned land, the same to be removed therefrom to such place as the party of the first shall designate on the Shaw farm.

"Said party of the first part also reserves the tool-house and barracks west of the large house, and the water-tank near the barn; the same to be removed by him therefrom.

"The party of the first part is to remove the fence, now west of the proposed division line, onto the line; and that afterwards each one of the parties is to keep up one-half of said division fence,—the party of the first part to keep up the north end or half, and the parties of the second to keep up the south half, of said line fence.

"Party of the first part assumes the contract now due from Jasper N. Shaw relative to the hedge now growing upon the farm transferred to him this day by Judson J. Dikeman and Orville Dougherty, he agreeing to hold said Shaw and all other parties harmless by reason thereof, and to settle with the Dayton Hedge Company therefor.

"The party of the first is to prepare the foundation for the barns to be moved by the parties of the second part, and to remove the stone from the foundation of said barns so to be removed, at his own expense.

"In testimony whereof the parties have hereunto set their hands and seals at Three Rivers, Michigan, the 16th day of June, A. D. 1887, aforesaid."

Plaintiffs claim that the reason why a deed from Arnold to plaintiffs was not drawn and executed at the time was that the quantity of land was not known, and it required a survey to ascertain the quantity and aggregate value at the agreed price.

That after the papers were all executed Richard Dougherty said he might want to sell the mortgage, and he thought it might sell better if it was executed by Mrs. Arnold. A notary and witness were then sent over to get the signature and take the acknowledgment of Mrs. Arnold to the mortgage, but she absolutely refused to sign the mortgage.

The next day the Shaws commenced to remove to the farm in Branch county, and towards evening Dikeman

took a load of household goods to Arnold's, but was refused permission to leave them; and Arnold refused to do anything further about carrying out the contract.

The above is the transaction as the plaintiffs claim it to have occurred.

The defendant claims that he told Mr. Dikeman that he wanted his own attorney, Mr. Bean, to draw his papers, and to look over the abstract of the Shaw farm, and the will through which Mrs. Shaw claimed, and that if everything was right he would *not* then sign any papers until his wife agreed to the trade.

That the plaintiffs gave him a partial abstract of the Shaw farm, which he took to Mr. Bean's office for him to examine, and was told by Mr. Bean that the abstract was not down to date, and was imperfect in other particulars; that he (Bean) was just going away to a funeral, and could not look after the matter that day, but would look after it when the abstract was completed.

That when he went back he met Mr. Dikeman on the stairs leading to Barnard's office, and told him what Bean said, and then told him that he would accept no title until Mr. Bean had looked over the completed abstract, and all the papers, and pronounced them correct; and Dikeman replied, that was all right; they would get a complete abstract, and Mr. Bean should pass upon it, and upon the papers, but the papers could be drawn that day, and be left with Barnard for Bean's inspection; and they went on and drew the papers.

That when George Arnold, the son of defendant, who was present a portion of the time, went home to dinner, he found his mother unalterably opposed to the trade; and when he came back to Barnard's office he testifies that he so told Orville Dougherty, and that Dougherty said they would get the papers ready to sign, and if she would not sign, that would end it.

That when the papers were drawn Mr. Barnard suggested it would be well for those present to sign, and that it would save their coming again; that then the deed from plaintiffs to defendant could be sent to the wife of Orville Dougherty to sign and acknowledge, and they could go to Mr. Arnold's house, and have his wife sign and acknowledge the mortgage; and, when the deed came back from Mrs. Dougherty, Bean could examine the abstract, and all papers, and if everything was correct they could then be delivered; and the papers were thereupon signed.

The defendant further claims that he never acknowledged the mortgage, but that his and his wife's names were both written in the same acknowledgment, and it was understood that the acknowledgment should be joint; that, after the papers were signed, Mr. Dikeman, Mr. Arnold, and a notary went together to Mr. Arnold's house, to have her sign the mortgage, and jointly acknowledge the same; that Mrs. Arnold absolutely refused to sign, and the notary and Mr. Dikeman went away, and took the mortgage with them; and that the trade thereupon fell through.

On June 18 the deed from Shaw to plaintiffs and the mortgage from Arnold to Richard Dougherty were left for record by Mr. Dikeman. The reasons given by Mr. Dikeman for recording these instruments were that he—

"Had heard on the streets of Three Rivers that Otis Arnold was not worth a cent, and you could not collect a dollar of him; and another reason why I wanted to have the papers recorded was, Richard Dougherty wanted I should have his mortgage recorded."

The discharge of mortgage was placed upon record on June 20.

After the deed was signed and acknowledged by Mrs. Dougherty, plaintiffs tendered it to defendant, and he declined to accept it, and declined to have a survey made

of the land mentioned in the contract. The plaintiffs caused a survey to be made, from which they found an excess of quantity which, at the price named in the contract, amounted to $711. This they tendered to defendant, and he refused to accept it; and also tendered a deed, and requested him to execute the same, which he declined to do.

This action was brought to recover the value of the land which defendant refused to convey. The theory of the plaintiffs was that they had sold and conveyed to defendant the Shaw farm for $13,000, to be paid for by defendant, $5,000 down, which was arranged for by the giving of the notes and mortgage to Richard Dougherty in payment of so much indebtedness to him from them, and the balance of $8,000 to be paid by a conveyance of certain land at an agreed price, and certain other land, the exact quantity of which was unknown, at an agreed price per acre; and if there should be an excess in quantity, so that the aggregate price would exceed $8,000, they should pay for such excess at the rate of $100 per acre; and that in this action they were entitled to recover what said land was reasonably worth, less the $711 excess at the agreed price.

The defendant's theory was that his agreement to exchange farms was conditional upon his wife's assent, and upon the examination and approval by his attorney of the abstract of title and the papers; that the papers were not complete, and were not executed for immediate delivery, but were to be left with Mr. Barnard until such examination could be had and assent of his wife obtained; that they were delivered without authority, and after plaintiffs were informed that his wife would not consent, and before any examination or approval by his attorney of the abstract or papers, and that he was under no obligation to execute a deed.

But the agreement was reduced to writing, and was signed by him, and it contains no conditions respecting the obtaining the wife's signature or assent, or the examination and approval by his attorney; and the agreement so reduced to writing and signed cannot be varied or modified by parol testimony. It was competent, however, for defendant to show by parol that the papers were not to be delivered until certain contingencies should happen, or that they were left in escrow until some subsequent event should occur, and delivery contrary to such agreement would not be binding upon the party.

I think the defendant's fifth and eighth request should have been given, viz.:

"5. The question of delivery of a deed is always one of intention of the parties. In all cases the intention that the deed shall be delivered and become effective must exist, and therefore it is essential that the deed be understood by the parties to be completed and ready for delivery in order to have the mere placing of it in the hands of a grantee to be construed into a delivery."

"8. If the jury find that it was the understanding of the parties that the abstract was to be brought down to date, and that Mr. Bean was to have an opportunity to examine the abstract and other papers, before title passed, then the bargain could not be considered completed until this had taken place, and the plaintiffs, if the jury so find the facts to be, cannot recover in this suit."

This was the defendant's theory of the case which he asked to have submitted to the jury. There was testimony to support it, and it was proper for the jury to pass upon it. The court, however, did not submit this theory of the defendant to the jury, and instruct them in relation to the law in case they found the testimony preponderated in favor of such theory, but contented himself by merely stating that—

"The defendant on his part claims that the execution of the deed of the Shaw farm was not complete on the 16th day of June, because it was not signed by the wife

of Orville Dougherty, and that the deed was not delivered to him, and that he was not to accept and take the deed until it should be executed by the wife of Orville Dougherty, nor until the abstract of title to the Shaw farm should be examined by his attorney, and declared to be correct."

He nowhere states what the law is, or what their verdict should be, if they found defendant's claim sustained by the weight of evidence, but immediately proceeds to present the case to them under the plaintiffs' theory; and, after instructing them that whether the deed of the Shaw farm was delivered and accepted was a question of fact for them, he instructs them that the delivery of the mortgage and notes is important only as it bears upon the question of the delivery of the deed; that the signing of the mortgage by the wife of Mr. Arnold, the defendant, was not essential to its validity, whether it was or was not given for purchase money.

The transaction between the plaintiffs and defendant involved all that was contemplated and necessary to accomplish the result, and it is proper to regard it as a whole in order to determine whether it was a binding agreement between the parties. It included the exchange of farms between the plaintiffs and Mrs. and Mr. Shaw, the discharge of the mortgage held by Richard Dougherty, the exchange of land between plaintiffs and defendant after they had acquired the title to the Shaw farm, and the incumbering of the Shaw farm by defendant for $5,000. Each step in the progress towards the result was therefore material.

Failure to carry out the arrangements between any of the parties necessarily terminated the agreement between the plaintiffs and defendant, which, stripped of unnecessary verbiage, was an agreement to exchange a portion of defendant's farm, including his homestead, valued at a certain price, for the Shaw farm, valued at $13,000, and

pay the difference in money. It was the exchange of one homestead for another; and the husband, before the exchange was completed, could no more mortgage the homestead he was to receive in exchange, without his wife's consent and signature, than he could do so after the transaction was completed. If this could be done, then the wife's interest in the homestead could be mortgaged without the wife's consent or signature simply by calling it a purchase-money mortgage, and the wife deprived of her homestead interest through the machinations of her husband and a third party.

This appears in a still stronger light upon plaintiffs' theory, which was that Mrs. Arnold knew of the contemplated exchange, and consented thereto. She then must have contemplated that she and her husband were to receive the Shaw farm as a homestead to the extent allowed by law in exchange for the one she was relinquishing. But under the evidence she did not know that a mortgage of $5,000 was to be placed on that homestead; for until the parties met on July 16, at Barnard's office, at which meeting she was not present, no mention was ever made of mortgaging the Shaw farm to Richard Dougherty. The first contract, of date June 11, says nothing about a mortgage, or even a payment for a difference in value between the farms. It was an exchange of one property for the other. It is quite a different contract from that drawn in Barnard's office on the 16th of the month. She was neither consulted nor consented to the execution of the mortgage upon her homestead which was to be received in exchange. If the title vested at all in Mr. Arnold, it so vested as his homestead under the facts and circumstances of this case.

The mortgage was executed as a loan to Richard Dougherty, and not as a security to him for a portion of the purchase money. Richard Dougherty conveyed no title

to Mr. Arnold, and he stands in this transaction simply as a creditor loaning money to Mr. Arnold.

The wife's homestead rights will be protected in whatever form they may come in question, whether at law or in chancery. It was error for the court to instruct the jury that—

"The signing of the mortgage by the wife of Mr. Arnold, the defendant, was not essential to its validity, whether it was or was not given for the purchase money."

It is true that the validity of the mortgage was not directly in issue between the parties to the instrument, but it was involved in the theory presented by the respective parties, and had an important bearing upon the theory of the defendant that the papers were incomplete, and not ready for delivery, and were not to be delivered, but were to remain in Mr. Barnard's hands until, among other things, Mrs. Arnold's consent to the arrangement could be obtained

Error is assigned upon the following instruction given to the jury by the court:

"If the jury find that during the negotiations, on June 16, the defendant was told by Richard Dougherty that he (Dougherty) would not discharge his mortgage on the Sherwood farm until he had the notes of the defendant, secured by mortgage on the Shaw farm, which defendant had arranged to give, and the defendant was told by Mr. Barnard that he could not execute a mortgage upon the Shaw farm until he had accepted the deed, and he then did accept the deed, and afterwards executed the notes and mortgage, and signed the contract, then the verdict of the jury must be for the plaintiffs."

The Sherwood farm was the farm owned by plaintiffs, upon which Richard Dougherty held his mortgage.

The fault of this instruction is that the circuit judge ignores the theory of the defendant, which his testimony was introduced to prove, that all this was done with the

express understanding that the papers were to be executed as far as they could be by such of the parties as were present, and were then to be left in Barnard's hands until Mrs. Arnold's consent and signature to the mortgage could be obtained, and until his attorney, Mr. Bean, had examined the papers, and advised him that the title was satisfactory.

If this contention of the defendant was true, then the plaintiffs were not entitled to recover, although defendant formally accepted the deed, and executed the notes and mortgage under the understanding stated; and in view of defendant's theory of the case, which was not presented to the jury by the court, it was error to charge them that—

"If the jury should find that the defendant said before he signed the contract he wished Mr. Bean to look the papers over, but afterwards changed his mind and executed the contract, it would be just as binding on him as if nothing had been said about Mr. Bean's looking them over."

It was one of the matters of defense that defendant should be furnished with a complete abstract of the Shaw farm for Mr. Bean to examine, and, if the title was not perfect, he was not to take it. Defendant claimed and offered to show that such abstract was not furnished bringing the state of the title down to the date of the transaction, and that as a matter of fact plaintiffs did not have a complete title to such farm. An abstract was produced at the time, but it did not purport to show conveyances later than March 10, 1883, and upon it appeared an undischarged mortgage for $2,000.

The title to Mrs. Shaw purported to have been derived through the last will of Garrett Sickles, her father. The will contained no specific description of the land devised. The seventh clause of the will reads as follows:

"*Seventh.* I give and devise to my beloved wife, Elizabeth Sickles, the use, rents, and profits of all the residue of my real estate, situated in the State of Michigan, together with any and all estate, right, and interest in lands which I may acquire after the date of this will, for and during her natural life. But on her decease, the remainder thereof I give to my daughter, Elsie Jane Sickles, to have and to hold the said premises to her, the said Elsie Jane Sickles, and to her heirs and assigns forever."

On August 26, 1878, Elizabeth Stebbins conveyed by quitclaim deed to Elsie J. Shaw the following described premises:

"The north part of the west half of the north-east quarter of section twenty-four, also the south part of the east half of the east half of the south-west quarter, and also the south part of the west half of the south-east quarter, of section thirteen, * * * in town six south, of range twelve west; being all the interest which said Elizabeth Stebbins has to said land by virtue of the will of Garrett Sickles, now deceased."

The deed drawn by Barnard on June 16, and claimed to convey the Shaw farm, contains the following descriptions, viz.:

"All of those certain pieces or parcels of land, situated, lying, and being in the township of Fabius, St. Joseph county, State of Michigan, and described as follows, to wit:

"The small twenty-eight and 23-100 (28 and 23-100) chains of the east half (E. ½) of the south-west quarter of section number thirteen (13), hereby conveying a strip of land, 28 and 23-100 chains in width, off from the south end of said east half of the south-west quarter of said section thirteen (13).

"Also that part of the south-east quarter of section thirteen (13), commencing at the south-west corner of the south-east quarter aforesaid; thence east twenty-two and 50-100 (22 and 50-100) chains; thence north twenty-eight and 23-100 (28 and 23-100) chains; thence west twenty-two and 50-100 (22 and 50-100) chains, to quarter line; thence south to place of beginning.

"Also all of that part of the west half (W. ½) of the west half (W. ½) of the north-east quarter of section number twenty-four (24), commencing at the south-east corner of said west half of west half of said north-east quarter (¼); thence south twenty-nine (29) rods; thence west twenty-five (25) rods; thence north twenty-nine (29) rods; thence east to place of beginning: All of same above described land being in township number six (6) south, of range number twelve (12) west, west meridian, Michigan; containing 124½ acres, be the same more or less."

It is claimed by the defendant that it is apparent from the face of the papers that this deed from Dikeman and Dougherty to defendant embraces land which was a part of the Shaw farm, which is not embraced in the quit-claim deed from Elizabeth Stebbins, formerly Elizabeth Sickles, to her daughter, Mrs. Shaw. It does so appear without question. The land described in the deed to defendant covers more territory than was conveyed by the quitclaim deed to Mrs. Shaw. The quitclaim deed does not purport to convey all the interest the grantor derived from the will to land upon those sections, but only to the land described in the deed. The interest conveyed is restricted to the land conveyed. The court ruled that this was immaterial; that the defendant must rely upon the covenants of warranty in his deed. But I think the defendant had an undoubted right to a good title, and one not clouded or incumbered by the life-interest of Mrs. Stebbins.

In *Allen v. Atkinson*, 21 Mich. 361, this Court held that the vendee had an undoubted right to a good title, and to a deed with proper covenants; and he had a right also to insist that the title should be a marketable one, not open to reasonable objection.

The defendant offered testimony from which, if it had been submitted to the jury under proper instructions,

they might have found that he did not take the deed relying upon the warranty contained therein, but that the title was to be good, and its sufficiency was to be passed upon by his legal adviser after an examination.

The rule of damages is that sanctioned in the case above cited, and in *Pierson v. Spaulding,* 61 Mich. 90 (27 N. W. Rep. 865).

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

The other Justices concurred.

WILLIAM KULENKAMP v. JOHN GROFF, IMPLEADED WITH F. JOSEPH LERG.

Bills and notes—Parol evidence to contradict terms of instrument —Fraud—Want of consideration—Surety.

1. Obtaining the signature of a third party to a note under a promise by the payee that the maker should not be liable thereon, which is not kept, is not such a fraud as will nullify the note.
2. Parol proof that a maker of a promissory note was induced to sign it by the agreement of the payee that he should not be held liable thereon is inadmissible to vary or contradict the *legal* effect of the instrument.
3. Where, after the execution and delivery of a note, a third party, who had refused to become surety thereon, was induced to sign it as a maker, by the promise of the payee that it should never be used against him, and that his signature was only desired to aid in securing prompt payment by the *real* payor, who took no part in the transaction, such facts may be proved in a suit by the payee upon the note to show a want of consideration for the promise of such *accommodation* maker.

Error to Washtenaw. (Kinne, J.) Argued June 20, 1888. Decided October 19, 1888.

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108 296
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112 323
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114 92
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116 491
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119 363
71 675
126 213
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s40NW 57
s15ASR 283
129 3235
71 675
s40NW 57
s15ASR 283
130 2374
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e136 2 69
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71 675
158 2254

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

Hewett & Freeman and *E. B. Norris,* for appellant.

John W. Patchin (Sawyer & Knowlton, of counsel), for plaintiff.

[The points of counsel are fully stated in the opinion. —REPORTER.]

MORSE, J. The plaintiff brought suit in justice's court upon the following promissory note:

"$116.00. FREEDOM, March 30, 1886.

"One year after date I promise to pay to Charles Kulenkamp, or bearer, the sum of one hundred and sixteen dollars, for value received, at the People's Bank, at Manchester, with use at seven per cent.

"F. JOSEPH LERG.
"JOHN GROFF."

He obtained judgment. The defendant Groff thereupon appealed to the circuit court for the county of Washtenaw. Upon the trial in said circuit the defendant Groff gave evidence tending to establish the following facts:

On the day the note was executed Charles Kulenkamp, a brother of the plaintiff, held an auction upon his farm for the sale of personal property. The plaintiff at this sale put up a span of horses of his own, and the defendant Groff assisted him in the sale by acting as a "by-bidder" to run the price up. One of these horses was bid in by defendant Lerg for the sum of $116. By the terms of the auction sale the purchaser of property, not paying therefor down in cash, was required to give his note, with a signer or surety thereto. The note in question was drawn up by the auctioneer's clerk. Lerg signed it, and left it with the clerk. He requested Groff to sign it with

him, but Groff refused. Afterwards the plaintiff accosted Groff, and requested him to sign it.

The defendant testifies as follows in regard to the conversation between himself and plaintiff:

"Kulenkamp said I ought to sign the note. He was satisfied with Mr. Lerg for his pay, but he was rather slow, and thought if I would sign it he would get his pay out of it quicker than he would if I was not on, because he would not see me suffer, and I would not be holden on the note. He would see that I would not lose anything or have any trouble about it; and I told him it may be he would go to work and dispose of the note, and then where would I be? He agreed to hold the note. He said it was a custom at auctions. If he did not get any signer, some others would want to give notes without signers. He agreed to hold the note, and see that I did not have any trouble. I refused, and after a while I said I would do it, but I wanted a witness. Mr. Burtless stood off a little way, and we got him up, and told it before him."

The defendant Lerg had no part in obtaining the signature of Groff to the note, and was not present when defendant signed it.

Upon this showing, which was not rebutted, the circuit judge ruled that no defense had been made to the note, and instructed the jury to find accordingly. The plaintiff had verdict and judgment for the face of the note, and interest.

The counsel for the defendant contend that this oral proof was admissible, and established a perfect defense to the note, if found to be true by the jury, to whom it should have been submitted. They claim that they have the right to show by parol, as between the original parties to the instrument, that it was never to be used or have any being as against Groff; and also that the testimony shows that the signature of Groff was procured by fraud upon the part of plaintiff, which fraud can be shown by parol.

It is admitted that the general rule is that oral contemporaneous evidence is not admissible to vary, alter, or contradict the terms of a written instrument. But it is argued that to this rule there are several well-recognized exceptions, when the contest is between the immediate parties to a note. In such case parol evidence is admissible to impeach the consideration, to show fraud or illegality in its inception, or that it was delivered conditionally, or for a specified purpose only. See *Farwell v. Ensign*, 66 Mich. 600 (33 N. W. Rep. 734). The defendant's counsel insist that their claim, as before set forth, comes within the exceptions as to fraud and a delivery for a specified purpose.

As far as the claim of fraud is concerned, it is not tenable. The signature of Groff was not procured by false pretenses, by the statement of any fact as existing which did not exist, but upon false promises which have not been performed. It is no more nor less than the nonperformance of an oral agreement made at the time the note was signed, and which oral agreement was totally at variance with the terms of the written contract as set forth in the note. This cannot be considered such a fraud as would nullify the note.

If proof of this unperformed agreement not to hold Groff upon this note, in plain contradiction to its terms, can be admitted to destroy his liability upon it, then any unperformed oral agreement made at the time a written contract or note is executed may be admitted, under the claim of fraud, to defeat the terms and purpose of the written agreement. The maker of a note, as well as the surety or indorser, may say—

"It is true, I signed the note, but it was agreed I was not to pay it, and the collection of it is a fraud upon me."

Written instruments, under the admission and use of

such proof to defeat them, would be of but little value, and altogether uncertain, and of no more strength than oral agreements. See *Ortmann v. Bank*, 39 Mich. 518, and cases cited.

It is insisted that the cases of *Manistee Bank v. Seymour*, 64 Mich. 59 (31 N. W. Rep. 140), and *Farwell v. Ensign*, 66 Id. 600 (33 N. W. Rep. 736), are authority in favor of the claim of the defendant. In the latter case, Justice CHAMPLIN, in speaking of the general rule, notices the following exceptions:

"As between the immediate parties, parol evidence is admissible to impeach the consideration, to show fraud or illegality in its inception, or that it was delivered conditionally, or for a specified purpose only."

As before shown, there was no such fraud or illegality in the inception of this instrument as would vitiate it. Nor can it be claimed to have been delivered conditionally, or for a "specified purpose only." It was delivered under the promise that, although Groff had solemnly agreed in writing to pay it, he should not be holden upon it. This is the substance of the whole matter. There was no condition attached to the delivery except this, that the oral agreement not to pay should supersede and control the written contract to pay. If this defense can be allowed, then, as before said, in speaking of the claim of fraud, every promissory note, as between the immediate parties thereto, and every contract in writing, is open to parol proof that it does not correctly represent the agreement made, and oral evidence may be given to contradict, alter, or vary such written agreement.

This is not the law in this State. *Seckler v. Fox*, 51 Mich. 92 (16 N. W. Rep. 246); *Kelsey v. Chamberlain*, 47 Id. 241 (10 N. W. Rep. 355); *Jones v. Phelps*, 5 Id. 218; *Sutherland v. Crane*, Walk. Ch. 523; *Martin v. Hamlin*, 18 Mich. 354; *Adair v. Adair*, 5 Id. 204; *Vanderkarr v.*

Thompson, 19 Id. 82; *Beers v. Beers*, 22 Id. 42; *Gram v. Wasey*, 45 Id. 223 (7 N. W. Rep. 762).

For cases elsewhere similar to the one under consideration, see *Bank v. Dunn*, 6 Pet. 57; *Bank v. Jones*, 8 Id. 14; *Davis v. Randall*, 115 Mass. 547; *Hancock v. Fairfield*, 30 Me. 299; *Thompson v. McKee*, 5 Dak. 172 (37 N. W. Rep. 367); *Knoblauch v. Foglesong*, 38 Minn. 352 (37 N. W. Rep. 586); *Dickson v. Harris*, 60 Iowa, 727 (13 N. W. Rep. 335); *Billings v. Billings*, 10 Cush. 178; *Remington v. Wright*, 43 N. J. Law, 451; *Ewing v. Clark*, 76 Mo. 545; *Pierpont v. Longden*, 46 Conn. 499; *Perry v. Bigelow*, 128 Mass. 129; *Stack v. Beach*, 74 Ind. 571.

But we think the evidence admissible to show no consideration for the promise made in the note. If the defendant's theory be correct, he did not execute this note at the request of Lerg, the principal maker, and the consideration running from plaintiff to Lerg had nothing to do with the signing of the note by the defendant. Neither was there any consideration passing from Lerg to the defendant. If, then, there was any valid consideration for the execution of this note by the defendant, it must have been one passing from the plaintiff to him. There is no showing that plaintiff would not have parted with his property, and taken the note of Lerg in payment for the same without the signature of the defendant, but, on the contrary, the evidence given by the defendant shows that the plaintiff was willing to make the sale, relying upon Lerg alone for payment, and that he claimed that he desired the name of the defendant only for the purpose of aiding him in securing a quicker payment from Lerg.

The note, then, if the defendant's testimony be taken as true, was signed by defendant to accommodate the plaintiff, with the promise that it should never be used against him. We can see no consideration moving to defendant from any one for the execution of this note by

him. There is no dispute but his undertaking was really that of a surety.

Such a contract, not under seal, must be supported by a sufficient consideration. The usual consideration in such cases is that the credit to the principal debtor is induced or given because of the promise of the surety. This is not the case here. Nor is there shown any consideration arising out of either benefit to Lerg or the defendant, or detriment to the plaintiff, to support the contract of the defendant here.

Judgment will be reversed, and new trial granted, with costs.

The other Justices concurred.

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ALBERT W. LOBDELL ET AL. v. THOMAS G. HORTON.

Sale—Passing of title—Submission to jury.

Whether the title to personal property passes or not, where something remains to be done before the exact amount to be paid therefor can be arrived at, depends upon the intention of the parties, and is a proper question for a jury.

Error to Mecosta. (Fuller, J.) Argued June 21, 1888. Decided October 19, 1888.

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

L. G. Palmer and *N. W. Bush,* for appellants.

Frank Dumon, for defendant.

CHAMPLIN, J. Plaintiffs brought *assumpsit* to recover on an account for goods sold and delivered.

The declaration was upon the common counts. The defendant pleaded the general issue, with notice of set-off.

On the trial defendant admitted the correctness of plaintiffs' claim, subject, however, to be reduced by such set-off as he should be able to prove.

The main contention was over a quantity of hemlock logs, which defendant claimed to have sold and delivered to plaintiffs, and for which the plaintiffs were to pay him $2.75 for each thousand feet, as soon as they were sawed, according to the mill tally.

The plaintiffs, on the contrary, claimed that the transaction was not an absolute sale, but was intended as a security for an indebtedness which defendant owed to them.

The testimony in support of the theory of each party was properly submitted to the jury by the court, and they found in accordance with the defendant's theory.

Plaintiffs' claim that, because the logs were not to be paid for until the lumber was sawed and tallied, so as to ascertain the quantity, the title did not pass.

The pith of the question lies in the fact that before the logs were sawed they were mostly destroyed by fire.

We have often decided that whether the title passed or not, where something remained to be done before the exact amount to be paid could be arrived at, depended upon the intention of the parties, and was a proper question of fact to be determined by a jury. Upon this point the charge was explicit, and we see no occasion for disturbing the verdict.

The judgment of the circuit court must be affirmed.

The other Justices concurred.

INDEX.

Head-note references are to pages. Where there are several notes on a page, the number of the note is added in parenthesis, unless the reference is to all.

Cross-references are to *subjects*, and the same rule is followed as to giving *number* of head-note.

ACCOUNTING IN CHANCERY.

In an accounting in chancery, in order that the whole controversy may be settled and adjusted, equity will sometimes permit a judgment, though obtained in an action for a wrong, to be made an item, in favor of the party holding it, in the account to be taken. 106 (2).

ACQUIESCENCE.

No one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine. 129 (4).

See PRESCRIPTION (2).

ACTION.

A resolution by a board of supervisors to save a building committee appointed to superintend the construction of a court-house harmless from all suits growing out of the erection of said court-house will not create a right of action against the board of supervisors for the failure of the committee to require the contractor to execute the bond required by Act No. 94, Laws of 1883, for the payment by the contractor for labor and materials furnished in the erection of said building. 538 (2).

See STATUTE OF LIMITATIONS (1–5).

ADVERSE POSSESSION.

1. There are other ways of holding possession of land besides enclosing it by a fence. 391 (2).
2. In this case it is held that the use of the land in suit by

ADVERSE POSSESSION.—Continued.

the defendant for public purposes, for more than thirty years, under an original dedication to public use, is a bar to the present action. 508.

See EVIDENCE (1-3); PRESCRIPTION.

AFFIDAVIT.

An allegation in an affidavit in attachment that two defendants "are justly indebted" to the plaintiff, imports a *joint* indebtedness, and the after averment that such debt is due from *one* of said defendants necessarily avers that it is due from *both*. 284.

AFTER ACQUIRED PROPERTY.

A provision in a chattel mortgage covering after acquired property is held valid in *Eddy v. McCall*, 497 (2).

AMENDMENT—See EXECUTORS AND ADMINISTRATORS (4).

APPEAL BOND—See CHANCERY APPEAL BOND.

ARGUMENTS TO JURY—See PRACTICE IN CIRCUIT COURT (2, 3).

ARREST.

1. A person who responds to the call of a *known* officer to assist in making an arrest is protected by the *call*, and must necessarily be by the *law*, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the officer. 377 (1).

2. Whenever the statute punishes an offense by imprisonment in the State prison, unless it is expressly declared by the statute to be a misdemeanor, such offense must be considered and treated as a felony, as regards the right of an officer to arrest without process. 378 (2).

3. In this case it is held that the question of probable cause for the arrest complained of was fairly submitted to the jury, and that from the undisputed facts (see opinion) the sheriff was justified in arresting the plaintiff. *Id.* (3).

4. There must be some discretion reposed in a sheriff or other officer, making an arrest for felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; which discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness, or a reckless indifference to the common dictates of humanity. *Id.* (4).

ARREST.—Continued.

5. In order to justify a sheriff in handcuffing a prisoner arrested for felony, it is not necessary that he should be unruly, or attempt to escape, or to do anything indicating a necessity for such restraint, nor, in the absence of these indications, that he should be a *notoriously* bad character. *Id.* (5).

6. The sheriff making an arrest for felony cannot stop, when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. The officer's duty is to take and safely keep him, and bring him before a magistrate, and, if he does this without wantonness or malice, it is not for the jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish such officer in damages for doing what honestly appeared to him at the time to be reasonable and right. *Id.* (6).

ASSESSMENT—See DRAINS (2).

ATTACHMENT SUIT.

An allegation in an affidavit for writ of attachment that two defendants, naming them, "are justly indebted" to the plaintiffs, imports a *joint* indebtedness, and the after averment that such debt is due from *one* of said defendants, necessarily avers that it it is due from *both*. 284.

See AFFIDAVIT.

ATTORNEY AND CLIENT.

A contract made by the trustees of a copartnership with an attorney to prosecute and defend all suits for and against the firm growing out of the business being carried on by said trustees, is held not to cover a suit between the beneficiaries to settle their relative rights, in which the trustees are incidentally involved by reason of their trusteeship. 433 (1).

ATTORNEY GENERAL—See FRANCHISE (2).

BANKRUPTCY.

Nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding. 254 (3).

BILL OF PARTICULARS.

The office of a bill of particulars is to inform the opposite party of the cause of action to be relied upon, which is not specially set forth in the declaration. 616 (1).

See TRIAL OF SUIT.

BILL OF REVIEW.

1. A bill of review should be filed within the time allowed for appealing, unless on newly-discovered evidence, or when there has been some reason that is satisfactory for the delay. 116 (2).
2. The refusal of the circuit judge to grant leave to file a bill of review in this case is held to have been within his discretion, fairly exercised. 534 (4).

See EQUITY PRACTICE.

BILLS AND NOTES.

1. Negotiable instruments, fair on their face, which have, before maturity, passed into the hands of *bona fide* holders for value, will be enforced in their hands, although non-enforcible as between the original parties on grounds of public policy; but if declared void by the statute they are void as against the party who gave them, and in the hands of all other parties. 209 (1).
2. To defeat a recovery by the holder of commercial paper purchased for value and before maturity, he must be shown to have had knowledge of such facts and circumstances as would make his purchase of the paper with the intention of enforcing it an act of bad faith. 210 (2).
3. A joint note made by a husband and wife in payment of his debt, and to secure a loan to pay other debts due from him, is not binding on the wife, whose only interest in her husband's business is that of a creditor for money put into said business. 223 (1).
4. An indorser of a note who signs his name below that of the payee, to whose order it is drawn, is liable as a *subsequent* and not *joint* indorser, and is released by the release of the payee without his consent. 254 (2).
5. Parol proof that a maker of a promissory note was induced to sign it by the agreement of the payee that he should not be held liable thereon is inadmissible to vary or contradict the *legal* effect of the instrument. 675 (2).

BILLS AND NOTES.—Continued.

6. Where, after the execution and delivery of a note, a third party, who had refused to become surety thereon, was induced to sign it as a maker, by the promise of the payee that it should never be used against him, and that his signature was only desired to aid in securing prompt payment by the *real* payor, who took no part in the transaction, such facts may be proved in a suit by the payee upon the note to show a want of consideration for the promise of such *accommodation* maker. *Id.* (3).

See FRAUD (3).

BOARD OF SCHOOL EXAMINERS—See SCHOOLS AND SCHOOL-DISTRICTS (5-7.)

BOARD OF SUPERVISORS.

A resolution by a board of supervisors to save a building committee appointed to superintend the construction of a court-house harmless from all suits growing out of its erection will not create a right of action against the board for the failure of the committee to require of the contractor a bond to secure labor and material claims. 538 (2).

See STATE ROADS.

BOND.

A *subcontractor* is not one of the persons sought to be protected by Act No. 94, Laws of 1888, requiring a bond by contractors securing the payment of claims for labor and materials furnished in the erection of public buildings. 538 (1).

See CHANCERY APPEAL BOND.

BREACH OF CONTRACT TO LOAN MONEY—See TENDER.

BUILDING COMMITTEE—See ACTION.

CAUSE OF ACTION.

A good cause of action is made out in favor of a plaintiff who sues for commissions for bringing about bargains for the sale of real estate, by showing that he did all he could do in that direction, and that the sale failed through defendant's fault. 261.

See ACTION.

CERTIORARI—See TRANSFER OF SUIT (4).

CHANCERY APPEAL BOND.

1. To authorize the rendition of judgment for costs against a

CHANCERY APPEAL BOND.—Continued.
surety in a chancery appeal bond under How. Stat. § 7663, a certified copy of the bond must be made a part of the return, to enable the court to inspect it on the hearing, and ascertain as to its sufficiency for that purpose. 431 (1).
2. Sureties upon a chancery appeal bond are entitled to the earliest action possible after decree made, if the defendant wishes to avail himself of a statutory judgment against them, and avoid the necessity of a suit upon the bond. *Id.* (2).

CHARGE TO JURY.

1. The interest of a witness is to be always weighed and considered by the jury, and when referred to by counsel, as they have a right to do, it is not error for the court to instruct the jury that, if the interest or employment of such witness has impaired or biased his judgment, such fact may be considered by them in weighing the value of his testimony. 61 (2).
2. An instruction to a jury not based upon any evidence in the case is erroneous. 263 (4).
3. A party has the right to have his theory of the case submitted to the jury, if supported by testimony, with proper instructions in relation to the law in case they find the testimony preponderates in favor of such theory. 656 (3).
4. An instruction that, if a given state of facts is found by the jury, the plaintiff is entitled to a verdict, but which ignores the theory of the defendant, which his testimony tends to support, and which is a complete defense if accepted by the jury, is erroneous. *Id.* (6).
5. In a case involving an alleged double payment to a witness for work, which he denied, an expression by the court in his charge to the jury of doubt as to the honesty of the witness in receiving such double pay, is held prejudicial error. 579 (5).
6. Where the testimony as to a given fact is direct and positive on both sides, and plainly irreconcilable, it is the province of the jury to determine which party is right, and it is error for the court to instruct them that there is an entire misapprehension between the parties upon the disputed question. *Id.* (6).

See LIQUOR TRAFFIC (6).

CHATTEL MORTGAGE.

1. Under How. Stat. § 7682, the interest of a mortgagor in personal property is subject to levy and sale on execution at any

CHATTEL MORTGAGE.—Continued.

time before the *actual* foreclosure of the mortgage; but such sale cannot be in parcels, but must be of the mortgagor's interest in the *whole* property. 1 (1).

2. The measure of damages in trover by a mortgagee for the *wrongful* sale of chattel-mortgaged property *in parcels* is the amount remaining unpaid for principal and interest on the mortgage, not exceeding the value of the property so wrongfully sold, which amount may be contested by the defendant, and to this end he may show the value of other property taken by the mortgagee on the mortgage. *Id.* (2).

3. Where, in a suit involving the validity of a chattel mortgage as to creditors, the value of the property is out of all proportion to the mortgage debt, this is a circumstance to be considered by the jury in determining the *good faith* of the transaction. 2 (7).

4. Where two chattel mortgages were executed on the same day, and by an arrangement between the mortgagor and the mortgagees in one of the mortgages the amount of their lien was fixed at a sum less than that shown by the mortgage, of which fact the other mortgagee had knowledge, and purchases the mortgage for the sum so fixed, he can only claim a lien thereunder, as against the creditors of the mortgagor, for the sum so paid and interest thereon. *Id.* (8).

5. A mortgage of "20 acres of wheat now sown and growing on the ground, and still to be sown, on the 20 acres, this present season of 1886," on a specified farm, is not void for uncertainty, but plainly indicates by its terms that it was intended to cover the *first* 20 acres of wheat which the mortgagor should sow on said farm, and that the 20 acres had not all been sown at the time of the execution of the mortgage; and it is the duty of a subsequent purchaser or incumbrancer to inquire and ascertain *what* portion of the 20 acres had been sown before purchasing. 459 (1).

6. The "subsequent purchasers and mortgagees in good faith," referred to in How. Stat. § 6196, are those who become so *after* the expiration of one year from the filing of the mortgage, and *before* its renewal. 460 (2).

7. While the filing of a chattel mortgage ceases to be constructive notice at the expiration of one year, its subsequent renewal preserves its lien as to all persons except those

CHATTEL MORTGAGE.—Continued.

acquiring liens, and purchasers or mortgagees, in good faith, in the interim, with the like force and effect as if renewed prior to the expiration of said year. *Id.* (3).

8. The case of *Briggs v. Mette*, 42 Mich. 12, in so far as it conflicts with *Wetherell v. Spencer*, 3 Id. 123, is overruled. *Id.* (4).

9. A provision in a chattel mortgage extending its lien to after-acquired property is held valid and effectual as between the parties and as to third persons upon the facts stated in the opinion in *Eddy v. McCall*, 497 (2).

See EVIDENCE (5, 7).

COMMISSIONER OF HIGHWAYS—See HIGHWAYS.

COMMISSIONS.

Where a plaintiff who sues for commissions for bringing about bargains for the sale of real estate is shown to have done all that he could do in that direction, and that it was defendant's fault, and not his, that no sale was made, he makes out a good cause of action. 261.

CONFIRMATION OF FORECLOSURE SALE.

1. Where the confirmation of a foreclosure sale is objected to as effected secretly, and without notice to defendant or his solicitors, and it appears that the defendant had such notice, it was his duty to inform his solicitors. 534 (1).

2. On appeal from the confirmation of a foreclosure sale, the bill cannot be attacked, nor the decree reviewed, if the court had jurisdiction of the subject-matter and the defendant. *Id.* (2).

3. An objection to the confirmation of a foreclosure sale on the ground that the premises were bid in by the defendant at a great sacrifice, is overruled in the absence of a showing that if a new sale was ordered a larger or even as large a price could be obtained. *Id.* (3).

CONFLICT OF JURISDICTION.

The question of an invention, and its alleged use, and what is covered by it, may be litigated in the State courts, so long as the question of the validity of the patent or its infringement is not in issue. 476 (7).

CONSIDERATION—See BILLS AND NOTES (6).

CONSTITUTIONAL LAW.

1. Act No. 262, Laws of 1887, providing for the reporting by registers of deeds of mortgages for assessment purposes, is not unconstitutional. 16 (1).
2. Section 31 of Act No. 313, Laws of 1887, requiring the removal of screens, etc., during the time when by the provisions of the act places where liquor is sold are required to be closed, is not in conflict with section 26, Art. 6, of the Constitution of Michigan, securing "the persons, houses, papers, and possessions of every person from unreasonable searches and seizures," nor with the fourteenth amendment to the Constitution of the United States, declaring that "No person shall be deprived of life, liberty, or property without due process of law." 38 (1).
3. Act No. 31, Laws of 1887, making it unlawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold, or kept for sale, within one mile of the Michigan Soldiers' Home, or within the same distance to sell or give such liquor to a soldier, sailor, or marine who is an inmate or employé of said Home, is not in conflict with section 32 of Art. 6 of the State Constitution, nor with the fourteenth amendment to the United States Constitution. 234.

CONSTRUCTION OF CONTRACT.

A contract for the sale of a store which provides that the vendee shall be saved against interference, legal or otherwise, entitles him to some assurance against disturbance beyond the contingencies of a lawsuit. 112 (4).

CONSTRUCTION OF DEED—See DEED (2, 3).

CONSTRUCTION OF WILL—See WILL (2, 3).

CONTRACT.

1. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy, and void. 141 (1).
2. A contract let by a highway commissioner for building a bridge at a cost of over $50, without security, as required by How. Stat. § 1414, is invalid. 227 (1).
3. Persons dealing with public corporations are bound to make their contracts according to law, and will not be protected unless they do so. *Id.* (2).

CONTRACT.—Continued.

4. Contractors have ample means to protect themselves, and if a township can be held on an implied contract, or estopped by the acts of its officers, when there is no valid contract, it would enable those persons to disregard the law entirely, and collude with their friends to do indirectly what, if directly done, would be a plain illegality. *Id.* (3).
5. If the capacity of the machine manufactured upon a contract for a particular purpose is to be tested in establishing a condition precedent to payment, it should comply with the conditions mentioned in the contract. 263 (3).

See ATTORNEY AND CLIENT; CONSTRUCTION OF CONTRACT; TENDER.

CONTRIBUTION.

1. The rule that no contribution can be claimed as between joint wrong-doers is inapplicable to partners, in the general form in which it is stated. 475 (1).
2. The claim of a partner to contribution, in respect of a partnership transaction, cannot be defeated on the ground of illegality, unless the partnership is itself an illegal one, or unless the act relied on as the basis of the claim is not only illegal, but was committed by the partner seeking contribution when he knew or ought to have known of its illegality. 476 (2).
3. The rule seems to be well settled that where the money sued for was paid pursuant to a judgment recovered by a third person against the plaintiff, such judgment is competent evidence against the defendant of the *fact* of the judgment and of the *amount* paid. *Id.* (3).
4. In a suit for contribution by members of a firm against a member who was joined with them as defendants in a suit for a wrong for which the firm was primarily liable, but who was not served with process, being out of the jurisdiction of the court, but who was notified of the pendency of the suit by the defendants who did appear and defend, and refused to join in such defense, although a member of the firm at the time the wrong was committed, the judgment recovered is conclusive evidence against said defendant, both as to damages and costs. *Id.* (4).
5. Where two copartners paid a judgment recovered in an action of tort for which the firm was primarily liable, the

CONTRIBUTION —Continued.

liability of a third member, against whom judgment is recovered in a suit for contribution, is measured by his interest in the firm business, and the profits resulting therefrom. *Id.* (6).

CONTRIBUTORY NEGLIGENCE.

If the question of contributory negligence is in doubt under the evidence, it should be submitted to the jury. 364.

CORPORATION OFFICERS—See EVIDENCE (9, 10).

CORRECTION OF DESCRIPTION—See EQUITY (1).

COSTS.

A judgment for costs against a surety in a chancery appeal bond will not be rendered under How. Stat. § 7663, unless a certified copy of the bond is made a part of the return. 431 (1).

COVENANTS.

Where a land contract provides for a title which shall be perfect, something more than a warranty deed is called for, and the vendee is not bound to rest upon covenants. 112 (3).

CRIMINAL LAW.

PLEADING.

1. An information charging respondent with obtaining two promissory notes by means of *false* representations as to the pecuniary responsibility of an alleged corporation for which he claimed to be agent, but which fails to show that the corporation, directly or by agent, made any agreement or had any dealings with the party alleged to have been defrauded, or to state the consideration for the notes, or to whom payable, or whether negotiable or not, charges no offense. 296.
2. After the examination of a respondent on a charge of larceny, a variance between the complaint and warrant in stating the name of the owner of the property, he being described as Allen *Bricker* in the complaint, and as Allen *Brinker* in the warrant, is properly corrected by the justice by amending the warrant to correspond with the complaint and the testimony given on the examination; and, if such amendment is not made, the circuit court may make it under How. Stat. § 9537. 313.

CRIMINAL LAW.—Continued.

3. An information for resisting an officer while attempting to preserve the peace, which fails to inform the respondent of the acts or facts constituting the offense, or of the acts of the officer which the respondent obstructed, or in what manner the resistance was made, charges no offense. 340.
4. An information for obtaining property by false pretenses, which avers that the respondent well knew them to be false, but fails to aver that such pretenses were false in *fact*, is fatally defective, and a conviction cannot be sustained under it. 343.

JURY.

5. It would not be conducive to justice, or at all practicable, to interrupt criminal trials to examine into charges of alleged improper conduct of the prosecuting officer and others, out of court, in furnishing refreshments to members of the jury, or conversing in their presence, with a view to the discharge of the jury if the charges are sustained. 447 (*a*).
6. There is great impropriety in a prosecuting officer consorting with jurors, and offering them entertainment of any sort. *Id.* (*b*).
7. The most dangerous form of influence is that which brings jurors and parties or counsel into familiar intercourse, which offers opportunity for insidious and indirect means of persuasion and conciliation, which operates sometimes unconsciously, but none the less forcibly; and if the court is satisfied that enough has happened to involve serious risk of undue bias, especially in cases where feeling is easily excited and prejudice aroused, the verdict should be set aside. *Id.* (*c*).

EVIDENCE.

8. It has been declared by the courts that expert testimony is not of the best or highest order, and that it is extremely dangerous, unless well guarded, and closely confined within its legitimate province. 158 (*a*)
9. An expert witness is to be judged from the same standpoint as any other, and if the jury find his conclusions or opinions to be the result of a biased or interested judgment, or of self-serving or improper motives, or that such opinions or conclusions are worthless or unreasonable in the light of the facts in the case, they have a right to reject such opinions, partially or entirely, in making up their verdict. *Id.* (*b*).

CRIMINAL LAW.—Continued.

10. Facts are always superior to theories, and the opinions of medical men are no more infallible than those of other men. Nor is their reason or judgment any less liable to be warped or colored by bias and interest than that of others; nor are they deficient in that pride of opinion which sometimes leads men "convinced against their will to be of the same opinion still." 159 (*c*).

11. It was the duty of the prosecution to lay the whole *case* of the decedent's sickness and death, as they had made it, before the expert witnesses, or as much of it as had an important bearing upon his death, instead of selecting detached portions of it to suit their theories of the case. *Id.* (*d*).

12. Expert testimony is only allowed upon the theory that it is necessary in some cases, where the jury cannot be supposed to comprehend the significance of facts shown by other testimony, which needs scientific or peculiar explanation by those who do comprehend it. *Id.* (*e*).

13. In a prosecution for rape upon a girl 11 years old, her statements to her mother charging respondent with the offense, made 13 days after its alleged commission, is admissible, it appearing that her reason for not making a more immediate disclosure was from fear that her mother would whip her. 303 (1).

14. The testimony of physicians as to the physical condition of a respondent charged with rape, a knowledge of which was gained from an examination at the jail submitted to voluntarily after respondent was informed that the prosecuting attorney had sent them for that purpose, which was the *sole* object of their visit, is not privileged, and its admission is not error. 304 (2).

15. In a prosecution for statutory rape upon a girl under 14 years of age, evidence of her reputation for chastity, or of specific acts of lewdness, is inadmissible, her good or bad character not being in issue, she being too young to consent to the intercourse. *Id.* (3).

16. Where a respondent on trial for rape testifies in his own behalf that he did not have a venereal disease, as testified to by the people's witnesses, it is proper to show, on his cross-examination, the nature and object of certain bottles of medicine used by him while confined in jail. *Id.* (4).

17. In a prosecution for rape, specific acts of intercourse by the

CRIMINAL LAW.—Continued.

prosecutrix with persons other than the respondent cannot be shown; and her denial on her cross-examination of having admitted such acts is conclusive. 309.

MEDICAL BOOKS.

18. The contents of medical books cannot be got before the jury, unless, as in the case of *Pinney v. Cahill*, 48 Mich. 584, the expert is unwise enough to state that a certain book lays down a certain proposition. 159 (*g*).

19. The refusal of the court to permit counsel for a respondent to read in the hearing of the jury from a medical work which had not been made evidence is not error. 304 (5).

SELF-DEFENSE.

20. In cases of self-defense, the question to be determined is, did the accused, under all of the circumstances of the assault, as it appeared to him, honestly believe that his life was in danger, or that he was in danger of great bodily harm, and that it was necessary to do what he did in order to save himself from such apparent threatened danger, and, if so, the inquiry is ended. It can and ought to make no difference whether he was a bold, strong man, used to affrays and personal encounters, or a weak, timid man, unacquainted with broils or assaults, as to the *sufficiency* of his reason for his action, if the jury believe he acted honestly in fear of his life or of great bodily harm. 298 (1).

21. In cases of self-defense, the physical and mental make-up of the respondent, and his experience in danger, are to be considered as bearing upon the *honesty* of his alleged belief, upon which he bases his right to act; and in such consideration the fact that the accused is weak, timid, and cowardly by nature is to be weighed in his favor. 299 (2).

PROSECUTING ATTORNEY.

22. It has time and time again been said by this Court that the duty of the prosecuting attorney is not to distort or withhold evidence in order to convict. He is the representative of the people, of which the accused is one, and his duty is to fairly and fully lay before the jury every material fact and circumstance known to him to exist, without regard to their tendency to establish the guilt or innocence of the respondent. This is his whole duty,—no more, no less. 159 (*f*).

CRIMINAL LAW.—Continued.

23. It is not legally presumed that a prosecuting officer will pursue a prisoner whom he believes to be innocent, or resort to any means to deprive any one of his legal rights, or to suggest false charges, or use improper testimony against him. 447 (*e*).

24. It has been held from time immemorial that the trial court is bound to see and provide affirmatively that no injustice is done the prisoner by the improper course of a prosecutor; and when this goes so far that the right to a fair trial is evidently infringed, this Court will correct the wrong. *Id.* (*f*).

25. In this case it is held that it is apparent from the whole record that the trial was had under circumstances very hostile to fair procedure, and that the jury had laid before them in a very offensive way considerations having no proper bearing on the issue which they had to try, and the conviction is set aside and a new trial granted. *Id.* (1).

26. Under our laws it is settled that the public is as much interested as the defense in having no person unjustly condemned. *Id.* (*d*).

LARCENY.

27. A judgment debtor, whose sewing-machine had been seized and sold on execution, and left by the judgment creditors on trial with a party who desired to purchase it, is not guilty of larceny in taking the machine from said prospective vendee, to whom he made known his claim that it was exempt property, and to whom he gave a receipt for the machine, he acting in the matter under the advice of counsel. 315.

See ARREST; CRIMINAL PROCEDURE; INTENT (2).

CRIMINAL PROCEDURE.

1. The general policy of the State divides the original criminal jurisdiction into that which is exercised by courts having plenary common-law powers and that which is exercised by justices of the peace. A similar distinction has been kept up for a long time between cases subject to summary jurisdiction in inferior courts, and cases prosecuted by common-law methods. 335 (*b*).

2. In regard to the former, which are always petty offenses, a jury may be waived; and when a jury acts it has complete

CRIMINAL PROCEDURE.—Continued.

authority over facts and law, and the magistrate has not the control incident to common-law trials. 336 (*c*).

3. In common-law cases the prosecution must be by indictment, or some equally safe method, based on some sworn showing; the jury must be selected and sworn, so as to secure the full benefits of the law; and the court passes upon the law questions instead of the jury, and error lies upon its judgment. *Id.* (*d*).

See LIQUOR TRAFFIC (5).

DAM—See EQUITY (4, 5); EVIDENCE (13).

DAMAGES.

1. The measure of damages in trover by a mortgagee for the wrongful sale of chattel-mortgaged property on execution is the amount remaining unpaid for principal and interest, not exceeding the value of the property sold. 1 (2)
2. In this case complainant is awarded $1,500 damages as entire compensation for the total injury to him by the continuance of a mill dam heretofore and hereafter. 270 (3).
3. Where the assignee of a certificate issued on the sale of land for the tax of 1881, made under the tax law of 1882, cut the timber, and replevied the logs from the original land-owner, who had seized and marked them, the measure of damages on a recovery by the defendant is the value of the logs at the time of serving the writ, with interest from that date. 388 (2).
4. In a suit by a contractor upon a non-apportionable building contract not fully performed, the measure of damages is what the building is reasonably worth in the condition in which it is turned over to the defendant, not exceeding the contract price, less the reasonable cost of completing it in accordance with the contract. 554.
5. A notice of recoupment which alleges that, by reason of the plaintiffs' failure to deliver logs in sufficient quantities to keep defendant's mill constantly supplied for sawing purposes, defendant was compelled to shut down said mill a large number of times, and keep a large number of men idle, whereby he was prevented from putting his lumber on the market, and from filling his orders and performing his contracts, and lost great gains and profits, states defendant's claim for damages in no

DAMAGES.—Continued.

other than the most speculative way, and fails to present a fact to be tried as to damages. 578 (2).

6. In such a case it is not error for the court to exclude from the consideration of the jury the alleged loss of profits, and to instruct them that if defendant had men permanently employed, and was obliged to and did pay them while thus compelled to remain idle, the amount paid would be a legitimate item of damage; but that the employés who worked by the day, and who were not paid for such lost time, he could not charge for. 579 (3).
7. Where, in trover to recover the value of logs cut from plaintiff's lands, it appears that the trespass was neither willful nor negligent, the measure of damages is the value of the timber on the land. 594 (4).
8. The measure of damages for a willful refusal by the defendant to convey land agreed to be received by the plaintiff on an exchange of farms, as *part* payment for the farm deeded by him to the defendant, is the fair, market value of the defendant's farm at time of the breach. 657 (9).

See EVIDENCE (26).

DEED.

1. See *Shelden v. City of Grand Rapids* for a case involving the doctrine of dedication of land to public use and of adverse possession. 508.
2. The object to be arrived at by courts in construing deeds or other contracts is to ascertain the intention of the parties. 633 (1).
3. All grants must be construed reasonably, and in the light of surrounding circumstances. *Id.* (2).
4. It is well settled by numerous cases that when the *habendum* in a deed is repugnant and contrary to the granting clause it is void, and that it can only affect the grant when it can be construed as consistent with the premises. It cannot divest the grantee of the legal estate already granted him in the premises, nor can it frustrate a grant complete before, or abridge or lessen the estate granted. *Id.* (3).
5. In this case a deed is held to have vested the fee in the grantee, and the *habendum*, being repugnant to the granting clause, is rejected. The facts are summarized in the headnote. *Id.* (4).

DEED.—Continued.

6. Whether a deed has been delivered so as to pass title depends upon the intention of the parties. 656 (1).
7. It is competent for a grantor to show by parol that a deed which he had executed and acknowledged was not to be delivered until the happening of certain contingencies, or that it was left in escrow until the happening of some subsequent event, and a delivery contrary to such an agreement is not binding upon him. *Id.* (2).

See TAXES (14).

DEFINITIONS.

1. Malice. 267 (2).
2. Game. 325 (1).
3. Mill Tally. 350.
4. Felony. 378 (2).
5. Subsequent purchasers and mortgagees in good faith. 460 (2).
6. Reasonable time. 528 (1).

DELIVERY—See DEED (6, 7).

DESCRIPTION—See CHATTEL MORTGAGE (5); EQUITY (1).

DISCHARGE—See EXECUTORS AND ADMINISTRATORS (1, 2).

DISCHARGE IN BANKRUPTCY.

Nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding. 254 (3).

DISCRETION.

The discretion exercised by a circuit judge in granting or refusing interlocutory applications in a chancery suit will not be reviewed unless clearly abused. 504 (2).

See BILL OF REVIEW.

DIVORCE—See DOWER.

DORMANT PARTNER.

A dormant partner may be joined as a party in a suit by or against the firm at the option of the plaintiffs. 476 (5).

DOWER.

A wife entitled to dower under How. Stat. § 6246 (*Percival v. Percival*, 56 Mich. 297), on a divorce from her husband, is entitled to dower in the surplus arising upon a foreclosure sale under a mortgage executed prior to their marriage. 150 (4).

DRAINS.

1. Land-owners who petition for the construction of a drain, and release the right of way over their lands, and assent to all the proceedings in laying out, establishing, and constructing it, are estopped from complaining of any *irregularities* in such proceedings. 249 (1).
2. The failure of a drain commissioner to give notice of the time and place for a review of his assessments of benefits, which were made without notice to those interested some two or three months after the contracts for the construction of the drain were let, and without the knowledge or assent of certain complaining land-owners, will render such assessments void as to them. *Id.* (2).

EQUITY.

1. A husband and wife, intending to mortgage their farm of 160 acres, by mistake included only 40 acres in the mortgage, after which they conveyed the whole farm, subject to the mortgage, their grantees having knowledge of the facts, who sold 80 acres of the *non-mortgaged* land, including the homestead 40 acres, to a party having like knowledge, and who intended to defraud the holder of the mortgage by such purchase. A bill was filed to reform the mortgage, and the purchaser of the homestead contended that the court could not grant such relief as to said homestead, as the wife of the mortgagor had never signed a mortgage covering the same. In granting the relief prayed for, the Court held that said grantees must be considered as having reformed and corrected the description, so far as they are concerned, by the circumstances of their purchase and ownership of the premises; and as the default of the wife had been entered for want of an appearance, a decision of the question of the power of the court to so reform the mortgage as to her was not required. 77.
2. Equity will sometimes permit a judgment, though obtained for a wrong, to be made an item in an accounting in chancery in favor of the holder, to the end that the whole controversy may be settled and adjusted. 106 (2).
3. It is not always a matter of course to grant relief in a court of equity against the maintenance of a private nuisance, when the law side of the court is open for legal redress. The extent of the injury, its character, the comparative values of

EQUITY.—Continued.

the properties affected, and other considerations which may present themselves under the varying circumstances, ought to be duly weighed, and relief afforded or withheld, as equity and good conscience require. 129 (6)

4. In a case where the continued maintenance of a dam at an unlawful height involves the practical destruction of 300 acres of land, or over, be its value what it may, and the consequent, and weekly, and perhaps daily, recurring injury to each of the several owners, for which each would have a right of action, causing a multiplicity of suits and vexatious litigation, it is held to be just and equitable to abate the nuisance by injunction. *Id.* (7).
5. The removal of a mill-dam so far as it exceeds a proper height, by a decree of the equity court, is a matter of equitable discretion. 270 (1).

See ACCOUNTING IN CHANCERY (2).

EQUITY JURISDICTION.

1. A resident tax payer of a school-district which the township board of school inspectors, acting without jurisdiction, have attempted to divide into other districts, may file a bill to restrain the sale of the school house and other property of the original district. 87 (3).
2. Equity has jurisdiction to enjoin the sale by executors of lands to pay debts and legacies, which the heirs have sold to third parties, until the lands remaining in the hands of the heirs or devisees are disposed of for that purpose, and, having so taken jurisdiction, may take cognizance of the whole matter to declare for what specific purpose a sale may be ordered. 119 (2).

EQUITY PRACTICE.

1. A bill in the nature of a bill of review, not verified or accompanied by any sworn showing, should be dismissed by the court. 116 (1).
2. Under the rules, a bill of review should be filed within the time allowed for appealing, unless on newly-discovered evidence, or when there has been some reason that is satisfactory for the delay. *Id.* (2).
3. Several land-owners injured by the maintenance of a dam at an unlawful height may join in a bill filed *solely* for *injunctive* relief. 129 (5).

EQUITY PRACTICE.—Continued.

4. Where the proofs in a chancery suit are taken in open court, and the only question in the case is brought to the attention of the court, a reference as to a defendant who is brought in by publication is unnecessary. 504 (1).
5. The discretion exercised by a circuit judge in granting or refusing interlocutory applications in a chancery suit will not be reviewed unless clearly abused. *Id.* (2).

ESTATES OF DECEASED PERSONS.

1. Until an estate is settled, it can never be known how far land devised can be affected by debts or charges. 112 (2).
2. Under How. Stat. § 6037, lands remaining in the hands of heirs or devisees must be sold to pay debts or legacies before resorting to those sold by them to those sold by them to third parties, and equity has jurisdiction to restrain the sale by executors of such lands in any other order. 119 (1).
3. Under our statutes, as well as under the general policy of the law, no part of a testator's estate should be treated as intestate if it can be reasonably avoided. 278 (5).

See EXECUTORS AND ADMINISTRATORS; LEGACIES.

ESTOPPEL.

1. Public policy will not permit the doctrine of estoppel to aid in validating an unexecuted contract which it holds to be void. 141 (2).
2. A township cannot be estopped by the acts of its officers when there is no valid contract. 227 (3).
3. Land-owners who petition for the construction of a drain, and release the right of way over their lands, and assent to all the proceedings in laying out, establishing, and constructing it, are estopped from complaining of any irregularities in the proceedings. 249 (1).
4. It is quite possible for land-owners to estop themselves from seeking equitable relief to abate a mill-dam. 270 (2).
5. Where a contract provides for the delivery, upon the cars, of all of the merchantable white pine on certain descriptions of land that the owner should deem fit for a specified market, and for the delivery of the remainder of the timber at the owner's mill, it is his duty to designate in some proper manner the *first* class of logs, and if he gives a *general* description, and leaves the *particular* designation to the *judgment* of the contractors or their foreman, or the scaler agreed

ESTOPPEL.—Continued.

upon by the parties, *which* is fairly and honestly exercised, he is bound thereby. 578 (1).

EVIDENCE.

ADVERSE POSSESSION.

1. The suppositions of a witness as to the location of a disputed division line are incompetent testimony, as are his conclusions that land-owners had acquiesced in such location. 391 (1).

2. In a suit involving plaintiff's alleged adverse occupancy of land up to a division fence, which defendant claimed was not built by the plaintiff with the expectation of holding all of the land inclosed within it, it is competent for the defendant to show, in support of said claim, that after a survey of the land, which disclosed that a portion of the fence encroached on defendant's land, the plaintiff removed it so as to conform to the division line as located by said survey. 520 (2).

3. In a case involving a claim of title to land by adverse occupancy up to a division fence, which when built commenced on the true line, and by a deviation inclosed the land in dispute, which fence was composed in part of logs and brush,—the adjoining land being wild, and the owner not living in the neighborhood,—the evidence of adverse holding should be so strong and conclusive as to convince the jury that the fence was built as a *permanent* assertion of title to *all* of the land inside of it, which was thereafter held for the statutory period under such circumstances, and in such a way, as to plainly give notice to the community that the occupant claimed title thereto as against all persons, and this so notoriously that the original owner, if he did not know of such hostile occupation, ought to have known of it. *Id.* (3).

CHATTEL MORTGAGE.

4. In trover by a mortgagee for the wrongful sale of chattel-mortgaged property on execution, the amount unpaid on the mortgage may be contested by the defendant, who may show the value of other property taken by the mortgagee on the mortgage. 1 (2).

5. On the trial of an action of trover for the value of mortgaged property seized on execution against the mortgagor on his premises, an agreement between the mortgagor and

EVIDENCE.—Continued.

mortgagee by which the latter was entitled to the immediate possession of the property, with the right to hold it until the mortgage debt was due or paid, is admissible. *Id.* (3).

6. On the cross-examination of a mortgagee who sues for the value of a portion of the mortgaged property sold on execution against the mortgagor, he may be inquired of fully as to other portions of the property released to the mortgagor, or appropriated by the mortgagee under his mortgage. *Id.* (4).

7. Where, in a suit by a mortgagee for the value of a portion of the property sold on an execution against the mortgagor, a witness for the plaintiff, who had assisted in transacting the business culminating in the execution of the mortgage, denied on cross-examination having stated to a third party that he had counseled the mortgagor as to what disposition he could make of his property so as to cover it up, the defendant is bound by his answer, and the testimony of such third party that he did so state, not in the presence of the plaintiff, is inadmissible, even for the purpose of impeaching said witness. 2 (6).

8. The fact that the value of chattel-mortgaged property is out of all proportion to the mortgage debt, is a circumstance to be considered by the jury in determining the good faith of the transaction. *Id.* (7).

CORPORATION OFFICERS.

9. While the testimony of the officers of a corporation as to their personal dealings with a deceased defendant in creating a contract for the sale of real estate on commission may be objectionable as calling for matters equally within his knowledge, such objection cannot apply to all of the services rendered in making such sale. 104 (2).

10. In such a case the testimony of persons who dealt with and were introduced by the corporation agents to the deceased, who recognized in their presence the employment claimed by the corporation, is admissible in support of such claim. *Id.* (3.)

EXEMPTION.

11. Evidence that property replevied from an attaching creditor was exempt, is a complete defense in a suit against the officer who replevied it, for failing to require a new bond, an exception being taken to the first one. 493 (1).

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EVIDENCE.—Continued.

12. A party having personal knowledge of the value of property involved in a replevin suit, may be asked to state it, and it is unnecessary strictness to prevent his stating the amount of the appraisement. 561 (6).

EXPERTS.

13. In a suit to enjoin the flooding of complainants' lands by the maintenance of a dam at an unlawful height, actual tests by observation and experience afford the most satisfactory testimony upon which to rely in determining the *results* from such obstruction, and are controlling when brought in conflict with instrumental measurements, however accurately and carefully taken. 128 (1).

14. A surveyor, who testifies to finding all of the corners pertaining to a given description of land, may be asked "if he found them according to the government survey," it being a matter on which he is authorized to testify as an expert, and any evil resulting from his answer can be remedied by a cross-examination, showing his sources of information, or by other testimony if his opinion is not correct. 520 (1).

FRAUD.

15. It is not necessary, in order to prove fraudulent purchases, to show the complicity of the vendee's assignee and his vendee, from whom the goods are replevied, in the original scheme, if one existed, as they may be unable to hold the goods without being guilty of actual dishonesty. 258 (2).

16. In a suit involving an alleged fraudulent purchase of goods, where the order was sent to the vendors by mail, one of the vendors, who went to the vendee's place of residence to investigate his pecuniary condition, may testify to the forwarding of the order to him by his firm, as explaining why he went to see the vendee. 561 (2)

17. A party claiming to have been defrauded may testify that he relied and acted on the representations made. *Id.* (3).

18. In a case involving an alleged fraudulent purchase of goods by means of false representations made by the vendee as to his financial condition, his whole conduct at the time in any way concerning his business and property is material, and, instead of drawing close lines to exclude facts, a very full inquiry into all the circumstances should be allowed. *Id.* (4).

EVIDENCE.—Continued.

19. In a suit involving the alleged fraudulent purchase of goods by means of false representations as to the vendee's financial standing, it is not irrelevant to show that the defendant was already indebted to the plaintiffs; and the entire amount of defendant's indebtedness is pertinent, both as bearing on the truth of his representations, and also on the question of insolvency. *Id.* (7).

NEGLIGENCE.

20. For the purpose of refreshing the recollection of a witness who testifies for the plaintiff in a negligence case to the surroundings of the accident as observed by him, his attention may be called to his statements made before the coroner's jury on the same subject. 81 (1).

21. As bearing upon the question of the exercise of due diligence for his personal safety by an insured person who was killed by falling into an excavation under a sidewalk, which had been partly covered, and so as to resemble, under an electric light, a continuation of the sidewalk, it is competent for the plaintiff to show the appearance of the walk on the succeeding night, under like circumstances and surroundings, by witnesses who took observations, and whose testimony was similar to that of witnesses who observed such appearance on the night of the accident. *Id.* (2).

NOTICE TO PRODUCE PAPERS.

22. A notice to produce all letters and papers from a certain date to the time of the trial, covering a period of five years, none of which are indicated by date or subject, or reference to any particular transaction, is too vague to be used as a basis for evidence of their contents. 561 (8).

MISCELLANEOUS.

23. To show a surrender of a lease, a mutual agreement between the lessor and the original lessee that the lease is terminated must be clearly proved. 50 (1).

24. Evidence that a plaintiff, who sues for commissions for bringing about sales of real estate, did all that he could in that direction, and that the sales failed through the fault of the defendant, makes out a good cause of action. 261.

25. Testimony showing the construction placed upon the term "mill tally" is held admissible. 350.

26. In a suit upon a contract for the construction of a machine

EVIDENCE.—Continued.

at a stipulated price, which the vendee refused to accept because not answering to the requirements of the contract, evidence by the plaintiff of the cost of the machine is irrelevant, his recovery being limited to the contract price. 263 (1).

27. In such a case evidence of the workings of *similar* machines, but not *like* the one in suit, and the amount of help required to operate them, is inadmissible, being outside of the issue being tried. *Id.* (2).

28. Where in a suit against the trustees of a copartnership upon a contract made by their business agent, who was also a member of the firm, the judgment, if one is recovered, must be paid out of the trust estate, the death of such agent renders the testimony of the plaintiff as to the terms of the contract inadmissible under Act No. 139, Laws of 1885, said trustees being the representatives of said deceased beneficiary. 434 (2).

29. The testimony of a wife as to matters of which she has no knowledge except as informed by her husband is incompetent. 497 (1).

30. Where, in a suit to recover for timber cut from plaintiff's land by defendant's contractor, the defendant denies the trespass, and gives notice of the statute of limitations, testimony of a third party showing a settlement by defendant with him for a trespass committed on his land at the same time as the one charged by plaintiffs, and by the same contractor, which cutting extended onto plaintiff's land, is admissible as tending to establish plaintiff's claim, and as showing that it was not barred by the statute of limitations. 594 (2).

31. Parol proof that a maker of a promissory note was induced to sign it by the agreement of the payee that he should not be held liable thereon is inadmissible to vary or contradict the *legal* effect of the instruments, but such facts may be shown to show want of consideration for the *promise* of such accommodation maker. 675 (2, 3).

See CRIMINAL LAW (8–17); FRAUD (2); LIQUOR TRAFFIC (6); REPLEVIN (7).

EXECUTING MORTGAGE IN BLANK—See STATUTE OF FRAUDS (3).

EXECUTION.

1. The interest of a mortgagor in personal property is subject

EXECUTION.—Continued.

to levy and sale on execution at any time before the actual foreclosure of the mortgage; but such sale cannot be in parcels. 1 (1).

2. An execution debtor need not select mortgaged property for his exemptions. 2 (5).
3. Land not occupied as a homestead is *prima facie* subject to levy and sale on execution, and its exempt character must be determined upon the facts as they existed when the levy was made. 150 (3).

See EVIDENCE (5–7).

EXECUTORS AND ADMINISTRATORS.

1. An order of distribution *alone* cannot discharge executors until the estate is distributed. 356 (1).
2. It is a dangerous and incorrect doctrine that executors can discharge themselves of their official responsibility without doing some act to change the character of their holding, and place the fund safely where it ought to be. *Id.* (2).
3. Where executors, after an order for distribution, make a wrongful conversion of the property to the use of one of them it is a clear breach of duty, for which action will lie on their bond. *Id.* (3).
4. Where leave was granted to an administrator appointed on the removal of the executors, who had failed to comply with the order of distribution, and had converted the property to the use of one of them, for leave to sue on their bond, which suit was prosecuted to judgment in the name of the judge of probate for the use of a contingent residuary legatee, who had no definite interest, the record was amended in the Supreme Court so as to show the administrator as the party in interest, he being entitled to take the fund, and see to its proper investment. *Id.* (4).

EXEMPTION.

1. An execution debtor need not select mortgaged property for his exemptions. 2 (5).
2. In a suit against a coroner for his failure to require a new bond in a replevin suit for attached property, on exceptions being taken to the one first given, he may defend by showing that the property was exempt from attachment. 493 (1).
3. The instructions to the jury on the question of exemption

EXEMPTION.—Continued.

are held warranted by the testimony and statements of counsel. *Id.* (2).

See EVIDENCE (11, 12).

EXPERTS—See EVIDENCE (13, 14).

EXPERT TESTIMONY—See CRIMINAL LAW (8, 12); EVIDENCE (13, 14).

FENCE—See ADVERSE POSSESSION (1).

FIRE INSURANCE.

1. The former opinion in this case, reported in 65 Mich. 527, is held controlling, as far as the defense of the forfeiture of plaintiff's policy by taking additional insurance contrary to its conditions is concerned; but it is further held that the question of the waiver by the defendant of such forfeiture should have been submitted to the jury. 414 (1).
2. It is the duty of the insured to *know* what his contract of insurance is, and he must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement; and the fact of his not having *seen* the policy will not excuse the want of such knowledge any more than his failure to *read* it, in the absence of proof of any adequate reason for *not* seeing it. 415 (2).
3. The fact that an insurance agent had authority, in a certain way and manner, to consent to the taking of additional insurance, and had done so in other cases, will not save a forfeiture incurred by taking such insurance with the consent of the agent in a manner outside of such authority, his right to waive such conditions of the policy not being shown. *Id.* (3).
4. An insurance company will be held to have waived the forfeiture of a policy incurred by taking additional insurance contrary to its conditions, where with full knowledge of the facts showing such forfeiture, which was supposed to have been waived, it fails to notify the insured of an intention to insist on such defense until after its adjuster has examined into the loss, and received from the insured all the information he asked for in relation to its extent and value, taking two days of his time and the services of a man furnished by the insured, and making no point of the taking of such additional insurance as a reason why the insurance should not be paid. *Id.* (4).

FORECLOSURE—See STATUTORY FORECLOSURE.

FORECLOSURE SUIT.

Prior lien-holders, or those claiming under a paramount title, are not proper parties to a foreclosure suit, nor can their claims be litigated therein. 398.

FORECLOSURE SALE—See CONFIRMATION OF FORECLOSURE SALE; DOWER.

FORFEITURE—See FIRE INSURANCE (1, 4).

FRANCHISE.

1. Holding a public market is an important public franchise. 92 (1).
2. There can be no doubt of the right and duty of the Attorney General to intervene and prevent franchises of a public nature from usurpation or from destruction. *Id.* (2).
3. All franchises are given for the purpose of securing some advantage to the public, and, when once exercised, the public have very generally a right to complain of their relinquishment. *Id.* (3).

FRAUD.

1. An essential element of actionable fraud is the fact that it is relied and acted on. 561 (3).
2. Single facts are seldom enough in themselves to show fraud, while the surroundings, although each may be, standing alone, not intrinsically serious, will, when looked at together, be very important, if not decisive, as they usually are. *Id.* (5).
3. Obtaining the signature of a third party to a note under a promise by the payee that the maker should not be liable thereon, which is not kept, is not such a fraud as will nullify the note. 675 (1).

See EVIDENCE (15–19); REASONABLE TIME (2).

GAME LAWS.

1. That quail and other wild fowl or birds fit for food come within the meaning of the word "game" there can be no doubt. 325 (1).
2. How. Stat. § 2202, does not apply to quail killed in another state, and brought into this State afterwards. *Id.* (2).

GRAND RAPIDS POLICE COURT—See POLICE COURT OF GRAND RAPIDS.

GUARDIAN AND WARD.

The powers of a testamentary guardian are the same as those possessed by one appointed by the court, and their exercise is allowed or withheld for the same reasons. 181 (4).

See INFANT.

HANDCUFFING PRISONER—See ARREST (5).

HIGHWAYS.

1. A contract let by a highway commissioner for building a bridge at a cost of over $50, without security, as required by How. Stat. § 1414, is invalid. 227 (1).
2. By the settled policy of this State, the care and supervision of all public highways and bridges is in the hands of the highway commissioners of the several townships, respectively, in which they are situated. 572 (1).

See STATE ROADS.

HOMESTEAD.

1. Actual residence upon land intended for a homestead is not an indispensable condition to its being in law a homestead, and, as such, exempt from levy and sale upon execution. 150 (1).
2. A party claiming unoccupied land exempt from execution, as a homestead, must show an intention on his part to occupy it as such, and that such intention existed prior to and at the time of such levy; and if it was conceived after the levy, and for the purpose of defeating the lien thereby created, it cannot be upheld, although a dwelling is erected or moved upon the land, and occupied by the owner and his family, after such levy and before sale. *Id.* (2).
3. Land not occupied as a homestead is *prima facie* subject to levy and sale on execution, and its exempt character must be determined upon the facts as they existed when such levy was made. *Id.* (3).
4. A husband cannot mortgage land for which he exchanges his homestead, and which is to be occupied in lieu thereof as a homestead, to secure a loan from a third party with which to pay the difference agreed to be paid on such exchange, without his wife's signature to the mortgage. 656 (4).
5. The wife's homestead rights will be protected in whatever form they may come in question, whether at law or in chancery. *Id.* (5).

HUSBAND AND WIFE.

A wife, whose only interest in her husband's business is that of a creditor for money put into the business, is not liable on their joint note given in payment of a debt due from the husband to the payee, and to secure a loan to pay other debts of the husband. 223 (1).

See MARRIED WOMAN.

INFANT.

1. Courts have a general superintending power over all infants, and the primary guardianship of the parent over his child lasts no longer than he is found to be competent, and discharges his duty, which nature has laid upon him, properly; and when he fails to do this, the proper court may interfere, and charge another with such performance. 180 (1).
2. Primarily, the court is the guardian of all orphan children, and will give the proper directions as to their care and support until such time as a guardian shall be appointed; and it is then its duty to see to it that the duties of the trust are properly discharged. 181 (2).
3. Guardians for infants may be appointed by the last will of the parent instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward. *Id.* (3).
4. The powers of a testamentary guardian are the same as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons. *Id.* (4).
5. Who shall or shall not be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the controlling question to be determined in making the selection is, and always should be, what will be for the best interest of the ward under all the circumstances? *Id.* (5).
6. In this case it is held that under the agreement made by the father of the infant with his wife's mother, on the request of his wife, and pursuant to which the child was brought from Washington to Port Huron, the last-named city became the child's residence, which was not changed by the agreement afterwards signed in Washington under

INFANT.—Continued.

duress; and that by virtue of their letters of guardianship the respondents have also the lawful custody of the child, the right to which the testamentary guardians never had, except that which comity gave them, and which can never be properly enforced in this State, under the circumstances appearing in this case. *Id.* (6).

INFORMATION—See CRIMINAL LAW (1, 3, 4).

INSURANCE—See FIRE INSURANCE.

INTENT.

1. An intent to violate section 13 of Act No. 313, Laws of 1887, prohibiting the sale of liquor to a minor, is essential to a conviction. 548 (1).
2. When a statute does not make *intent* an element of the offense, but commands an act to be done or omitted which, in the absence of the statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, will not excuse its violation. 549 (3).
3. The *fact* of a violation of the statute requiring a liquor saloon to be kept closed on Sunday, is conclusive of the *intent* to violate the law. *Id.* (4).

INTEREST.

A city will not be compelled by *mandamus* to pay interest on paving orders, payable out of a particular fund, and containing no promise for such payment. 118.

INTEREST OF WITNESS—See CHARGE TO JURY (1).

JOINDER OF COMPLAINANTS—See EQUITY PRACTICE (3).

JOINT JUDGMENT—See REPLEVIN (1).

JUDGMENT.

1. A joint judgment in replevin for the value of the property, in favor of defendants who are not shown to have a joint interest, cannot be sustained. 258 (1).
2. A judgment creditor cannot file a bill to reach choses in action in the hands of third persons while an execution is outstanding on his judgment. 422.

See REPLEVIN (1).

JURISDICTION.

The police court of Grand Rapids cannot try a party for misdemeanor punishable by fine and imprisonment beyond the jurisdiction of a justice of the peace. 335 (1).

See CONFLICT OF JURISDICTION.

JURY.

1. The provision in the charter of the city of East Saginaw creating the office of assessor, and requiring such officer to make and return lists of persons to serve as jurors, supersedes the general statute in that regard, and is sustained. 287 (1).
2. The return of more than 200 *qualified* petit jurors, under How. Stat. § 7556, is good cause for a challenge to the array; but, in such a case, it is the duty of the court to direct the clerk to strike from the *excessive* lists all names listed below the requisite number *first* appearing. *Id.* (2).
3. The selection of the jury, secured to litigants by our Constitution, is of first importance to parties, who have a right to have such jury constituted in substantial conformity with the law as established; and where a departure has occurred, and the positive provisions enacted to guard the right of trial by jury have been violated or disregarded, there is no warrant in our jurisprudence for treating the deviations as harmless irregularities. *Id.* (*a*).
4. There is nothing compulsory upon the Legislature as to how or in what manner lawful jurors' names shall be returned, but it is required to make some regulation upon the subject; and the general law enacted for that purpose is of no higher or greater authority than any other enactment upon that subject. One of the principal objects in any mode prescribed has been that the panel shall come from the *body* of the county, which means, under our system of territorial division, from *every township* in the county. *Id.* (*b*).
5. The right of trial by jury, in the circuit court, means more than that there shall be a trial before a body of laymen. It involves all the incidents of common-law jury trials, including challenges to the array and to the poll, peremptory and for cause, the assistance of counsel, the enforced attendance of witnesses, the separation of court and jury powers, and whatever else is essential on hearing or review; and under the Constitution it requires substantial equality throughout the State in methods of prosecution. 336 (*f*).

JURY.—Continued.

6. The question of contributory negligence, if in doubt upon the evidence, should be submitted to the jury. 364.
7. The object of the statute in allowing special questions to be submitted to the jury, and requiring answers thereto, 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 it is error to direct what answer shall be made, in the event the general verdict is a certain way. 391 (3).
8. The question of the waiver by an insurance company of an alleged forfeiture of the policy sued on should be submitted to the jury. 414 (1).
9. A jury is required whenever the right of eminent domain is exercised by any authority other than highway commissioners in laying out or discontinuing highways. 439 (*f*).
10. Whether the title to personal property passes or not, where something remains to be done before the exact amount to be paid can be ascertained, depends upon the intention of the parties, and is a proper question for the jury. 681.

See CRIMINAL LAW (5–7); PRACTICE IN CIRCUIT COURT (2, 3).

JUSTICES' COURTS.

It was not the design of the Legislature to confer upon justices' courts jurisdiction to try the title to land, and cases involving that question can be tried in those courts only when the title is admitted, in which case it is not tried. 44 (4).

See TITLE TO LAND (1–4).

LAND CONTRACT.

1. A land contract providing for a title which shall be perfect calls for more than a warranty deed, and the vendee is not bound to rest upon covenants. 112 (3).
2. Under a land contract calling for good and sufficient deed the grantee has a right to a good title, and to one not clouded or incumbered by an outstanding life-estate in a portion of the land conveyed. 656 (7).

LANDLORD AND TENANT.

To show a surrender of a lease, a mutual agreement between the lessor and the original lessee that the lease is terminated must be clearly proved, which surrender releases the original tenant from further liability. 50 (1).

LAPSED LEGACIES—See LEGACIES.

LARCENY—See CRIMINAL LAW (27).

LEASE.

To show a surrender of a lease, a mutual agreement between the lessor and the original lessee that the lease is terminated must be clearly proved, which surrender releases the original tenant from further liability. 50 (1).

See RAILROAD COMPANIES (2–4).

LEASE OF NEWSPAPER—See REPLEVIN (5).

LEGACIES.

1. Our statutes do not save legacies from lapsing if the legatee dies before the testator, except as provided by How. Stat. § 5812, which does not make the legacy become a part of the deceased legatee's estate, but simply gives it to his or her issue as *direct* beneficiaries. 278 (1).
2. The law in regard to lapsed legacies of personalty has always treated them as part of the general body of the estate, so that they pass to the residuary legatees. *Id.* (2).

LIBEL AND SLANDER.

Words charging another with the crime of larceny are actionable, and if used without warrant the law presumes malice. 267 (1).

LIQUOR TRAFFIC.

1. The law of 1887, requiring the removal of screens, etc., during the time when saloons are required to be closed, is constitutional. 38 (1).
2. The business of selling intoxicating liquors is one which the Legislature have an undoubted right to regulate or prohibit, and may therefore impose such conditions and restrictions upon the sale as in their judgment may seem wise, where such restrictions are applied to all alike or to the same class alike. *Id.* (*a*).
3. The business of selling intoxicating liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor; and it does not stand upon the same plane of utility and morality with many useful arts, trades, and professions. *Id.* (*b*).
4. Act No. 31, Laws of 1887, prohibiting the establishment or maintenance of a saloon, etc., within one mile of the Soldiers' Home, is constitutional. 234.

LIQUOR TRAFFIC.—Continued.

5. The liquor law of 1887 was intended to remove the trial of offenses under it into the higher courts, where the proceedings are conducted by common-law methods, and the rights of the public and of the prisoner fully guarded. 335 (*a*).
6. Where in a prosecution for selling liquor to a minor the undisputed and only evidence showed such sale in the respondent's presence, and in such a manner as to make his ignorance of it impossible, unless he lacked some of his senses, or was willfully ignorant, an instruction to the jury that such ignorance would make no difference, and that he would be liable at all events, could have no bearing or effect, there being no pretense of such ignorance. 349.
7. There must be an *intent* to violate the law in order to convict for a sale of liquor to a minor, under section 13 of Act No 313, Laws of 1887. 548 (1).
8. In a prosecution under section 13, Act No. 313, Laws of 1887, proof of the sale of liquor to a minor in a place where liquor was kept for sale makes out a *prima facie* case for the people, which the respondent may rebut by showing that the alleged minor was of full age, or by satisfying the jury that the size and appearance of the boy, coupled with his statement that he was over 21 years of age, led the respondent in *good faith* to believe that he was *not* a minor. *Id* (2).
9. In *People v. Roby*, 52 Mich. 577, the conviction was for not keeping a saloon closed on Sunday, which statutory offense belongs to that class where the *fact* of a violation is conclusive of the *intent* to violate the law. 549 (4).

LOAN—See TENDER.

LOGS AND LOGGING.

1. In this case testimony as to the proper construction to be placed upon the term "mill tally," as used in a logging contract, is held admissible, and to include "mill culls." 350.
2. The provision in the contract in this case for "keeping logs of particular lengths by themselves," as delivered on the skids at the mill, is construed to mean that the logs to be used for bill stuff should be kept separate from the other shorter logs. 579 (4).

See ESTOPPEL (5); MASTER AND SERVANT.

LOSS OF PROFITS—See DAMAGES (6).

MALICE.

1. The law presumes malice from the use of words charging another with a crime, if used without warrant. 267 (1).
2. Malice, in a legal sense, means a wrongful act done intentionally, and without just cause or excuse. *Id.* (2).

MANDAMUS.

1. *Mandamus* requiring the respondent to pay interest on paving orders payable out of a particular fund, the principal of which had been paid and accepted, and which contain no promise to pay interest, is denied, there being no statute or authority for such payment. 118.
2. A *mandamus* requiring Wayne county to maintain and operate a bridge across the river Rogue on the Monroe road, was denied, no liability on the part of the county being shown. 573 (4).

MARKET.

1. That holding a public market is an important public franchise is an elementary principle of law. 92 (1).
2. Markets are as old as civilization, and public market places have in many countries been identified with the most important events in their history. *Id.* (4).
3. The purpose of markets has always been to secure to all persons the privileges and conveniences arising from a general concourse of buyers and sellers, one main object being to enable producers to meet consumers of the usual necessaries of life directly, and without the interference of middlemen. *Id.* (5).
4. In this case the defendant is enjoined from interrupting the use of the market property, or any part of it, or any of the buildings heretofore used for market purposes, and directed to continue to maintain the market as such, and collect and apply the income for the purposes required by the statute of 1875, as amended by the law of 1881, and in no other way. *Id.* (6).

MARRIED WOMAN.

A wife, whose only interest in her husband's business is that of a creditor for money put into the business, is not liable on their joint note given in payment of a debt due from the husband to the payee, and to secure a loan used in payment of other debts of the husband. 223 (1).

MASTER AND SERVANT.

Where a boom company, having full control and management of a stream and the dams thereon, contracts for driving logs therein, the reasonable performance of which contract *obliges* the contractor to so run and manage the logs and water as to damage riparian owners, such damage is legally attributable to the company, and may be recovered of it. 61 (1).

MEDICAL BOOKS—See CRIMINAL LAW (18, 19).

MILL CULLS.

Are held to be included within the term "mill tally," as construed in this case. 350.

MILL-DAM.

1. The removal of a mill-dam so far as it exceeds a proper height, by the decree of the equity court, is not a matter of right, but of equitable discretion, and must depend on the circumstances of the case. 270 (1).
2. It is quite possible for land-owners to estop themselves from seeking equitable aid to abate a mill-dam; and when they come into a court of equity for relief, and are not willing to comply with equitable conditions, it is competent to give them their choice to do justice or get their remedy where they can. A court of equity is not to be made an instrument of wrong. *Id.* (2).
3. In this case complainant is awarded $1,500 damages as entire compensation for the total injury to him by the continuance of the dam heretofore and hereafter. *Id.* (3).

See EQUITY (4, 5).

MILL TALLY.

The term is construed to mean, under the testimony in this case, all of the product that was saved and set apart as proper to be classed as lumber, including mill culls. 350.

MINOR—See INFANT.

MONROE ROAD BRIDGE.

Without concluding the townships of Springwells and Ecorse by this decision, they not being parties, the Court find that the record fails to show any liability on the part of Wayne county to maintain and operate the bridge in question in this proceeding, and deny the writ asked for by relator. 573 (4).

MORTGAGE.

1. The requirement that mortgages which do not state the name and residence of the mortgagee shall not be recorded, is an essential part of the scheme for affording information to the assessing officer, and to prevent an evasion of the law. 17 (*h*).
2. A testatrix devised a farm in trust, to be conveyed by the trustee to a mother and daughter when the daughter reached full age, and after the discharge of such dues as should then be against her estate. The trustee accepted the trust, and was appointed executor of the will, but never settled the estate, nor rendered any account to the probate court, nor conveyed the farm to the beneficiaries. While yet a minor the daughter quitclaimed her interest in the farm to her mother, who, after her daughter became of age, at the request of the trustee, and on his representation that the money was needed to pay off the claims of certain heirs upon the land, executed a mortgage on the farm to secure a loan for that alleged purpose, the trustee representing to the mortgagee that the mother was then the sole owner of the mortgaged premises. This was done with the knowledge and acquiescence of the daughter, to whom the mother soon after reconveyed the interest deeded to her, and the next day conveyed to the daughter her own interest, subject to the mortgage, which the daughter assumed and agreed to pay. The mortgage was foreclosed by advertisement, and the land bid in by the mortgagee, and was not redeemed from such sale. A party claiming through the mortgagee filed a bill to have the mortgage declared to be in effect one made by the daughter and her mother and the trustee, and to foreclose it as such, and to hold all three for any deficiency arising on a sale under such foreclosure decree. A general demurrer was interposed, which was sustained by the court on the hearing below, and on appeal in the Supreme Court, for reasons stated in the opinion, to which reference is had. 69.

See CONFIRMATION OF FORECLOSURE SALE; CONSTITUTIONAL LAW (1); DOWER; EQUITY (1); STATUTORY FORECLOSURE; TAXES (1–9); TENDER.

MUNICIPAL CORPORATIONS.

Persons dealing with public corporations are bound to make their contracts according to law, and will not be protected unless they do so. 227 (2).

NEGLIGENCE.

1. A boom company, having full control and management of a stream and the dams thereon, which contracts for driving logs therein, the reasonable performance of which contract obliges the contractor to so run and manage the logs and water as to damage riparian owners, is liable for such damage. 61 (1).
2. Where the question of contributory negligence is in doubt under the evidence, it is the duty of the court to submit it to the jury. 364 (1).

See EVIDENCE (20, 21).

NEW PROMISE.

Nothing amounts to a new promise to avoid a discharge in bankruptcy that is not intended distinctly as a recognition and renewal of the debt as binding. 254 (3).

NEWSPAPER PLANT—See REPLEVIN (5).

NOTICE.

A verbal notice that the title to lands will come in question, unaccompanied with the bond required by How. Stat. § 6890, is properly disregarded by the justice. 44 (1).

See DRAINS (2).

NOTICE OF RECOUPMENT—See DAMAGES (5).

NOTICE TO PRODUCE PAPERS.

A notice to produce all letters and papers from a certain date to the time of the trial, covering a period of five years, none of which are indicated by date or subject, or reference to any particular transactions, is too vague to be used as a basis for evidence of their contents. 561 (8).

NUISANCE.

1. Equity will not grant relief, as a matter of course, against the maintenance of a private nuisance when the law side of the court is open for legal redress. 129 (6).
2. Where the maintenance of a dam at an unlawful height involves the practical destruction of 300 acres of land, be its value what it may, thereby threatening a multiplicity of suits and vexatious litigation, equity will abate the nuisance by injunction. *Id.* (7).

See EQUITY (3).

OFFICER.

1. A person who responds to the call of a known officer to assist in making an arrest is protected by the call, and the law, from suits for trespass or false imprisonment, if in his acts he confines himself to the order and direction of the officer. 377 (1).
2. In a suit upon a coroner's bond for failing to require a new bond in a replevin suit for attached property, upon exception being taken to the original bond, he may show, as a defense, that the property was exempt from attachment. 493 (1).

See ARREST.

OPENING TO JURY—See PRACTICE IN CIRCUIT COURT (2, 3).

ORDER OF DISTRIBUTION—See EXECUTORS AND ADMINISTRATORS (1, 3, 4).

OVERRULED CASES.

Briggs v. Mette, 42 Mich. 12, in so far as it conflicts with *Wetherell v. Spencer*, 3 Id. 123, is overruled by *Wade v. Strachan*, 460 (4).

PARCELS—See STATUTORY FORECLOSURE; CHATTEL MORTGAGE (1, 2).

PARTIES.

1. Several land-owners injured by the maintenance of a dam at an unlawful height may join in a bill filed solely for injunctive relief. 129 (5).
2. Prior lien-holders, or those claiming under a title paramount to the mortgage, are not proper parties to a suit for its foreclosure, nor can their claims be litigated in such suit. 398.
3. A *dormant* partner may be joined as a party in a suit by or against the firm at the option of the plaintiffs. 476 (5).

PARTNERS—See CONTRIBUTION.

PARTNERSHIP.

A dormant partner may be joined as a party in a suit by or against the firm at the option of the plaintiffs. 476 (5).

PATENT.

The question of an invention, and its alleged use, and what is covered by it, may be litigated in the State courts, so long as the question of the validity of the patent or its infringement is not in issue. 476 (7).

PAYMENT—See STATUTE OF LIMITATIONS (4).

PLEADING.

1. In an action for fraud, the declaration must definitely and issuably set forth the facts complained of, and relied upon for a recovery. 600 (1).
2. In an action against more than one defendant for alleged false statements by which the plaintiff was defrauded, the declaration should aver a conspiracy, and enumerate the false statements and circumstances relied upon as creating the liability, with particularity; and, if not made by all of the defendants, it should be averred that they all colluded and conspired together in such a manner as to authorize those actually making them to do so, and that they were in furtherance of the common design and fraudulent purpose. *Id.* (2).
3. In an action for false representations or statements, the declaration must aver that the plaintiff believed them to be true, and, so believing, relied upon them, and was thus induced to take the action claimed to have resulted to his damage. *Id.* (3).

See CRIMINAL LAW (1–4); DAMAGES (5); STATUTE OF LIMITATIONS (6); TITLE TO LAND (1, 3); TRIAL OF SUIT.

POLICE COURT OF GRAND RAPIDS.

The police court of Grand Rapids cannot try a party for a misdemeanor punishable by fine and imprisonment beyond the jurisdiction of a justice of the peace. 335 (1).

POSSESSION—See ADVERSE POSSESSION; PRESCRIPTION.

PRACTICE IN CIRCUIT COURT.

1. It is not commendable practice to allow a witness to be interrupted without some substantial reason; and such a practice, which can have no effect except to break up the course of testimony, has a direct tendency to confuse witnesses, and cannot help a jury in its duties. 561 (1).
2. Under our practice the argument of the case belongs to the close of the testimony, and not to the opening, and must be based on what actually appears in proof. 448 (*g*).
3. The only legitimate purpose of an opening is so to explain to the jury the nature and elements of the issue they are to try, that they may understand the bearing of the testimony which is thereafter put in, and any misrepresentation of what is covered by such issue has a tendency to prevent them from giving to the testimony, when put in, a proper comprehension of its bearings, or of its real force. *Id.* (*h*).

PRESCRIPTION.

1. Where a right by prescription to flow land is relied upon, the burden of proof is upon the claimant to show its exercise for at least 15 years to the height complained of and established by the proofs, and that *such* use of the land has been adverse, uninterrupted, peaceable, open, and notorious. 129 (2).
2. Title or rights in land founded on prescription originate from the fact of actual, adverse, peaceable, open, and uninterrupted possession for such length of time that the law presumes that the true owner, by his acquiescence, has granted the land, or interest therein, so held adversely. *Id.* (3).

PRINCIPAL AND AGENT.

Where the acts of an agent bind the principal, his declarations and admissions, respecting the same subject-matter, made at the same time, and constituting a part of the *res gestæ*, are also binding. 594 (1).

PROMISSORY NOTE—See BILLS AND NOTES.

PROSECUTING ATTORNEY—See CRIMINAL LAW (5, 6, 22–26).

PUBLIC BUILDING.

The failure of a building committee, appointed by a board of supervisors to superintend the erection of a court-house, to require the execution by the contractor of the statutory bond securing the payment of labor and material claims, will not create a right of action against the board because of their resolution to save the committee harmless from all suits growing out of the erection of said building. 538 (2).

See ACTION; BOND.

PUBLIC POLICY.

1. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy, and void. 141 (1).
2. Public policy will not permit the doctrine of estoppel to aid in validating an unexecuted contract which it holds to be void. *Id.* (2).

See BILLS AND NOTES (1).

QUESTIONS TO JURY—See JURY (7).

RAILROAD COMPANIES.

1. In this case the judgment of the justice is affirmed, except as to the attorney fee of $25 allowed the plaintiff, the evidence disclosing the defendant's failure to fence its road, as required by law, at the place where the animal entered upon its premises. 35.
2. The operation of a railroad by a lessee does not change the relations of the original company to the public. 645 (1).
3. Where the use of a railroad right of way is restricted to certain purposes, its more general use, resulting in damage to the grantor, is actionable. *Id.* (2).
4. Upon the facts stated in the opinion, the defendants are held to be jointly liable for the unlawful use by the Wabash Company of the right of way acquired of the plaintiff; and, as an examination of the opinion is essential to a correct understanding of the case, reference is had thereto. *Id.* (3).

RAPE—See CRIMINAL LAW (13-17).

REAL ESTATE BROKER—See COMMISSIONS.

REASONABLE TIME.

1. The rule that certain acts shall be performed in a reasonable time requires that the party should exercise such reasonable diligence as under all then and *subsequently existing* circumstances might be fairly expected. 528 (1).
2. To entitle a party to rescind a contract on the ground of fraud or false representations he must act promptly after he has discovered the fraud or falsity of the representations; but he is entitled to a reasonable time to investigate and ascertain whether the representations made are true. *Id.* (2).
3. When the *facts* are undisputed, what is a reasonable time is a question of law; but when they are controverted, or where motives of a party are involved, it is a proper question for a jury. *Id.* (3).

RECORD.

When the exercise of authority is limited by statute, and it affects the rights of individuals by divesting them of property or valuable rights, the record of the proceedings must show that the act by which this is done is within the limits of the power conferred. 438 (c).

See STATE ROADS (4).

RECORDING LAWS.

The statute requiring mortgages to state the name and residence of the mortgagee to entitle them to record (Act No. 262, Laws of 1887, § 12) is an essential part of the scheme for affording information to assessing officers and to prevent an evasion of the law. 17 (*h*).

RECOUPMENT—See DAMAGES (5).

REFORMING MORTGAGE—See EQUITY (1).

REPLEVIN.

1. A joint judgment in replevin for the value of the property, in favor of defendants who are not shown to have a joint interest therein, cannot be sustained. 258 (1).
2. It is not necessary, in order to prove fraudulent purchases, to show the complicity of the vendee's assignee and his vendee, from whom the goods are replevied, in the original scheme, if one existed, as they may be unable to hold the goods without being guilty of actual dishonesty. *Id.* (2).
3. In this case it is held that the case should have been submitted to the jury on the facts, there being pertinent testimony upon the question of fraud, the weight of which was for the jury. *Id.* (3).
4. The measure of damages on a recovery by the defendant in this case, is held to be the value of the logs at the time they were replevied, with interest from that date. 388 (2).
5. The owner of a newspaper who leases the entire plant, including the good-will of the business, for a term of years, with covenants for the continued publication of the paper, and for the return of the leased property and good-will at the expiration of the lease, and in case of a breach to have the right of immediate possession, can maintain replevin against a creditor of the lessee who levies upon the leased property as the property of the lessee. 407.
6. The failure of an officer to require a new bond, on exception being taken to the first one executed on the replevin of attached property, is excused by showing the exempt character of the property. 493 (1).
7. In a replevin suit, a witness having personal knowledge of the value of the property may be asked to state it, and it is certainly very unnecessary strictness to prevent his stating the amount of the appraisement. 561 (6).

RESCINDING CONTRACT—See REASONABLE TIME (2).

RESIDENCE—See TRANSFER OF SUIT (1).

REVIEW—See BILL OF REVIEW.

RIGHT OF WAY—See RAILROAD COMPANIES (3, 4).

SALE.

1. A sale of chattel-mortgaged property on execution cannot be made in parcels. 1 (1).
2. In this case it is held that, if defendant could be made liable for the burned lumber, it could not be under the contract, but on independent grounds (which are not relied upon); and that such liability does not exist, the lumber not having become defendant's property, subject to his risk as buyer. An examination of the opinion is necessary to a full understanding of the case. 370.
3. The question in this case is whether a mortgage was given for the purchase price of property claimed to have been purchased of defendant by complainant, or to secure a loan used in making such purchase, and the finding of the circuit judge in favor of complainant's claim is not disturbed. 612 (1).
4. A sale of personal property implies an affirmation by the vendor of its ownership, and he therefore warrants the title, unless it is shown by the facts and circumstances accompanying the sale that he did not intend to assert ownership, but only to transfer such interest as he might have in the property. *Id.* (2).
5. Whether the title to personal property passes or not, where something remains to be done before the exact amount to be paid therefor can be arrived at, depends upon the intention of the parties, and is a proper question for a jury. 681.

See CONFIRMATION OF FORECLOSURE SALE.

SALE IN PARCELS—See STATUTORY FORECLOSURE; CHATTEL MORTGAGE (1, 2).

SCHOOLS AND SCHOOL-DISTRICTS.

1. How. Stat. § 5041, requires the consent of a majority of the resident tax-payers of a school-district to its division into two or more districts, and, in case of the consolidation of two or more districts into one, the consent of a majority of the resident tax-payers of each district is required. 87 (1).
2. The words "dissolve" and "disband" are of similar import, and a vote taken to *disband* a school-district is supported by

SCHOOLS AND SCHOOL-DISTRICTS.—Continued.

a notice of a meeting to be held to vote upon a proposition to *dissolve* the district. *Id.* (2).

3. A resident tax-payer of a school-district which the township board of school inspectors, acting without jurisdiction, have attempted to divide into other districts, may file a bill to restrain the sale of the school-house and other property of the original district. *Id.* (3).
4. In this case it is held that the consent of a majority of the resident tax-payers of the district was not obtained to its destruction by division, and the action of the school inspectors is decreed to be null and void. *Id.* (4).
5. The secretary of the board of school examiners had no right, after the refusal of the board of examiners to grant, upon examination, a certificate, to issue a special certificate to the rejected applicant, under How. Stat. § 5154. 361 (1).
6. The object of How. Stat. § 5154, was to bridge over the time between the commencement of a school and the next meeting of the board of examiners, and a special certificate granted thereunder had life only until the time of such next regular examination. *Id.* (2).
7. The action of the majority of a board of school examiners in refusing a certificate cannot be questioned by the rejected applicant in a suit to recover wages she would have earned under her contract but for such adverse action. *Id.* (3).

SCHOOL EXAMINERS—See SCHOOLS AND SCHOOL-DISTRICTS (5–7).

SELF-DEFENSE—See CRIMINAL LAW (20, 21).

SET-OFF.

A defendant in a trover suit cannot set off against the value of the property he has wrongfully converted a debt due him from the plaintiff, to secure which he has a lien on the same property which is only enforcible in equity. 106 (1).

SOLDIERS' HOME.

Act No. 31, Laws of 1887, making it unlawful to establish or maintain a saloon, etc., within one mile of the Michigan Soldiers' Home, is constitutional. 234.

STATE COURTS—See CONFLICT OF JURISDICTION.

STATE ROADS.

1. In this case the proceedings of the board of supervisors of Eaton county, discontinuing a portion of a State road, are quashed, for reasons stated in the opinion. 438 (1).
2. A board of supervisors have jurisdiction under How. Stat. § 497, to discontinue a State road *without* the presentation of the petitions provided for by How. Stat. § 498 (*People v. Supervisors*, 20 Mich. 101), and when set in motion by such petitions their *insufficiency* is an *irregularity*, not going to the jurisdiction, but which will be considered on *certiorari* as affecting the validity of the proceedings in the particular case as injuriously affecting the rights of the petitioners for the writ. *Id.* (*a*).
3. The board of supervisors have not absolute and unlimited power to discontinue State roads. It is only when they deem it for the interest of the public that they are authorized so to do; and it must appear in some form in the record of their proceedings that their action is based upon what they deem for the interest of the public; and this fact cannot be gathered from the result of such action, when they are set in motion by the petition of interested parties. *Id.* (*b*).
4. How. Stat. § 501, requiring every order, resolution, and determination of a board of supervisors, made in pursuance of the act authorizing them to discontinue State roads, to be recorded in the records of the board, and to be signed by the chairman and clerk of such board, is *mandatory*, and was enacted for the protection of both public interests and private rights; and in the absence of such authenticated record the presumption that public officers perform their duty cannot sustain the action taken, whatever it may be. *Id.* (*d*).
5. It is not conceded that the action of the board of supervisors in laying out or discontinuing a State road is so purely of a legislative character as to dispense with the safeguards of the Constitution for the protection of private rights, nor with notice to parties directly interested and affected by the proceedings, required to bring such proceedings within the requirements of due process of law. 439 (*e*).
6. When the right of eminent domain is exercised by any other authority than highway commissioners in laying out or discontinuing highways, the constitutional requirement of a jury is retained. *Id.* (*f*).

STATE ROADS.—Continued.

7. At time of filing the opinion in this case there is no law by which a party aggrieved can have his damages and compensation ascertained by a jury when the board of supervisors lay out or discontinue a State road, Act No. 179, Laws of 1887, not providing for a constitutional jury of twelve. *Id.* (*g*).
8. It was held in *Sharp v. Evergreen*, 67 Mich. 443, that it was the duty of townships to keep the highways known as "State Roads" in repair, they being placed under their care and control by the Legislature in 1836, under which act, and subsequent legislation, the townships were liable, under the statutes, for not keeping such roads in repair, and in a condition reasonably safe and fit for public travel, the same as for a like neglect as to roads laid out by the highway commissioners. 572 (2).
9. The fact that the law forbids the altering or discontinuance of any State or territorial road by highway commissioners, and vests such power in the board of supervisors, does not interfere with or diminish the duty of the townships to keep such roads and the bridges upon them in good repair, while such roads are used as public highways, and have not been altered or discontinued. *Id.* (3).

STATUTE OF FRAUDS.

1. Agreements for the payment of commissions on the sale of real estate do not come within any provision of the statute of frauds. 104 (1).
2. A *verbal* promise by a mortgagee to pay a debt due a creditor of a mortgagor, in consideration of which the creditor agreed to and did refrain from attaching property belonging to the mortgagor *not* covered by the mortgage, and which property was afterwards converted to his own use by the mortgagee, is void under the statute of frauds. 201.
3. Complainant filed a bill to foreclose a mortgage, executed in blank as to conditions of payment, which blanks were filled in after delivery by direction of the mortgagor, as alleged. The court below dismissed the bill on the grounds that the authority was not shown by a preponderance of proof, and that *parol* authority would not be sufficient for that purpose; which decree is affirmed on the *first* ground stated, with an intimation that, under our statute and the weight of authority, the *second* ground is also tenable. 467.

STATUTE OF LIMITATIONS.

1. How. Stat. § 8713 (subd. 3), bars an action of *assumpsit* or debt for rent due on a *parol* lease in six years after the action accrues. 50 (2).
2. An action of *debt* for rent due on a lease under *seal* may be brought at any time within *ten* years after the action accrues, being governed by How. Stat. § 8719; but an action of *assumpsit* under How. Stat. § 7778, for such rent, is barred in *six* years, the *form* and not the *cause* of action fixing the bar. *Id.* (3).
3. No one can be said to acquiesce in a claim which he cannot dispute by bringing an action at law to determine, and hence the statute of limitations requires that an action shall be brought within 15 years after the right first accrues or the adverse entry. 129 (4).
4. A payment by one joint debtor from his own means, on the joint obligation, will not save the running of the statute of limitations as to the other debtor. 223 (2).
5. Where an action was commenced on a judgment by a summons in *assumpsit*, but the declaration was in debt, and the defendant gave notice that the cause of action did not accrue within ten years, within which time the suit was commenced, the variance is immaterial. 254 (1).
6. Under a plea of the statute of limitations the burden is upon the plaintiff to show the commencement of suit within the statutory period. 594 (3).

See EVIDENCE (30).

STATUTES—See INTENT (2).

STATUTES CONSTRUED.

1. Under How. Stat. § 7682, the interest of a mortgagor in personal property is subject to levy and sale on execution at any time before actual foreclosure, but such sale must be of the mortgagor's interest in the *whole* property. 1 (1).
2. Act. No. 262, Laws of 1887, providing for the reporting of mortgages for assessment purposes, is construed in *Attorney General v. Supervisors*, 16.
3. Section 12, Act No. 262, Laws of 1887, forbidding the recording of mortgages which do not state the name and residence of the mortgagee, is an essential part of the scheme for affording information to assessing officers, and to prevent an evasion of the act. 17 (*h*).
4. How. Stat. § 8713 (subd. 3), bars an action of *assumpsit* or

STATUTES CONSTRUED.—Continued.

debt for rent due on a *parol* lease in six years after the action accrues. 50 (2).

5. How. Stat. § 5041, requires the consent of a majority of the resident tax-payers of a school-district to its division into two or more districts, and, in case of the consolidation of two or more districts into one, the consent of a majority of the resident tax-payers of each district is required. 87 (1).

6. Under How. Stat. § 6037, lands remaining in the hands of heirs or devisees must be sold to pay debts or legacies before resorting to lands sold by them to third parties. 119 (1).

7. How. Stat. § 1414, requires security where a highway commissioner lets a contract involving an expenditure of over $50, the absence of which invalidates the contract. 227 (1).

8. How. Stat. § 5812, does not make a legacy become a part of the deceased legatee's estate, but simply gives it to his or her issue as direct beneficiaries. 278 (1).

9. Under our statutes no part of a testator's estate should be treated as intestate if it can be reasonably avoided. *Id.* (5).

10. The provision in the charter of the city of East Saginaw (Local Acts of 1885, pp. 350, 365), creating the office of assessor, and requiring such officer to make and return lists of persons to serve as jurors, superseded the general statutes in that regard, and is sustained. 287 (1).

11. The return of more than 200 *qualified* petit jurors, under How. Stat. § 7756, is good ground for challenge to the array; but, in such a case, it is the duty of the court to direct the clerk to strike from the *excessive* lists all names listed below the requisite number *first* appearing. *Id.* (2).

12. How. Stat. § 2202, does not apply to quail killed in another state, and brought into this State afterwards. 325 (2).

13. The liquor law of 1887 was intended to remove the trial of offenses under it into the higher courts, where the proceedings are conducted by common-law methods, and the rights of the public and of the prisoner fully guarded. 335 (*a*).

14. Under How. Stat. § 5154, the secretary of the board of school examiners had no right to issue a special certificate to an applicant who had been rejected on an examination by the board, the object of the statute being to bridge over the time between the commencement of school and the next meeting of the board. 361 (1, 2).

15. Under How. Stat. § 6499, the residence of the parties or of

STATUTES CONSTRUED.—Continued.

the attorneys of record controls as to the place of transfer, and the number or residence of the witnesses is not considered; and the statute only seems to apply to the attorneys of record in the case. 374 (1, 3.)

16. The object of the statute in allowing special questions to be submitted to the jury, is to ascertain whether in making up a verdict they have properly applied the law, as given by the court, to the facts in the case, and it is error to direct what answer shall be made, if the general verdict is a certain way. 391 (3).

17. How. Stat. § 7663, does not authorize the rendition of judgment for costs against a surety in a chancery appeal bond, unless a certified copy of the bond is made a part of the return. 431 (1).

18. Under How. Stat. § 497, a board of supervisors have jurisdiction to discontinue a State road without the presentation of the petitions provided for by How. Stat. § 498. 438 (*a*).

19. How. Stat. § 501, requiring every order, resolution, and determination of a board of supervisors, made in pursuance of the act authorizing them to discontinue State roads, to be recorded, and the record to be signed by the chairman and clerk, in *mandatory*. *Id.* (*d*).

20. Act No. 179, Laws of 1887, does not provide for a constitutional jury of twelve, but the defect is remedied by Act No. 250, Laws of 1889. 439 (*g* and foot-note).

21. The "subsequent purchasers and mortgagees in good faith," referred to in How. Stat. § 6196, are those who become such *after* the expiration of one year from the filing of the mortgage, and *before* its renewal. 460 (2).

22. The renewal of a chattel mortgage under How. Stat. § 6196, *after* the expiration of the statutory year, preserves its lien as to all persons except those acquiring liens, and purchasers or mortgagees, in good faith, in the interim, with the like force and effect as if renewed prior to the expiration of said year. *Id.* (3).

23. The provision of How. Stat. § 8503, requiring a sale in parcels on statutory foreclosure, is *mandatory*. 516 (1).

24. Act No. 94, Laws of 1883, requiring the execution of a bond by contractors for the erection of public buildings, was not intended for the protection of subcontractors. 538 (1).

STATUTES CONSTRUED.—Continued.

25. Under Act No. 313, Laws of 1887 (§ 13), forbidding the sale of liquor to a minor, there must be an *intent* to violate the law in order to warrant a conviction. 548 (1).

26. The statutes of uses and trusts are not complied with except by a contract or declaration of trust, signed by the holder of the legal title, and needing nothing outside of the papers to show the entire arrangement. 567.

STATUTES OF USES AND TRUSTS—See USES AND TRUSTS.

STATUTORY FORECLOSURE.

1. The provision of How. Stat. § 8503, requiring a sale in parcels on statutory foreclosure, is not merely directory (*Lee v. Mason*, 10 Mich. 403; *Udell v. Kahn*, 31 Id. 195), but is for the benefit of the mortgagor and purchasers from him, and is intended to protect important rights in the redemption of the premises, as well as being best calculated to bring a better price at the sale. 516 (1).

2. Where a mortgagee releases a portion of the mortgaged premises, and thereby severs the unreleased portion into two separate parcels, which are owned and occupied in severalty, such unreleased portion cannot be advertised and sold as one parcel on a statutory foreclosure. *Id.* (2).

SUBCONTRACTOR.

A subcontractor is not one of the persons sought to be protected by the statute requiring contractors for the erection of public buildings to execute a bond to secure labor and material claims. 538 (1).

"SUBSEQUENT PURCHASERS AND MORTGAGEES IN GOOD FAITH"—See CHATTEL MORTGAGE (6).

SUIT—See TRANFER OF SUIT; TRIAL OF SUIT.

SUNDAY LAW.

A resolution adopted on Sunday by a society not a religious or charitable association, authorizing the mortgaging of the society's real estate, is void, and it is a question of law for the court whether the character of the society brings it within the exception to the statute upon that subject. 608 (2).

SURPLUS ON FORECLOSURE SALE—See DOWER.

SURRENDER OF LEASE—See LANDLORD AND TENANT.

SURVEYOR—See EVIDENCE (14).

SYNONYMOUS TERMS.

The words to "dissolve" and "disband" are of similar import. 87 (2).

TAXES.

1. Act No. 262, Laws of 1887, providing for the reporting of mortgages for assessment purposes, is constitutional. 16 (1).
2. The object of the Legislature in providing for the reporting of mortgages for assessment, was to provide a method whereby values represented by mortgage securities could be brought to the attention of the assessing officer for the purposes of taxation. *Id.* (*a*).
3. The act in question does not separate mortgages from other personal property, and require the taxing officer to list and assess them as mortgages at the amount they purport to secure. *Id.* (*b*).
4. It is competent for the Legislature to assess and tax securities representing values. Whether it is the best plan to adopt, or whether it is expedient to do so, is not a judicial, but a political question, resting solely with the Legislature. *Id.* (*c*).
5. The constitutional rule of uniformity forbids that taxation should be double. No person can be twice assessed upon the cash value of the same property, to defray a public burden. *Id.* (*d*).
6. The general taxing law requires all property to be assessed for taxation at its true cash value. It does not, therefore, follow that the assessing officer is authorized to assess a mortgage security at the amount it purports to secure, but he must ascertain, according to his best information, its true cash value. 17 (*e*).
7. There may have been payments made upon the mortgage, which the record does not disclose, or it may have been taken merely as an indemnity, or to secure the performance of some act other than the payment of money. The land may not be worth the face of the mortgage. There may be prior mortgages, and many other contingencies which affect the true cash value. All these the assessing officer may consider, and it is his duty to ascertain, from inquiry of the person to be assessed, and other sources in order to ascertain the true cash value of the mortgage. *Id.* (*f*).
8. For the purposes of assessment, the note or bond, and the

TAXES.—Continued.

mortgage that secures it, is considered as one value or property. *Id.* (*g*).

9. The requirement that the register of deeds shall not record any mortgage which does not state the name and residence of the mortgagee is an *essential* part of the scheme for affording information to the assessing officer, and to prevent an evasion of the law. *Id.* (*h*).
10. An assessment made on property which is not believed to be, and is not in *fact*, assessable, cannot be valid. 231 (1).
11. Inasmuch as the assessment of personal property creates a personal judgment against the owner, which may be satisfied out of his other property, such a proceeding must be founded on a clear right to render it. *Id.* (2).
12. The statute does not contemplate that the owner of saw-logs, who may be a non-resident of the State as well as of the county or township, must appear in all parts of the State where his logs may be in transit, at the day when their liability to assessment is supposed to accrue in each township. *Id.* (3).
13. While, under certain circumstances, a party may be called on for sworn information, yet this is only to inform the conscience of the taxing officers, who, if satisfied concerning the facts, have no need of further information, and when so satisfied they cannot properly make an assessment against the facts. *Id.* (4).
14. A tax deed issued upon a sale made pursuant to the tax law of 1882, for the tax of 1881, is void upon its face. 388 (1).

TENDER.

To authorize a recovery for the breach of a contract to loan money on mortgage security, it is necessary for the plaintiff to show the tender to the defendant of a valid mortgage upon the land agreed upon, duly acknowledged, and in proper form. 608 (1).

TESTAMENTARY GUARDIAN—See GUARDIAN AND WARD.

TITLE—See SALE (2, 4, 5).

TITLE TO LAND.

1. A verbal notice under How. Stat. § 6890, that the title to lands will come in question, given by a defendant in an

TITLE TO LAND.—Continued.

action of trespass to lands in justice's court, unaccompanied with the required statutory bond, is properly disregarded by the justice. 44 (1).

2. A title, or claim of title, is not in question unless it is in issue in the case; and it is not in issue unless the title, or claim of title, is essential to the plaintiff's right of recovery, or to defeat a recovery in the action. *Id.* (2).

3. Where, in an action of trespass in justice's court, the declaration made no claim of title, and the defendant pleaded the general issue, and it appeared that the acts complained of were committed in that half of a public highway adjoining the land described in the declaration, thus necessitating proof of title, actual or constructive, on the part of the plaintiff in order to a recovery, which he sought to furnish by testifying to his occupancy and ownership of the land, such testimony brought him within the provisions of How. Stat. § 6895, and the justice should have certified the case to the circuit court, defendant not admitting said title. *Id.* (3).

4. It was not the design of the Legislature to confer upon justices' courts jurisdiction to try titles to lands, and they have provided a way, in actions for trespass or other actions where the damages claimed fall within the jurisdiction of the court, where the title to land may be involved, for a trial before the justice, namely, where the title claimed is *admitted.* In such cases the *title* is not tried. *Id.* (4).

5. The fact that the title to real estate was in a testator will not necessarily make an indefeasible title in his devisees. 112 (1).

6. A land contract providing for a title which shall be *perfect* calls for more than a warranty deed, and the vendee is not bound to rest upon covenants. *Id.* (3).

7. In this case it is held that the contract for the sale of the store does not merely provide that the vendee shall be saved against merely legal interference, the language being "legal or *otherwise*," and that he is entitled to some assurance against disturbance beyond the contingencies of a lawsuit. *Id.* (4).

8. Under a land contract stipulating for a good and sufficient deed the grantee has a right to a good title, and one not

TITLE TO LAND.—Continued.

clouded or incumbered by an outstanding life-estate in a portion of the land conveyed. 656 (7).

9. In *Allen v. Atkinson*, 21 Mich. 361, it was held that the vendee had an undoubted right to a good title, and to a deed with proper covenants; and he had a right also to insist that the title should be a marketable one, not open to reasonable objection. *Id.* (8).

See PRESCRIPTION.

TORT.

In an accounting in chancery, a judgment in an action for a tort is sometimes permitted to be made an item, in favor of the party holding it, in order that the whole controversy may be settled. 106 (2).

TRANSFER OF SUIT.

1. Under How. Stat. § 6499, the residence of the parties or of the attorneys of record controls as to the *place* of transfer, and the number or residence of the witnesses is not considered. 374 (1).
2. Where the attorney for a party is elected to the office of circuit judge, and thereby becomes disqualified to try the suit, the client has the right to select any attorney he sees fit in his stead, after which he may avail himself of his statutory right to transfer the case. *Id.* (2).
3. How. Stat. § 6499, does not seem to apply to any but the attorneys of record in the case to be transferred. *Id.* (3).
4. In this case, the commissioner having jurisdiction to act in the premises, his determination cannot be disturbed on *certiorari* on the showing made. *Id.* (4).

TRESPASS—See DAMAGES (7); EVIDENCE (30); TITLE TO LAND (1, 4).

TRIAL BY JURY—See JURY (5).

TRIAL OF SUIT.

Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of the Court, and squaring their case with it. 616 (2).

TROVER.

1. A defendant in a trover suit cannot set off against the value of the property he has wrongfully converted a debt due him from the plaintiff to secure which he has a lien on the same property which is only enforcible in equity. 106 (1).
2. In trover for the value of logs cut from plaintiff's land, if it appears that the trespass was involuntary, the measure of damages is the value of the timber on the land. 594 (4).

See DAMAGES (1, 7).

TRUSTS—See USES AND TRUSTS.

USES AND TRUSTS.

The statutes of uses and trusts are not complied with except by a contract or declaration of trust, signed by the holder of the legal title, and needing nothing outside of the papers to show the entire arrangement. 567.

VARIANCE.

Where an action was commenced on a judgment by a summons in *assumpsit*, but the declaration was in *debt*, and the defendant gave notice that the cause of action did not accrue within *ten* years, within which time the suit was commenced, the variance is of no consequence. 254 (1).

VENDOR AND VENDEE.

Under a contract for the sale of a store which provides that the vendee shall be saved against interference, legal or otherwise, he is entitled to some assurance against disturbance beyond the contingencies of a lawsuit. 112 (4).

WAIVER.

The question of the waiver of an alleged forfeiture of an insurance policy should be submitted to the jury. 414 (1).

See FIRE INSURANCE (1, 4).

WARRANTY.

An affirmation of ownership and warranty of title is implied from a sale of personal property, unless the accompanying facts and circumstances show that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the property. 612 (2).

WILL.

1. The fact that the title to real estate was in a testator will not necessarily make an indefeasible title in his devisee. 112 (1).

2. A will dividing the residue of the testator's estate into seven parts, and devising one-seventh to a father and mother, and their son, "in equal shares to each of them," though somewhat ambiguous, is construed, in view of other provisions of the will as to such residue, to give the seventh to the *collective* legatees. 278 (3).

3. Where a testator bequeathed one-seventh of the residue of his estate to a legatee after deducting therefrom the absolute legacy, which was valued at $6,000 for that purpose by the testator, the only way to get at such deduction is to include $6,000 with the balance of the body of the estate not specially bequeathed, and divide the aggregate into sevenths, and, if one-seventh exceeds $6,000, the legatee will be entitled to the difference, and, if not, the remainder, after leaving out the $6,000, would belong to the other residuary legatees. *Id.* (4.)

See LEGACIES.

WITNESS.

It is not commendable practice to allow a witness to be interrupted without some substantial reason, 561 (1).

See CHARGE TO JURY (1, 5); PRACTICE IN CIRCUIT COURT (1).

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